

APPENDIX D

Motion for Protective Order To Prevent Disclosure in Family Court Cases of VAWA
Confidentiality Protected Information starts on top of next page.¹

¹ Developed by Michael Lyons and Darcy Paul, Morgan Lewis and Bockius, LLP and Soraya Fata, Legal Momentum

[INSERT COURT NAME AND JURISDICTION]

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v.)	No. [Docket Number]
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[Insert])	[Insert Judge Name]
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MOTION FOR PROTECTIVE ORDER

[In accordance with local rule ____],² [Petitioner] respectfully moves this Court for a Protective Order to maintain the confidentiality of any Violence Against Women Act (VAWA) confidentiality protected petition or application for immigration status or benefits filed by [Petitioner] pursuant to Immigration and Nationality Act (INA) §§ 101(a)(15)(T);³ 101(a)(15)(U);⁴ 101(a)(51);⁵ 106;⁶ 240A(b)(2);⁷ or 244(a)(3)⁸ (as in effect on March 31, 1999) and any information related thereto. [Petitioner] further requests that this Court bar [Respondent] from discovering, using or attempting to use (e.g., in direct or cross-examination of witnesses) confidential information protected by VAWA in these proceedings. The grounds for this Motion are set forth in the attached Memorandum of Law.

WHEREFORE, for good cause shown, [Petitioner] requests that the Court grant this Motion and enter a Protective Order accordingly.

² Fed. R. Civ. P. 26(c)(1) permits federal courts, for good cause, to forbid discovery of or use of information to protect a party or person from “annoyance, embarrassment, oppression”
³ 8 U.S.C. § 1101(a)(15)(T) (2009).
⁴ 8 U.S.C. § 1101(a)(15)(U).
⁵ 8 U.S.C. § 1101(a)(51).
⁶ 8 U.S.C. § 1105a.
⁷ 8 U.S.C. § 1229b(b)(2).
⁸ 8 U.S.C. § 1254a(a)(3).

Dated: *[Month, Day, Year]*

Respectfully submitted,

/s/

[Name

Title

Contact Information]

[INSERT COURT NAME AND JURISDICTION]

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**[PETITIONER]’S MEMORANDUM IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER**

[Petitioner] respectfully submits this Memorandum of Law in support of [Petitioner’s] Motion for Protective Order to maintain the confidentiality of any self-petition for immigration status⁹ or benefits filed by [Petitioner] pursuant to the Violence Against Women Act (“VAWA”) and any information related thereto. Self-petitions for immigration status or benefits by victims of domestic abuse, sexual assault, human trafficking and many forms of criminal activity, including the existence or any case, and any information related to them (collectively “VAWA protected information”) are protected by VAWA’s broad confidentiality provisions codified at 8 U.S.C. § 1367(a) (2008).¹⁰ Absent limited exceptions, none of which apply here, these provisions expressly prohibit the release of protected information by the government to third parties. Although VAWA does not specifically address attempts by an abuser or a crime perpetrator to discover the same VAWA protected information from his victim in civil or criminal proceedings, Congress’s intent to prevent the use by or disclosure of any information

⁹ Violence Against Women Act (VAWA) confidentiality protections apply to all petitions or applications for immigration status or benefits filed pursuant to Immigration and Nationality Act (INA) §§ 101(a)(15)(T); 101(a)(15)(U); 101(a)(51); 106; 240A(b)(2); or 244(a)(3) (as in effect on March 31, 1999), 8 U.S.C §§ 1101(a)(15)(T); 1101(a)(15)(U); 1101(a)(51); 1105a; 1229b(b)(2); 1254a(a)(3) and any information related thereto.

¹⁰ See *Hawke v. Dep’t of Homeland Sec.*, No. C-07-03456 RMW, 2008 WL 4460241, at *7 (N.D. Cal. Sept. 29, 2008).

related to confidential VAWA applications to third parties is clear and unambiguous. Permitting abusers to discover or use protected information from their victims would render VAWA's confidentiality provisions meaningless and would subject victims to further abuse and harassment that VAWA is intended to prevent.

Therefore, and for the reasons described herein, [Petitioner] respectfully requests this Court issue a protective order to safeguard the existence and substance of any VAWA protected information and to bar any attempts by [Respondent] to discover or use such information in these proceedings.

