

Economic Relief for Immigrant Victims: Child Support and Spousal Support
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Financial control and isolation are powerful weapons that abusers use to maintain control over their victims. As a result, many domestic violence victims do not have access to bank accounts or charge accounts. In other instances, their abusers make it difficult for their victims to work outside the home, or completely forbid victims from working outside the home. This financial isolation and control is especially exacerbated where the abuser has immigration status and work authorization and the victim does not.²

The family-based immigration process and laws relating to temporary visas in particular can leave immigrant victims vulnerable to economic abuse. This is because an immigrant spouse, generally, is dependent on the U.S. citizen/lawful permanent resident/temporary visa holder spouse for immigration status. Immigration status determines whether someone can work in the United States legally, and whether he or she is eligible to receive certain public benefits. Immigrant victims may lack work authorization³ under a variety of situations, such as:

- when an abusive citizen or lawful permanent resident spouse has not filed immigration papers for them;
- when they received legal immigration status through an immigrant spouse who came to the United States on a work visa and the accompanying spouse visa the survivor received explicitly precludes legal work authorization;
- when they are undocumented;
- when they qualify for immigration relief under the Violence Against Women Act (VAWA) and they have not filed or have filed and are awaiting approval of their case. Immigrant victims under current DHS procedures do not receive work authorization until their immigration case is approved. As a result, victims often wait for significant periods of time before they receive legal work authorization. The wait times are generally as follows:
 - VAWA self-petitions

¹ Pending publication as a chapter in: Mo Therese Hannah, Ph.D. and Barry Goldstein, J.D., Editors, *Domestic Violence, Abuse, and Child Custody Legal Strategies and Policy Issue, Volume 2* (Civic Research Institute 2013).

² See Mary Ann Dutton, Leslye E. Orloff & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245 (2000).

³ As an attorney or advocate working with immigrant victims, it is important to warn the client about the immigration consequences of buying or using false papers in order to secure employment, and/or representing herself as a United States citizen, or signing a form stating that she is a United States citizen for purposes of employment. Battered immigrants who could potentially qualify to attain legal immigration status under Violence Against Women Act [hereinafter "VAWA"] could jeopardize their access to VAWA immigration benefits if they do any of these things. 8 U.S.C. § 1182(a)(6)(C)(ii), § 1227(a)(3)(D)(2003), and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) § 344(c). If you discover that your clients have done any of these things, then they should be referred to an immigration attorney in your area to advise them on how to proceed. For a referral to an immigration attorney familiar with VAWA immigration cases, or for technical assistance to attorneys and victim advocates, please contact the Immigrant Women Program of Legal Momentum at (202) 326-0040.

- When abuser is a U.S. Citizen and the victim files the VAWA self-petition and the application for lawful permanent residency simultaneously – (6 months, 26.1% of applicants)⁴
- When the abuser is a lawful permanent resident – (7-12 months 46.8%; between 13 months and 2 years 27.1%)⁵
- U-visa applicants – (6 months 6.1%, 7-12 months 63.9%, 13 to 18 months 30%)⁶
- Trafficking victims
 - With continued presence – (90 days)⁷
 - T-visa application (From 6.5 months to 2 years 3 months)⁸

Additionally, some immigrant victims of domestic violence have an immigration visa that requires them to work for a particular employer.⁹ If they leave the employment through which they obtained their visa, they are considered to be in violation of the terms of their visa, lose their legal immigration status and become undocumented. Abusers of immigrant women on employment-based visas may harass and abuse them at work which can cause immigrant victims to lose their jobs, and thus lose their legal immigration status.¹⁰

Economic independence plays a key role in whether or not a domestic violence survivor will be able to successfully leave an abusive relationship. Issues of economic survival particularly impact battered immigrant women, who also face linguistic and cultural barriers in addition to less access to public benefits than other victims.¹¹ Research indicates that the lack of access to financial resources is one of the most significant factors preventing immigrant victims of domestic violence from leaving abusive relationships.¹²

For many low-income immigrant victims of domestic violence, achieving adequate financial assistance usually requires a combination of help from family, friends, public assistance, employment, and child support. Women often must leave their support systems and

⁴ LESLYE E. ORLOFF, NATIONAL SURVEY ON TIMING OF ACCESS TO WORK AUTHORIZATION BY IMMIGRANT VICTIM VAWA SELF-PETITIONERS AND U-VISA APPLICANTS (Legal Momentum, September 28, 2011) available at <http://iwp.legalmomentum.org/reference/additional-materials/immigration/vawa-t-and-u-procedures/Timing%20of%20Immigrant%20Victim%20Access%20to%20Work%20Authorization%209.28.11.pdf/view?searchterm=national%20survey>.

⁵ *Id.*

⁶ *Id.*

⁷ LESLYE ORLOFF, VAWA, T AND U-VISA CASE PROCESSING TIMES, (Legal Momentum, February 11, 2011) available at <http://iwp.legalmomentum.org/reference/additional-materials/immigration/vawa-t-and-u-procedures/DHS%20and%20IJ%20Case%20Processing%20Times%20VAWA-T-U%202.11.11.pdf/view?searchterm=processing%20times>.

⁸ *Id.*

⁹ See INA § 101a(15); 8 U.S.C. § 1101 (2003); 8 C.F.R. § 274a.12(b) (2003). For example, persons on H, J, O, and TN visas have specific visas related to their employer, and their spouses and children, as “derivatives” on their visas, may or may not be authorized to work.

¹⁰ This pattern is typical of abusers in general. See, e.g., Richard M. Tolman & Jody Raphael, *A Review of Research on Welfare and Domestic Violence*, 56 J. SOC. ISSUES 655, 664-68 (2000); JODY RAPHAEL, PRISONERS OF ABUSE, DOMESTIC VIOLENCE AND WELFARE RECEIPT 6-10 (Taylor Institute, 1996). Similarly student visa holders receive visas that require them to attend college, university, graduate school or high school in this country. When student visa holders are victims of intimate partner violence or sexual assault, victims who leave school as the result of the abuse also violate the terms of their student visa and become undocumented.

¹¹ See Leslye Orloff, *Lifesaving Welfare Safety Net Access for Battered Immigrant Women and Children: Accomplishments and Next Steps*, 7 WM. & MARY J. OF WOMEN & L. 597, 614-21 (2001).

