

5.2

Ensuring Access to Protection Orders for Immigrant Victims of Family Violence^{1,2}

By Leslye Orloff, Joyce Noche, Jennifer Rose, and Laura Martinez

Introduction³

Some family court judges under the false impression that issuing protection orders will confer immigration status upon undocumented battered women have been reluctant to grant protection orders to immigrant victims of domestic violence. This chapter addresses the importance of protection orders as a tool to prevent domestic violence and discusses the authority and obligation of family court judges to issue protection orders to all survivors of intimate partner violence. Most importantly, this chapter explains the distinct separation

¹ “This Manual is supported by Grant No. 2005-WT-AX-K005 and 2011-TA-AX-K002 awarded by the Office on Violence Against Women, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.” This chapter has been prepared with the assistance of Nura Maznavi of George Washington University, School of Law, Hema Sarangapani, of Northeastern School of Law, Allyson Mangalanzo of Boston College School of Law, and Anne Cortina of Yale School of Law.

² In this Manual, the term “victim” has been chosen over the term “survivor” because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term “victim” allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act’s (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim’s gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use “he” in this Manual to refer to the perpetrator and “she” is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – “actual or perceived gender-related characteristics.” On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child’s immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse’s gender.

³ For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/protective-orders>.

Protection Orders

between the powers of family court judges to issue protection orders and other family court remedies to survivors of domestic violence and the federal authority to grant or revoke immigration status.

No action taken by a family court or criminal court judge can fully determine whether the Department of Homeland Security will confer legal immigration status on a battered immigrant or any other immigrant seeking legal immigration status.⁴ It is important for judges to understand that none of the forms of legal immigration status designed to help immigrant victims of domestic violence can be obtained by proof of domestic violence alone. For example, immigration relief based upon either the Violence Against Women Act (VAWA) or the Crime Victim Visa (U-Visa) requires submission of credible evidence proving a number of factors, each of which must be established to attain legal immigration status. Proof of domestic violence is only one required factor that in and of itself will not result in the immigrant victim being granted legal immigration status.

Purpose and Effectiveness of Protection Orders

Intimate partner violence is the single largest cause of injury to women in the United States.⁵ Significant legal reforms over the past thirty years have been aimed at preventing domestic violence, as well as creating legal remedies for battered women.⁶ One such measure has been the issuance and enforcement of civil protection orders (CPOs), also commonly known as “orders of protection” or “restraining orders.” A CPO is a court order prohibiting or restricting a person from “harassing, threatening, and sometimes merely contacting or approaching another specified person.”⁷ Currently all fifty states, the District of Columbia, Puerto Rico and all U.S. territories make CPOs available to victims of domestic violence.⁸ Most state statutes authorize CPOs to include broad protective relief for victims of violence including no further abuse, no contact, custody, economic relief, eviction orders and orders for the perpetrator of the abuse to stay away from the victims’ residences.⁹ Battered women in the United States typically make between 2.4 and 5 attempts to leave their abusers before they ultimately succeed.¹⁰ In light of this fact, it is particularly important that protection orders are awarded to both battered women who remain with or return to their abusers and to those who separate from their abusers.

CPOs grant immediate relief to victims of domestic violence by prohibiting batterers from committing further violence against a family or household member.¹¹ CPOs also protect victims of domestic violence from further harm by offering a civil court option¹² in cases where the victim may be reluctant or unwilling to

⁴ Actions taken by family and criminal court judges can affect the immigration case in a variety of ways. E.g., divorce can cut off family-based immigrant application from relief; criminal convictions can lead to a non-citizen’s deportation; and protection orders can provide evidence of domestic violence.

⁵ H.R. REP. NO. 103-395, 1, (1993). See Jacqueline C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH, [NEED First page], 1089 (2003); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 807, 809 (1993) (citing Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 JUV. & FAM. CT. J. 1, 58 (1992); Evan Stark & Anne Flitcraft, *Violence Among Intimates: An Epidemiological View*, in HANDBOOK OF FAMILY VIOLENCE 293, 301 (Van Hassett et al. eds., 1987)).

⁶ Klein & Orloff at 810.

⁷ BLACK’S LAW DICTIONARY (7th ed. 1999) (definition of “restraining order”).

⁸ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 807, 810 (1993). For an overview of statutory provisions recommended by judges, battered women’s advocates, batterer’s defense attorneys, prosecutors, and other domestic violence legal experts, see, MODEL CODE ON DOMESTIC & FAMILY VIOLENCE (Nat’l Council of Juvenile & Family Court Judges 1994).

⁹ *Id.*

¹⁰ Lewis Okun, *Termination or Resumption of Cohabitation in Women Battering Relationships: A Statistical Study*, in COPING WITH FAMILY VIOLENCE: RESEARCH AND POLICY PERSPECTIVES 107 (Gerald T. Hotaling et al. eds., 1988).

¹¹ Michael J. Voris, *The Domestic Violence Civil Protection Order and the Role of the Court*, 24 AKRON L. REV. 423, 425-426 (1990).

¹² *Gaab v. Ochsner*, 636 N.W.2d 669, 671 (2001) (The statute governing protection orders is construed liberally, with a view toward affecting its objects and promoting justice. The legislature intended the adult abuse laws to fill the void in existing laws in order to protect victims of domestic violence from further harm. “The purpose of a civil protection order is to prevent domestic violence in the future.” 636 N.W.2d at 671 (quoting *Peters-Riemers v. Riemers*, 624 N.W.2d 83 (N.D. 2001)); *Reynolds v. Reynolds*, 2001 WL 62442 *4 (2001) (Civil protection orders are intended to prevent domestic violence before it occurs and their purpose would be annulled if they could not be imposed in time to prevent the violence, rather than simply immediately before it occurs.); *Parish v. Parish*, 765 N.E.2d 359, 363 (2002) (“The purpose of a civil protection order ... is to provide protection from domestic violence and, incidental to that relief, to provide for support and shelter”).