I. FACTS

[Insert relevant facts of case, including facts related to the history of abuse, procedural background and defendant's actual or anticipated discovery request for VAWA protected information. Consider wording this section of the filing so as to not directly admit the existence of any VAWA protected immigration case.]

II. THE VIOLENCE AGAINST WOMEN'S ACT PROVIDES BROAD PROTECTIONS TO VICTIMS OF DOMESTIC VIOLENCE.

VAWA was originally enacted in 1994 primarily as a mechanism to provide funding for programs and services to assist victims of domestic violence and other specified crimes.¹¹ In addition, however, VAWA also created important legal protections for immigrant victims of domestic violence, child abuse, sexual assault, human trafficking and other criminal activity.¹² Those protections have expanded over the years through a series of amendments in 1996, 2000,

¹¹ Violent Crime Control and Law Enforcement Act ("1994 VAWA Act"), Pub. L. No. 103-322, 108 Stat. 1796 (1994).

¹² INA Section 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) offers immigration relief to victims of specific criminal activities. The U-visa regulations issued by the Department of Homeland Security summarize this criminal activity as follows: "INA sec. 101(a)(15)(U)(i), 8 U.S.C. 1101(a)(15)(U)(i). Qualifying criminal activity is defined by statute to be "activity involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: Rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes[.]" Id.,(iii). The list of qualifying crimes represents the myriad types of behavior that can constitute domestic violence, sexual abuse, or trafficking, or are crimes of which vulnerable immigrants are often targeted as victims." 72 Fed. Reg. 53,014, 53,015 (Sept. 17, 2007).

and 2005.¹³ Two significant VAWA provisions relating to battered immigrants and immigrant crime victims include: (1) the right to “self-petition” to obtain lawful immigration status and other benefits; and (2) broad confidentiality protections that prohibit release of the existence and substance of a VAWA petitioner’s application. As demonstrated repeatedly throughout VAWA’s legislative history, Congress specifically enacted these provisions to prevent abusers and crime perpetrators from using immigration status as a means to further control, harass, abuse or intimidate their victims. *See, e.g.*, H.R. REP. NO. 109-233 at 120 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 1636, 1671; 151 CONG. REC. E2605-04, E2607 (2005) (statement of Rep. Conyers) (VAWA confidentiality provisions “are designed to ensure that abusers and criminals cannot use the immigration system against their victims . . . [such as by] using DHS to obtain information about their victims, including the existence of a VAWA immigration petition. . . .”); H.R. REP. NO. 106-939 at 110 (2000), *as reprinted in* 2000 U.S.C.C.A.N. 1380, 1401-02 (Congress implemented these provisions “to ensure that domestic abusers with immigrant victims are brought to justice and that battered immigrants [] are able to escape the abuse”).

A. VAWA Allows Battered Immigrants and Immigrant Crime Victims to Self-Petition Without the Knowledge of Their Abusers.

Under normal circumstances, documented partners, spouses or family members are involved in petitioning for immigration benefits on behalf of their immigrant partners, spouses or family members. However, recognizing that victims of abuse need to break free from the control of their abusers, Congress, through VAWA, gave victims the right to self-petition for immigration status and benefits on their own and, importantly, without the knowledge, consent

¹³ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“1996 VAWA Act”), Pub. L. No. 104-208, 110 Stat. 3009 (1996); Victims of Trafficking and Violence Protection Act of 2000 (“2000 VAWA Act”), Pub. L. No. 106-386, Div B, Title V, 114 Stat. 1464 (2000); Violence Against Women and Department of Justice Reauthorization Act of 2005 (“2005 VAWA Act”), Pub. L. No. 109-162, Title VIII, Subtitle B, 119 Stat. 3057 (2006).

or aid of their abusive partner. *See, e.g.*, 2005 VAWA Act, codified at 8 U.S.C. § 1154(a)(1)(A)(i)-(iii) (2005) (describing procedure for granting immigration status). Congress also prohibited Department of Homeland Security (“DHS”) agents from making any adverse determinations regarding VAWA petitioners and other immigrant crime victims applying for VAWA related immigration relief using information provided solely by abusers, perpetrators or people associated with abusers or crime perpetrators, and required DHS agents to complete a certification of compliance in certain specified cases. *See* 8 U.S.C. § 1367(a).¹⁴

By allowing battered immigrants to “self-petition” and by providing them with a wide range of resources and benefits to assist them, Congress sought to empower battered immigrants to achieve independence from their abusers and limit the ability of abusers to retaliate against them. Immigrant victims of sexual assault, human trafficking and other mostly violent crimes were provided similar protection to enable and support victims in reporting crime and cooperating in the detection, investigation or prosecution of criminal activity by federal, state and local law enforcement, prosecutors, courts and state and local investigating agencies (e.g. child protective services, adult protective services, state labor boards, EEOC, etc.)