¹² See Mary Ann Dutton, Leslye E. Orloff & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL’Y 245, 259, 295-99 (2000).

move to a confidential location to escape the abuse, leaving them with few resources to start over in another community.¹³

Duty to Support Children

When a Non-Abusive Parent Fails to Seek Custody or Loses a Custody Case and the Court Awards Custody to the Abuser

A statutory duty to support children is imposed on parents in all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, and Guam.¹⁴ While this section of the chapter focuses on obtaining child support for immigrant custodial parents, it is important to note that immigrant victims may also have a case for child support initiated against them when they are not the custodial parent. Abusers who are custodial parents may bring child support proceedings against low-income victims of domestic violence in retaliation for leaving the relationship. Even victims who have not yet attained legal work authorization can be ordered to pay child support.¹⁵ When working with a low-income immigrant victim against whom child support is being sought, it is important to review your state's child support statute. Many states have recognized the need for a parent to reserve a portion of income to meet his or her basic subsistence needs before the child support award is calculated.¹⁶ Attorneys should explore what the immigrant victim's income and resources are, and whether advocacy for a basic subsistence reserve is appropriate.¹⁷

Joint or Shared Custody

If the immigrant victim and abuser have a shared custody agreement or if there is a court order awarding shared custody,¹⁸ the amount of child support awarded in many jurisdictions can be adjusted to reflect the percentage of time that each parent has physical custody of the children. The child support guidelines are rebuttable presumptions of an appropriate amount of child support. In other jurisdictions, the child support guidelines reflect the traditional custodial arrangement in which one parent has sole legal and physical custody of the child, and the other parent exercises visitation rights. In these jurisdictions, counsel for the immigrant victim should argue that the amount of support ordered should reflect the custody agreement.¹⁹ When the immigrant victim incurs costs related to care for the children under a shared-custody arrangement, her child support order should be adjusted accordingly.

¹³ MARTHA F. DAVIS, *The Economics of Abuse: How Violence Perpetuates Women's Poverty*, in BATTERED WOMEN, CHILDREN, AND WELFARE REFORM: THE TIES THAT BIND 17, 18 (Ruth Brandwein ed., 1999).

¹⁴ ARNOLD H. RUTKIN, 3-33 FAMILY LAW AND PRACTICE § 33.02 (Arnold H. Rutkin ed., Matthew Bender 2004).

¹⁵ Asal v. Asal, 960 P.2d 849, 850 – 851 (Okla. 1998) (Although the former husband claimed that he could not work due to his current immigration status, he was ordered to pay support because his testimony indicated that his mother was paying his expenses, and that he could work in the United States, but had not found work).

¹⁶ *Id.*

¹⁷ Attorneys representing immigrant victims with low-wage work need to be aware that the fact that the victim may not have work authorization will not protect her against having to pay child support, whether or not the amount is calculated taking into account a subsistence reserve.

¹⁸ This should not occur in domestic violence cases. Most states have family court laws or rules that consider domestic violence as part of the custody case (e.g. presumptions against awarding custody to abusive parents) that should deter judges from awarding custody to the perpetrator. However, courts around the country continue to award custody to abusers; see R. LUNDY BANCROFT, JAY G. SILVERMAN & DANIEL RITCHIE, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS (SAGE SERIES ON VIOLENCE AGAINST WOMEN) (Sep 14, 2011); *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 American University Journal of Gender, Social Policy & the Law 657 (2003).

¹⁹ RUTKIN, *supra* note 13.

Particular Benefits of Obtaining Court Ordered Child Support For Immigrant Victims As Early As Possible

Securing and enforcing child support and spousal support awards for immigrant victims can provide an important resource to enhance an immigrant victim's economic security. Such awards provide critical income for low-income battered immigrants who may not yet be eligible to work, and who are often not eligible to receive a full range of public benefits. Even when immigrant victims can access public benefits for themselves and their children or can access VOCA crime victim's assistance funds, child and spousal support are important additional sources of economic support.

Obtaining child support awards early in representation of an abuse victim in a protection order proceeding or through temporary orders can provide a range of benefits to for the victim, such as:

- Court ordered child support with payments made through the court
 - Provides a safe avenue through which victims receive support
 - Provides non-citizen perpetrators with evidence of child support payment that the perpetrator will need to provide DHS in any application filed to attain naturalized citizenship
- Creates an ongoing obligation to pay child support and an accruing debt for unpaid child support that creates a future opportunity for the victim to collect unpaid child support through state child support enforcement agencies.
 - Attachment of tax refunds
 - Inability of the perpetrator to get car loans without paying outstanding child support debt
- The fact of a child support order provides immigrant victim evidence of income due to her that she can use to prove to immigration officials that she is not likely to become a public charge and provides evidence to support the victim's application for lawful permanent residency
- Unpaid child support is a fact that can put a victim in a better position in any future child custody litigation.

In working with immigrant victims it is important to work with the client to determine whether child support can be safely pursued. Screening for eligibility for VAWA or U visa immigration relief is an important first step in this analysis. An immigrant victim who may be concerned that pursuing custody or child support could trigger reprisal from the perpetrator who will follow through on threats to have the victims deported. Determining that the victim qualifies for VAWA immigration protections and filing her immigration case can protect her from immigration enforcement and can put her on a path to obtaining legal work authorization. This can mitigate her safety concerns and build her confidence and willingness to pursue spousal and child support. At least thirty-seven jurisdictions authorize the payment of child support as

part of their civil protection order remedies²⁰ and all other states use catch-all provisions to order child support payments in protection order proceedings. Catch all provisions authorize courts in protection order cases to grant any relief that the court deems will promote the petitioner's or her children's well-being and safety as part of a protection order.²¹

In addition to spousal and child support, other economic relief can be included as remedies in civil protection order cases, including: rent and mortgage payments, utilities payments, possession of residence or vehicle (for transportation to work), vehicle payments, and child care expenses.²² Other creative forms²³ of relief include medical bills, lost earnings, repair and replacement of damaged property, alternative housing costs, meals, out-of-pocket expenses for injuries, relocation and travel expenses, replacement costs for locks, and counseling costs.²⁴ Any relief provided for in a protection order is only valid for the duration of the protection order.²⁵ Attorneys representing immigrant victims should explore and assist clients in seeking permanent spousal and child support orders as part of another family court action before the date on which the protection order ends.²⁶

Immigration Consequences of Criminal Convictions for Failure to Pay Child Support

²⁰ See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 998 (1993)

