

How Training and Expertise Improve VAWA Immigration Case Processing: The Efficacy and Legislative History of the Specialized VAWA Unit¹

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The Domestic Violence Context

People who are unfamiliar with victims' reactions to domestic violence may be inclined to discredit what are actually common responses to it. They may not understand the reasons for which a domestic violence victim chooses to remain in or return to an abusive relationship, to leave her children with the abusive partner, to refuse to press criminal charges against the abuser, or to fail to tell anyone about the abuse.³ Strangers to the dynamics of relationships involving domestic abuse often will refuse to credit a battered woman's belief that she is in imminent danger because she does not flee the situation.⁴

Other common misperceptions result from a lack of understanding of the cycle of domestic violence. Domestic violence results from an abusive partner's need to exercise power and control over his mate and has been described as a "pattern of interaction" comprised of physical, sexual and psychological elements.⁵ When such a pattern of violence develops within a domestic relationship, it may not be necessary for the abuser to resort to violence to control his victim. A single violent incident in the past often remains a strong enough threat to effectively control the victim and gain her continuing obedience. When the victim shows signs of resistance, the abuser merely resorts to violence to reestablish control. In this manner, a pattern of interactions changes the dynamics of the relationship. The victim comes to recognize certain non-violent cues as predictors of violence, and the "meaning of the communication extends far beyond what is being said or done in the moment."⁶

In passing the Violence Against Women Act and including immigration protections in it, Congress sought to create a mechanism through which U.S. immigration laws could offer help to immigrant victims of domestic violence, sexual assault, human trafficking, and other crimes. Spousal

¹ This report was adopted from Rocio Molina, Leslye E. Orloff, & Benish Anver, *Considerations for the Board of Immigration Appeals in Violence Against Women Act Cases* (Feb. 19, 2013), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/materials-for-adjudicators-and-judges/reports-memos-social-science-research-and-related-data/BIA-VAWA-Cases-Report-2.21.13.pdf/view>

² The authors are grateful for the assistance of pro bono attorneys from Crowell and Moring without whose assistance this review would not have been possible, as well as Mojisola Ahonsi.

³ See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Women's Syndrome*, 21 Hofstra L. Rev. 1191, 1195 & n.16 (1993) (hereinafter Dutton, *Understanding Women's Responses to Domestic Violence*).

⁴ See *Domestic Violence & Immigration: Applying the Immigration Provisions of the Violence Against Women Act (A Training Manual for Attorneys and Advocates)*, Appendix C: Expert Testimony Concerning Battering, at 4 ("[I]t is extremely important that decision makers in domestic violence cases do not interpret failure to leave an abuser sooner as evidence that suggests that the abuse was not occurring. In fact, often the contrary is true").

⁵ See Letter from Nawal Ammar, et al., to Hon. Lamar Smith (R-TX) and Hon. John Conyers, Jr. (D-MI), *Revisions in HR 4970 are detrimental to provisions in VAWA* (May 31, 2012) (on file with author) (attached to this memo).

⁶ See Mary Ann Dutton, *The Dynamics of Domestic Violence: Understanding the Response from Battered Women*, 68 Fla. B.J. 24, 24 (Oct. 1994) ("[B]oth parties [come to] understand the meaning of specific actions and words within the continually changing context that includes a history of violence or abuse and the resultant physical injuries and psychological, social, and economic consequences of it.") (hereinafter Dutton, *The Dynamics of Domestic Violence*); Dutton, *Understanding Women's Responses to Domestic Violence*, *supra* note 26, at 1208-09 (describing possible patterns of violence and abuse).

abuse consists of chronic violence and is characterized by persistent intimidation and repeated physical and psychological harm. Absent intervention, it is almost guaranteed that the same woman will be assaulted over and over by her mate.⁷ Studies indicate that the repeated violence escalates in severity over time and knowledge of this fact is the foremost reason women stay with their batterers.⁸

History and Purpose of the VAWA Immigration Laws

Through the Battered Spouse Waiver: Congress Defines Domestic Violence Under U.S. Immigration Laws as “Battering or Extreme Cruelty”

The first form of immigration protection developed to help remedy the problem of domestic violence perpetrated against immigrant spouses and children of U.S. citizens and lawful permanent residents was the battered spouse waiver, which was created in 1990. In 1986, Congress passed the Immigration Marriage Fraud Amendments Act (IMFA),⁹ which added a new section to the Immigration and Nationality Act creating a two-year conditional residency period during which immigrant spouses are required to remain married to their U.S. citizen or lawful permanent resident spouses.¹⁰ This two-year residency requirement was imposed on all spousal petitions for lawful permanent residency, if the couple had been married for less than two years on the date the couple attended its lawful permanent residency interview.¹¹ This new section requires that both husband and wife file a joint petition to have the condition removed, and for the immigrant spouse to be granted full lawful permanent residency, within ninety days before the end of the two-year period.¹² These new IMFA requirements had unintended negative consequences for immigrant spouses and their children who were victims of family violence.¹³ Although IMFA contained waivers of the joint petitioning requirement, evidence of battery or extreme cruelty was not enough to obtain a waiver of the joint filing requirements.¹⁴ The House Judiciary issued a 1990 report describing the harm to immigrant domestic violence victims that resulted from the inadequacy of the IMFA waivers—

“The terms of the statute do not make it sufficiently clear that an abused spouse who has entered a marriage in good faith will be granted the waiver either on the basis of ‘extreme hardship’ or termination of the marriage for ‘good cause.’”¹⁵

The Battered Spouse Waiver was enacted as part of the Immigration Act of 1990 so that battered immigrant spouses and abused immigrant children would no longer be trapped in abusive marriages and could leave them without forfeiting access to status offered by lawful permanent residency.¹⁶ An abused immigrant spouse or child could be granted a battered spouse waiver upon submission of proof that the immigrant spouse had entered the marriage in good faith and that “during the marriage the alien spouse

⁷ See S. Rep. No. 545, 101st Cong., 2d Sess., 36 (1990)

⁸ See Ammar, *supra* note 6 at 2. See also B. E. Carlson, *Battered Women and Their Assaultants*, 22 Soc. Work 455 (1997).

⁹ Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended at 8 U.S.C. § 1186a.)

¹⁰ Andorra Bruno and Andrea Siskin, *Immigration: Noncitizen Victims of Family Violence* CRS 2(Congressional Research Service, May 3, 2001);

¹¹ INA § 216(a)(1), 8 U.S.C. § 1186a(a)(1) (1986); INA § 216(g)(1), 8 U.S.C. § 1186a(g)(1).

¹² INA § 216(c)(1), 8 U.S.C. 1186a(c)(1); INA § 216(d)(2), 8 U.S.C. 1186a(d)(2); INA § 216(d)(3), 8 U.S.C. 1186a(d)(3).

¹³ See generally INA § 216; Andorra Bruno and Andrea Siskin, *Immigration: Noncitizen Victims of*

Family Violence (Congressional Research Service, May 3, 2001); William A. Kandel, *Immigration Provisions of the Violence Against Women Act* (May 15, 2012) available at: <http://www.fas.org/sgp/crs/misc/R42477.pdf>

¹⁴ Andorra Bruno and Andrea Siskin, *Immigration: Noncitizen Victims of Family Violence* (Congressional Research Service, May 3, 2001); at CRS 3

¹⁵ U.S. Congress. House Committee on the Judiciary. *Family Unity and Employment Opportunity Immigration Act of 1990*, report to accompany H.R. 4300, 101st Cong., 2nd Sess., H. Rept. 101-723, Part 1, p. 51. (Hereinafter cited as House Report 101-723(I)). Also see Janet M. Calvo, “Spouse-Based Immigration Laws: The Legacies of Coverture,” *San Diego Law Review*, v. 28, summer 1991, p. 606-611.

¹⁶ William A. Kandel, *Immigration Provisions of the Violence Against Women Act* 25(May 15, 2012) available at: <http://www.fas.org/sgp/crs/misc/R42477.pdf>

or child was battered by or was the subject of extreme cruelty perpetrated by” the citizen or permanent resident spouse or parent.¹⁷

Representative Louise Slaughter explained congressional intent regarding the creation of the battered spouse waiver and terms the types of abuse that were to be covered in the purpose of immigration law definition of “battering or extreme cruelty” as follows:

[T]he bill we have before us contains a small but significant provision which will literally free thousands of immigrant women from a nightmare of brutal physical abuse and mental cruelty.... Immigrant women are some of the most vulnerable to domestic violence, yet their plight is not well enough known to effect real change. Not long ago, I heard the heart wrenching story of an immigrant woman living in Rochester with her abusive American spouse. She was regularly beaten by her husband and subjected to unspeakable cruelties. She lived with two paralyzing fears--that of her husband's rage and that of being forced back to her native Haiti. The 1986 Marriage Fraud Act leaves this woman trapped in the abusive relationship for at least 2 years or face deportation to a country which is no longer her home...