B. VAWA Broadly Prohibits Disclosure of VAWA Protected Information

The filing of any VAWA petition triggers strict confidentiality requirements that are intended to further protect victims from harassment and intimidation by their abusers. *See* 8 U.S.C. § 1367(a)(2); H.R. REP. NO. 109-233 at 120.¹⁵ Specifically, VAWA broadly prohibits federal authorities (including, but not limited to DHS, the Department of Justice and the

¹⁴ *See also* Memorandum from Director J. Torres to Field Office Directors and Special Agents in Charge re: “Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005” (Jan, 22, 2007), attached as Ex. 1.

¹⁵ *See also Hawke*, 2008 WL 4460241, at *7 (stating that the congressional policy behind the enactment of the VAWA confidentiality provisions requires even moot petitions to remain confidential).

Department of State) from permitting the use by or disclosure of *any information* related to confidential VAWA applications to *any third party*.¹⁶ See 8 U.S.C. § 1367(a)(2).

The importance of VAWA confidentiality protections cannot be overstated. Over the years, Congress has carefully evaluated the need for and subsequently expanded VAWA’s confidentiality provisions each time it has reauthorized the Act to further protect VAWA self-petitioners from their abusers. See, e.g., 1994 VAWA Act, § 40508, 108 Stat. at 1950 (enacting confidentiality provisions to protect victims of domestic abuse and directing the Attorney General to analyze means for protecting confidential information of “abused spouses to protect such persons from exposure to further abuse”); 1996 VAWA Act, H.R. REP. NO. 104-828 (Conf. Rep.), (adding provision to prevent the “use by or the disclosure of” information pertaining to an alien’s application for relief where that individual is a victim of domestic abuse); 2000 VAWA Act, H.R. REP. NO. 106-939 at 111 (extending the scope of VAWA protections to improve its goal of “prevent[ing] immigration law from being used by an abusive citizen or lawful permanent resident spouse as a tool to prevent an abused immigrant spouse from reporting abuse or leaving the abusive relationship”); 2005 VAWA Act, H.R. REP. NO. 109-233, 118 (adding provisions to prevent reliance in immigration proceedings on evidence provided by abusers to “ensure that abusers and criminals cannot use the immigration system against their victims”); 2013 VAWA Act Section 810, (adding that disclosures of any information must be done “in a manner that protects the confidentiality of such information”). In addition, Congress provided for stiff penalties for those who violate the Act, subjecting federal agents and other government employees to disciplinary action and civil monetary penalties of \$5,000 for each violation. See *id.* at § 1367(c).

¹⁶ VAWA only permits the disclosure of information to certain specified individuals (*i.e.* sworn officers or employees of certain federal agencies) for specified purposes. See *id.* at § 1367(a)(2) (2008).

Congress created only a few limited exceptions to VAWA’s confidentiality provisions. Those exceptions include disclosure to specified agencies for certain legitimate law enforcement purposes, national security purposes, Congressional oversight, census purposes, and to assist with immigrant victim access to certain public benefits. *See* 8 U.S.C. § 1367(b) (as amended by VAWA 2013). VAWA confidentiality may also be waived by the petitioner or disclosed, only with appropriate protections, in connection with an immigration court or administrative agency judicial review of a determination of a self-petitioner’s immigration petition. *Id.*

Absent limited exceptions, VAWA’s broad confidentiality provisions expressly prohibit the release of protected information by the government to third parties. Although VAWA does not specifically address attempts by an abuser to discover the same VAWA protected information from his victim in civil or criminal proceedings, Congress’s intent to prevent the use by or disclosure of any information related to confidential VAWA applications to third parties is clear and unambiguous. Permitting abusers to discover or use protected information from their victims would render VAWA’s confidentiality provisions meaningless and would subject victims to the further abuse and harassment that VAWA is intended to prevent.