²¹ The following states have specific provisions for the award of support to the petitioner and/or her minor children (they may also contain catch-all provisions for other forms of financial relief): ALA. CODE § 30-5-7(d)(5) (2003); ALASKA STAT. ANN. § 18.66.100(c)(12) (West 2003); ARK. CODE ANN. § 9-15-205(a)(4) (West 2003); CAL. FAM. CODE § 6341 (West 2003); DEL. CODE ANN. tit. 10, §1045(a)(6) (West 2010); GA. CODE ANN. § 19-13-4(a)(6) & § 19-13-4(a)(7) (West 2002); FLA. STAT. § 741.30(6)(a)(4) (West 2002); 750 ILL. COMP. STAT. § 60/214(b)(12) (2003); IND. CODE § 34-26-5-9(c)(3)(C) (2010); IOWA CODE § 236.5 (2003); KAN. STAT. ANN. § 60-3107(a)(6) (West 2002); KY. REV. STAT. ANN. § 403.750(4) (West 2002); LA. REV. STAT. ANN. § 46:2136 (A)(2) (2003); ME. REV. STAT. ANN. tit. 19-A, § 4007(1)(I) & § 4007(1)(J) (2003); MD. CODE ANN., FAM. LAW § 4-506(d)(9) (West 2002); MASS. GEN. L. ANN. ch. 209A, § 3(e) (West 2003); MINN. STAT. ANN. § 518B.01 subd. 6(5) (West 2003); MISS. CODE ANN. § 93-21-15(1)(e) (West 2003); MO. REV. STAT. § 455.050 (2003); NEV. REV. STAT. § 33.030 (2003); N.H. REV. STAT. ANN. § 173-B:5 (I)(b)(7) (2002); N.J. STAT. 2C:25-29b.(8) (2003); N.M. STAT. ANN. § 40-13-5 (A)(2) (West 2003); N.Y. FAM. CT. ACT § 842 (McKinney 2003); N.C. GEN. STAT. § 50B-3(a)(6) (West 2003); N.D. CENT. CODE ANN. § 14.07.1-02 (West 2011); OHIO REV. CODE ANN. § 3113.31(E)(1)(e) (West 2003); OR. REV. STAT. ANN. § 107.718(1)(h) (West 2001) (allowing emergency monetary assistance); 23 PA. CONS. STAT. ANN. § 6108 (a)(5) (West 2006); R.I. GEN. LAWS ANN. § 15-15-3(a)(4) (West 2002); S.C. CODE ANN. § 20-4-60(c)(2) (2002); S.D. CODIFIED LAWS § 25-10-5(4) (2003); TENN. CODE ANN. § 36-3-606(a)(7) (West 2003); TEX. FAM. CODE ANN. § 85.021(4) (West 2003); UTAH CODE ANN. § 78B-7-106 (2)(h) (formally cited as 30-6-4.2(2)(h)) (West 2003); VT. STAT. ANN. Tit. 15, § 1110 (West 2003); W. VA. CODE ANN. § 48-27-503(4) & 48-27-503(5) (West 2003); WIS. STAT. ANN. § 813.12 (West 2002); WYO. STAT. ANN. § 35-21-105(b)(ii) (West 2003). The following states have catch-all provisions that a court could use to award financial relief: ARIZ. REV. STAT. ANN. § 13-3602(G)(6) (West 2003); CONN. GEN. STAT. ANN. § 46b-15 (West 2003); D.C. CODE § 16-1005(c)(10) (2003); HAW. REV. STAT. § 586-5.5 (West 2003); IDAHO CODE ANN. § 39-6306(1)(e) (West 2003); MONT. CODE ANN. § 40-15-201(2)(j) (2002); NEB. REV. STAT. § 42-924(1)(g) (2002); VA. CODE ANN. § 16.1-279.1 (West 2003); WASH. REV. CODE ANN. § 26.50.060 (West 2003). See also *Powell v. Powell*, App. D.C. 547 A.2d 973 (1988); *Mabry v. Demery*, 707 A.2d 49 (D.C. Cir. 1998); *Katsenelenbogen v. Katsenelenbogen*, 365 Md. 122 (2001); *Parrish v. Parrish*, 95 Ohio St. 3d 1201 (2002); *Brown v. Brown*, 2000 Ohio App. LEXIS 949 (March 14, 2000).

²² Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 996 (1993) (full discussion of the broad range of economic relief available as part of a protection order see Chapter 5 of this Manual).

²³ Other creative economic remedies that counsel for immigrant victims have been able to attain under protection order catch all provisions include: ordering the abuser to pay for any and all costs associated with the filing and completion of victim's immigration case; ordering the respondent to turn over a certain amount of money to be held in trust for payment of the victim's attorney's fees in a subsequent divorce, custody or other family law matter; and ordering the abuser to pay for any and all costs associated with supervised visitation, including any application fee that may be required.

²⁴ Klein & Orloff, *supra* note 21 at 994-995 (citing creative state statutes that allow for these forms of relief).

²⁵ LESLYE E. ORLOFF & CATHERINE F. KLEIN, DOMESTIC VIOLENCE: A MANUAL FOR PRO BONO LAWYERS § Remedies 75 (2d ed. Ayuda, 1992).

²⁶ Most state protection orders are of between one and three years duration. Some states have protection orders that last indefinitely. Catherine F. Klein & Orloff, *supra* note 21 at 1085 (1993).

There are immigration consequences for a non-citizen who fails to prove to DHS that they have been supporting their children.²⁷ When a lawful permanent resident applies for naturalization to become a U.S. citizen, if they have children, the non-citizen must present proof that persuades DHS that they have been supporting their children in order to prove they have *good moral character*. Establishing good moral character is a requirement for several types of immigration relief, including cancellation of removal for non-permanent residents,²⁸ self-petitions for battered spouses²⁹ and children under VAWA, voluntary departure,³⁰ citizenship,³¹ and registry.³² There is generally no waiver available for this requirement, and, if an individual is found to lack good moral character, the form of immigration relief the immigrant has requested must be denied.³³ These immigration consequences can lead to a lump sum payment to the custodial parent of all court ordered child support unpaid in the past. The child support payment requirements to prove good moral character under immigration law can be a factor that helps encourage non-citizens to pay child support and to agree to child support orders.

Noncompliance with child support payments can have serious legal and immigration consequences. Every state has laws that criminalize failure to support a spouse or child. The penalties range in severity. Both civil and criminal penalties can be imposed for failure to pay child support. Many state child support enforcement statutes provide that a sentence of greater than one year may be imposed for willful failure to pay child support. The presence of mens rea, the “willful” requirement in criminal child support enforcement statutes, could result in a conviction for failure to pay child support being considered a crime of moral turpitude under immigration law.³⁴ When a batterer is convicted under such a statute, the sentence may mean that the batterer has committed a crime of moral turpitude. Immigrants with a conviction of a crime of moral turpitude can be deported and can be denied lawful permanent residency, **even if the non-custodial non-paying parent does not actually receive a sentence of greater than one year.**³⁵ The key language under federal immigration law is that a crime of moral turpitude is a crime “for which a sentence of one year or longer *may* be imposed.”³⁶(emphasis added)

There is also a federal remedy for non-payment of child support under the Child Support Recovery Act when implemented in combination with the Deadbeat Parents Punishment Act of 1998. These federal statutes work together to impose criminal sanctions on parents who

²⁷ See Leslye E. Orloff, Joyce Noche, Anne Benson, Laura Martinez & Jennifer Rose, *Ensuring Economic Relief for Immigrant Victims Through Family Law Proceedings: Child Support and Spousal Support*, 21-29, in BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS (Legal Momentum 2004) (detailed explanation of the ramifications for a non-citizen parent of failure to pay child support), available at http://iwp.legalmomentum.org/family-law-for-immigrants/economic-relief/c_FAM_BB_Economic-Relief-for-Victims-Child-Spousal-Support.pdf/view?searchterm=joyce%20noche.

