

Current State of Violence Against Women Act and Trafficking Victim Protection Act Implementing Regulations and Policies

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It is crucial that judges be apprised of the fact that numerous provisions of the Violence Against Women Act (VAWA) that became law in 1994, 1996, 2000 and 2005 have yet to be implemented by DHS policies or regulations.¹ To prevent misapplication of the law, it is also critical to know that there are aspects of VAWA immigration regulations and policies that have remain in the Code of Federal Regulations that were explicitly overruled by subsequent VAWA statutory amendments. Adjudicators must take care not to rely on overruled regulations when analyzing legislative intent with regard to VAWA, T or U visa immigration relief.² Judges and panel members issuing decisions should compare current statutes and regulations carefully prior to issuing decisions relying on regulations.

Careful consideration of the current state of VAWA provisions and regulations allows for proper adjudication and avoids misinterpretations of the law. The following provides an up-to date list of VAWA statutory provisions for which no implementing regulations or policies have been issued. This list is followed by a consequent list of VAWA and Trafficking Victim Protection Act (TVPA) regulations that were overruled by statute. This report ends with a list of current regulations that do not reflect expansions of VAWA or TVPA protections that became law subsequent to the issuance of the regulations.

I. No Regulations or Implementing Policies for Provisions

- VAWA self-petitioning for elder abuse victims (VAWA 2005 § 816)
- Employment Authorization for Abused Spouses of Certain Non-Immigrant (A), (E)(iii), G, or H) Professionals (VAWA 2005 § 828) (implementation is pending- comment period ended on January 10, 2013 and comments are currently under review)

¹ For further discussion of legislative history of the Violence Against Women Act *See* Leslye Orloff and Janice Kaguyutan, Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses American University Journal of Gender Law and Social Policy

² One example of a case in which in the Board’s reasoning the BIA explicitly relied on regulations long overruled by VAWA statutes was Matter of Adelina MARTINEZ 25 I&N Dec. 66 (BIA 2009). In that case the Board stated:

“Furthermore, given that the respondent is seeking relief as the battered spouse of a lawful permanent resident, we find that there are additional factors relevant to our consideration. Importantly, the Immigration Judge found that the respondent divorced her abusive ex-husband in 2004, and that she has already relied on her relationship with her ex-husband to adjust her status as a VAWA self-petitioner..... Moreover, the respondent has been remarried since 2006 and is no longer in an abusive relationship with her ex-husband....Congress did not provide specific regulations explicating section 240A(b)(2) of the Act. *However, we observe that the regulations for the self-petitioning provisions of section 204(a) of the Act state that a self-petitioning spouse must be legally married to his or her abuser at the time the petition is filed. 8 C.F.R. § 204.2(c)(1)(ii).* Furthermore, they state that after the petition has been properly filed, legal termination of the marriage will have no effect on the decision made on the self-petition, *but that the self-petitioner’s remarriage constitutes a basis for denial of the self-petition. Id.*” Emphasis added.

VAWA 2000 explicitly considered the two regulatory requirements that imposed by VAWA self-petitioning implementing regulations—1) that the self-petitioner be married to the abuser on the date that the self-petition was filed; and 2) that the self-petitioner’s remarriage constitutes a basis for denial of the self-petition. As a result VAWA 2000 contained statutory amendments authorizing the filing of VAWA self-petitions after divorce so long as the petition is filed within two years of divorce. Additionally, Congress did not want to restrict the ability of a battered immigrant abuse victim to remarry, amending VAWA to allow remarriage of a battered immigrant self-petitioner, ensuring that remarriage would not lead to denial of a self-petition or revocation of an approved self-petition.

- Removal of two-year custody and residency requirement for abused adopted children (VAWA 2005 § 805(d))
- VAWA, T and U-visa victims not subject to reinstatement of removal (VAWA 2005 § 813(b))
- Abused children can include their own children in their VAWA self-petitions (VAWA 2000 § 1503)(b)(2))
- Any credible evidence applicable to all categories of VAWA, T and U visas (VAWA 1994 §40701(a) (3) for VAWA self-petitions; VAWA 2000 §1513(c) for U-visas)
- Creation of a uniform definition of “VAWA self-petitioner” (VAWA 2005 § 811)
- Allows fees to be waived for all aspects of all adjudications related to VAWA, T- and U-visas (TVPRA 08§ 201(d) (3))
- DHS structure for handling VAWA, T and U visa applicants- centralizing all aspects of these cases at the VSC VAWA Unit (policy was issued, but no regulations)
- Employment authorization for victims with approved VAWA self- petitions (VAWA 2005 § 814(b))
- Third party abuse as extreme cruelty (VAWA 1994 § 40701(a)(1)(c))
- Intended spouse provisions and qualifying relationships (VAWA 2000 § 1503(a), (b))
- Protection from age-out for child self-petitioners at filing (VAWA 2000 § 1503(d), VAWA 2005 §§ 805(a) and (b))
- Child abuse and incest victims self-petitioning up to age 25 (VAWA 2005 § 805(c))
- No petitioning for family members who were the abusers or perpetrators for which the VAWA, T, or U-visa was based (VAWA 2005 § 814(e))
- Cuban Adjustment without residency requirements (VAWA 2000 § 1509(a))
- Cuban Adjustment within two years of the death or termination of marriage provision (VAWA 2005 § 823)
- NACARA for battered immigrant spouses related to abuser at time abuser granted relief and removes residency requirement (VAWA 2000 § 1510)
- NACARA for battered immigrant spouses related to abuser even if abuser did not apply and the filing deadline has passed (VAWA 2000 § 815)
- Access to HRIFA for battered spouses and children (VAWA 2000 § 1511)
- Access to HRIFA for battered spouses and children even if eligible abuser did not apply and the filing deadline has passed (VAWA 2005 § 824)
- Parole of children of VAWA cancellation grants (VAWA 2000 § 1504(b))
- Reentry after unlawful presence, multiple illegal reentries, and reentry after removal (VAWA 2000 § 1505(a))
- Misrepresentation, HIV and 212(h) waivers (VAWA 2000 §§§ 1505(c), (d), (e))
- Public charge (VAWA 2000 § 1505(f)) (self-petitioner are exempt from the affidavit of support requirements and receipt of non-cash benefits and special