Responding to this woman's circumstances and those of thousands of alien spouses nationwide, I introduced legislation to amend the Marriage Fraud Act and provide immigrant spouses in a bona fide marriage, an escape from the beatings, the insults and the fear.... The Immigration Marriage Fraud Amendments Act of 1986 [IMFA] mandates a 2-year period of conditional permanent residency for foreigners who marry American citizens or permanent residents. At the end of this 2-year period, the American spouse with the foreign spouse must file a joint petition to gain full permanent residency for the foreign spouse. Due to a lack of clarity in the IMFA, a battered foreign spouse may be forced to choose between remaining in an abusive relationship or facing possible deportation to a country that is no longer his or her home...

Under the IMFA, if the resident spouse refuses to sign the joint petition, deportation proceedings can be initiated by the Immigration and Naturalization Service.... Where a foreign spouse could demonstrate that he or she entered into a marriage with a resident spouse in good faith and could establish through credible evidence that he or she was battered by the American spouse, the foreign spouse would be allowed to waive the joint petition requirement and file independently to have the conditionality of his or her permanent residence removed. This waiver would not force the foreign spouse to seek a divorce and would thus avoid the question of good cause which must be considered in the good cause/good faith waiver and it would make it clear to abused spouses that there was an escape from their situations....[T]his additional waiver would not alter the spirit of the IMFA and the conditional permanent residence system established in 1986, it would be beneficial to a large number of persons trapped in abusive relationships...

Those in this situation are often advised to remain with the abuser until the 2 years of conditional permanent residence have ended because of the lack of clarity in the law. Abused spouses should be sent a clearer signal that there is an escape from their dilemma and that the abusing spouse does not have complete control over their lives... the House

¹⁷ See generally, Cecilia Olavarria and Moira Fisher Preda, , Additional Remedies Under Vawa: Battered Spouse Waiver, in *Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants* (Legal Momentum, 2010) available at http://ivp.legalmomentum.org/immigration/battered-spouse-waiver/tools/3.5_Battered-Spouse-Waiver_2004-MANUAL-BB.pdf/view

intends that when the citizen or resident spouse engages in battering or cruelty against a spouse or child, neither the spouse nor child should be entrapped in the abusive relationship by the threat of losing their legal resident status. It is the Committee's intent that the Attorney General will grant the waiver when battering of or cruelty to spouse or child is demonstrated. The House intends that the discretion given to the Attorney General to decide to deny waiver requests under this provision be limited to rare and exceptional circumstances such as when the alien poses a clear and significant detriment to the national interest....

I am also concerned with the situation in which the citizen or resident spouse abuses a child or alien child. It is the intent of the legislation, then, that the conditional resident spouse be able to protect the child without fearing that the citizen or resident spouse will refuse to cooperate in the joint petition, joint interview requirements for the alien spouse. In such a situation, the good faith or extreme hardship waiver will be granted to the alien spouse. The existence of a child of the marriage is evidence that the marriage was entered into in good faith. Both a child and the child's alien parent would suffer extreme hardship if the child were denied the protection and support of the alien spouse when the citizen or resident spouse abuses the child....

The group that would be targeted by the clarifications I have proposed is one of the most vulnerable in American society today. The vast majority of abused foreign spouses are women. Most are new to American society and many do not speak English as a first language. This group is in particular need of statutory language that clearly protects them from abusive spouses taking advantage of the necessity of filing a joint petition at the end of the 2-year period.¹⁸

The House Judiciary Committee report in 1990 was explicit about congressional intent in allowing victims of "battery" or "extreme cruelty" who provided proof of a good faith marriage to a U.S. citizen or lawful permanent resident spouse to be granted the battered spouse or child waiver:

The purpose of this provision is to ensure that when the U.S. citizen or permanent resident spouse or parent engages in battering or cruelty against a spouse or child, neither the spouse nor child should be entrapped in the abusive relationship by the threat of losing their legal resident status.¹⁹

Again, in 1990, the House was explicit in its intent to allow victims of "battery" or "extreme cruelty" to be granted the battered spouse or child waiver when Representative Benjamin Gilman (R-NY) supported the creation of this waiver:

In particular, the marriage fraud provisions, required our review and modification. The battered spouse or child waiver of the conditional residence requirement portion would allow the Attorney General to bestow permanent resident status if an alien can demonstrate that, while the marriage was entered into in good faith, evidence has shown that the spouse was battered by, or was the subject of extreme mental cruelty perpetrated by, his or her spouse or parent.

¹⁸ Congressional Record for the 101st Congress House of Representatives UNITY AND EMPLOYMENT OPPORTUNITY IMMIGRATION ACT OF 1990 (House of Representatives - October 02, 1990) page H8642

¹⁹ House Report 101-723(I), p. 78.

This provision would, in effect, create an avenue of relief for a spouse or child caught in a detrimental relationship. Under current law a damaging situation must be endured in order to maintain legal status in the United States. It would seem unconscionable that any human being should be required by our laws to remain in a situation in which they are abused in order to remain in legal status.²⁰

It is important to note that the House Judiciary Committee, in creating the battered spouse waiver, chose to define domestic violence for immigration law purposes as “battery” or “extreme cruelty” and describe this behavior more generally to encompass a range of “abusive” behaviors. Evidence to support a battered spouse waiver “can include, but is not limited to, reports and affidavits from police, medical personnel, psychologists, school officials, and social service agencies.”²¹ The House Judiciary Committee adopted Representative Slaughter’s view, further clarifying its intent by stating that legitimate requests for battered spouse waivers should be denied only in “rare and exceptional circumstances such as when the alien poses a clear and significant detriment to the national interest.”²²

Extreme Cruelty in the Family Courts: Guidelines for Adjudicating Domestic Violence Cases

In 1994, the National Council of Juvenile and Family Court Judges created the Family Violence Model State Code that set the standard at the time for development and implementation of state laws designed provide effective criminal and civil justice system responses to domestic violence.²³ The Model Code “treats domestic and family violence as a crime which requires early, aggressive and thorough intervention.”²⁴

“The Model Code enumerates the range of criminal conduct employed by many perpetrators of domestic or family violence. The Model Code offers this detailed list to underscore the breadth of violent crimes and fear-inducing or harmful conduct undertaken by perpetrators of domestic or family violence. ...The Model Code defines “crime involving domestic or family violence” to include one or more of the following crimes against another family or household member:

- Arson;
- Assault Offenses (Aggravated Assault, Simple Assault, and Intimidation);
- Burglary, Breaking and Entering;
- Destruction, Damage, Vandalism of Property;
- Homicide Offenses (Murder and Non-negligent Manslaughter, Negligent Manslaughter, and Justifiable Homicide);
- Kidnapping, Abduction;
- Sex Offenses, Forcible (Forcible Rape, Forcible Sodomy, Sexual Assault with an Object, and Forcible Fondling);

²⁰ Family Unity and Employment Opportunity Immigration Act of 1990, **October 2, 1990**, 136 Cong. Rec. H. 8629 (Vol. 136, No. 126, Pg. H8629).

²¹ *Ibid.*, p. 78-79.

²² *Ibid.*, p. 79.

²³ National Council of Juvenile and Family Court Judges, *Family Violence; Model State Code* (1994).

²⁴ *Id.* at iv.

- Stolen Property Offenses;
- Weapon Law Violations;
- Disorderly Conduct;
- Family Offenses, Nonviolent;
- Stalking; [and]
- Trespass of Real Property...”²⁵

The Model Code also allowed the opportunity for states to add additional crimes to the list.²⁶ Over time, state protection order statutes have expanded to offer protection against a larger list of family violence offenses including stalking, harassment, and threats, and attempts to harm family members, household members and intimate partners. However, the analysis conducted to support most protection orders issued in the United States continues to focus on criminal activity.²⁷

The family court rulings that consider extreme cruelty an important factor in determining whether to provide protection to harmed individuals have other significant considerations in common with VAWA immigration cases. All VAWA self-petitions, VAWA cancellation and VAWA suspension cases require proof of a valid marriage, and family court rulings too involve members of one family or household. Further, family court rulings focus on US citizens, and these VAWA immigration cases involve immigrant spouses and children who, but for the abuse, would have been able to obtain legal immigration status based on the marriage or the parent-child relationship, if the U.S. citizen or lawful permanent resident spouse of parent had filed for citizenship on the immigrant spouse or child’s behalf.