The limited exceptions to VAWA mandated confidentiality of VAWA protected information do not extend to discovery or use in civil litigation between the victim and her abuser, or to criminal litigation in which the victim testifies against her abuser. Although there is an exception permitting “disclosure of information in connection with judicial review of a determination in a manner that protects the confidentiality of [VAWA protected information],” 8 U.S.C. § 1367(b)(3), that exception relates to judicial review of a self-petitioner’s immigration application in immigration proceedings before an immigration judge, at the DHS administrative

appeals unit or by the Board of Immigration Appeals.¹⁷ Self-petitions are broadly protected by VAWA and nowhere in VAWA or its extensive legislative history is there any evidence that Congress contemplated an exception that would result in disclosure of VAWA protected information by a victim to her abuser. Rather, the opposite is true; through VAWA, Congress intentionally sought to prevent abusers from obtaining or using VAWA protected information at all.

VAWA clearly and unambiguously describes the information that the statute protects and the limited circumstances in which the information may be disclosed. A plain reading of VAWA and common sense dictate that absent the voluntary disclosure of the information by the victim¹⁸ or other enumerated exceptions listed in section 1367(b), VAWA protected information should remain confidential regardless of whether the information resides with the government or with the victim. Any other reading of the statute would undermine the very purpose of VAWA and render utterly meaningless the statutorily mandated confidentiality provisions that are intended and designed to protect victims from further abuse, intimidation and harassment by their abusers.

If [PETITIONER] filed for immigration status or benefits under VAWA, the existence and substance of that petition, as well as any additional information related to that petition, would be covered by VAWA's broad confidentiality provisions. If [*Respondent*] in turn requested VAWA protected information from DHS or other federal agencies, government officials could not disclose that information under any circumstances without violating VAWA confidentiality requirements and subjecting themselves to sanctions. Logic and a fair reading of

¹⁷ See *Hawke*, 2008 WL 4460241, at *6 (holding that the "judicial review" exception to VAWA confidentiality extends only to judicial review of a government determination of the immigration status of a VAWA self-petitioner, not in other civil and criminal proceedings).

¹⁸ Any action by a party or a judge in a civil or criminal court proceeding seeking or ordering disclosure of information that the court or the party seeking the information could not obtain from DHS would be coercion and not voluntary disclosure and would be contrary to the intent of federal VAWA confidentiality laws.

the statute dictate, therefore, that [*Respondent*] should not be allowed to circumvent VAWA and seek the very same protected information from the [*Petitioner*]. The fact that a victim may have retained copies of or otherwise possess VAWA protected information (*e.g.*, copies of documents related to the VAWA petition or other related information) should not change the outcome; VAWA protected information should remain confidential.

Significantly, VAWA's strict confidentiality requirements do not expire *unless* the self-petition is denied on the merits and all opportunities for appeal of the denial are exhausted. *Id.* at § 1367(a). Confidentiality regarding granted petitions *never expires*.¹⁹

III. ARGUMENT

A. The Court Should Issue a Protective Order to Ensure Confidentiality of Any VAWA Protected Information.

Although VAWA does not specifically address discovery of VAWA protected information by the abuser directly from his victim in civil or criminal litigation, [*Respondent*] should not be able to obtain VAWA protected information from [*Petitioner*] that he could not legally obtain from the government. VAWA clearly and unambiguously describes the information that the statute protects and the limited circumstances in which the information may be disclosed. A plain reading of VAWA and common sense dictate that absent the voluntary disclosure of the information by the victim or other enumerated exceptions listed in section 1367(b), VAWA protected information should remain confidential regardless of whether the information resides with the government or with the victim. Any other reading of the statute

¹⁹ See *Hawke*, 2008 WL 4460241, at *6 ("[W]hen Congress wrote "denied," the word meant "denied *on the merits*." The text of section 1367(a) harmonizes with this interpretation. The full provision dictates that the confidentiality expires "when the application for relief is denied *and all opportunities for appeal of the denial have been exhausted*." 8 U.S.C. § 1367(a). But a mooted petition cannot be appealed because there is nothing to appeal. Congress' focus on the exhaustion of all opportunities for review underscores its intent to limit the expiration of confidentiality to petitions that have been denied on the merits. This focus on the merits also accords with the fact that the confidentiality never expires on *granted* petitions filed by the victims of abuse.").

would undermine the very purpose of VAWA and render utterly meaningless the statutorily mandated confidentiality provisions that are intended and designed to protect victims from further abuse, intimidation and harassment by their abusers.

