

# CRS Report for Congress

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## **Immigration: Noncitizen Victims of Family Violence**

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# Immigration: Noncitizen Victims of Family Violence

## Summary

During the last decade, Congress has enacted special immigration provisions to assist the battered alien spouses (most of whom are women) and children of U.S. citizens and lawful permanent residents. The first such provision was added to the Immigration and Nationality Act (INA) by the Immigration Act of 1990. The most recent set of amendments to INA was enacted by the 106<sup>th</sup> Congress. To deter immigration-related marriage fraud, Congress, in 1986, had established a two-year conditional status for alien spouses and children who obtained permanent residence based on a recent marriage. In most cases, the alien and his or her spouse had to submit a joint petition at the end of the two-year period to have the condition removed. This requirement posed problems for battered aliens, whose spouses often refused to cooperate in the filing of joint petitions. The 1990 Immigration Act created a special waiver of the joint petition requirement for battered spouses and children.

The Violence Against Women Act (VAWA) of 1994 provided additional relief to noncitizen victims of family violence. It allowed them to file self-petitions for immigration preference status, rather than having to rely on their batterers to file initial petitions on their behalf. (Obtaining immigration preference is a prerequisite for becoming a lawful permanent resident.) VAWA also established special requirements for battered alien spouses and children seeking relief from deportation.

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which contained strong measures to deter illegal immigration. Under IIRIRA, however, battered aliens were eligible for various exemptions. IIRIRA also amended the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which had placed restrictions on alien eligibility for federal benefits. IIRIRA classified battered aliens as "qualified aliens," who were thereby eligible for certain public benefits.

In addition, battered aliens have benefitted from a recent expansion of eligibility for adjustment of status, the process by which aliens present in the United States may obtain permanent residence without having to leave the country. In 1994, Congress made adjustment of status available to aliens who had entered the country illegally. These eligibility rules, section 245(i) in the INA, apply to aliens whose petitions for immigrant preference were filed by April 30, 2001. This provision expired on January 14, 1998, but was temporarily reinstated through April 30, 2001.

The 106<sup>th</sup> Congress enacted the Battered Immigrant Protection Act (BIWPA) as part of the VAWA reauthorization bill. The Act provides relief in various areas, including cancellation of removal, adjustment of status, and self-petitioning. BIWPA included language from several similar bills that proposed to expand existing protections for noncitizen victims of family violence. They include measures to prevent violence against women (S. 51, S. 245, S. 2787, H.R. 357), as well as bills to provide economic security and safety for battered women (S. 1069) and to provide protection for battered alien women (H.R. 3083).

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# Immigration: Noncitizen Victims of Family Violence

## Introduction

Family violence is increasingly being recognized as a serious problem in the United States. Although it affects all segments of society, experts believe that a combination of factors may put noncitizen women married to U.S. citizens or lawful permanent residents at increased risk of spousal abuse. These factors include poor English language skills, economic dependence on the citizen or permanent resident spouse, poverty, unemployment, and crowded living conditions.<sup>1</sup>

During the last decade, Congress has acted to address the unique problems faced by the battered alien spouses (most of whom are women) and children of U.S. citizens and lawful permanent residents.<sup>2</sup> It has enacted a series of waivers and other special provisions designed to ensure their safety and protect their rights. At the same time, battered aliens, many of whom are undocumented, have not been completely insulated from the effects of restrictive immigration policies. They have been impacted, both directly and indirectly, by provisions intended to deter immigration-related fraud and preserve the integrity of the immigration system. As a result, advocates argued, abused alien spouses and children did not receive sufficient, appropriate relief under the law. The 106<sup>th</sup> Congress expanded the existing protections for battered aliens, in part, to address these concerns.

## Obtaining Lawful Permanent Residence

Many of the immigration provisions covered in this report concern the ability of battered aliens to gain lawful permanent residence. Lawful permanent residents, also known as immigrants, are entitled to live and work in the United States indefinitely unless they commit a removable offense. A brief overview follows of the process by which aliens obtain lawful permanent residence. As set forth in the Immigration and Nationality Act (INA) of 1952, as amended,<sup>3</sup> the first step to becoming a permanent resident is obtaining immigration preference. In most cases, family-based petitions for

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<sup>1</sup>See, for example, Michelle J. Anderson, "A License to Abuse: The Impact of Conditional Status on Female Immigrants," *Yale Law Journal*, v. 102, April 1993, p. 1401-1404. (Hereafter cited as Anderson, "A License to Abuse")

<sup>2</sup>The term "alien" is synonymous with "noncitizen." "Child," as defined in §101(b)(1) of the Immigration and Nationality Act and used throughout this report, refers to an unmarried child who is less than 21 years of age.

<sup>3</sup>Act of June 27, 1952, ch. 477; 66 Stat. 163; 8 U.S.C. 1101 *et seq.* INA is the basis of current immigration law.

immigration preference status have to be filed with the Immigration and Naturalization Service (INS) by the beneficiary's U.S. citizen or lawful permanent resident relative.<sup>4</sup> An exception, which was enacted in 1994 and is discussed in a subsequent section, enables certain battered alien spouses and children to self-petition.

In addition to an approved petition, a prospective immigrant must have a visa number immediately available to him or her. An alien who is the spouse or child of a lawful permanent resident is subject to the visa allocation system, which sets limits on the number of individuals in the various preference categories who can be granted lawful permanent resident status each year. Thus, after their petitions for immigration preference are approved, relatives of lawful permanent residents must wait for the State Department to assign them an immigrant visa number. Spouses and children of U.S. citizens are not subject to numerical immigration limits and do not have to wait for an immigrant visa number to become available. Once their petitions are processed and approved, a visa number will be immediately available to them.

Once a visa number is available, an alien already in the United States may be eligible to apply to adjust to permanent resident status without leaving the country. Those not eligible to adjust status must apply for an immigrant visa at a U.S. consulate abroad, usually in their home country. Upon admission to the United States, the visa holder acquires lawful permanent residence. All applicants for permanent residence must be found "admissible" to the United States by INS. Under INA, aliens may be inadmissible for health, security, criminal, or other reasons.<sup>5</sup>

## Laws and Policy Prior to the 106<sup>th</sup> Congress

### Marriage Fraud

The first immigration provision to assist battered alien spouses and children of citizens and lawful permanent residents was enacted in 1990. It was prompted by legislation passed 4 years earlier to deter fraud committed by aliens who marry citizens or permanent residents to gain immigration benefits. The Immigration Marriage Fraud Amendments (IMFA) of 1986 added a new §216 to INA.<sup>6</sup> Section 216 established a 2-year conditional status for alien spouses and children who obtain lawful permanent residence based on a marriage entered into less than 2 years earlier. During the 2-year conditional period, INS can terminate the alien's conditional

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<sup>4</sup>Spouses and children of U.S. citizens are eligible for classification as immediate relatives; spouses and children of lawful permanent residents are eligible for family-sponsored second preference classification. For additional information on the preference categories, see CRS Report 94-146, *Immigration: Numerical Limits on Permanent Admissions, FY1998-FY2000*, by Joyce Vialet.

<sup>5</sup>The INS website [<http://www.ins.usdoj.gov>] contains detailed information on becoming a lawful permanent resident. For an explanation of the process for battered spouses and children, see [<http://www.ins.usdoj.gov/graphics/howdoi/battered.htm>], visited February 14, 2000.

<sup>6</sup>P.L. 99-639, November 10, 1986; 100 Stat 3537; 8 U.S.C. 1186a.

permanent resident status if it determines that the marriage was entered into to evade U.S. immigration laws or that the marriage has been terminated, other than through the death of the spouse. To have the conditions on the grant of permanent residence removed at the end of the 2-year period, the alien and his or her spouse must jointly submit a petition.

Under IMFA as originally enacted, the joint petition requirement could be waived on two grounds. The alien had to prove either: (1) extreme hardship would result if he or she were deported; or (2) he or she had entered into the marriage in good faith but had terminated the marriage for good cause and was not at fault for failing to meet the joint petition requirement. Denial of a joint petition or a waiver application resulted in termination of the alien's lawful permanent residence.