Department of Homeland Security and Legacy Immigration and Naturalization Sees Extreme Cruelty and Part of a Pattern of Domestic Violence, Power and Control

The Violence Against Women Act Extends Immigration Law Protections to Immigrant Spouses and Children of U.S. Citizens and Lawful Permanent Residents

In 1994, Congress amended the nation’s immigration laws and specifically enacted VAWA to address the unique barriers immigrant women and children face in domestic violence situations. Congress recognized that the existing immigration laws actually fostered the abuse of immigrant women by placing their ability to gain permanent lawful status completely in the control of the abusers.²⁸ VAWA 1994 offered two forms of protection to immigrant victims of spouse and child abuse – the VAWA self-petition and VAWA suspension of deportation. Domestic violence under immigration law was defined as battering or extreme cruelty. This definition applies in a range of immigration cases including VAWA self-petitioning, VAWA suspension of deportation, and the battered spouse waiver.²⁹ VAWA offers immigration relief to immigrant spouses and children who “ha[ve] been battered or³⁰ ha[ve] been subjected to extreme cruelty perpetrated by” the alien’s U.S. citizen or lawful permanent

²⁵ *Id.* at 3.

²⁶ *Id.*

²⁷ For an overview of the range of actions that can lead to issuance of protection orders see, American Bar Association Commission on Domestic Violence, Standards of Proof for Domestic Violence Civil Protection Orders (CPOs) By State (6/2009) available at: http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/Standards_of_Proof_by_State.authcheckdam.pdf

²⁸ See H.R. Rep. No. 395, 103d Cong., 1st Sess. 26-27 (1993).

²⁹ INA § 204(a)(1)(A)(iii)(bb); 204(a)(1)(A)(iv); 204(a)(1)(A)(vii)(V); 204(a)(1)(B)(ii)(I)(bb); 204(a)(1)(b)(iii); 216(c)(4)(C); 244(a)(3)(as in effect on March 31, 1997); 240A(b)(2).

³⁰ *Id.* (Emphasis added).

resident spouse, former spouse (within two years), intended spouse, parent or step-parent. The statute and the regulations treat battering and extreme cruelty as two separate factual determinations that are independent of each other.

Immigration Regulations Define “Battering or Extreme” Cruelty

VAWA immigration regulations define “battering or extreme cruelty,” as:

*[b]eing the victim of any act or a threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts [or threatened acts] that, in and of themselves, may not initially appear violent may be part of an overall pattern of violence.*³¹

This single definition covers a range of abusive actions including:

- physical violence,
- sexual violence,
- threats of violence, and
- extreme cruelty
 - psychological abuse that results or threatens to result in physical or mental injury
 - acts of coercive control (e.g. forced prostitution, forceful detention, exploitation)
 - other acts, threats, attempts, or threatened acts, that are part of an overall pattern of violence and coercive control (e.g., withholding medication, immigration related abuse, isolation, intimidation, economic abuse)
 - threats or attempts to commit crimes (e.g. threats to kill, maim, sexual assault, kidnap)

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),³² which erected new barriers to gaining lawful permanent residence for many family-based petitioners³³ and eliminated suspension of deportation, replacing it with a more limited form of immigration relief, cancellation of removal.³⁴ However, with regard to battered immigrants, IIRIRA created a special form of VAWA cancellation of removal that was substantially identical to and not more restrictive than VAWA suspension of deportation.³⁵ Under the IIRIRA amendments, Congress left this suspension remedy virtually unchanged and retained the mandate that, “[i]n acting on applications under this paragraph, the Attorney General *shall* consider any credible evidence relevant to the application.”³⁶

³¹ 8 C.F.R. § 204.2(c)(1)(vi).

³² Illegal Immigration Reform and Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (hereinafter “IIRIRA”).

³³ See, e.g., new INA §§ 212(a)(4)(C)(ii) (new enforceable affidavits of support) and 212(a)(9)(B) and (C) (new “unlawful presence” bars to admission).

³⁴ See new INA § 240A, 8 U.S.C. § 1229b, replacing former INA § 244.

³⁵ See INA § 240A(b)(2) and 244(a)(3)(as in effect on March 31, 1997).

³⁶ INA § 240A(b)(2), 8 U.S.C. § 1229b(b)(2) (emphasis added).

IIRIRA's protections for immigrant domestic violence victims were not limited to the creation of VAWA cancellation of removal and included:

- Access to public benefits by making VAWA self-petitioners, VAWA suspension and VAWA cancellation or removal applicants qualified immigrants under federal public benefits laws;
- Exceptions from affidavit of support requirements³⁷ and the need to submit any affidavit of support in VAWA self-petitioning cases;³⁸
- Exceptions for victims filing for relief under VAWA from the 3 and 10 year unlawful presence bars;³⁹
- Creation of VAWA confidentiality protections⁴⁰ designed to ensure that immigration judges, Department of Homeland Security (DHS), Department of Justice (DOJ) and State Department officials do not:
 - Disclose the existence or contents of a VAWA related immigration case to anyone, with only limited exceptions;⁴¹
 - Rely on perpetrator provided information to harm an immigrant victim by denying immigration relief, pursuing an immigration enforcement action or a removal or deportation action against the victim;⁴² and
 - Barring immigration enforcement actions at protected locations by requiring DHS enforcement officials to certify in immigration proceedings that if part of the enforcement action occurred at a prohibited location that the enforcement action did not rely on perpetrator provided information and authorizing the immigration judge to dismiss cancellation of removal when VAWA confidentiality violations have occurred.⁴³

In October 2000, bipartisan efforts led to the passing of the Battered Immigrant Women Protection Act as part of the Violence Against Women Act of 2000 (VAWA 2000).⁴⁴ Congress intended the immigration provisions of VAWA 2000 to aid battered immigrants by repairing residual immigration law obstacles or “catch-22” glitches impeding immigrants seeking to escape from abusive relationships.⁴⁵ Through VAWA 2000, Congress, by expanding categories of immigrants eligible for VAWA protection through the creation of T and U-visa; improving battered immigrant access to public benefits, restoring protections offered under the VAWA of 1994 that were affected by the passage of subsequent laws; and providing other measures of protection to battered immigrants, furthered its

³⁷ See INA § 212(a)(4)(C)(I)(I) & (II) (exemption from enforceable affidavit of support requirement).

³⁸ See United States Citizenship and Immigration Services information regarding affidavits of support (stating “an individual who has an approved form I-360 as a battered spouse or child” does not need to file an affidavit of support), available at: <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=720b0a5659083210VgnVCM100000082ca60aRCRD&vgnnextchannel=720b0a5659083210VgnVCM100000082ca60aRCRD>

³⁹ See INA § 212(a)(9)(B)(iii)(IV), referencing INA § 212(a)(6)(A)(ii) (exception to three- and ten-year unlawful presence bars).

⁴⁰ See Leslye Orloff, *Ch. 3: VAWA Confidentiality: History, Purpose, DHS Implementation and Violations of VAWA Confidentiality Protections*, in *Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault* (Legal Momentum, 2011), available at: <http://iwp.legalmomentum.org/reference/additional-materials/vawa-confidentiality/training-materials/Ch3-SA-Man--Confidentiality.pdf/view>

⁴¹ The provisions were originally written to apply to the U.S. Department of Justice including immigration judges, the BIA and the immigration and Naturalization Service. With the creation of the Department of Homeland Security (DHS) VAWA confidentiality protections extend to DHS, DOJ and the State Department. 8 U.S.C. 1367 (2005).

⁴² See Orloff, *supra* note 23 at 14.

⁴³ See Orloff, *supra* note 23 at 10.

⁴⁴ The Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified in scattered sections of 8, 18, 20, 28, 42, and 44 U.S.C.) (Oct. 28, 2000).

⁴⁵ The Violence Against Women Act of 2000 Section-by-Section Summary, Vol. 146, No. 126 Cong. Rec., 106th Cong., 2nd Sess., at S10195 (Oct. 11, 2000).

express and unequivocal intent to “ensure that domestic abusers with immigrant victims were brought to justice and that the battered immigrants Congress sought to help in the original Act are able to escape the abuse.”⁴⁶

Congress revisited the issues faced by immigrant victims when it passed the Violence Against Women Act of 2005 (VAWA 2005). In VAWA 2005, Congress not only reaffirmed its commitment to addressing domestic violence issues by reauthorizing VAWA, but also expanded VAWA self-petitioning in the areas of child abuse and elder abuse. VAWA 2005 enhanced protection for immigrant child abuse victims by allowing immigrant children who had suffered battering *or* extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident parent before the child turned 21, to file for VAWA self-petitioning protection so long as the self-petition was filed before the applicant child turned 25. Elder abuse victims were for the first time offered access to VAWA self-petitioning if they were “battered or subject to extreme cruelty by” their U.S. citizen son or daughter over 21 years old.