If [PETITIONER] filed for immigration status or benefits under VAWA, the existence and substance of that petition, as well as any additional information related to or contained in that petition, would be covered by VAWA's broad confidentiality provisions. If [RESPONDENT] in turn requested VAWA protected information from DHS or other federal agencies, government officials could not disclose that information under any circumstances without violating VAWA confidentiality requirements and subjecting themselves to sanctions. Logic and a fair reading of the statute dictate, therefore, that [*Respondent*] should not be allowed to circumvent VAWA and seek the very same protected information from the [*Petitioner*]. The fact that a victim may have retained copies of or otherwise possess VAWA protected information (*e.g.*, copies of documents related to the VAWA petition or other related information) should not change the outcome; VAWA protected information should remain confidential.

B. No Statutory Exception to VAWA Mandated Confidentiality Applies in this Litigation.

The limited exceptions to VAWA mandated confidentiality of VAWA protected information do not extend to discovery or use in civil litigation between the victim and her abuser, or to criminal litigation in which the victim testifies against her abuser. Although there is an exception permitting “disclosure of information in connection with judicial review of a determination in a manner that protects the confidentiality of [VAWA protected information],” 8 U.S.C. § 1367(b)(3), that exception relates to judicial review of a self-petitioner's immigration

application.²⁰

Self-petitions and all VAWA related immigration cases filed by immigrant crime victims and immigrant family violence victims are broadly protected by VAWA, and nowhere in VAWA or its extensive legislative history is there any evidence that Congress contemplated an exception that would result in disclosure of VAWA protected information by a victim to her abuser.

Rather, the opposite is true; through VAWA, Congress intentionally sought to prevent abusers from obtaining or using VAWA protected information at all.

IV. CONCLUSION

For the reasons stated herein, [*Petitioner*] respectfully requests that the Court grant [*Petitioner's*] Motion for a Protective Order to maintain confidentiality of any VAWA protected information and to further prohibit [*Respondent*] from seeking discovery of or otherwise using or attempting to use VAWA confidential information in this proceeding.

Dated: [*Month, Day, Year*]

Respectfully submitted,

/s/

[*Name*

[*Title*

[*Contact Information*]

²⁰ See *Hawke*, 2008 WL 4460241, at *7 (holding in a case of first impression that the term “determination” in § 1367(b)(3) refers to “the government’s determination of a VAWA self-petitioner’s immigration status” and not to civil or criminal court proceedings).

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of _____, _____, I caused a true copy of the foregoing Motion for Protective Order, Memorandum of Law and proposed Protective Order to be served by U.S. mail, postage prepaid, and to be delivered to a process server with instructions promptly to serve it personally upon:

*[Name
Contact Information]*

/s/
*[name
Title
Contact Information]*

Attorney[s] for [PETITIONER].

[INSERT COURT NAME AND JURISDICTION]

_____)	
[Insert])	
)	
)	
)	Criminal No. [Docket Number]
v.)	
)	[Insert Judge Name]
[Insert Name Of Defendant])	
)	
Defendant.)	
_____)	

PROTECTIVE ORDER

This matter comes before the Court on [Petitioner]’s Motion for Protective Order. Having considered [Petitioner’s] Motion, Memorandum of Law, [any Opposition thereto], and the record herein, it is HEREBY ORDERED that:

[Petitioner’s] Motion for Protective Order is GRANTED.

It is further ORDERED that:

1. All information regarding any self-petition by [Petitioner] under VAWA is protected from disclosure by 8 U.S.C. § 1367(a) and no statutory exception listed in 8 U.S.C. § 1367(b) permits disclosure of information protected by VAWA in this litigation.

2. [Petitioner] is not required to produce any information regarding a VAWA self-petition, if it exists.

3. Absent further Order of this Court, [Respondent] is prohibited from seeking discovery of information regarding any self-petition by [Petitioner] in discovery, or through attempting to elicit such information through direct or cross examination of witnesses during proceedings related to this litigation.

IT IS SO ORDERED this _____ day of _____, 2008.

Date: _____

*[Insert Judge Name
And Jurisdiction]*

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