²⁸ Good moral character is a requirement for cancellation under INA § 240A(b)(1), as well as for special rule cancellation for battered spouses and children under VAWA, and for certain nationals of Guatemala, El Salvador, and former Eastern bloc countries under NACARA § 203. Immigration courts can properly exercise their discretion to deport, rather than grant relief to, fathers who paid only limited amounts of child support. See *Satoot v. I.N.S.*, 24 F.3d 249, 1994 WL 192120 (9th Cir. 1994) (unpublished opinion); *In re Halas*, 274 F. Supp. 604 (D.C. Pa. 1967). It is important to note that the parent not paying child support in the *Satoot* case was also abusive.

²⁹ INA § 204(a)(1)(A)(iii)(II)(bb) and INA § 204(1)(B)(ii)(II)(bb).

³⁰ INA § 244(a); 8 U.S.C. § 1254a(a)(2002).

³¹ INA § 316(d) – (e); 8 U.S.C. § 1427(d) – (e) (2002). For decisions related to failure to pay child support and good moral character, see *Matter of S*, 3 I & N Dec. 393 (BIA 1998); *Matter of Pires da Silva*, 10 I&N Dec. 191 (BIA 1983); *Halas*, 274 F. Supp. 604 (E.D. Pa. 1967). See also *Matter of Dobric*, 189 F. Supp. 638 (D. Minn. 1960); *In re Petition for Naturalization of Spak*, 164 F. Supp. 257 (E.D. Pa. 1958).

³² INA § 249(c).

³³ See *Miller v. INS*, 762 F.2d 21 (3d Cir. 1985). There is an exception under INA § 204(a)(1)(C) for self-petitioners under VAWA with criminal convictions that would otherwise preclude good moral character, if the conviction is connected to the abuse and waivable when determining admissibility under INA § 212(h).

³⁴ Check your state nonsupport statutes, found in footnotes above, and accompanying statutes (if any) for the actual length of sentence.

³⁵ INA § 237(a)(2)(A)(i); 8 U.S.C. § 1227 (a)(2)(A)(i)(2002).

³⁶ *Id.*

willfully avoid child support payments for a child in another state, and who owe more than a year's worth of child support or five thousand dollars (\$5,000). When a parent's nonpayment of court ordered child support meets any of these criterion, they have committed a federal crime punishable by up to two years in prison for certain deadbeat parents.³⁷ Conviction of this federal crime could also constitute a crime of moral turpitude, since the length of sentence that could be imposed under the statute is up to two years in prison. Federal child support enforcement actions could lead to the non-paying non-citizen parent being denied lawful permanent residency and being deported.

It is extremely important to seek and win child custody awards for non-abusive immigrant victims. Should an immigrant victim client not seek custody or lose a custody case resulting in the court awarding sole or joint custody to her abuser, the immigrant victim non-custodial parent could be required to pay child support under state laws. Non-custodial immigrant victims should be encouraged to pay child support. Paying child support will help your client prove that she is of good moral character in her VAWA immigration case as well as in other immigration cases the victim may have in the future. It is important to adequately advise immigrant victims of their rights and responsibilities, and consequences of failure to pay their child support orders.

Seasonal Employment, Self-Employment, and Unreported Income

When a non-custodial parent is employed seasonally or has fluctuating income, child support guidelines generally allow the court to look at the income over a period of time.³⁸ Generally, when calculating the child support order, courts will require full financial disclosure and review financial information including, but not limited to, income tax returns and year-to-date income for a lengthy enough period to account for past or anticipated changes in income.³⁹ For income that is steadily increasing, use of prior year's income is appropriate.⁴⁰

Determining child support can be difficult if the non-custodial parent owns his or her own business, works in a family business, or earns unreported income. Locating and examining the true worth of the non-custodial parent's business is paramount to obtaining an appropriate child support order. If it is safe for the clients to do so, attorneys and advocates should advise clients to copy any information that would be helpful in a child support and/or spousal support case, such as spouse's credit reports, bank statements, canceled checks, deposit slips, monthly credit card statements, loan applications, etc. In addition, if there are specific benefits to the business for the non-custodial spouse, such as a company car, housing, and credit cards; these benefits should be taken into account when determining income and an appropriate child support award.⁴¹ In these cases, the custodial battered immigrant parent may also have to testify as to the non-custodial parent's salary and the lifestyle of the family before they were separated.

³⁷ 18 U.S.C. § 228 (2002).

³⁸ LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 2.03[d] (2001).

³⁹ See *Ball v. Wills*, 190 W.Va. 517, 438 S.E.2d 860 (1993); *Cleveland v. Cleveland*, 249 N.J. Super. Ct. 96, 592 A.2d 20 (App. Div. 1991).

⁴⁰ See *Schaeffer v. Schaeffer*, 717 N.E.2d 915 (Ind. Ct. App. 1999); *Mahoney v. Mahoney*, 567 N.W. 2d 206 (N.D. 1997).

⁴¹ MORGAN, *supra* note 37 at § 2.03[e] (2001). See Bruce L. Richman, *Eye on the Business*, Family Advocate, Vol. 23, No. 2 American Bar Association Fall 2000.

If the non-custodial parent is hiding or manipulating income, courts can consider the earning capacity of the parent when awarding child support.⁴² This issue arises in cases in which the non-custodial parent is claiming less income than he actually earns, has voluntarily reduced work hours, or quit his job to evade his child support obligations. All state child support guidelines examine the income and earning capacity of a non-custodial and custodial parent in the process of calculating each parent's income share or percent of income to determine the amount of child support that will be awarded.⁴³ Past employment records of the non-custodial parent can be introduced to show that he is voluntarily reducing his income.⁴⁴ The custodial parent's testimony about the non-custodial parent's work schedule, earnings and extravagant spending patterns when the parties resided together can also provide evidence of the non-custodial parent's earning capacity.⁴⁵ In cases in which the abuser has voluntarily left a well-paying job to avoid child support payments, the courts can impute former income to the non-custodial parent.⁴⁶ Finally, lack of immigration status of the non-custodial parent is not a valid defense in a child support case.⁴⁷

Proving the Abuser's Income and Ability to Pay

Attorneys representing immigrant victims have been successful in using Employer's Statements to prove income in a child support case in lieu of the employer's testimony. The Employer's Statement and Employer's affidavit⁴⁸ can be admitted into evidence under court rules that deem these documents prima facie evidence of income.⁴⁹ In other jurisdictions Employer's Statements and Employer's affidavits are generally admitted under the State's equivalent to the Federal Rule of Evidence Rule 902 Self-Authentication.⁵⁰ Under these circumstances, these statements are obtained through a subpoena duces tecum, but the Employer is not "excused" from having to testify. If the opposing counsel objects to the admission of the Employer's Statement, the person who signed the Employer's Statement and Employer's affidavit would need to be available to testify to the fact that the Employer's Statement contains information that is kept in regular course of business. In practice, by keeping the employer on call and providing opposing counsel copies of the Employer's Statement and Employer's Affidavit, opposing counsel usually agrees to stipulate that the figures contained in the Employer's Statement shall be used by the court in calculating the child support amounts.