Any Credible Evidence Standard: Importance of Understanding Domestic Violence Dynamics

In 1994, Congress created the special “any credible evidence” standard and has consistently applied this standard to all forms of immigration relief created from 1994 to the present under VAWA and the Trafficking Victim’s Protection Act. A key contributor to the effectiveness of VAWA immigration relief is that statutory guarantee that victims applying for relief under VAWA or the TVPA can submit “any credible evidence” they can garner to support their immigration case.⁴⁷ Congress mandated a flexible evidentiary standard that recognizes the context of domestic violence. VAWA immigration protections eased the evidentiary standard that had been previously required in all other immigration cases that came before immigration courts. VAWA recognized that immigrant victims of abuse often lack access to evidence that is in their abuser’s control, and that immigrant victims of abuse may lack specific forms of corroborative evidence of abuse. Congress required that the Attorney General “consider *any credible evidence* relevant to the application” of a battered immigrant seeking suspension of deportation.⁴⁸ Immigration judges and the Board must make determinations in VAWA cases that recognize and evaluate the context of the abuse suffered by the applicant. To do otherwise would subvert Congress’ goal of aiding immigrant victims of domestic abuse.

While Congress intended the Attorney General to interpret the “any credible evidence” standard, that interpretation must give the statute its intended ameliorative effect.⁴⁹ The INS General Counsel’s office has articulated an “any credible evidence” standard in the context of self-petitions that reflects VAWA’s purposes, which permit, but do not require, petitioners to demonstrate that preferred primary or secondary evidence is unavailable.⁵⁰ As the Office of the General Counsel has noted, the purpose of such flexibility is to take into account the experience of domestic violence. Such flexibility should also be employed by immigration judges and the Board when making decisions regarding VAWA claims. Judges and the Board must understand and consider the nature and impact of domestic abuse in making

⁴⁶ *Id.*

⁴⁷ Leslye E. Orloff, Kathryn C. Isom, & Edmundo Saballos, *Mandatory U-Visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act’s Immigration Protections and its “Any Credible Evidence” Rules- A Call for Consistency*, 11 GEO. J. GENDER & L. 619, 620-21 (2010).

⁴⁸ 8 U.S.C. § 1254(g) (emphasis added).

⁴⁹ See H.R. Rep. No. 395, at 25.

⁵⁰ See, e.g., 8 C.F.R. §§ 103.2(b)(2)(iii) and 204.1(f)(1). See also Paul W. Virtue, Office of General Counsel, “*Extreme Hardship*” and *Documentary Requirements Involving Battered Spouses and Children*, Memorandum to Terrance O’Reilly, Director, Administrative Appeals Office (Oct. 16, 1998), at 6-7, reprinted in 76(4) Interpreter Releases 162 (Jan. 25, 1999)(“[T]hat section [of the regulations] allows the battered spouse or child self-petitioner to submit ‘any credible evidence’ and does not require that the alien demonstrate the unavailability of primary or secondary evidence.”).

these determinations. Otherwise, the actions and statements of domestic violence victims may be misunderstood due to insufficient information regarding the dynamics of abusive relationships.

Despite the any credible evidence standard, there continue to be VAWA cancellation and suspension cases in which the immigration judge:

- Does not allow victims to provide evidence from expert witnesses on domestic violence dynamics;
- Does not allow the victim to provide full testimony on the details of the battering or extreme cruelty in the relationship; or
- Issues a decision reflecting a lack of understanding of domestic violence dynamics and issues decisions against the victim
 - discredits the victim's testimony about domestic violence because the victim stayed with or returned to the abuser; or
 - makes findings of facts that would support a finding of fact the victim was battered or subjected to extreme cruelty but denies the case.

Efficacy of Specialized VAWA Unit

Critical components of the justice system encountering domestic violence, child and elder abuse victims include police officers, prosecutors, state criminal and family courts, and federal agencies. Prior to the passing of the Violence Against Women Act, many justice system officials, including judges, believed they understood domestic violence from their own experiences with their families and/or in their work. However, as justice system personnel gained expertise in efforts to protect victims and prosecute perpetrators they learned that views and beliefs they previously held were neither accurate, nor fully informed. Since the passage of VAWA, each component has, over time, gained the specialized training they needed to avoid being manipulated by abusers and to better understand how to approach victim and community safety. The approach each agency takes to this important issue has a direct impact on victim and community safety and the justice system's ability to hold perpetrators of domestic violence accountable.

For over 3 decades, agencies throughout the justice system have gained expertise and training on domestic violence dynamics and developed best practices that have been funded, evaluated, and shared with other state and federal agencies, particularly since the passage of the Violence Against Women Act in 1994. These best practices help government agencies learn how to carry out their statutory obligations to offer access to justice and assistance to victims while protecting the system against those who may try to fraudulently benefit from protections designed for victims, including perpetrators. State criminal and family courts, police and prosecutors, and federal agencies (DOJ –Human Trafficking, DHS, HHS, HUD) have all been successful in developing approaches that strike an appropriate balance between these goals that do not result in victims with valid cases being denied protections Congress developed to help them. The next section will discuss the effective approach DHS developed and implemented for adjudication of crime victims cases including VAWA self-petitions, and T and U visa cases within the context of national best practices for adjudication of domestic violence cases. It also makes recommendations to continue this approach in order to further improve the quality, consistency and efficiency of case processing and adjudication of VAWA cancellation of removal and suspension of deportation cases.

Congressional and Federal Government Priority and Best Practices: Trained Adjudicators Are a Core Component of Access to Justice For Domestic Violence and Child Abuse Victims

It is standard practice within the judicial system that specialized training is necessary and important when working with domestic violence and sexual assault victims for adjudicators to “develop expertise in domestic violence issues, including a well-developed understanding of the dynamics of domestic violence, knowledge of legal remedies for victims, and familiarity with services available...”⁵¹ The Congressional intent of the Violence Against Women Act is to offer protection to victims and hold offenders accountable.⁵² These goals cannot be accomplished when untrained adjudicators deny VAWA protections to survivors. Congress, state courts, and federal agencies have, since VAWA’s inception, placed an increasing priority on specialized training for state court judges, immigration judges, and DHS adjudicators responsible for issuing decisions in domestic violence and sexual assault cases on the dynamics of domestic violence and sexual assault, including the particular dynamics experienced by immigrant victims.⁵³ Over the past 30 years, specialized units have been created within state and federal courts, prosecutors’ offices, police departments and state and federal government agencies whose work is dedicated to improving access to justice, protection and informed fair adjudication of domestic violence, sexual assault, stalking and human trafficking cases. It is well established that specialized training is needed to detect, investigate, prosecute and adjudicate violence against women cases. This approach has been a cornerstone for best practices that are supported and promoted with funding from VAWA for almost two decades. Congress, in VAWA 2005, confirmed its support for the direction that the Immigration and Naturalization Service (INS) took in 1997 when it created the VAWA Unit at the Vermont Service Center (VSC), modeled after best practices for domestic violence and sexual assault adjudications throughout the justice system. It has long been established that having specialized units composed of personnel with specialized training on domestic violence, sexual assault, stalking and human trafficking accomplishes three very important goals:⁵⁴

⁵¹ SUSAN KEILITZ, SPECIALIZATION OF DOMESTIC VIOLENCE CASE MANAGEMENT IN THE COURTS: A NATIONAL SURVEY 7 (2000).