IMFA had unintended, negative consequences for noncitizen victims of family violence. By establishing a 2-year conditional residence requirement, advocates argued, the statute served to increase the power of the abuser over the alien spouse. Linda Kelly described the impact of IMFA, as follows:

Caught in limbo, many battered women were reluctant to leave their abusive spouses, as without their husbands' legal assistance the women risked losing permanent residency and facing deportation.<sup>7</sup>

Although, as noted above, IMFA provided for waivers of the joint petition requirement, they were difficult to obtain. Evidence of battery alone was not sufficient to qualify for a waiver. A 1990 House Judiciary Committee report described the inadequacy of IMFA in providing relief to battered alien spouses:

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."<sup>8</sup>

**Battered Spouse or Child Waiver.** In 1990, Congress attempted to remedy the problems the joint petition requirement had created for noncitizen victims of family violence. As part of the Immigration Act of 1990, it amended INA §216(c)(4) to establish a new battered spouse or child waiver.<sup>9</sup> To obtain this waiver, the alien spouse had to demonstrate that he or she had entered the marriage in good faith and that "during the marriage the alien spouse or child was battered by or was the subject of extreme cruelty perpetrated by" the citizen or permanent resident

<sup>7</sup>Linda Kelly, "Stories From the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act," *Northwestern University Law Review*, v. 92, winter 1998, p. 670. (Hereafter cited as Kelly, "Stories From the Front")

<sup>8</sup>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., 2<sup>nd</sup> 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.

<sup>9</sup>P.L. 101-649, §701, November 29, 1990; 104 Stat. 4978, 5085; 8 U.S.C. 1186a(c)(4)(C).

spouse or parent. The alien spouse also had to show that he or she was not at fault for failing to meet the joint petition requirement.

A House Judiciary Committee report was explicit about congressional intent in creating 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.<sup>10</sup>

The report specified that evidence to support a waiver “can include, but is not limited to, reports and affidavits from police, medical personnel, psychologists, school officials, and social service agencies.”<sup>11</sup> It further stated 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.”<sup>12</sup>

The Immigration Act of 1990 also made other changes to INA’s joint petition waiver provisions to assist battered aliens. It added language to INA §216(c)(4) instructing the Attorney General to establish by regulation “measures to protect the confidentiality of information concerning any abused alien spouse or child.”<sup>13</sup> In addition, the 1990 act amended INA §216(c)(4)(B) to broaden the existing waiver based on termination of a good faith marriage. It eliminated the requirements that the battered alien had to have been the one to terminate the marriage and had to have done so for good cause.<sup>14</sup> Thus, the marriage termination waiver became available to aliens who had entered into good faith marriages that were subsequently terminated, whether or not the alien had initiated the termination and regardless of the reason. The House Judiciary Committee report explained that these changes were necessary to respond to the needs of battered spouses and children:

In many cases there are obstacles that prevent a battered alien spouse from initiating a divorce, such as lack of resources to pay for a lawyer; ethnic or cultural prohibitions against divorce; ....

Often, aliens are denied the waiver because they cannot satisfy the “good cause” requirement under no-fault [divorce] laws.<sup>15</sup>

***Implementing the Waiver.*** In May 1991, INS issued an interim rule to implement the battered spouse or child waiver provisions of the 1990 Immigration

<sup>10</sup>House Report 101-723(I), p. 78.

<sup>11</sup>*Ibid.*, p. 78-79.

<sup>12</sup>*Ibid.*, p. 79.

<sup>13</sup>P.L. 101-649, §701(a)(5); 104 Stat. 5085; 8 U.S.C. 1186a(c)(4).

<sup>14</sup>P.L. 101-649, §701(a)(2); 104 Stat. 5085.

<sup>15</sup>House Report 101-723(I), p. 51.

Act.<sup>16</sup> In supplementary information accompanying the rule, it set forth its competing concerns in implementing the waiver:

The Service has balanced the need to make compliance with the evidentiary requirements for the waiver as simple as possible against the need to ensure that unscrupulous aliens do not take advantage of the waiver to obtain immigration benefits .... This rule allows battered conditional residents to establish eligibility, yet is stringent enough to prevent misuse of the benefit.<sup>17</sup>

As stated above, the 1990 act required that the alien spouse demonstrate that he or she or a child “was battered” or “was the subject of extreme cruelty” in order to qualify for the waiver. The INS rule defined these terms together as including, but not being limited to, “being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury.” It specified that “psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor) or forced prostitution” were to be considered acts of violence.<sup>18</sup>

The rule distinguished between the types of evidence needed to support waiver applications based on claims of “physical abuse” and “extreme mental cruelty.” In the case of physical abuse claims, the rule echoed the language of the House Judiciary Committee report. It stated that acceptable evidence “may include, but is not limited to, expert testimony in the form of reports and affidavits from police, judges, medical personnel, school officials and social service agency personnel.”<sup>19</sup>

Waiver applications based on claims of extreme mental cruelty, by contrast, had to be supported by the evaluation of a licensed clinical social worker, psychologist, or psychiatrist.<sup>20</sup> INS explained in supplementary information accompanying the rule that such professional evaluations were necessary because “the effects of mental and emotional abuse are difficult to observe and identify” and “most Service officers ... are not qualified to make reliable evaluations of an abused applicant’s mental or emotional state.”<sup>21</sup>

Advocates for battered aliens criticized the INS evidentiary requirement for extreme cruelty as overly stringent. Martha Davis and Janet Calvo maintained that “very few women fleeing an abusive relationship will be able to first locate, then pay for a mental evaluation by a psychologist or other professional.” They further argued that the extreme cruelty proof requirement reflected a fundamental misunderstanding of abuse, by “focusing exclusively on the applicant’s mental state rather than the

<sup>16</sup>U.S. Dept. of Justice, Immigration and Naturalization Service, “Conditional Basis of Lawful Permanent Residence for Certain Alien Spouses and Sons and Daughters; Battered and Abused Conditional Residents,” *Federal Register*, v. 56, no. 95, May 16, 1991, p. 22635-22638. The regulations are codified at 8 C.F.R. 216.5.

<sup>17</sup>*Federal Register*, v. 56, no. 95, May 16, 1991, p. 22636.

<sup>18</sup>8 C.F.R. 216.5(e)(3)(i).

<sup>19</sup>8 C.F.R. 216.5(e)(3)(iii).

<sup>20</sup>8 C.F.R. 216.5(e)(3)(iv) and (vii).

<sup>21</sup>*Federal Register*, v. 56, no. 95, May 16, 1991, p. 22636.

abuser's activity."<sup>22</sup> In their view, the high standard of proof was contrary to congressional intent in establishing the battered spouse or child waiver.<sup>23</sup>

## Violence Against Women Act Protections

The 103<sup>rd</sup> Congress sought to clarify the evidentiary requirements for joint petition waivers and to address broader immigration-related problems faced by battered aliens in the Violence Against Women Act (VAWA) of 1994. VAWA, which is Title IV of the Violent Crime Control and Law Enforcement Act of 1994, includes three sections (§§40701-40703) related to abused alien spouses and children.<sup>24</sup> Section 40702 amended the joint petition waiver provisions in INA §216(C)(4) to direct the Attorney General to "consider any credible evidence relevant to the application." The Attorney General, however, was given sole discretion to determine credibility and weigh the evidence.<sup>25</sup> As written, the credible evidence language applied to all applications for joint petition waivers and not specifically to those for battered alien waivers.<sup>26</sup>

**Self-Petitioning for Battered Aliens.** Some noncitizen victims of family violence were not eligible to apply for a battered spouse or child waiver of the joint petition requirement for conditional residents because they had never been granted conditional permanent residence in the first place. Prior to 1994, most family-based petitions for immigration preference status for battered noncitizens, like those for noncitizens generally, had to be filed by the alien's U.S. citizen or lawful permanent resident relative. (As explained above, obtaining immigration preference is a prerequisite for becoming a permanent resident.) It is commonly believed, however, that abusers are less likely than other individuals to petition for their noncitizen spouses and children. According to INS, abusers typically do not file petitions on behalf of their close family members because "they find it easier to control relatives who do not have lawful immigration status." At the same time, battered relatives

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<sup>22</sup> Martha F. Davis and Janet M. Calvo, "INS Interim Rule Diminishes Protection for Abused Spouses and Children," *Interpreter Releases*, v. 68, June 3, 1991, p. 668.

<sup>23</sup> See *Ibid.*, p. 669. For a discussion of congressional intent, see Anderson, "A License to Abuse," p. 1419-1420.