⁴² See Lewis Becker, *Spousal and Child Support and the "Voluntary Reduction of Income" Doctrine*, 29 CONN. L. REV. 647 (1997). For a discussion of the child support obligations of incarcerated parents, see Karen Cavanaugh & Daniel Pollack, *Child Support Obligations of Incarcerated Parents*, 7 CORNELL J. L. & PUB. POL'Y 531 (1998).

⁴³ See American Bar Association, *Child Support Guidelines*, 498 *Family Law Quarterly*, Volume 45, Number 4, Winter 2012 available at http://www.americanbar.org/content/dam/aba/publications/family_law_quarterly/vol45/4win12_chart3_childsupport.authcheckdam.pdf

⁴⁴ Some courts impute income to the non-custodial parent regardless of the reason of voluntarily being unemployed or underemployed. Others use a "good faith test" to determine if the reason for under- or unemployment is valid. See Morgan, *supra* note 37 at § 2.04[b], [c] (2001).

⁴⁵ Testimony on earning capacity need not be limited to testimony provided by the custodial parent. In cases of self-employed abusers, attorneys representing battered immigrants have successfully presented testimony on income generated through employment from investigators and from witnesses employed in a similar line of work (e.g. street vendor, waiter, construction worker).

⁴⁶ See *Lascaibar v. Lascaibar*, 658 So. 2d 170, 171 (Fla. Dist. Ct. App. 1995); *Hutto v. Kneipp*, 627 So. 2d 802, 805-806 (La. Ct. App. 1993); *In re Marriage of Gable*, 750 P.2d 534, 535-36 (Or. Ct. App. 1988); see also Lewis Becker, *Spousal and Child Support and the "Voluntary Reduction of Income" Doctrine*, 29 CONN. L. REV. 647 (1997). Some courts will also order a non-custodial parent to undertake a job search and report to the court every two weeks on the progress of that job search until the non-custodial parent has secured employment.

⁴⁷ *Asal v. Asal*, 960 P.2d 849, 850 – 851 (Okla. 1998).

⁴⁸ See *infra* Appendix ___ for a sample Employer's Statement and Employer's Affidavit.

⁴⁹ See e.g. District of Columbia SCR General Family Rule J.; Alabama, ARJA Rule 32(F); Louisiana, LSA-R..S. 9:315.2 (A); Maryland, MD. CODE ANN. FAM. LAW § 12-203; Maine, 19-A.M.R.S.A. § 2004 1A.

⁵⁰ See e.g. Texas Rule of Evidence, 902 Self Authentication. The Texas rule requires that the Employer's State be on file for 14 days prior to the hearing, the federal rule does not have this requirement. Attorneys should check State rules in the appropriate jurisdiction.

Some employers may refuse to comply with the subpoena duces tecum. When this occurs the subpoena can be enforced against the employer. Uncooperative employers may be working helping the non-custodial parent avoid issuance and enforcement of child support orders. If the employer fails to comply with a subpoena, the subpoena can be enforced against him. When an employer fails to comply with a wage withholding order, the employer may be sanctioned under state law for non-compliance. Attorneys for immigrant victims have won damage awards from employers for failure to comply with court wage withholding orders.⁵¹

Wage Withholding

Wage withholding requires the non-custodial parent's employer to withhold child support from the non-custodial parent's paycheck. For victims of domestic violence, wage withholding should be a part of every child support order preferable because it minimizes any contact between the abuser and victim, and provides an objective method to prove whether child support has been paid. Wage withholding is available which child support is ordered as part of a protection order, child support order, or divorce order.⁵² In negotiating with counsel for non-citizen perpetrators, emphasizing that wage withholding provides the non-citizen parent solid evidence of payment of child support that can be used to prove good moral character to immigration officials in naturalization applications can be persuasive in attaining consent to wage-withholding.

Retroactive Child Support Awards and Prior Child Support Orders

When issuing a child support award, the court can award retroactive child support back to the date of birth of the minor child.⁵³ Some states have presumptions for limiting retroactive child support to a lesser period of time. Attorneys for battered women have been successful in overcoming this presumption and winning retroactive support awards for longer periods of time. This can be done by showing the relationship the non-custodial parent has had with the child to date or by arguing that the non-custodial parent knew or should have known about the minor child.⁵⁴ In making determinations about retroactive child support,⁵⁵ courts will consider not only

⁵¹ TEX. FAM. CODE ANN. § 158.210; *See, e.g., Belcher v. Terry*, 420 S.E.2d 909 (W. Va. 1992) (Holding that W.Va. Code Sections 48A-5-3(n) and 48 A5-3(f)(b) (Supp. 1991) clearly provides a right of action against employers who failed to withhold child support payments from salary in accordance with a receipt of notice to do so from the state's Child Advocacy Office. The court also said that punitive damages could be obtained after a showing that the failure to withhold was willful on the part of the employer.); *Child Support Recovery Svcs., Inc. ex rel S.C. v. Inn at the Waterfront, Inc.*, 7 P.3d 63 (Alaska 2000) (Affirming summary judgment against an employer for failure to withhold income from an employee who had child support obligations...the court's finding relied on ALASKA STAT. § 25.27.260(a) and (b)).

Casino Magic Corp. v. King, 43 S.W.3d 14 (Tex. App. 2001) (Awarding mother \$36,951.85 in delinquent child support plus attorney fees and court costs after mother filed motion to enforce child support wage withholding order against father's employer where employer purportedly failed to comply with previous order.); *See also, State v. Filipino*, Conn. Super. Ct. LEXIS 266 (2000) (Suing on behalf of respondent's former wife, the Connecticut Support Enforcement Division prevailed when the court held employer to be in contempt for willfully violating a valid withholding order, and found employer liable to mother in the sum of \$29,259 for the full amount of income not withheld since receipt of the notice to withhold.)

⁵² Depending on your jurisdiction's rules, a wage withholding order may be issued automatically with a court order that includes spousal and/or child support. If wage withholding orders are not automatically issued, you must request that the court issue the order. *See* Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105, § 453(g)(1) (1996) (codified, as amended, in scattered sections of 42 U.S.C.).