⁵² See Legislative History of the Violence Against Women Act of 1994: VIOLENCE AGAINST WOMEN ACT OF 1993 (House of Representatives - November 20, 1993) Congressional Record pages H10359 (Statement of Representative Moakley) and (Statement of Representative Morella) (“H.R. 1133 will: Require all States to enforce orders of protection regardless of State of origin and to encourage mandatory arrest policies; Provide grants for more effective law enforcement and prosecution strategies and for rape prevention programs and antiviolence curriculums for school-aged children; Grant permission for battered immigrant women, the spouses of U.S. citizens or legal residents, to self-petition for legal status for themselves and their children; and Provide training for judges and other court personnel about rape, sexual assault, and domestic violence.”);

⁵³ *Id.*; See CONGRESSIONAL RECORD, VOL.146, NO.126 TRAFFICKING VICTIMS PROTECTION ACT OF 2000--CONFERENCE REPORT --S10,195- (Senate - October 11, 2000). (“Sec. 1512. Access to Services and Legal Representation for Battered Immigrants. Clarifies that Stop grants, Grants to Encourage Arrest, Rural VAWA grants, Civil Legal Assistance grants, and Campus grants can be used to provide assistance to battered immigrants. Allows local battered women’s advocacy organizations, law enforcement or other eligible Stop grants applicants to apply for Stop funding to train INS officers and immigration judges as well as other law enforcement officers on the special needs of battered immigrants.”) and S10,224 (Statement of Senator Levin “VAWA has been tremendously successful in the training of judges, court personnel, prosecutors, police and victims’ advocates.”); See also Legislative History of the Violence Against Women Act of 2005 DEPARTMENT OF JUSTICE APPROPRIATIONS AUTHORIZATION ACT, FISCAL YEARS 2006 THROUGH 2009 -- (Extensions of Remarks - December 18, 2005) [Page: E2607] SPEECH OF HON. JOHN CONYERS, JR. OF MICHIGAN IN THE HOUSE OF REPRESENTATIVES SATURDAY, DECEMBER 17, 2005 (“Congress encourages the DHS’s specially trained VAWA unit and CIS VAWA policy personnel: (1) to develop a training program that can be used to train DHS staff, trial attorneys, immigration judges, and other DOJ and DOS staff who regularly encounter alien victims of crimes, and (2) to craft and implement policies and protocols on appropriate handling by DHS, DOJ and DOS officers of cases under VAWA 1994, the Acts subsequently reauthorizing VAWA, and IIRIRA.”)

⁵⁴ For a discussion of the social science research explaining the why specially trained professionals are required to fairly adjudicate domestic violence and sexual assault cases based on an understanding of the dynamics of abuse and coercive control *see generally* NAWAL AMMAR, HELENE BERMAN, JACQUELYN CAMPBELL, ANINDITA DASGUPTA, MARY ANN DUTTON, GISELLE HASS, STEPHANIE J. NAWYN, LESLYE E. ORLOFF, ANITA RAJ, RACHAEL RODRIGUEZ, EVAN STARK, JAY G. SILVERMAN, CRIS M. SULLIVAN, DAVID B. THRONSON, VERONICA TOBAR THRONSON, HANNAH BRENNER, J. RUBEN PARRA-CARDONA, JULIA L. PERILLA, VAWA IV LEGISLATIVE HISTORY HOUSE MARK-UP RESEARCHER’S PERSPECTIVE ON IMMIGRATION PROTECTIONS FOR IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT (2012), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/september-9-12-2012-san-diego-ca/research/VAWA-IV-House-Researcher-Data-Sign-on.pdf/view>

1. Improves and facilitates access to justice and protection for crime victims in a manner that protects their safety and is mindful of the urgency of their need for protection;
2. Strengthens the ability of police, sheriffs and prosecutors to detect, investigate and prosecute perpetrators and hold them accountable for their crimes, enhancing victim, community and officer safety; and
3. Ensures the expertise needed to detect patterns that enable adjudicators to ferret out and deny fraudulent cases while, at the same time, having the training that promotes recognition of patterns of coercive control and abusive behavior that simultaneously allows officers to identify and offer swift protections to victims filing valid cases under VAWA's immigration protections.

From 1997 through 2007, the VAWA Unit was staffed by a specialized VAWA Unit staffed by non-rotating staff who wanted to serve in the VAWA Unit. The INS adopted a system for adjudicating VAWA self-petitions that was patterned after the models that courts and other justice system entities have found to be most successful.

Successful Specialized VAWA Unit: Vermont Service Center's Domestic Violence Expertise

A. Purpose of INS Formation of the VAWA Unit

In 1997, in response to numerous complaints about INS District Offices mishandling, refusing to decide, losing and/or incorrectly denying VAWA self-petitioning cases, INS decided to consolidate adjudication of VAWA cases in one location.⁵⁵ All cases filed under the VAWA self-petitioning provisions were transferred to the VAWA Unit of the INS Vermont Service Center (VSC) facility.⁵⁶ The VSC was chosen because it had a good track record for handling VAWA self-petitions and it was

⁵⁵ See Letter from Leslye Orloff, Director of Program Development, Ayuda to T. Alexander Aleinikoff, Executive Associate Commissioner for Programs, Immigration and Naturalization Service (June 13, 1996) (regarding INS documenting field office adjudication problems in VAWA Self-Petitioning cases), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/vawa-unit-statistics/1996.6.13%20Orloff-Aleinikoff%20letter%20June%2013%201996.pdf/view>; see also Letter from T. Alexander Aleinikoff, Executive Associate Commissioner, Immigration and Naturalization Service, to Leslye Orloff, Director of Program Development, Ayuda, (Aug. 22, 1996) (regarding June 13, 1996 letter from Ayuda about VAWA Self-Petitioning cases), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/vawa-unit-statistics/1996.8.22%20Aleinikoff-Orloff%20letter%20Aug%2022%201996.pdf/view>

⁵⁶ Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009, Report of the Committee on the Judiciary, House of Representatives, to Accompany H.R. 3402, H.R. Rep. No. 109-233, at 116 (2005)

The Unit was created 'to ensure sensitive and expeditious processing of the petitions filed by this class of at-risk applicants [VAWA self-petitions and VAWA related cases]...' to '[engender] uniformity in the adjudication of all applications of this type' and to '[enhance] the Service's ability to be more responsive to inquiries from applicants, their representatives, and benefit granting agencies.'

(citing 62 Fed. Reg. 16607-16608 (1997)).

See also Statement of Rep. John Conyers, *supra* note 11, at E2606:

In 1997, the Immigration and Naturalization Service Consolidated adjudication of VAWA self-petitions...in one specially trained unit that adjudicates all VAWA immigration cases nationally....T visa and U visa adjudications were also consolidated in the specially trained VAWA unit.

(Citing USCIS Interoffice Memorandum from Michael D. Cronin to Michael A. Pearson, HQINV 50/1, August 20, 2001, 67 Fed. Reg. 4784 (Jan. 31, 2002)).

extremely responsive to requests by victim advocates and attorneys to improve the processing and adjudication of VAWA cases.

Consolidating all VAWA self-petitioning adjudications accomplished five equally important goals.

- First, it enhanced the safety and security of victims by ensuring that their VAWA, T or U visa cases would be adjudicated by a team of properly trained experts who understood the serious nature of domestic violence, sexual assault, trafficking and crime victimization and the impact of these crimes on victims and their children.
- Second, this centralized office was organized based upon successful models for handling domestic violence cases throughout the criminal justice system.
- Third, it allowed DHS to assure compliance with VAWA confidentiality statutory requirements in every aspect of each process involved with receipt, file management, adjudication, work authorization, adjustment and benefits and employment eligibility verification for all VAWA, T and U visa cases.
- Fourth, was necessary for implementation of 1996 welfare law reforms providing VAWA self-petitioners and their children access to public benefits as qualified immigrants based on receipt of a prima facie determination issued by the VAWA Unit.⁵⁷
- Fifth, as we have seen throughout the justice system, having a specialized unit with expertise on violence against women issues is the best approach to detecting fraud. Having experts who see violence against women cases every day allows for effective identification of fraudulent applications in a manner that protects victims. Expert adjudicators have the training and experience to identify victims with valid cases and protect against denials of legitimate applications by untrained decision-makers who too often impose their own views of domestic violence or sexual assault on the case and will deny the case because they believe the victim did not suffer “enough violence” or did not report the rape or abuse soon enough.

a. Congressional Support for the VAWA Unit

DHS followed the lead of law enforcement and prosecutors’ offices across the country by creating the Vermont Service Center, which is comprised of well-trained individuals in a highly specialized VAWA unit. Following passage of the Violence Against Women of Act of 2005 John Conyers stated in legislative history:

I want to emphasize the importance of the fact that the law assures that adjudication of all forms of immigration relief related to domestic violence, sexual assault, trafficking or victims of violent crime continue to be adjudicated by the specially trained VAWA unit.⁵⁸

⁵⁷ Memorandum from Paul Virtue, Acting Executive Associate Commissioner, Office of Programs, Immigration and Naturalization Service, to Regional Directors, District Directors, Officers-in-Charge, & Service Center Directors, Immigration and Naturalization Service, *Supplemental Guidance on Battered Alien Self-petitioning Process and Related Issues 2* (May 6, 1997), available at: http://niwaplibrary.wcl.american.edu/immigration/vawa-self-petition-and-cancellation/government-memoranda-and-factsheets/VAWA_INSOP%20VAWA%20Self-Petition%20memo_5.6.97_OVW_3.31.09.pdf/view