<sup>24</sup> P.L. 103-322, September 13, 1994; 108 Stat. 1796, 1902.

<sup>25</sup> 108 Stat. 1955; 8 U.S.C. 1186a(c)(4).

<sup>26</sup> The legislative history of the credible evidence provision, however, suggests that it was originally intended to loosen INS's evidentiary requirements for extreme mental cruelty waivers. In 1993, during the first session of the 103<sup>rd</sup> Congress, the House passed a credible evidence provision as part of another violence against women bill (H.R. 1133). This provision directed the Attorney General to consider any credible evidence submitted in support of a waiver application "whether or not the evidence is supported by an evaluation of a licensed mental health professional." (As explained above, INS only required such evaluations for extreme mental cruelty waivers.) The provision was subsequently included in the version of the 1994 crime bill (H.R. 3355) that passed the House. The Senate-passed version of H.R. 3355 contained no credible evidence language. In conference, the House-passed credible evidence provision was retained, but amended to exclude the reference to evaluations by licensed mental health professionals.

often do not seek help or leave their abusers because they fear deportation or lack knowledge about available services.<sup>27</sup> Advocates urged policymakers to end battered aliens' reliance on their abusers to obtain legal residency.

Congress's response to such calls for relief came in §40701 of the 1994 crime act. Section 40701 amended INA §204(a)(1) to allow some battered alien spouses and children to self-petition for immediate relative or second preference status. In a report on a related bill containing a self-petitioning provision, the House Judiciary Committee explained that "the purpose of permitting self-petitioning is to prevent the citizen or resident from using the petitioning process as a means to control or abuse an alien spouse."<sup>28</sup> Under INA §204(a)(1), as amended, self-petitioners must meet certain requirements. Prior to BIWPA, a self-petitioning spouse must —

- ! be married to a U.S. citizen or lawful permanent resident;
- ! be a person of good moral character;
- ! have resided in the United States with the citizen or permanent resident spouse;
- ! be residing in the United States;
- ! have entered into the marriage in good faith;
- ! have been battered or subjected to extreme cruelty by the citizen or permanent resident spouse during the marriage, or be the parent of a child who was so battered; and
- ! show that his or her removal from the United States would result in extreme hardship to the alien or the alien's child.<sup>29</sup>

A self-petitioning alien child has to meet similar requirements.<sup>30</sup> In language identical to that relating to joint petition waiver applications, §40701 also directed the Attorney General to consider any credible evidence relevant to battered alien petitions and granted the Attorney General sole discretion to determine credibility and weigh the evidence.<sup>31</sup> In March 1996, INS published an interim rule to implement Section 40701 that detailed the eligibility requirements for self-petitioning battered spouses and children.<sup>32</sup>

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<sup>27</sup>U.S. Dept. of Justice, Immigration and Naturalization Service, "Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children," *Federal Register*, v. 61, no. 59, March 26, 1996, p. 13062.

<sup>28</sup>U.S. Congress. House Committee on the Judiciary. *Violence Against Women Act of 1993*, report to accompany H.R. 1133, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess., H. Rept. 103-395, p. 37. H.R. 1133, as reported by the House Judiciary Committee and passed by the House, would have allowed self-petitioning by battered alien spouses, as well as by aliens whose spouses failed to file petitions on their behalf.

<sup>29</sup>108 Stat. 1953, 1954; 8 U.S.C. 1154(a)(1)(A)(iii) and (B)(ii).

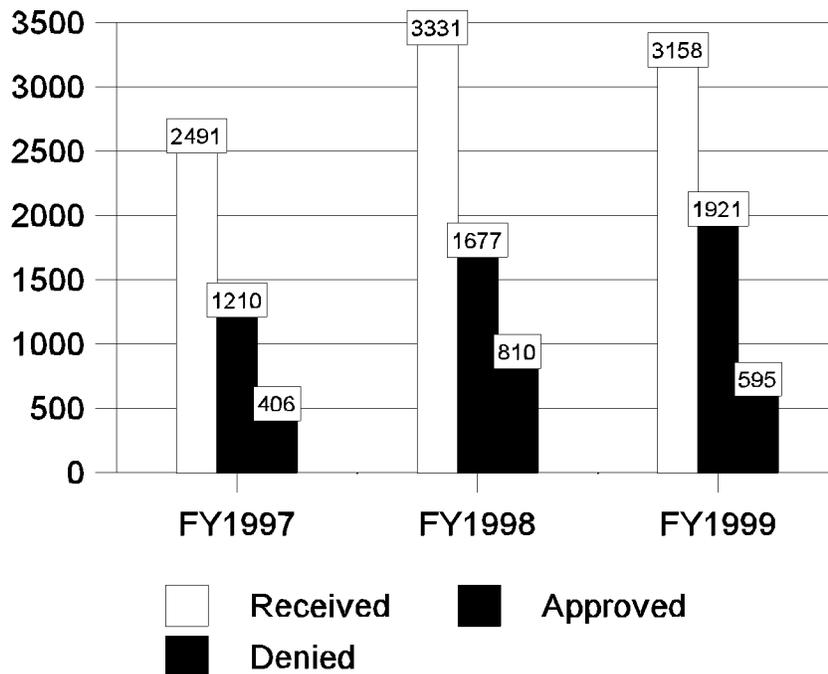
<sup>30</sup>108 Stat. 1953, 1954; 8 U.S.C. 1154(a)(1)(A)(iv) and (B)(iii).

<sup>31</sup>108 Stat. 1954; 8 U.S.C. 1154(a)(1)(H).

<sup>32</sup>U.S. Dept. of Justice, Immigration and Naturalization Service, "Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-  
(continued...)

**Figure 1** below shows the number of VAWA self-petitions received, approved, and denied in fiscal years 1997 through 1999. Self-petitions that are not finally adjudicated in the fiscal year in which they are received are carried over into the next fiscal year. For fiscal years 1997 through 1999, approximately one quarter to one third of the self-petitions finally adjudicated in each year were denied.<sup>33</sup> INS does not maintain detailed statistics on the reasons for denials. According to the agency, however, a significant number of denials each year are due to self-petitioners' failure to meet the statutory threshold eligibility requirements. Examples include aliens self-petitioning as battered spouses who are no longer married to a citizen or lawful permanent resident and aliens self-petitioning as battered children who are not under 21 years old.

**Figure 1. VAWA  
Self-Petitions**



**Source:** Chart prepared by the Congressional Research Service (CRS) from data provided by the Immigration and Naturalization Service.

<sup>32</sup>(...continued)

Petitioning for Certain Battered or Abused Spouses and Children," *Federal Register*, v. 61, no. 59, March 26, 1996, p. 13061-13079. The regulations amended 8 C.F.R. 103.1, 103.2, 204.1, 204.2, 205.1, 205.2, and 216.1. For an analysis of the self-petitioning requirements for battered aliens, see Gail Pendleton, "Immigration Relief for Noncitizens Suffering Domestic Violence, 1998 Update," in *1998-99 Immigration and Nationality Law Handbook*, v. II, R. Patrick Murphy, ed. (Washington: American Immigration Lawyers Association, 1998), p. 140-155. INS is in the process of writing the final rule. (Hereafter cited as Pendleton, "Immigration Relief for Noncitizens")

<sup>33</sup>Denials accounted for 25.1% of total final adjudications (the sum of denials and approvals) in FY1997, 32.6% in FY1998, and 23.6% in FY1999.