purpose cash benefits that are not intended for income maintenance are not subject to public charge consideration).

- Failing to voluntarily depart exception (VAWA 2005 § 812)
- 245(a) and (c) Adjustment for VAWA's in the United States: VAWA 2000 § 1506(a)
- VAWA confidentiality disclosure protections (IIRIRA § 384, VAWA 2000 § 1513(d))
- VAWA confidentiality referrals for victims (VAWA 2000 § 1513(c))
- Extension of VAWA confidentiality to trafficking victims (VAWA 2005 § 817)
- Guidance and training on VAWA confidentiality (VAWA 2005 § 817)
- Physical or psychological trauma cooperation exception (VAWA 2005 § 801(a)(3))
- Allows change of status to T visas or U visas for non-immigrants (VAWA 2005 § 821(c))
- Extends duration of U- and T-visas for up to 4 years (VAWA 2005 §§ 821(a), (b))
- Clarifies that cooperation includes victim's response to and cooperation with requests for evidence and information (VAWA 2005 § 804(b))
- T-visa adjustment designations (TVPRA 2008 §§ 201(a) and (d))
- Physical presence expansion (TVPRA 2008 § 201(a))
- Policy Guidance Needed To Ensure That Civil Litigants Can Receive Continued Presence (TVPRA § 205(a)(1))
- Policy Guidance Needed For Immediate Access To Parole For Family Members Of Trafficking Victims With Continued Presence (TVPRA § 205(a) and (b))
- Materials development for state and local law enforcement (TVPRA § 205(a))
- U Visa adjustment designations (TVPRA § 201(e))
- Mandatory Submission of Information on Criminal Convictions for Specified Crimes and Disclosure of U.S. Citizen Spouse or Fiancé(s) Criminal Conviction Information (International Marriage Broker Regulation Act)
- Providing the Victim with Information about the Number of Petitions Previously Filed (International Marriage Broker Regulation Act)
- IMBRA Enhancements to DHS Computer Case Tracking System (DHS Developed and Implemented a VAWA Confidentiality Code of Admission on December 21, 2010. The computer system that is to identify citizens who file multiple fiancé/spouse visas not fully implemented).
- Brochure about FGM being grounds for child abuse (1996 IIRAIA § 644)

II. Regulations That Were Overruled by Statute

- Deletion of U.S. residency for VAWA self-petitioners allowing filing from abroad.
 - VAWA 2000 § 1503(b) overruled: 8 CFR § 204.2(c)(1)(i)(C) and (D) and 8 CFR § 204.2(c)(1)(v)

- Good Moral Character for VAWA cancellation/suspension parallel to special VAWA inadmissibility waivers
 - VAWA 2005 § 822(c) overrule 8 CFR § 204.2(c)(1)(vii)
- A self-petitioners remarriage does not preclude approval of a VAWA self petition
 - VAWA 2000 § 1507(b) overruling 8 CFR § 204.2(c)(1)(ii)
- Deleted extreme hardship requirement for VAWA self-petitioners
 - VAWA 2000 §§ 1503(b) and (c) overruling: 8 CFR §§ 204.2(c)(1)(i)(G) and (viii)
- Self-petitioning regulations requiring residence proof of residence of a battered spouse or child with the abuser requirement
 - VAWA 2000 § 1503 overruled 8 CFR § 204.2(c) (1) (v); § 204.2(c)(2)(iii); 8 CFR. § 204.2(e)(1)(v); § 204.2(e)(2)(iii).
- Retrieving priority dates for child self-petitioners
 - VAWA 2000 § 1502(d) overruled 8 CFR § 204.2(a)(4)