The bipartisan House legislative history of VAWA 2005 authored jointly by Representative James Sensenbrenner, and Representative John Conyers,⁵⁹ Ranking Member of the Chair of the House Judiciary Committee discussed the importance of the VAWA Unit by stating as follows:

In 1997, the Immigration and Naturalization Service consolidated adjudication of VAWA self-petitions and VAWA-related cases in one specially trained unit that adjudicates all VAWA immigration cases nationally. The unit was created “to ensure sensitive and expeditious processing of the petitions filed by this class of at-risk applicants . . .”, to “[engender] uniformity in the adjudication of all applications of this type” and to “[enhance] the Service’s ability to be more responsive to inquiries from applicants, their representatives, and benefit granting agencies.” See 62 Fed. Reg. 16607– 16608 (1997). T visa and U visa adjudications were also consolidated in the specially trained VAWA unit. See, USCIS Interoffice Memorandum HQINV 50/1, August 30, 2001, from Michael D. Cronin to Michael A. Pearson, 7 Fed. Reg. 4784 (Jan. 31, 2002).⁶⁰

Consistent with these procedures, the Committee recommends that the same specially trained unit that adjudicates VAWA self-petitions, T and U visa applications, process the full range of adjudications, adjustments, and employment authorizations related to VAWA cases (including derivative beneficiaries) filed with DHS: VAWA petitions T and U visas, VAWA Cuban, VAWA NACARA (§§ 202 or 203), and VAWA HRIFA petitions, 214(c)(15)(work authorization under section 933 of this Act), battered spouse waiver adjudications under 216(c)(4)(C) and (D), applications for parole of VAWA petitioners and their children, and applications for children of victims who have received VAWA cancellation....⁶¹

In 1996, Congress created special protections for victims of domestic violence against disclosure of information to their abusers and the use of information provided by abusers in removal proceedings. In 2000, and in this Act, Congress extended these protections to cover victims of trafficking, certain crimes and others who qualify for VAWA immigration relief. These provisions are designed to ensure that abusers and criminals cannot use the immigration system against their victims. Examples include abusers using DHS to obtain information about their victims, including the existence of a VAWA immigration petition, interfering with or undermining their victims’ immigration cases, and encouraging immigration enforcement officers to pursue removal actions against their victims.⁶²

This Committee wants to ensure that immigration enforcement agents and government officials covered by this section do not initiate contact with abusers, call abusers as witnesses or relying on information furnished by or derived from abusers to apprehend, detain and attempt to remove victims of domestic violence, sexual assault and trafficking, as prohibited by section 384 of IIRIRA. In determining whether a person furnishing information is a prohibited source, primary

⁵⁸ Legislative History of the Violence Against Women Act of 2005 DEPARTMENT OF JUSTICE APPROPRIATIONS AUTHORIZATION ACT, FISCAL YEARS 2006 THROUGH 2009 -- (Extensions of Remarks - December 18, 2005) [Page: E2607] SPEECH OF HON. JOHN CONYERS, JR. OF MICHIGAN IN THE HOUSE OF REPRESENTATIVES SATURDAY, DECEMBER 17, 2005.

⁵⁹ See generally, Rep. John Conyers, Jr., The 2005 Reauthorization of the Violence Against Women Act: Why Congress Acted to Expand Protections to Immigrant Victims 461 (Sage Publications, 2007).

⁶⁰ The VAWA Unit is the location where self-petitions, T and U visa cases and other cases of immigrant victims are adjudicated. Committee on the Judiciary, House of Representatives, Department of Justice Appropriations Authorization Act, Fiscal Years 2006 to 2009 to Accompany HR 3402. 109th Congress, 1st Session, Report 109- 233, September 22, 2005 p. 116

⁶¹ *Id.*

⁶² *Id.* at 122.

evidence should include, but not be limited to, court records, government databases, affidavits from law enforcement officials, and previous decisions by DHS or Department of Justice personnel. Other credible evidence must also be considered. Government officials are encouraged to consult with the specially trained VAWA unit in making determinations under the special “any credible evidence” standard.⁶³

B. VAWA Confidentiality Case Processing

By creating the VAWA Unit and sending virtually all⁶⁴ VAWA confidentiality protected cases to the VAWA Unit for adjudication, DHS protected against VAWA confidentiality violations by DHS officials. The VAWA Unit’s protections against VAWA confidentiality violations include:

- Mailroom staff at the VSC receives special training on handling of cases entitled to VAWA confidentiality protection.
- Each case is screened carefully for a safe address check as the first step in case processing.
- Cases are marked clearly on the outside of the file that the case so it is clear to all DHS officials who see the file that the case has VAWA confidentiality protection.
- A Class of Admission Code “384” is assigned to each VAWA confidentiality protected case that the VAWA Unit enters into the Central Index System to notify all DHS components that the case is receiving VAWA confidentiality protection signifying that no information about the case, the victim, the victim’s location, case status or any other information about or contained in the case file can be released.⁶⁵ It also notifies DHS officials about restrictions and prohibitions that apply to reliance on information provided by a perpetrator or the

⁶³ *Id.* at 122

⁶⁴ It is important to note that, as of this writing, there remains one VAWA confidentiality protected case type that USCIS has failed to transfer to the VAWA Unit for adjudication – applicants for battered spouse waivers under INA section 216(c)(4)(C). Congress called for all battered spouse waiver cases to be adjudicated by the VAWA Unit’s staff with special training on the dynamics of domestic violence in VAWA 2005. *See* U.S. Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009, Report of the Committee on the Judiciary, House of Representatives, to Accompany H.R. 3402, H.R. Rep. No. 109-233, at 116 (2005)

Consistent with these procedures, the Committee recommends that the same specially trained unit that adjudicates VAWA self- petitions, T and U visa applications, process the full range of adjudications, adjustments, and employment authorizations related to VAWA cases (including derivative beneficiaries) filed with DHS: VAWA petitions T and U visas, VAWA Cuban, VAWA NACARA (§§ 202 or 203), and VAWA HRIFA petitions, 214(c)(15)(work authorization under section 933 of this Act), ***battered spouse waiver adjudications under 216(c)(4)(C)*** and (D), applications for parole of VAWA petitioners and their children, and applications for children of victims who have received VAWA cancellation.

(emphasis added).

As a result of continuing to be adjudicated at each of the USCIS Service Centers, battered spouse waivers, are adjudicated by USCIS Service Center staff that do not receive the same specialized training that VAWA Unit staff receive. The result is inconsistency in case adjudications between service centers and battered immigrant spouses whose abusive U.S. citizen spouses filed immigration papers on the abused immigrant spouse’s behalf and who were granted conditional resident status receiving less access to VAWA protections than battered immigrant spouses of citizen or lawful permanent residents who self-petition. This is true despite the fact that battered spouse waiver applicants are afforded VAWA confidentiality protection as VAWA self-petitioners (INA Section 101(a)(51)(C); 8 U.S.C. 1367(a)(1)(F).

⁶⁵ U.S. DEP’T OF HOMELAND SECURITY, BROADCAST MESSAGE ON NEW 384 CLASS OF ADMISSION CODE (2010), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message-to-DHS-384-COA-Final-12.21.10.pdf/view>

perpetrator's family member as a basis for an enforcement action against the VAWA confidentiality protected victim.⁶⁶

- Use of a specialized hotline answered only by VAWA Unit supervisors that allows for verification to protect against release of information about any VAWA confidentiality protected case to any person other than the victim's authorized victim advocate or attorney.

Efficacy of the Specialized VAWA Unit in Processing Battered Immigrants' Applications for Immigration Relief

The primary goal in creation of the VAWA Unit was to establish a centralized system that uniformly handled VAWA cases in an efficient manner and with the utmost care. Creation of the VAWA Unit at the VSC also provided a centralized "clearinghouse"⁶⁷ with the capacity to implement 1996 welfare provisions which make certain battered aliens -- including self-petitioners and others -- eligible for public benefits,⁶⁸ and to implement VAWA confidentiality protections that became law as part of 1996 immigration reform legislation.⁶⁹ The highly specialized unit was able to maintain consistency and efficiency through intensive training, two key components to effective adjudication of these types of applications.⁷⁰ These improvements in the processing method were especially important to battered immigrants whose safety depended on the expediency of the Unit's determinations. The creation of the specialized unit enhanced the safety and security of victims by ensuring that a properly trained expert who understood the serious nature of domestic violence and the impact on its victims would adjudicate their VAWA cases. The Unit was also trained on "how batterers use their authority over victims' immigration status to control victims and prevent them from seeking assistance from the criminal justice system."⁷¹ Maintaining confidentiality and being well versed in the resources that should be offered to victims allowed the Unit to preserve victim safety while adjudicating cases and to prevent the perpetrator from exerting further control over the victim.