***Criticisms of the Self-Petitioning Requirements.*** Advocates maintained that the stringency of the VAWA self-petitioning requirements may have deterred qualified battered spouses and children from applying, and may have prevented those who did apply from having their petitions approved. Advocates argued, for example, that a battered spouse may not have had access to the documentation necessary to prove an abuser's status or a good faith marriage. In addition, they viewed the need to show that deportation would result in extreme hardship as a significant obstacle to many self-petitioners. While acknowledging that "INS adopted a definition of extreme hardship tailored to abused women," Gail Pendleton described the extreme hardship requirement as the "primary barrier" facing qualified self-petitioners. Furthermore, she wrote, "because decisions on this factor are discretionary, denials on this basis are particularly difficult to challenge."<sup>34</sup>

With respect to the good moral character element, advocates maintained that the interim regulations issued by INS in March 1996 went beyond what VAWA required and were unnecessarily burdensome. They were critical of the fact that the regulations describe the self-petitioner's affidavit as "primary evidence" of his or her good moral character, but then stated that the affidavit should be accompanied by a local police clearance or state-issued criminal background check from each place that the self-petitioner has lived during the past 3 years. Under the regulations, however, if such reports were not available, the self-petitioner could have included an explanation and other evidence of good moral character, such as affidavits from others.<sup>35</sup> Advocates were also concerned that the regulations identified past actions by a self-petitioner that would lead to a finding that he or she lacks good moral character, absent the establishment of extenuating circumstances. These actions included willful failure or refusal to support dependents and commission of unlawful acts that adversely reflect upon his or her moral character.<sup>36</sup> Advocates contended that such disqualifying actions by a self-petitioner may be directly related to being a victim of domestic violence. They further argued that an abusive spouse could make it difficult, if not impossible, for a battered self-petitioner to meet the good moral character requirement by, for instance, "filing for custody of children or bringing criminal countercharges against the victim."<sup>37</sup>

Some advocates called for the elimination of selected requirements for self-petitioning battered aliens. Linda Kelly believed that VAWA self-petitioners should not have to prove extreme hardship or good moral character. She argued that beneficiaries of traditional spousal petitions were not subject to these requirements, and that neither requirement was necessary to deter marriage fraud.<sup>38</sup> Felicia Franco agreed with Kelly that the extreme hardship requirement should be repealed.<sup>39</sup> She

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<sup>34</sup>Pendleton, "Immigration Relief for Noncitizens," p. 152, 154.

<sup>35</sup>8 C.F.R. 204.2(c)(2)(v) and (e)(2)(v).

<sup>36</sup>8 C.F.R. 204.2(c)(1)(vii) and (e)(1)(vii).

<sup>37</sup>Pendleton, "Immigration Relief for Noncitizens," p. 151.

<sup>38</sup>See Kelly, "Stories From the Front," p. 684-688, 704-705.

<sup>39</sup>See Felicia E. Franco, "Unconditional Safety for Conditional Immigrant Women," *Berkeley* (continued...)

pointed out that battered aliens whose spouses had filed initial petitions on their behalf did not have to demonstrate that their deportation would result in extreme hardship.<sup>40</sup> In her view, the extreme hardship requirement unfairly burdened self-petitioners and, thus, undermined VAWA's stated goal of providing relief to this vulnerable population.<sup>41</sup>

In response to such criticisms, INS emphasized that the VAWA self-petitioning provisions enabled the battered spouse or child to sever the immigration relationship with the abuser. Once the immigration relationship is severed, INS explained, the self-petitioner must qualify for immigration preference on his or her own. In this regard, self-petitioners were in a different situation than aliens whose spouses or parents filed petitions on their behalf. With respect to the extreme hardship requirement, in particular, INS argued that it was implemented fairly and that it was useful in preventing abuse of the self-petitioning provisions. INS cites its 1996 interim rule on VAWA's self-petitioning provisions and a 1998 memorandum by the INS General Counsel to show how it made extreme hardship determinations in battered spouse and child cases. The interim rule indicated that "‘Extreme hardship’ must be evaluated on a case-by-case basis after a review of all the circumstances in the case."<sup>42</sup> The memorandum by the INS General Counsel stated that adjudicators reviewing battered spouse and child petitions "should take an open and flexible approach to the issue of extreme hardship," and discussed certain factors that they should consider in making extreme hardship determinations in such cases. These factors included the following: "many countries either do not have laws protecting victims of abuse or domestic violence or in fact have laws or practices which legitimize violence against women"; "the lack of medical, social, and psychological services for the abuse victim and the effect that will have on the victim"; and "the effect that removing the alien from the United States would have on [ongoing legal] proceedings [in areas such as child custody and criminal prosecutions against the abusive spouse] and the effect that the unavailability abroad of these proceedings would have on the alien."<sup>43</sup> The memo further cautioned:

While it is the self-petitioner's burden to ... establish that extreme hardship does exist in his or her case, adjudicators should keep in mind that many self-petitioners

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<sup>39</sup>(...continued)

*Women's Law Journal*, v. 11, 1996, p. 130-131.

<sup>40</sup>See *Ibid.*, p. 122. As discussed above, battered aliens applying for a battered spouse or child waiver of the joint petition requirement (whose spouses previously filed initial petitions on their behalf) have to show proof of a good faith marriage and battery or extreme cruelty, as do self-petitioners, but do not have to demonstrate extreme hardship.

<sup>41</sup>*Ibid.*, p. 121-122.

<sup>42</sup>*Federal Register*, v. 61, no. 59, March 26, 1996, p. 13067.

<sup>43</sup>Virtue, Paul W., General Counsel, INS, "Extreme Hardship" and Documentary Requirements Involving Battered Spouses and Children, memorandum for Terrance M. O'Reilly, Director, Administrative Appeals Office, October 16, 1998, p. 5-6 (on file with author).

will be unable to articulate or fully develop these concepts beyond a generalized statement of fear or anxiety.<sup>44</sup>

**Suspension of Deportation/Cancellation of Removal.** The third VAWA battered alien provision concerned “suspension of deportation,” a procedure that stopped an alien’s deportation and enabled the alien to become a permanent resident. Section 40703 of the 1994 crime act amended INA to establish special requirements for battered alien spouses and children seeking relief from deportation.<sup>45</sup> Prior to enactment of VAWA, applicants for suspension of deportation had to have been present in the United States for a continuous period of at least 7 years. Section 40703 reduced this residence requirement for battered spouses and children to 3 years.

As part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Congress replaced “suspension of deportation” with “cancellation of removal.”<sup>46</sup> In doing so, it reformulated the VAWA suspension of deportation provisions as a special cancellation of removal rule for battered spouses or children. The rule was added to INA as §240A(b)(2).

Prior to the enactment of BIWPA, an alien applying for cancellation of removal under the special battered alien rule was required to demonstrate the following:

- ! he or she has been battered or subjected to extreme cruelty in the United States by a citizen or permanent resident spouse or parent, or is the parent of a child who has been subjected to such abuse by a citizen or permanent resident parent;
- ! he or she has been continuously physically present in the United States for at least 3 years prior to filing the cancellation of removal application;
- ! he or she has been a person of good moral character during the period of continuous physical presence in the United States;
- ! he or she is not inadmissible to the United States on criminal or security grounds;
- ! he or she is not deportable based on marriage fraud, criminal offenses, document fraud, or security-related activities;
- ! he or she has not been convicted of an aggravated felony; and
- ! his or her removal would result in extreme hardship to the alien, the alien’s child, or, if the alien is a child, to the alien’s parent.<sup>47</sup>

If an alien’s application for cancellation of removal is approved, he or she is eligible to adjust to lawful permanent resident status immediately. In any fiscal year, however, the Attorney General cannot cancel the removal and adjust the status under

<sup>44</sup>*Ibid.*, p. 5.

<sup>45</sup>108 Stat. 1955. For a discussion of these requirements, see Pendleton, “Immigration Relief for Noncitizens Suffering Domestic Violence, 1998 Update,” p. 156-162.

<sup>46</sup>IIRIRA is Division C of P.L. 104-208, September 30, 1996; 110 Stat. 3009.

<sup>47</sup>P.L. 104-208, §304(a); 110 Stat. 3009-587, 3009-594. The battered alien rule can be found at 8 U.S.C. 1229b(b)(2).

INA §240A, or suspend the deportation and adjust the status under the pre-IIRIRA suspension section, of more than 4,000 aliens.<sup>48</sup>

Despite some similarities between the cancellation of removal and self-petitioning requirements for battered noncitizens, the two procedures are fundamentally different. Aliens can apply for cancellation of removal only when they are in removal proceedings before an immigration judge. Another difference, in place prior to BIWPA, is that battered aliens applying for cancellation of removal could not include their children in their applications. In addition, since the two procedures have different eligibility requirements, a particular battered alien may not be eligible for both.<sup>49</sup>

## Eligibility for Public Benefits

The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996<sup>50</sup> impacted noncitizens, including abused aliens, by placing new restrictions on alien eligibility for federal benefits.<sup>51</sup> Aliens classified by the act as “qualified” were eligible for some benefits, while those not classified as qualified were ineligible for almost all types of federal assistance. Section 431 of PRWORA defined “qualified aliens” to include lawful permanent residents and refugees, among others. Battered alien spouses and children of U.S. citizens and lawful permanent residents were not initially included in the definition.