⁵³ *See* Sample Retroactive Child Support Order available at: http://iwp.legalmomentum.org/family-law-for-immigrants/economic-relief/c_FAM_Retroactive%20Child%20Support%20Order_OVW%2011.14.04.pdf/view

⁵⁴ *See e.g.* TEX. FAM. CODE ANN. § 154.131(d) (presumption that retroactive child support awards are limited to 4 years can be overcome by proof that the obligor knew or should have known that he was the father of the child or that he sought to avoid establishment of child support).

the support that the non-custodial parent would have provided the child, but also the fact that the custodial parent who has been supporting the child in the meantime and is entitled to reimbursement.⁵⁶ If the non-custodial parent is a non-citizen, payment of retroactive child support back to the date of the child's birth, will provide evidence of good moral character for immigration purposes including naturalization.

Spousal Support

Spousal support orders can be an important component of an immigrant victim's ability to achieve self-sufficiency and stability for herself and her children.⁵⁷ For immigrant victims who qualify to attain legal immigration status either through a VAWA or a U-visa case, spousal support orders provide victims with an important source of income while awaiting approval of their immigration case and receipt of work authorization. The wait from filing to receipt of work authorization for immigrant victims can be between six months and two years, depending on the type of immigration case the victim qualifies for.⁵⁸ Spousal support orders can also provide critical support for immigrant victims who are transitioning to self-sufficiency and obtaining the skills, training, and education needed in order to become self-supporting.

Spousal and child support orders differ in that courts are given broad discretion to determine whether a spousal support order is appropriate in a particular case. Courts also have the discretion to determine the amount and duration of the spousal support order.⁵⁹ Some states have statutes that list general factors that courts may consider in determining a spousal support order.⁶⁰ Many states approach spousal support as 'rehabilitative' and direct that the amount of support should be enough to allow a spouse to obtain the necessary job skills, education, or training to enable him or her to become fully self-supporting.⁶¹

The following are the factors most courts consider in determining spousal support awards. Generally, the courts will look at all the factors and then apply the factors to the facts of a particular case:

- **Standard of Living Established During Marriage:** The court will look at the parties' standard of living during the marriage and, to the extent possible, fashion an award that would maintain this standard for both parties. Marriages of long duration are generally

⁵⁵ It is important to determine whether prior child support orders have been entered for the client's child by other courts or through State Child Support IV-D agencies. When these cases exist it is important for counsel to give proper notice to both the non-custodial parent and the IV agency of any child support case being filed. Counsel may need to file motions to intervene in the prior child support case and motions to consolidate the prior case or cases with the current case and ask that the court reduce the prior orders to judgments. It is also important to include, in any new child support order, received arrearage language from prior court orders and retroactive judgments. In seeking a retroactive judgment, it is important that the client provide you with a detailed timeline of when they were living with the abuser and when they were not. Many times, there will have been previous separations and nonsupport periods that qualify for retroactive support. It is also important that all initial pleadings include requests for both retroactive and arrearage amounts so that the court can address these issues if they come up at trial. Some judges will not award arrearages amounts or retroactive support if requests for these forms of relief were not included in the pleadings.

⁵⁶ See e.g. *In Re Valdez*, 980 S.W.2d 910, 913 (Tex. App. 1998).

⁵⁷ As in child support, an assessment on the risks in pursuing spousal support should be evaluated carefully with the immigrant victim.

⁵⁸ LESLYE ORLOFF, NATIONAL SURVEY ON TIMING OF ACCESS TO WORK AUTHORIZATION BY IMMIGRANT VICTIM VAWA SELF-PETITIONERS AND U-VISA APPLICANTS (Legal Momentum, September 28, 2011) available at <http://iwp.legalmomentum.org/reference/additional-materials/immigration/vawa-t-and-u-procedures/Timing%20of%20Immigrant%20Victim%20Access%20to%20Work%20Authorization%209.28.11.pdf/view>.

⁵⁹ RUTKIN, *supra* note 13 at § 35.03. See, e.g., *In re Marriage of Cheriton*, 92 Cal. App. 4th 269 (Cal. Ct. App. 2001)

⁶⁰ *Id.*

⁶¹ *Id.*

given significant weight in the duration and amount of a spousal support award.⁶² In representing an immigrant victim in a marriage of a long duration to a citizen or lawful permanent resident spouse who never filed immigration papers for the non-citizen spouse, consider arguing that the long duration of the marriage combined with the perpetrator's failure to file or follow through on immigration relief for the victim should be a basis for both spousal support and a disproportionate share of family assets.

- **Income and Financial Resources of Each Party:** The spouse seeking spousal support must prove that he or she needs the support. If the U.S. citizen or lawful permanent resident spouse did not file a petition asking immigration authorities to grant legal immigration status to the immigrant victim, counsel should inform the court and present evidence that this *immigration-related abuse* by the abuser is the reason the immigrant spouse does not have legal work authorization. The immigrant spouse needs spousal support at least until she is able to receive work authorization and becomes self-supporting.⁶³
- **Duration of the Marriage:** Although court practice in some jurisdictions is to award spousal support as part of the temporary orders in divorce cases, with regard to final orders of maintenance, alimony or spousal support, it can be difficult to obtain spousal support awards in marriages of less than five years duration absent extraordinary circumstances.⁶⁴ In seeking spousal support awards for immigrant victims with shorter marriages, since immigration status and the ability to obtain legal work authorization are linked, it can be relevant to present evidence demonstrating how the abuser used immigration-related abuse, including failure to file papers, threats to withdraw the immigration case and threats to have the victim deported, to keep the victim in the abusive relationship and to maintain economic control over her. This evidence helps persuade the court of the need for a rehabilitative alimony or temporary order of support to allow the immigrant victim to attain legal work authorization through her immigration case and become self-supporting.⁶⁵
- **Age and Physical and Emotional Health of Parties:** The courts will examine the age and physical and emotional health of the parties. Evidence of physical, sexual, emotional,

⁶² RUTKIN, *supra* note 13; *See, e.g., In re Hasabnis*, 322 Ill. App. 3d 582 (Ill. App. Ct. 2001) (Outlining the factors courts consider, including duration of marriage, in deciding support amount).

⁶³ *See Stone v. Stone*, 2004 Ohio 671 (2004); *Watson v. Watson*, 724 So.2d 350 (Miss. 1998); *Korn v. Korn*, 867 So. 2d 338 (Ala. Civ. App. 2003).

⁶⁴ RUTKIN, *supra* note 13; *See e.g., Harrelson v. Harrelson*, 932 P.2d 247 (Alaska 1997); *Hann v. Hann*, 629 So. 2d 918 (Fla. Dist. Ct. App. 1994).