Due to its training, the VAWA unit staff has developed the expertise necessary to analyze the credibility of the applications the Unit receives. This skill is important because of the high volume of applications received; efficiency is important in processing these types of cases, particularly in making *prima facie* determinations. By constantly being exposed to this limited type of application, the Unit was able to expertly and quickly distinguish between fraudulent and legitimate cases. This was accomplished through training that allowed staff to identify patterns and dynamics among both the valid approvable

⁶⁶ U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT, INTERIM GUIDANCE RELATING TO OFFICER PROCEDURE FOLLOWING ENACTMENT OF VAWA 2005 (2007), available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/government-memoranda-and-factsheets/VAWA-CONF_Torres-ICE-VAWA-Confidentiality-Memo-Jan-22-2007.pdf/view; See also Memorandum from William I. Howard, Principal Legal Advisor, VAWA 2005 Amendments to Immigration and Nationality Act and 8 U.S.C. § 1367 (Feb. 1, 2007).

⁶⁷ Memorandum from Paul Virtue, Acting Executive Associate Commissioner, Office of Programs, Immigration and Naturalization Service, to Regional Directors, District Directors, Officers-in-Charge, & Service Center Directors, Immigration and Naturalization Service, *Supplemental Guidance on Battered Alien Self-petitioning Process and Related Issues 2* (May 6, 1997), available at: http://niwaplibrary.wcl.american.edu/immigration/vawa-self-petition-and-cancellation/government-memoranda-and-factsheets/VAWA_INSOP%20VAWA%20Self-Petition%20memo_5.6.97_OVW_3.31.09.pdf/view

⁶⁸ *Id.*

⁶⁹ *Id.* at 4; See also Memorandum from Paul Virtue, Acting Executive Associate Commissioner, Office of Programs, Immigration and Naturalization Service, to All INS Employees, Immigration and Naturalization Service, *Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA § 384* (May 5, 1997), available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/government-memoranda-and-factsheets/c_VAWAConf_DHSGuidanceSec%20384_05.05.97_FIN.pdf

⁷⁰ Conyers, *supra* note 54 at 461.

⁷¹ *Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 2083 Before the Subcomm. On Immigration and Claims of the H. Comm. On the Judiciary*, 106th Cong. (2000) (statement of Barbara Strack, Acting Executive Associate Commissioner for Policy and Planning, Immigration and Naturalization Service), available at: <http://judiciary.house.gov/legacy/stra0720.htm>.

applications and the fraudulent ones.⁷² Since the members of the specialized staff share information with each other, each case is adjudicated appropriately, consistently, and in a timely manner, and the fraudulent cases are disposed of quickly. The VAWA Unit's current approach and structure provides the public with a one-stop, user-friendly service where the staff knows the status of each case and fully understands the process of adjudication.⁷³

The 2005 amendments to VAWA confidentiality required DHS and DOJ to issue guidance and train officers and employees.⁷⁴ This training requirement was added by Congress to more effectively stop VAWA confidentiality violations that were being committed most often by immigration enforcement officers, District office personnel, and DHS trial attorneys.⁷⁵

The Vermont Service Center embraced this mandate by training its staff in domestic violence, sexual assault, trafficking, and crime victimization, and how these issues impact immigrant victims. Their training also fosters expertise in how abusers of immigrant victims exert power and control. In addition to these subjects, the VAWA Unit was trained to understand the full range of VAWA confidentiality requirements and the ways in which VAWA confidentiality laws affect adjudication and case processing. Effective training allowed the Unit to become more efficient in its case processing and more proficient and successful in making *prima facie* determinations to distinguish fraudulent cases from legitimate ones. As the legislative history of the 2005 amendments to VAWA makes clear, this level of training is necessary to both the efficiency of the Unit, but also protects victims' confidentiality and expedited processing of their sensitive cases.

Training and Expertise of the VAWA Unit Improves Fraud Detection

The VAWA specialized Unit is effective. The specially trained DHS VAWA Unit uses a high degree of diligence and vigilance in adjudicating these cases as compared to family based immigration applications. VAWA and U visa cases have a higher rate of Requests for Further Evidence (RFE) issued by immigration authorities as compared to other types of immigration cases.⁷⁶ DHS data on VAWA unit case processing reveals that the VAWA Unit requires significantly more evidence in VAWA self-petitioning cases when battered spouses and children apply for immigration relief on their own without the abusive U.S. citizen or lawful permanent resident spouse's knowledge, assistance or consent. The DHS VAWA unit issues a 4 times greater rate of requests for further evidence in VAWA self-petitioning cases than in family based visa petition cases.⁷⁷

- Requests for further evidence rate
 - 74% VAWA cases
 - 18.3% family visa petition cases

⁷² Office of Policy and Planning, "Strategic Plan Toward INS 2000." U.S. Immigration and Naturalization Service, 1994, p. 17.

⁷³ *Id.* at 16.

⁷⁴ 8 U.S.C. 1367(d).

⁷⁵ Report of the Committee on the Judiciary House of Representatives to Accompany H.R. 3402. Department of Justice Appropriations Act Fiscal Years 2006 through 2009. 109th Congress, First Session, Report 901- ; September 22, 2005. Pages 118-122.

⁷⁶ DHS VAWA Unit data (2007-2011); See also, See also, Immigration Committee of the National Task Force to End Sexual and Domestic Violence, *Without Evidence of a Systemic Problem, House VAWA Bill Proposes Radical Changes that Undermine VAWA Protections for Immigrant Victims Current System Saves Thousands of Lives Each Year, but Changes Will Jeopardize Victims and Empower Abusers* (2012) Available at: <http://4yawa.org/pages/yawa-fact-sheets>

⁷⁷ DHS VAWA Unit data (2007-2011)

The denial rate for VAWA self-petitioning cases is also higher than for family based visa petition cases generally.⁷⁸

- Denial rate
 - 31.4% VAWA self-petitions
 - 21% U visas
 - 11.2 % family members of citizens
 - 14.2% family members of lawful permanent residents

Adjudication by a specially trained unit promotes consistency of adjudications and helps ensure that immigrant crime victims receive a careful, full and fair adjudication of their VAWA, T and U visa cases. It is critical for an adjudicator to cultivate knowledge about factors including the social, economic, immigration status, cultural, and religious ties that the abuser uses to maintain power and coercive control over the victim.⁷⁹ For foreign born victims, immigration related abuse often persists even after a protection order has been issued against the perpetrator.⁸⁰ Immigration related abuse corroborates, co-exists with, or predicts escalation of the abuse toward physical and sexual abuse.⁸¹ Extensive experience with adjudicating domestic violence results in efficient and well-informed decision-making⁸² and furthers procedural fairness and trust that decisions will be made in a consistent manner that is objective, neutral, and fair.

Part of the ongoing development of the VAWA Unit should continue to include specialized training, which Congress has consistently supported in the context of VAWA.⁸³ Understanding of issues such as the domestic violence dynamics experienced by abused spouses and children, immigration related abuse,⁸⁴ problems and patterns in criminal investigations and prosecutions of perpetrators,⁸⁵ support services for victims, problems immigrant victims have in accessing services,⁸⁶ and sentencing

⁷⁸ *Id.*

⁷⁹ Natasha Bakht for Justice Paul Bentley of the Ontario Court of Justice on behalf of the National Judicial Institute, *Problem Solving Courts as Agents of Change*, 13 (2004), available at: <http://www.iadtc.law.ecu.edu.au/pdfs/Problem%20Solving%20Courts%20Paper%20final%20ppr.pdf>. See also, Nawal H. Ammar, Leslye E. Orloff, Mary Ann Dutton, and Giselle A. Hass, *Battered Immigrant Women in the United States and Protection Orders: An Exploratory Research*, *Criminal Justice Review* 2012 37: 337 (originally published online 1 August 2012), available at: <http://iwip.legalmomentum.org/reference/additional-materials/family-law-for-immigrants/protective-orders/research-reports-and-data/AmmaretalCPO.pdf/view>; Nawal Ammar, Helene Berman, Jacquelyn Campbell, Anindita Dasgupta, Mary Ann Dutton, Giselle Hass, Stephanie J. Nawyn, Leslye E. Orloff, Anita Raj, Rachael Rodriguez, Evan Stark, Jay G. Silverman, Cris M. Sullivan, David B. Thronson, Veronica Tobar Thronson, Hannah Brenner, J. Ruben Parra-Cardona, Julia L. Perilla, *Researcher's Perspective on Immigration Protections for Immigrant Victims of Domestic Violence and Sexual Assault*, (December 6, 2012), available at: <http://iwip.legalmomentum.org/reference/additional-materials/research-reports-and-data/research-US-VAIW/20120531%20VAWA%20IV%20House%20Researcher%20Data%20Sign%20on%20FINAL.pdf/view>