Section 431 of PRWORA was subsequently amended by IIRIRA, which added a new subsection (c) to classify some battered aliens as qualified aliens. Under §431(c), as amended, battered spouses and children are to be considered qualified aliens if they meet all of the following conditions: they have been battered or subjected to extreme cruelty in the United States; there is “a substantial connection between [the] battery or cruelty and the need for the benefits to be provided”; and they have been approved for, or have a pending petition or application that sets forth a prima

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<sup>48</sup>INA §240A(e)(1); 8 U.S.C. 1229b(e)(1). This cap does not apply to certain aliens, including VAWA suspension of deportation applicants, as set forth in INA §240A(e)(3), 8 U.S.C. 1229b(e)(3).

<sup>49</sup>For a comparison of VAWA self-petitioning and cancellation of removal, see Sarah Ignatius, “Selected Recent Developments in Family Immigration Law,” *Immigration Briefings*, No. 96-10, October 1996. For those noncitizen victims of family violence who do not meet the eligibility requirements for self-petitioning or cancellation of removal, another option may be to apply for asylum. In 1995, the INS Office of International Affairs issued guidelines on adjudicating gender-related asylum claims from women, which recognized domestic violence as a potential basis for asylum. The INS guidelines are reproduced in *Interpreter Releases*, v. 72, June 5, 1995, p. 781-790. For a discussion of asylum claims involving domestic violence, see Lauren Gilbert, “Family Violence and the Immigration and Nationality Act,” *Immigration Briefings*, No. 98-03, March 1998.

<sup>50</sup>P.L. 104-193, August 22, 1996; 110 Stat. 2105.

<sup>51</sup>For additional information, see CRS Report 96-617, *Alien Eligibility for Public Assistance*, by Joyce C. Vialet and Larry M. Eig.

facie case for, immigration preference or cancellation of removal.<sup>52</sup> In addition, in order to be classified as qualified aliens, battered spouses and children cannot be residing with the individual responsible for the battery or cruelty.

Qualified aliens are eligible for certain federal programs and are ineligible for others. They can participate in programs such as Head Start, educational assistance programs, and child nutrition programs. With significant exceptions, most qualified aliens are not eligible for Supplemental Security Income (SSI) or Food Stamps, and are ineligible for Medicaid (other than emergency Medicaid) and Temporary Assistance for Needy Families (TANF) for the first 5 years after entry. There are no specific exceptions for battered aliens.

## IIRIRA Provisions

IIRIRA, enacted in September 1996, had the twin goals of deterring illegal immigration and increasing the personal responsibility of legal immigrants. According to its proponents, it contained “the strongest illegal immigration measures ever passed.”<sup>53</sup> Battered aliens, however, were not subject to the full impact of these measures. Under IIRIRA, abused spouses and children who met specified criteria were granted special treatment and various exemptions. Among the act’s battered alien provisions were those discussed above concerning cancellation of removal and alien eligibility for federal assistance. Much of the special treatment accorded battered spouses and children under IIRIRA seemed to be premised on the idea that abused aliens should not be held responsible for circumstances or events directly related to their abuse.

**Inadmissibility and Deportability.** To help reduce illegal immigration, IIRIRA made significant amendments to INA’s inadmissibility provisions. Inadmissibility provisions are relevant to all noncitizens who want to become lawful permanent residents, because, as noted above, all prospective immigrants must be deemed admissible to the United States. Sections 301(b) and 301(c) of IIRIRA established new grounds of inadmissibility. Section 301(c) amended INA §212(a)(6)(A) to make inadmissible an alien who is present in the United States without being admitted or paroled or an alien who arrives in the United States at any time or place except as designated by the Attorney General. Battered spouses and children are exempt from this ground of inadmissibility if they can demonstrate the following: they qualify for immigration preference; they have been battered or subjected to extreme cruelty; and “there was a substantial connection between the battery or cruelty ... and the alien’s unlawful entry into the United States.”<sup>54</sup>

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<sup>52</sup>8 U.S.C. 1641(c).

<sup>53</sup>Representative Lamar Smith, remarks in the House, *Congressional Record*, daily edition, v. 142, September 28, 1996, p. H12099.

<sup>54</sup>110 Stat. 3009-578; 8 U.S.C. 1182(a)(6)(A)(i) and (ii). Under a transition provision in IIRIRA (§301(c)(2)), battered aliens who can demonstrate that they first arrived in the United States before April 1, 1997, only have to show that they qualify for immigration preference.

Section 301(b) of IIRIRA added a new § 212(a)(9)(B) to INA that established 3-year and 10-year bars on admissibility based on periods of illegal presence in the United States. Under INA § 212(a)(9)(B)(i), an alien who was unlawfully present for more than 180 days but less than 1 year, voluntarily departs, and seeks admission to the country again within 3 years of departure or removal is inadmissible. Similarly, an alien who was unlawfully present for more than 1 year and seeks admission within 10 years of departure or removal is inadmissible. There were several exceptions, including one for abused aliens. Battered spouses and children were not subject to the admissibility bars if they could demonstrate the following: they qualified for immigration preference; they had been battered or subjected to extreme cruelty; and there was a substantial connection between the battery or cruelty and the “violation of the terms of the alien’s nonimmigrant visa.”<sup>55</sup>

In accordance with IIRIRA’s goal of reducing illegal immigration, the “substantial connection” requirement for both inadmissibility exceptions appears designed to restrict the exemptions to those battered aliens who arguably are not responsible for their unlawful entry and stay in the United States. Individuals whose primary interest is providing relief to domestic violence victims, however, have criticized the inadmissibility exceptions as too limited. They were concerned that some otherwise-qualified VAWA self-petitioners would not be unable to satisfy the exceptions’ “substantial connection” requirements and, as a result, may have been deemed inadmissible.

Section 531 of IIRIRA addressed another ground of inadmissibility — likelihood that an alien would become a public charge. Section 531 amended INA §212(a)(4) to require that family-based petitioners execute legally enforceable affidavits of support, in which they agree to provide support to the aliens they are sponsoring, in order to overcome the public charge ground of inadmissibility. Battered self-petitioners are exempt from this requirement.<sup>56</sup>

In addition to strengthening existing inadmissibility provisions, IIRIRA established new grounds for removal of noncitizens, including lawful permanent residents. IIRIRA §350 amended INA §237(a)(2) to make deportable, aliens who at any time after admission are convicted of a crime of domestic violence, stalking, or child abuse, neglect, or abandonment, or who violate a protection order.<sup>57</sup> Although this change was intended to protect abused women and children,<sup>58</sup> advocates were concerned about the ways in which it may negatively impact battered noncitizens.

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<sup>55</sup>110 Stat. 3009-576, 577; 8 U.S.C. 1182(a)(9)(B)(i) and (9)(B)(iii)(IV). An alien who overstays a visa, or otherwise violates its terms, is considered to be unlawfully present. This exception does not directly address the case of a battered alien who was unlawfully present following illegal entry into the country, as opposed to following entry on a nonimmigrant visa.

<sup>56</sup>110 Stat. 3009-674; 8 U.S.C. 1182(a)(4) and (4)(C)(i).

<sup>57</sup>110 Stat. 3009-639; 8 U.S.C. 1227(a)(2)(E). IIRIRA §350 actually amended INA Section 241(a)(2), but another IIRIRA §305(a)(2)) redesignated INA §241 as §237.