III. Current Regulations That Do Not Reflect Current Law

- Not requiring residence with a spouse as a self-petitioning requirement (VAWA 2000 § 1503(b) (1))
 - 8 CFR § 204.2(c) (1) (v); § 204.2(c)(2)(iii).. Current regulations do not reflect the VAWA 2000 deletion of two prior requirements (residence in the U.S. to file a self-petition and residence at some time with the abuser in the U.S.).
- Residence of the child with the abuser as a self-petitioning requirement (VAWA 2000 § 1503(b)(2))
 - 8 CFR. § 204.2(e)(1)(v); § 204.2(e)(2)(iii). Needs to be amended to reflect VAWA 2000 deletion of two prior requirements (residence in the U.S. to file and residence at some time with the abuser in the U.S.)
- Priority dates for child self-petitioners (VAWA 2000 § 1502(d))
 - 8 CFR § 204.2(a)(4) does not allow a child self-petitioner to retrieve a parent's priority date from an I-130 self-petition in spite of this transfer being allowed for an adult self-petitioner.
- Deletion of U.S. residency requirement for VAWA self-petitioners (VAWA 2000 § 1503(b))
 - 8 CFR § 204.2(c)(1)(i)(C) and (D) do not include the VAWA 2000 amendments.
- Filing self-petitions from abroad (VAWA 2000 § 1503(b))
 - 8 CFR § 204.2(c)(1)(v) does not incorporate VAWA 2000.
- Filing within two years of death, divorce, loss of citizenship or lawful permanent residency (VAWA 2000 § 1503(b); § 1507(a))
 - 8 CFR § 204.2(c)(1)(ii) does not currently reflect the VAWA 2000 and VAWA 2005 changes.
- Changes in the abuser's status after filing (VAWA 2000 Sec 1507(a))
 - 8 CFR § 204.2(c)(1)(iii) does not include VAWA 2000 language regarding loss of status or citizenship.

- Victim should benefit from abuser's naturalization (VAWA 2000 § 1507(a)(2))
 - 8 CFR § 204.2(c)(1)(iii) does not include the reclassification of a self-petitioner to an immediate relative when the abuser naturalizes.
- Remarriage (VAWA 2000 § 1507(b))
 - 8 CFR § 204.2(c)(1)(ii) states that the self-petitioner's remarriage before the self-petition is approved will result in a denial. This regulation was explicitly overruled by VAWA 2000.
- Deleted the extreme hardship requirement for VAWA self-petitions (VAWA 2000 §§ 1503(b) and (c))
 - 8 CFR §§ 204.2(c)(1)(i)(G) and (viii) continue to require extreme hardship.
- Filing Self-petition within two years of divorce (VAWA 2000 §§1503(b) and (c))
 - 8 CFR § 204.2(c)(1)(ii) continues to require current marriage.
- Technical correction to good moral character (VAWA 2005 § 822(c))
 - 8 CFR § 204.2(c)(1)(vii) does not reflect the change that was included as VAWA III Section 822.
- Good moral character victim exception (VAWA 2000 § 1503(d)(2))
 - 8 CFR § 204.2(c)(1)(vii)- The final VAWA rule good moral character requirements must be paralleled with inadmissibility waivers in order to ensure eligibility for all.
- Prima facie determinations (IIRAIRA § 501)
 - 8 CFR § 204.2(c)(6)- USCIS is issuing prima facie notices. The final rule should incorporate these procedures.
- Eliminates extreme hardship requirement for family members (VAWA 2005 § 801(a)(2))
 - 8 CFR § 214.11(o)(2) does not include implementation of the VAWA 2005 amendments.
- Counting continued presence towards the three-year residence requirement and immediate adjustment of status for T-visa holders whose investigation or prosecution is complete (VAWA 2005 § 803(a))
 - 8 CFR § 245.23(e)(2)(i)(B) is complete; however, the final VAWA regulations should confirm that the clock for counting three years towards adjustment of status begins on the date that the T-visa recipient was initially granted continued presence.
- Extend T-Visa Status For T Visa Victims Whose T-Visas Have Expired (TVPRA 2008 § 201(b))
 - Amendments needed to 8 C.F.R. 214.11 to reflect TVPTA 2008 201(b) changes.
- Cooperation requirements for minors to adjust status (TVPRA § 201(d)(1)(C)(iii))
 - 8 CFR 245.23(a)(6)(ii) currently requires that child trafficking victims receiving T-visas must comply with reasonable requests for cooperation. This regulation must be amended to reflect the TVPRA 2008 amendments that overrule this regulation.

- Allowed Absences That Do Not Interrupt Continuous Presence (TVPRA § 201(d))
 - 8 C.F.R.245.23(a)(3) needs to be amended to reflect the TVPRA 2008 amendments
- Duration of U-visas (TVPRA § 201(c))
 - 8 C.F.R. 245.24(b)(2)(ii) should be amended to be fully consistent with the requirements of TVPRA Section 201(c).
- Early Access To Employment Authorization For U-Visa Applicants (TVPRA § 201(c))
 - 8 CFR 274a.12(a) added U-visa recipients to the list of immigrants authorized to receive work authorization.