⁸⁰ Mary Ann Dutton, Leslye Orloff and Giselle Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 2 *GEO. J. GENDER & L* 245 (2000), available at: <http://iwip.legalmomentum.org/reference/additional-materials/research-reports-and-data/research-US-VAIW/Characteristics%20of%20Help-Seeking%20Immigrant%20WomenOVW%2010.23.01.pdf/view> (Hereinafter Dutton Helpseeking)

⁸¹ Giselle Aguilar Hass, Mary Ann Dutton and Leslye E. Orloff, *Lifetime Prevalence of Violence Against Latina Immigrant: Legal and Policy Implications*, *Domestic Violence: Global Response* (2000) at 93-113, available at: http://iwip.legalmomentum.org/reference/additional-materials/research-reports-and-data/research-US-VAIW/RSCH_Lifetime_Prevalence_DV_Latinas.pdf/view

⁸² Keilitz, *supra* note 41 at 24 (citing Delphi study of practitioners, judges, court managers and domestic violence experts).

⁸³ H.R. Rep. No. 109-233, at 118 (2005).

⁸⁴ Giselle Aguilar Hass, Mary Ann Dutton and Leslye E. Orloff, *Lifetime Prevalence of Violence Against Latina Immigrant: Legal and Policy Implications*, *Domestic Violence: Global Responses*, pp. 93-113 2000 A B Academic Publishers Printed in Great Britain available at http://iwip.legalmomentum.org/reference/additional-materials/research-reports-and-data/research-US-VAIW/RSCH_Lifetime_Prevalence_DV_Latinas.pdf/view

⁸⁵ HON. STEPHEN B. HERRELL & MEREDITH HOFFORD, *FAMILY VIOLENCE: IMPROVING COURT PRACTICE, RECOMMENDATIONS FROM THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES* 16 (1990)

⁸⁶ Anna Pohl, Hema Sarangapani, Amanda Baran, and Cecilia Olavarria, *Barriers to Accessing Services: The Importance of Advocates Accompanying Battered Immigrants Applying For Public Benefits* (2004) available at http://iwip.legalmomentum.org/public-benefits/benefits-for-qualified-immigrants/PB_BB-Accompanying_Immigrants_Applying_for_Benefits-MANUAL-BB.pdf/view

procedures are crucial to proper and efficient adjudication of immigration relief applications that include elements of domestic violence.⁸⁷

When adjudicators lack training on domestic violence dynamics, access to justice for battered immigrants who are abused by their U.S. citizen or lawful permanent resident spouses or parents is delayed or denied. When an application for VAWA cancellation of removal or suspension of deportation relief is denied, victims of spouse and child abuse must choose between returning to live with her perpetrator or leaving the country and losing all contact with their children. Either option leaves victims with legitimate cases susceptible to ongoing abuse, coercive control, and retaliation by the abuser. This result is contrary to Congressional intent in VAWA, and is particularly troubling since, in most circuits, such a decision by the Board is unreviewable.

Another compelling argument for maintaining a specialized VAWA Unit is uniformity in applying relevant law. After developing expertise on the subject matter, adjudicators in specialized units are more likely to apply the law in a more uniform and consistent manner than their counterparts in the other service centers.⁸⁸ Uniformity and consistency facilitate a more streamlined adjudication process, yields more consistent results⁸⁹ and better case management. Having a specially trained unit promotes full implementation of the array of protections Congress created for this special class of immigrant crime victims.

Specialized training will include understanding the dynamics of domestic violence, sexual assault, human trafficking, workplace violence, and other U visa criminal activities experienced by immigrant victims to enable adjudicators to correctly identify abuse dynamics, patterns, coercive control, and nuances that are present in legitimate cases of abuse and not present in fraudulent cases.

Conclusion

Research and data regarding urban homicide rates indicate that foreign-born women are at a higher risk for homicide from an intimate partner.⁹⁰ This phenomenon occurs because there is often a clash of culture, language barriers, the issue of fear and deportation, especially in cases where such immigrants are undocumented. Domestic violence abuse rates rise to almost three times the national average when a foreign born woman is married to U.S. citizen man.⁹¹ Without any specialized training to fully understand the implication of such abuse for immigrants, inexperienced adjudicators may not recognize the more subtle signs of trauma and other patterns of abuse, including immigration related abuse.⁹² Threats of deportation, to turn the victim in for immigration enforcement and/or to withdraw papers the perpetrator filed for the victim constitute immigration related abuse.⁹³ Such abuse is ten times higher in physically and sexually abusive relationships than in emotionally abusive relationships.⁹⁴

⁸⁷ See Herrell, *supra* note 96 at 42.

⁸⁸ Zimmer, *supra* note 42 at 47.

⁸⁹ Zimmer, *supra* note 42 at 47.

⁹⁰ Victoria Frye, Sandro Galea, Melissa Tracy, Angela Bucciarelli, Sara Putnam, and Susan Wilt, *The Role of Neighborhood Environment and Risk Femicide of Intimate Partner in a Large Urban Area*, American Journal of Public Health, August 2008, Vol. 98, No 8, pp1473-1479.

⁹¹ Add cite

⁹² Giselle Aguilar Hass, Mary Ann Dutton and Leslye E. Orloff, Lifetime Prevalence of Violence Against Latina Immigrant: Legal and Policy Implications, Domestic Violence: Global Responses, pp. 93-113 2000 A B Academic Publishers Printed in Great Britain available at http://iwp.legalmomentum.org/reference/additional-materials/research-reports-and-data/research-US-VAIW/RSCH_Lifetime_Prevelence_DV_Latinas.pdf/view

⁹³ *Id.*

⁹⁴ Mary Ann Dutton, Leslye Orloff and Giselle Hass, Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications, 2 GEO. J. GENDER & L 245 (2000), available at: <http://iwp.legalmomentum.org/reference/additional-materials/research-reports-and-data/research-US-VAIW/Characteristics%20of%20Help-Seeking%20Immigrant%20Battered%20WomenOVW%2010.23.01.pdf/view>

When immigration related abuse exists in a relationship where physical or sexual abuse has not yet occurred, immigration related abuse could be an indication that the lethality of abuse is increasing.⁹⁵

It is important to remember that VAWA cancellation of removal and suspension of deportation applicants, with their children, are each immigrants married to or the children of a U.S. citizen or lawful permanent resident. The citizen or lawful permanent resident spouse or parent, were they not an abuser, would have filed on behalf of the immigrant for lawful permanent residency, based on proof of the immigrant's good faith marriage to a U.S. citizen or lawful permanent resident. Were it not for the abuse, the immigrant would have received lawful permanent residency as a result of the filing by their citizen or lawful permanent resident spouse or parent.

In creating the VAWA Unit, Congress determined the need for a specially trained Unit within DHS to curb the instances described above and to ensure access to relief for those who are eligible under VAWA.⁹⁶ The specialized nature of the VAWA Unit allows adjudicators to be more effective detecting fraud due to specialized training that equips them with the knowledge they need to easily identify patterns in fraudulent claims that come before them. With the proposed training in place, adjudicators in the VAWA Unit will acquire the knowledge necessary to properly discern credibility issues, effectively work with victims of abuse, and note that it requires them to understand the victim's fear for herself, for her children, her sense of guilt and shame, which are further complicated by ongoing threats of deportation from her abuser, which then prevents her from seeking help and cooperating with law enforcement.⁹⁷

⁹⁵ Giselle Hass, Nawal Ammar and Leslye Orloff "Battered Immigrants and U.S Citizen Spouses" (Legal Momentum, April 24, 2006) available at http://iwp.legalmomentum.org/reference/additional-materials/iwp-training-powerpoints/september-9-12-2012-san-diego-ca/research/BB_RSRCH_ImmVictims_Battered_Imm.pdf/view

⁹⁶ See House Judiciary Committee Report, *supra* note 73, at 116.

⁹⁷ Ann Shalleck, *Theory and Experience in Constructing the Relationship between Lawyer and Client: Representing Women who have been abused*, 64 TENN. L. REV. 1019, 1046-47 (1997).