<sup>58</sup>See Linda Kelly, “Domestic Violence Survivors: Surviving the Beatings of 1996,” *Georgetown Immigration Law Journal*, v. 11, 1997, p. 303-304. (Hereafter cited as Kelly, “Domestic Violence Survivors”)

Lauren Gilbert wrote that this provision “discourag[ed] undocumented women married to abusive lawful permanent residents from seeking police protection or from filing or enforcing a CPO [civil protection order]” because removal of an abusive spouse can leave an undocumented battered alien without a means of gaining lawful permanent residence.<sup>59</sup> Prior to BIWPA, INS regulations stated that the spouse must be in a legal immigration status at the time the VAWA self-petition was filed and at the time was is approved.<sup>60</sup> A further concern of advocates was that the battered alien might be incorrectly removed on domestic violence grounds.<sup>61</sup>

Another inadmissibility and deportability provision of relevance to battered noncitizen spouses and children is IIRIRA §384. It prohibits the Attorney General from determining that an alien is inadmissible or deportable based solely on information provided by that alien’s battering spouse, parent, or other family member. This section also prohibits the disclosure of information concerning a battered alien, except as specified.<sup>62</sup>

**Mail-Order Brides.** Section 652 of IIRIRA addressed the battered alien issue in connection with another area of concern — the “mail-order bride” industry. Section 652 directed the Attorney General to conduct a study to determine, among other things, the extent of domestic abuse in mail-order marriages. The study, entitled *International Matchmaking Organizations: A Report to Congress*, was released by INS in February 1999. In the section of the report on domestic abuse, INS explained that it had developed estimates of abuse in mail-order marriages by using its administrative records, since it had no direct data on these marriages. In one approach, INS reviewed VAWA self-petitions “for evidence that the parties had met through mail-order firms.” It found little such evidence. As stated in the report:

Both of the administrative samples based on self-petitioning cases result in the conclusion that less than 1 percent of the abuse cases now being brought to the attention of the INS can be attributed to the mail-order bride industry .... While the amount of abuse of foreign-born spouses documented in these claims is alarming, there is no empirical evidence in the INS records indicating that the mail-order bride industry is responsible for bringing together most of those couples.<sup>63</sup>

## Adjustment of Status

Of great significance to battered aliens who want to become lawful permanent residents were changes to the adjustment of status provisions contained in §245 of

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<sup>59</sup>Gilbert, “Family Violence and the Immigration and Nationality Act.” Also see *Ibid.*, p. 314.

<sup>60</sup>8 C.F.R. 204.2(c)(1)(iii).

<sup>61</sup>See Kelly, “Domestic Violence Survivors,” p. 314-315.

<sup>62</sup>110 Stat. 3009-652; 8 U.S.C. 1367.

<sup>63</sup>U.S. Dept. of Justice, Immigration and Naturalization Service, *International Matchmaking Organizations: A Report to Congress*, [[http://www.ins.usdoj.gov/graphics/aboutins/repstudies/Mobrept\\_full.pdf](http://www.ins.usdoj.gov/graphics/aboutins/repstudies/Mobrept_full.pdf)], p. 16, visited February 23, 2000.

INA.<sup>64</sup> As mentioned above, “adjustment of status” refers to a process by which aliens present in the United States may obtain lawful permanent resident status without having to leave the country. Prior to 1994, adjustment of status under §245 was available only to aliens who met a strict set of conditions. Among these conditions, aliens had to have entered the country legally and, unless they were the spouses, children, or parents of U.S. citizens or fell within certain “special immigrant” categories, had to have maintained a lawful immigration status since entry. Prospective immigrants who were ineligible for adjustment of status had to travel abroad and obtain an immigrant visa from a U.S. consulate of the State Department, usually in their home country.

In 1994, as part of the FY1995 Commerce, Justice, State appropriations act, Congress enacted a temporary amendment to INA Section 245 that broadened eligibility for adjustment of status.<sup>65</sup> The new provision, INA §245(i), made eligible for adjustment aliens who had entered the country illegally or who were disqualified from adjusting for certain other reasons. It was to be in effect for three years beginning on October 1, 1994. Applicants for adjustment under §245(i) had to meet all the requirements for immigrant visa issuance. They had to be admissible to the United States and eligible for an immigrant visa, and a visa had to be immediately available to them. In addition, they had to pay a surcharge on top of the standard filing fee.<sup>66</sup>

INA §245(i), set to expire on October 1, 1997, was extended by a series of continuing resolutions until passage of the FY1998 Commerce, Justice, State appropriations act. Section 111 of that act amended §245(i) to enable aliens to apply for adjustment of status if they were the beneficiaries of a petition for immigration preference or an application for labor certification filed by January 14, 1998.<sup>67</sup> Battered spouses and children who filed self-petitions for immigration preference by that January date were covered by the provision.

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<sup>64</sup>8 U.S.C. 1255.

<sup>65</sup>P.L. 103-317, Title I, §506(b), August 26, 1994; 101 Stat. 1724, 1765.

<sup>66</sup>The Senate Appropriations Committee explained its support for the new adjustment provision in its report on the relevant bill: “Although the current process was originally designed to dissuade aliens from circumventing normal visa requirements [that is, entering the United States illegally before visas became available to them], it has not provided the intended deterrent effect and merely creates consular workload overseas.” See U.S. Congress, Senate Committee on Appropriations, *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Bill, 1995 and Supplemental Appropriations Bill, 1994*, report to accompany H.R. 4603, 103<sup>rd</sup> Cong., 2<sup>nd</sup> Sess., S. Rept. 103-309, p. 134. For further information on INA §245(i), see CRS Report 97-946, *Immigration: Adjustment to Permanent Residence Status Under §245(i)*, by Larry M. Eig and William J. Krouse. (Hereafter cited as CRS Report 97-946, *Immigration*)

<sup>67</sup>P.L. 105-119, §111, November 26, 1997; 111 Stat. 2440, 2458; 8 U.S.C. 1255(i). Subsequently, Congress enacted P.L. 106-554 which temporarily reenacts INA §241(i) from January 1, 2001 until April 30, 2001. For a discussion of congressional debate on §245(i) extension, see CRS Report 97-946 “Immigration,” p. 5-6, and CRS Report RS20836 “Immigration Legislation in the 106<sup>th</sup> Congress,” p. 1-2.

Adjustment of status has various advantages over consular processing for prospective immigrants. Most obviously, it spares them the expense, time, and disruption to life and work involved in traveling abroad to obtain an immigrant visa.<sup>68</sup> Since enactment of IIRIRA and its inadmissibility provisions, the ability to adjust status has become even more beneficial. As discussed above, IIRIRA established 3-year and 10-year bars on admissibility that are triggered when an alien who has been unlawfully present in the United States for more than 180 days, leaves and subsequently seeks admission. An alien who has been unlawfully present and goes abroad for consular processing would be subject to the relevant admissibility bar.<sup>69</sup> An alien adjusting status would not be affected by the bars.

For battered aliens, many of whom are afraid to return to their home countries, adjustment of status has added importance. As explained by advocates, many battered spouses fear that departing the United States would put them at risk of physical harm and of losing custody of their children. Advocate Leslye Orloff argued that the expiration of the §245(i) adjustment provision leaves undocumented battered spouses in an untenable position:

They know that they are going to be forced to make an impossible choice to either leave the country to get their green card [which certifies permanent residency], and risk extreme danger for themselves and their children ... or to give up their chance of ever getting a green card, putting themselves and their children at risk for different kinds of dangers.<sup>70</sup>

Faced with this choice, advocates said, many undocumented battered aliens have chosen not to pursue permanent residency.

In addition to exposing battered aliens to potential risks, advocates argued that the current policy of requiring battered aliens to obtain immigrant visas in their home countries was inconsistent. They explained that battered spouses who self-petition for immigration preference status had to demonstrate that their deportation would result in extreme hardship to themselves or their children. Given this requirement, they contended, it was unfair to force battered aliens to return to their home countries for visa processing. INS agreed with advocates that the policy was inconsistent and supported restoration of some type of adjustment of status provision for battered aliens.<sup>71</sup>

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<sup>68</sup>For a discussion of the advantages of adjustment of status over consular processing, see David L. Neal, "The Changing Dynamics of Adjustment of Status: Part One," *Immigration Briefings*, No. 95-05, May 1995; and Charles Gordon *et al.*, *Immigration Law and Procedure*, v. 4, §51.01[3] (New York: Matthew Bender, rev. January 2000).

<sup>69</sup>As stated above, battered aliens who meet certain requirements are excepted from the admissibility bars.

<sup>70</sup>Quoted in Ginger Thompson, "Fearing Their Husbands, and the Law," *New York Times*, April 18, 1999, p. 29. As noted above, battered aliens who are covered by the grandfather provision enacted in 1997 continue to be eligible to apply for adjustment under §245(i).

<sup>71</sup>*Ibid.*, p. 30. INS's support for some type of adjustment of status provision for battered aliens was confirmed in a telephone conversation with INS staff.