⁶⁵ *See In Re Marriage of Shirilla*, 89 P.3d 1 (Mont. 2004)(court found that rehabilitative maintenance award was necessary to allow the immigrant spouse to work on her English proficiency). In some cases, an abuser may have helped the immigration victim attain legal immigration status. If he filed an immigration case for her, he may have completed an affidavit of support. For a full discussion of how the affidavit of support might be useful as evidence of ability to pay in spousal support proceedings, *see* Leslye Orloff, Joyce Noche, Anne Benson, Laura Martinez & Jennifer Rose, *Ensuring Economic Relief for Immigrant Victims Through Family Law Proceedings*, in *BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS* (Legal Momentum, 2004) available at http://iwp.legalmomentum.org/family-law-for-immigrants/economic-relief/c_FAM_BB_Economic-Relief-for-Victims-Child-Spousal-Support.pdf

economic, and immigration related abuses are important. If either spouse suffers from a medical or emotional condition that will affect earning capacity or the present or future need for treatment, this may also be a factor in the amount and duration of support.⁶⁶ Presenting evidence about the abuse and related trauma may be helpful in securing more support, particularly if the immigrant victim must seek mental health services as a result.

- **Time Necessary for Either Party to Acquire Sufficient Education or Training in Order to Find Appropriate Employment:** Courts often approach spousal support as a temporary mechanism to assure the financial self-sufficiency for both parties. Factors that attorneys working with battered immigrants should raise include:
 - Actions the perpetrator took to keep the victim from learning English and provide sufficient alimony to support the victim as she takes English and other job training classes she needs to gain economic self-sufficiency;
 - whether the perpetrator failed to file immigration papers for the victim delaying her access to legal work authorization;
 - The immigrant victim's eligibility for VAWA immigration relief, or other possible routes to immigration status;⁶⁷
 - The time it will take for the victim's immigration case to be approved, to obtain legal work authorization, to seek and to obtain employment;
 - Any plans that the survivor has to further her educational or career development to enhance the immigrant victim's ability to become self-supporting; and
 - Any education or training she would need or has had in the past which was delayed because of domestic violence and/or family obligations;
 - Whether the perpetrator filed an affidavit of support in an immigration case filed on the victim's behalf.

- **Needs of Recipient Spouse and Financial Resources of Payor Spouse:** The needs and resources of the recipient spouse will be balanced against the financial resources of the payor spouse.⁶⁸ The award of support must not be disproportionate to the payor's ability to pay, nor should it be in excess of the payee spouse's financial needs.⁶⁹ In the case of an immigrant victim married to a spouse who delayed or did not file an immigration case on the immigrant spouse's behalf, this failure to timely file for immigration relief that would have provided the immigrant spouse legal immigration status and work authorization needs should be considered as part of this analysis. When the citizen or

⁶⁶ See CAL. FAM. CODE § 4325, which creates a rebuttable presumption where there is a criminal conviction for an act of domestic violence entered by the court within five years of the filing of the dissolution proceeding, or at any time thereafter for any award of temporary or permanent spousal support to the abusive spouse otherwise awardable.

⁶⁷ There may be other routes to immigration status besides VAWA relief, e.g., family-based sponsorship, employment-based petition, and education-related visas. Attorneys and advocates should consult with an experienced immigration attorney for assistance in pursuing these other routes.

⁶⁸ RUTKIN, *supra* note 13. See, e.g. *In re Marriage of Mathews*, 70 WASH. APP. 116 (1993) (reversing the order for maintenance fees awarded to the wife because it did not leave the husband with the ability to meet needs and financial obligations, as statutorily required, and would force him to pay maintenance fees out of his disability and retirement income).

⁶⁹ *Id.*

lawful permanent resident spouse created circumstances causing the non-citizen spouse to be in greater need of financial assistance, this factor needs to be part of the court's determination of the payor's ability to pay. In addition, it should include amounts necessary to avoid loss of community assets pending finalization of the divorce (i.e. marital home, insurance, vehicles, etc.).⁷⁰

- **Contributions of Each Spouse During Marriage:** Virtually all states recognize the nonmonetary contributions of each spouse during the marriage, which usually takes the form of homemaking or child-care services.⁷¹ Examples of other contributions to the marriage or sacrifices for the marriage an immigrant victim may have made⁷² include:
 - contributions to the success of a family business;
 - contributions to the other spouse's pursuit of a graduate, or professional degree;
 - sacrificing career or educational opportunities in victim's home country;
 - sacrificing access to family members in the home country; and/or
 - loss of home-country ties that she might have made for the marriage.⁷³
- **Retroactive Nature of the Spousal Support Award:** In most jurisdictions, the final support award of the court will be retroactive to the date of the commencement of the action, or the date upon which the request for support was filed.⁷⁴

Immigration Affidavits of Support as Evidence of the Ability to Pay Child Support and/or Spousal Support

An Affidavit of Support is a document that a U.S. citizen or lawful permanent resident is required to submit to immigration authorities as part of the application for immigrant benefits filed on behalf of an immigrant spouse, child or relative.⁷⁵ In the affidavit of support, the U.S.

⁷⁰ Counsel for immigrant victims should explore with clients the possibility of being awarded the marital home as part of a divorce decree. Home ownership is very important to people and many immigrant victims would not be able to qualify for a home loan after the divorce on their own. There are pros and cons to homeownership that need to be explored with clients. Home ownership is not always financially feasible. The abuser can be ordered to pay or help pay the mortgage pending the finalization of the divorce in community property states. The client may also explore the possibility of identifying persons with whom she can share the residence whose rent payment can be used to help pay the costs of a mortgage that is higher than the amount the court orders the abuser to pay. If the home is awarded to the client, the abuser will be required to sign a Special Warranty Deed and client will sign the Deed of Trust to Secure Assumption.

⁷¹ RUTKIN, *supra* note 13. See e.g., Hammer v. Hammer, 991 P.2d 195 (Alaska 1999) (court factored in wife's homemaking for nearly 19 years out of the 23 year marriage, to conclude that more monetary support is necessary from husband when considering that wife is not likely to obtain employment that will adequately satiate basic needs).

⁷² RUTKIN, *supra* note 13; See e.g., Watson v. Watson, 724 So. 2d 350 (Miss. 1998)(court noted the wife's contributions as a spouse and that her age and lack of work experience warranted a periodic alimony payment in the amount of \$1,000.00 per month); Ahmad v. Ahmad, 2001 Ohio App. LEXIS 5303 (Ohio Ct. App. 2001); In re Marriage of Ganghar, 2000 Minn. App. LEXIS 405 (2000).

⁷³ See In re Marriage of Gangahar, *supra* note 72 (court noted that respondent-wife gave up everything when she left India and was completely dependent on petitioner when she arrived in the United States); In re Marriage of Hanson, 378 N.W.2d 28 (Minn. Ct. App. 1985) (holding that trial court award of temporary maintenance was proper as respondent left Taiwan to marry petitioner and is now unable to speak English or to support herself, further, respondent would be unable to return to her native country without personal disgrace).