Supporters of immigration restrictions, however, opposed an adjustment of status provision for battered aliens. In their view, creating such an exception for undocumented battered aliens would be a dangerous precedent that would invite pressure from other groups for similar treatment. They maintained that no illegal aliens should receive preferential treatment under U.S. immigration laws. According to Daniel Stein, executive director of the Federation for American Immigration Reform:

If a person enters this country illegally or overstays a visa, showing flagrant disregard for the laws of this country . . . the fact that they have suffered abuse is a tragedy, but it does not mean that they should not be subject to the same laws as any other undocumented immigrant.<sup>72</sup>

## **Legislation in the 106<sup>th</sup> Congress**

On October 28, 2000, President Clinton signed into law the Victims of Trafficking and Violence Protection Act of 2000 (P.L. 106-386; H.R. 3244/Smith), of which division B is the Violence Against Women Act of 2000. As in the original VAWA bill, the VAWA reauthorization bill expands existing protections for noncitizen victims of family violence. Specifically, Title V of VAWA 2000 is the Battered Immigrant Women Protection Act of 2000 which established special rules for noncitizen victims of family violence with respect to cancellation of removal and suspension of deportation, eliminated time limitations on motions filed by them to reopen removal and deportation proceedings, and made battered alien spouses and children eligible for adjustment of status

Bills before both houses of Congress proposed to expand existing protections for noncitizen victims of family violence, including measures to prevent violence against women introduced by Senators Joseph Biden (S. 51, S. 2787) and Orrin Hatch (S. 245)<sup>73</sup> and Representative John Conyers (H.R. 357). In addition, Senator Paul Wellstone introduced a measure (S. 1069) to provide economic security and safety for battered women, and Representative Janice Schakowsky introduced a bill (H.R. 3083)<sup>74</sup> to provide protection for battered alien women.

S. 2787, which had more than 50 bipartisan cosponsors, was reported by the Senate Judiciary Committee without amendment on July 12, 2000. In the House, the Judiciary Committee's Immigration and Claims Subcommittee held a hearing on H.R. 3083 on July 20, 2000. No major actions beyond committee referrals occurred on any of the other bills.

S. 51, S. 245, H.R. 357, and H.R. 3083, as introduced, and S. 2787, as reported, included certain comparable provisions to assist battered alien spouses and children.

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<sup>72</sup>*Ibid.*, p. 30.

<sup>73</sup>A crime bill introduced by Senator Hatch (S. 899) contained the same battered alien provisions as S. 245.

<sup>74</sup>An immigration bill introduced by Representative Conyers (H.R. 4966) contained the same battered alien provisions as H.R. 3083, with a couple of exceptions.

S. 51 (§208), S. 2787 (§§501-512), H.R. 357 (§§630-641), and H.R. 3083 would have made additional changes to existing law beneficial to abused aliens. S. 1069, as introduced, did not include any of the provisions common to the other bills in its battered alien subtitle (§§1051-1070). It did, however, propose various other reforms to assist battered aliens, some of which are similar to provisions in S. 51, S. 2787, H.R. 357, and H.R. 3083.

## **Cancellation of Removal**

The Battered Immigrant Protection Act of 2000 (BIWPA) amends INA's §240A cancellation of removal provisions in a manner similar to S. 51, S. 245, S. 2787, H.R. 357, and H.R. 3083.<sup>75</sup> The Act exempts aliens applying for cancellation under the battered spouse or child rule from the annual numerical limitation on cancellation of removal. It establishes a special procedure for calculating continuous physical presence in the United States for battered aliens. As mentioned above, battered alien spouses and children applying for cancellation of removal must demonstrate that they have been physically present in the United States for a continuous period of at least 3 years. Under §240A(d)(1) of INA, an alien's period of continuous physical presence is deemed to end when the alien is served written notice of removal proceedings. The act exempts battered spouses and children from this provision, enabling them to continue accumulating continuous presence time after being served a notice.

The Act creates a special waiver for battered spouses and children regarding the treatment of breaks in the period of continuous physical presence. Under INA §240A(d)(2):

An alien shall be considered to have failed to maintain continuous physical presence in the United States ... if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.<sup>76</sup>

BIWPA allows the Attorney General to waive this provision for humanitarian purposes in cases of battered applicants for cancellation of removal who demonstrate a connection between the absences and the battery or extreme cruelty forming the basis of the cancellation of removal application. This provision is the same as H.R. 3083, and similar to S. 51, H.R. 357 except that they required a substantial connection between the absences and the battery or extreme cruelty. S. 2787 would have gone beyond BIWPA with respect to the treatment of breaks in the period of continuous presence. Rather than permitting a waiver, S. 2782 would have required that an alien not be considered to have failed to maintain continuous physical presence as a result of an absence, if the alien demonstrates a connection between the absence and the battery or extreme cruelty.

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<sup>75</sup>8 U.S.C. 1229b. The bills also would make some analogous changes with respect to INA suspension of deportation provisions, as in effect prior to enactment of IIRIRA.

<sup>76</sup>8 U.S.C. 1229b(d)(2).

Further relaxing existing statutory requirements for cancellation of removal, the Act allows the Attorney General to determine that battered aliens satisfied the good moral character requirement even if they had been convicted of certain domestic violence-related crimes. H.R. 357 also would have eliminated the requirement that battered applicants for cancellation of removal show that their removal would result in extreme hardship.

In addition, although S. 51, S. 1069, S. 2787, H.R. 357, and H.R. 3083 all proposed other significant amendments to INA's cancellation of removal provisions, BIWPA contains the provisions outline in S. 2789. BIWPA directs the Attorney General to grant parole to the child of an alien, or to the parent of a child alien, when the alien's removal is cancelled under the battered spouse or child rule. BIWPA also provides for the filing of adjustment of status applications by these aliens. In another important change, BIWPA extends the battered spouse or child cancellation of removal rule to battered "intended spouses" of citizens or lawful permanent residents, as defined below in the section on VAWA self-petitioning. The Act permitted battered spouses to include their children in their cancellation of removal applications and would permit battered children to include their parents in their cancellation applications.<sup>77</sup>

## Adjustment of Status

The BIWPA permits abused aliens to adjust to legal permanent resident status in the United States. BIWPA amends INA §245 to make battered aliens who successfully self-petition for immigration preference status and meet the other requirements for immigrant visa issuance eligible to adjust to permanent resident status.<sup>78</sup> As explained in the next section, BIWPA expands eligibility for VAWA self-petitioning beyond battered spouses and children to cover the following groups of battered aliens: "intended spouses," former spouses, adult sons and daughters, and parents. BIWPA makes its newly authorized self-petitioners eligible for adjustment of status. Also, an abused child who turns 21 years old after applying for status adjustment would continue to be considered a child for adjustment purposes. Prior to the 106<sup>th</sup> Congress, prospective family-based immigrants who entered the country illegally or who, unless they are the spouses, children, or parents of U.S. citizens or fall within certain "special immigrant" categories, have not maintained a lawful immigration status since entry may apply for adjustment of status under §245 only if their petitions for immigration preference were filed by January 14, 1998. Included in the Labor, Health and Human Services, Education FY2001 appropriations law is a provision providing for the temporary reinstatement, from January 1, 2001 until April 30, 2001, of §245(i) of INA enabling authorized aliens to adjust to LPR status

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<sup>77</sup>S. 1069, H.R. 357, and H.R. 3083 would have permitted parents to include their adult sons and daughters, as well as their minor children, in their cancellation of removal applications. H.R. 357 and H.R. 3083 also would extend the battered spouse or child cancellation rule to alien parents who have been abused by their U.S. citizen adult sons or daughters.

<sup>78</sup> 8 U.S.C. 1255. The provision in S. 245 only covered battered spouses and children of citizens or lawful permanent residents, while the other bills made additional groups eligible for adjustment of status.

if they are otherwise eligible for visas.<sup>79</sup> As explained above, aliens not eligible to adjust status must travel abroad for consular visa processing. The provisions on status adjustment enacted in BIWPA are similar to those in S. 51, S. 245, S. 2787, H.R. 357, and H.R. 3083.

## VAWA Self-Petitioning

BIWPA eases the self-petitioning requirements for battered spouses and children, in the same manner as S. 51, S. 2787, H.R. 357, and H.R. 3083. It amends INA §204(a)(1) to protect battered self-petitioners against changes in their abusers' citizenship or immigration status that occur after the petitions are filed.<sup>80</sup> INS regulations state that in order for a battered spouse or child to be eligible to self-petition, the abusive spouse or parent must be a U.S. citizen or lawful permanent resident at the time the self-petition is filed and at the time it is approved.<sup>81</sup> BIWPA eliminates the requirement that the abusive spouse or parent be in status at the time of petition approval, and eliminates other self-petitioning requirements. Under the Act, self-petitioning aliens are not required to demonstrate that their removal would result in extreme hardship to themselves or their children, and would not have to be residing in the United States.<sup>82</sup> While not eliminating the good moral character requirement, BIWPA allows the Attorney General to determine that a battered alien was a person of good moral character even if the alien had been convicted of certain domestic violence-related crimes.

BIWPA expands eligibility for VAWA self-petitioning in a manner similar to S. 51, S. 1069, S. 2787, H.R. 357, and H.R. 3083. BIWPA amends the self-petitioning spouse provisions of INA §204(a)(1) to extend coverage to an "intended spouse" — which the bills define as an alien who believed that he or she had married a U.S. citizen or lawful permanent resident but "whose marriage is not legitimate solely because of the bigamy" of that citizen or lawful permanent resident, or if he or she had been the bona fide spouse of a citizen or lawful permanent resident within the past 2 years and met other specified requirements.<sup>83</sup> In the case of divorce, the alien would have to demonstrate a connection, between the legal termination of the marriage and the battery or extreme cruelty. H.R. 357 and H.R. 3083 would have extended self-

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<sup>79</sup>P.L. 106-554, §1502, December 21, 2000.

<sup>80</sup>8 U.S.C. 1154(a)(1).

<sup>81</sup>8 C.F.R. 204.2(c)(1)(iii) and (e)(1)(iii).

<sup>82</sup>S. 2787, H.R. 357, and H.R. 3083 would have completely eliminated the requirement of current U.S. residence. BIWPA contains the more limited provision of S. 51 specifying that the alien would have to be residing in the United States unless the alien's spouse or parent is an employee of the U.S. Government or a member of the U.S. Armed Forces stationed abroad, or subjected the alien or alien's child to battery or extreme cruelty in the United States.

<sup>83</sup> Only S. 2787, H.R. 357, and H.R. 3083 contained the spousal provision to permit a battered former spouse to self-petition, if he or she had been the bona fide spouse of a citizen or lawful permanent resident within the past 2 years and met other specified requirements.

Due to apparent drafting errors, the provisions of H.R. 357 related to self-petitioning by former spouses and adult sons and daughters of lawful permanent residents substitute the word "citizen" for "lawful permanent resident."

petitioning to battered adult sons and daughters of citizens or lawful permanent residents and to battered parents of citizens.<sup>84</sup>

With respect to child petitioners, BIWPA enacted the provision outlined in S. 2787, such that self-petitioning children of citizens, or derivative children, who turned 21 would be considered petitioners for preference status as unmarried sons or daughters of citizens or lawful permanent residents or as married sons or daughters of citizens, as appropriate, with the same priority date as the self-petition.<sup>85</sup> In addition, BIWPA allows self-petitioning battered children to include their own children in their petitions.

## Inadmissibility Grounds

BIWPA amends INA §212(a)<sup>86</sup> to provide for various inadmissibility waivers and exceptions for battered aliens. The Act does not establish any waivers of the public charge ground of inadmissibility. It changed the factors to be considered in making public charge determinations about battered aliens with approved self-petitions so that consular officers or the Attorney General can not consider any benefits battered aliens were authorized to receive under IIRIRA as qualified aliens. As explained above, qualified aliens are eligible for certain federal programs. The provisions enacted were similar to those outlined in S. 2787. S. 51, S. 1069, H.R. 357, and H.R. 3083 would have exempted battered aliens who successfully petition for immigration preference from the ground of inadmissibility based on the likelihood of becoming a public charge. S. 1069 and H.R. 3083 also would have exempted battered aliens who qualify for cancellation of removal from the public charge ground of inadmissibility.

BIWPA also allows the Attorney General, “for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest,” to waive all but a few specified inadmissibility grounds for battered aliens who qualify for immigration preference or cancellation of removal. S. 51, H.R. 357, and H.R. 3083 contained these provisions; however, H.R. 3083 would have required the battered alien to demonstrate a connection between the disqualifying act and the battery or extreme cruelty in all cases, while H.R. 357 would have only required such a showing when the inadmissibility ground being waived related to criminal activity or misrepresentation. S. 51 contained no such requirements.

In addition, BIWPA amends the inadmissibility grounds established by §§301(c) and 301(b) of IIRIRA. As explained above, IIRIRA §301(c) amended INA §212(a)(6)(A) to make inadmissible an alien who is present in the United States without being admitted or paroled or an alien who arrives in the United States at any time or place except as designated by the Attorney General. IIRIRA §301(b) added

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<sup>84</sup>In order for adult sons and daughters to be eligible to self-petition under H.R. 3083, they needed to have experienced at least one incident of battery or extreme cruelty prior to age 21.

<sup>85</sup> S. 1069, H.R. 357, and H.R. 3083 would have provided that a child who filed a VAWA self-petition, or who was included in a parent’s self-petition as a derivative, would remain a child for self-petitioning purposes after turning 21 years old.

<sup>86</sup>8 U.S.C. 1182(a).

a new §212(a)(9)(B) to INA that established 3-year and 10-year bars on admissibility based on periods of illegal presence in the United States. Current law includes exceptions to these inadmissibility provisions for certain battered aliens. The exceptions cover battered spouses and children who can show that they qualify for immigration preference and that they have been battered or subjected to extreme cruelty. The battered aliens also must demonstrate a substantial connection between the battery or cruelty and either the alien's unlawful entry into the United States in the case of INA §212(a)(6)(A)(ii) or the alien's violation of the terms of his or her nonimmigrant visa in the case of INA §212(a)(9)(B)(iii)(IV). BIWPA amended these exceptions to eliminate the requirement that battered spouses and children demonstrate a substantial connection in either case. H.R. 3083 would have further amend the exceptions to cover battered sons and daughters of citizens or lawful permanent residents and battered parents of citizens.

## **Domestic Violence Grounds for Removal**

As discussed above, IIRIRA added a new §237(a)(2)(E)<sup>87</sup> to INA that made aliens who are convicted of a crime of domestic violence, stalking, or child abuse, neglect or abandonment, or who violate a protection order, deportable. Advocates have expressed concerns that victims of domestic violence could be subject to removal on these grounds. BIWPA amends INA §237(a)(2)(E) to provide for discretionary relief in such circumstances. The Act allows the Attorney General to waive application of these grounds for removal upon making certain determinations, such as that the alien was acting in self-defense.<sup>88</sup> The Attorney General is also able to grant a waiver for humanitarian purposes. This waiver was contained in S. 1069, H.R. 357, and H.R. 3087.<sup>89</sup>

## **Eligibility for Public Benefits**

BIWPA contains no provisions to grant battered aliens access to certain public benefits. H.R. 357, H.R. 3083, and S. 1069 would have amended PRWORA to make battered aliens who were qualified aliens under IIRIRA §431(c) eligible for food stamps and SSI. They would have further amended PRWORA to exempt qualified battered aliens from the 5-year bar on the receipt of Medicaid and TANF. These provisions were not included in the final bill.

## **Conclusion**

Since 1990, Congress has enacted special provisions to provide various forms of relief to battered alien spouses and children of U.S. citizens and lawful permanent residents, and BIWPA continues this trend. Although the current discussion of noncitizen victims of family violence is being led by those who want to expand

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<sup>87</sup>8 U.S.C. 1227(a)(2)(E).

<sup>88</sup>Unlike the other bills, the waiver provision in S. 2787 did not cover crimes of child abuse, neglect, or abandonment.

<sup>89</sup>The provision in S. 2787 did not include a waivers granted for humanitarian purposes.

existing protections, it is important to remember that providing relief to vulnerable populations is not the only goal of immigration policy. Other related goals include preventing immigration-related fraud, deterring illegal immigration, and increasing the responsibility of legal immigrants. Making, as well as implementing, immigration policy with respect to noncitizen victims of family violence requires striking a balance between these different goals. It requires finding ways of providing adequate relief to abused aliens, while simultaneously guarding against potential abuses of the immigration system.