⁷⁴ RUTKIN, *supra* note 13; See e.g., Gotten v. Gotten, 748 S.W.2d 430 (1987) (Stating that the court's support decision was retroactive, and therefore the wife was entitled to reimbursement for mortgage payments made prior to the entering of the court's decision).

⁷⁵ An Affidavit of Support is required in all family-based immigration cases, whether the sponsored immigrant is applying for permanent residence through adjustment of status in the U.S. or an immigrant visa at a United States consulate abroad. INA § 212(a)(4)(C); 8 U.S.C § 1182(a)(4)(C). In employment-based immigration cases an affidavit of support is also required if the immigrant will be employed by in a business owned by a relative. INA § 212(a)(4)(D); 8 U.S.C. § 1182(a)(4)(D).

citizen or lawful permanent resident family member signs a sworn statement promising to financially support the immigrant family member. Affidavits of Support can be helpful in family court cases in obtaining child and spousal support awards.

The Affidavit can be used as evidence of income and the ability to pay child and/or spousal support and as evidence of the abusive spouse's or parent's obligation to support his family.⁷⁶ Application filed seeking lawful permanent residence on behalf of family members filed after December 19, 1997 require that the applicant submit an enforceable Affidavit of Support on Form I-864.⁷⁷ The Affidavit of Support requires that the applicant spouse assume the responsibility to support a family member until the immigrant family member becomes a U.S. citizen or is credited with forty quarters, usually ten years, of employment.⁷⁸ If the immigrant victim attained lawful permanent or conditional resident status through her spouse, he will have had to file an affidavit of support in her immigration case. The existence of an affidavit of support provides critical information that can help in obtaining child and spousal support, including evidence of the sponsoring spouse's income.

When filing the Affidavit of Support with the Department of Homeland Security, the sponsor is required to submit to immigration authorities, together with the Affidavit, the following documents:

- A copy of the sponsor's income tax returns for the last three years, if he or she had a legal duty to file;⁷⁹
- evidence of current employment or self-employment (normally recent pay stubs and a statement from the sponsor's employer on business stationery);⁸⁰
- If the income is below 125% of the poverty level for the family size,⁸¹ the sponsor may also submit other proof of his ability to support his immigrant spouse and/or child, including evidence of the sponsor's assets.

⁷⁶ See *Sinojia v. Sinojia*, No. 113953, 1994 Conn. Super. LEXIS 2485 (Conn. Super. Ct. Sept. 27, 1994)(spousal support); *Stein v. Stein*, 831 S.W.2d 684 (Mo. Ct. App. 1992)(affidavit of support admitted as evidence); *K.S. v. I.G.S.*, Index No. 313910/00 (N.Y. Sup. Ct. July 16, 2001)(spousal support); *Walsh v. Walsh*, 764 N.E.2d 1103 (Ohio Ct. App. 2001)(as evidence); *Dao v. Nguyen*, No. 2071-95-4, 1995 WL 653322 (Va. Cir. Ct. Nov. 7, 1995)(spousal support); *Moody v. Sorokina*, 830 N.Y.S.2d 399, 402 (N.Y. App. Div. 2007)(holding that Affidavit of Support can be enforced as a contract by the immigrant spouse of the affiant); *Schwartz v. Schwartz*, CIV-04-770-M, 2005 WL 1242171, at *2 (W.D. Okla. May 10, 2005)(dismissing motion for summary judgment holding "...plaintiff, a sponsored immigrant, can maintain an action against defendant, a sponsor, to enforce defendant's obligations under the Affidavit of Support regardless of whether means-tested public benefits have been provided. The Court further finds that an Affidavit of Support is a legally enforceable contract. Finally, the Court finds that a sponsor and sponsored immigrant's divorce does not automatically terminate the sponsor's obligations under the Affidavit of Support.").

⁷⁷ A sponsor who signs an affidavit of support may be required to repay any "means-tested public benefits" received by the sponsored immigrant if requested by the government agency that provided the benefits. See INA § 213A(b). See generally, Charles Wheeler, *The New Affidavit of Support and Sponsorship Requirements*, 74 Interpreter Releases 1581 (Oct. 20, 1997); Michael J. Sheridan, *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to Prevent Aliens from Becoming Public Charges*, 31 CREIGHTON L. REV. 741, 753-54 (1998). Affidavits of Support filed before December 19, 1997 were filed on Form I-134. These affidavits of support provide evidence of ability to pay but are not enforceable in the same manner as the Affidavits of Support filed on Form I-864.

⁷⁸ 8 U.S.C. § 1183a(a)(3)(A) & (B) (2003).

⁷⁹ 8 C.F.R. § 213a.2(c)(2)(i) (2011).

⁸⁰ 8 C.F.R. § 213a.2(c)(2)(ii) (2011).

⁸¹ See 8 C.F.R. § 213a.1 (2011). In determining whether the household income is sufficient, household size is calculated to include the sponsor, all persons related to the sponsor by birth, marriage, or adoption living in the sponsor's residence, the sponsor's dependents, the sponsored immigrant(s), and any immigrants the sponsor has previously sponsored for immigration status when that support obligation has not terminated.

Obtaining information that was submitted in conjunction with the Affidavit of Support can be useful in cases where proving the abuser's income and ability to pay would otherwise be difficult. This evidence is particularly helpful when the abusive sponsor is self-employed or works for a family member, or is hiding or manipulating income. To determine that the Affidavit of Support has been filed, counsel for an immigrant victim in a protection order-, child support-, divorce- or other family court proceeding should:

- In a protection order case, require the perpetrator turn over to the court and the victim a copy of the Affidavit of Support he filed together with copies of the underlying required documents including copies of the tax returns filed with DHS;
- Require that the perpetrator sign in open court and turn over to the victim a Freedom of Information Act (FOIA) request to obtain copies of the battered immigrant's immigration file;
- Use discovery in the family court case to obtain copies of the Affidavit of Support and tax returns that the abusive spouse filed with his Affidavit of Support and pay stubs attesting to current income;
- If the perpetrator states to the court that he does not have and cannot turn over copies of the Affidavit of Support and/or copies of his tax returns, the abuser can be ordered to obtain an IRS transcript of tax returns filed for the past three years.⁸² Tax returns covering the past three years exist because they were required to be obtained and submitted to DHS along with the Affidavit of Support.

⁸² To obtain a transcript of tax returns, an individual can submit IRS Form 4506-T by mail, fax, or in person at a local IRS office or order by calling 1-800-829-1040. If an attorney or individual other than the taxpayer is requesting the transcript or other document, IRS Form 2848, Power of Attorney and Declaration of Representative, must be signed by the taxpayer and submitted with the request. For more information and to obtain these forms, see the IRS official website: <http://www.irs.gov/formspubs/>.