Protection Orders

charge their abusers criminally with domestic violence for safety or other reasons.¹³ The abuser does not have to be present for a victim to get a CPO. While the assistance of an attorney in obtaining a CPO is not required, access to protection orders without such assistance can be particularly difficult for immigrant victims for whom language and cultural issues pose significant barriers to obtaining these orders *pro se*.

Under VAWA's Full Faith and Credit provisions, all states are required to enforce protection orders, regardless of the state or court in which the original order was issued.¹⁴ Accordingly, a state must enforce an out-of-state order, even if the order protects individuals who would not otherwise be eligible for relief under that state's domestic violence statute.¹⁵

A 1998 study by the National Institute of Justice concluded that victims' views on the effectiveness of protection orders vary with the accessibility of the courts to the victims.¹⁶ Before receiving a protection order, study participants experienced abuse ranging from intimidation to injury with a weapon.¹⁷ The majority of women surveyed felt that civil protection orders protected them from further incidents of physical and psychological abuse, helping them regain a sense of well-being.¹⁸ The simple act of even applying for a CPO was associated with helping to improve the participants' sense of well-being.¹⁹ In the initial interviews, 72% of participants reported that their lives had improved.²⁰ During follow-up interviews, the proportion reporting life improvement increased to 85%, with more than 90% reporting increased self-esteem, and 80% feeling safer.²¹ After receiving CPOs, 72% in initial interviews and 65% in follow-up interviews reported no continuing problems with their abusers.²² The researchers acknowledged the limitations of protection orders in restraining abusers with a history of violent offenses. However, researchers found that VAWA offered a "pivotal opportunity" to increase awareness of and access to protection orders, and to strengthen their enforcement by encouraging changes in justice system practices.²³

Research has shown that the effectiveness of civil protection orders for victims of intimate partner violence depends on how specific and comprehensive the orders are, and how well they are enforced.²⁴ The number of domestic violence victims killed by their batterers decreased considerably when the women were offered protection and services.²⁵ Unfortunately, widespread enforcement of civil protection orders is lacking.²⁶ It is extremely important for all victims of domestic violence to have full access to the enhanced safety offered by protection orders, without regard to immigration status.

Battered Immigrant Women and the Violence Against Women Acts of 1994 and 2000

In addition to the obstacles that all victims face in leaving an abusive relationship, battered immigrant women face further barriers, resulting from factors such as immigration status, language, and culture. In drafting the

¹³ Michael J. Voris, *The Domestic Violence Civil Protection Order and the Role of the Court*, 24 AKRON L. REV. 423, 426 (1990).

¹⁴ 18 U.S.C. §§ 2265-2266 (1994).

¹⁵ See generally Barbara J. Hart, Full Faith and Credit for Protection Orders and Federal Domestic Violence Crimes, Presentation to the National College of District Attorneys by the Associate Director of the Battered Women's Justice Project (1995).

¹⁶ UNITED STATES DEPARTMENT OF JUSTICE & NATIONAL INSTITUTE OF JUSTICE, CIVIL PROTECTION ORDERS: VICTIMS' VIEWS ON EFFECTIVENESS 1 (1998).

¹⁷ *Id.* at 1-2.

¹⁸ *Id.* at 1.

¹⁹ *Id.* at 2.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 2.

²⁴ *Id.* at 1.

²⁵ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 807, 813 (1993); see Jacqueline C. Campbell, et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH, (2003). Studies show that the numbers of shelters and services available in a state to assist battered women positively correlates with a drop in the numbers of women killed by intimate partners. Karen D. Stout, "Intimate Femicide": *Effects of Legislation and Social Services*, 4 AFFILIA 25 (1989).

²⁶ S. REP. NO. 101-545

Protection Orders

Violence Against Women Act 1994 (VAWA 1994), Congress recognized the special need to offer immigration relief to undocumented immigrant victims of domestic violence. The legislative history of VAWA 1994 makes it clear that Congress recognized that U.S. immigration laws reflected the larger failure of many other U.S. laws in general to adequately address domestic violence.²⁷ The U.S. House of Representatives Committee on the Judiciary, while drafting VAWA 1994, found that domestic violence was greatly exacerbated in marriages where the non-citizen spouse's legal status depended on her marriage to the abuser.²⁸ Since U.S. immigration laws placed the alien's opportunity to gain legal status in the hands of her citizen or permanent resident spouse, the threat or fear of deportation would deter the battered non-citizen from taking actions such as filing for a C.P.O., filing criminal charges, or calling the police in order to protect herself and her children.²⁹ Immigrant battered women fear continued abuse if they stay in the relationship and deportation if they report the abuse or attempt to leave.³⁰ As a result, many immigrant victims feel trapped and alone in abusive homes, afraid to talk to anyone about the violence or to seek help.³¹

The immigration provisions of VAWA 1994 were designed to help remedy this problem by providing battered immigrant women, abused by their U.S. citizen or lawful permanent resident spouses, a way to secure lawful immigration status without their abusers' cooperation or knowledge.³² The abused spouses and children helped by VAWA 1994's self-petitioning and suspension of deportation (cancellation of removal) provisions were immigrant victims who, but for the actions or inactions of their abusive citizen or lawful permanent resident spouse or parents, would have legal immigration status. Congress specifically amended existing immigration laws to provide battered women and children with an escape route.³³ VAWA's immigration provisions also provided the protection of legal immigration status as an incentive, freeing many battered immigrants to assist in the prosecution of their abusers.³⁴ VAWA's immigration provisions were designed to stop abusers from using tactics of control over their victims' immigration status and from using threats of deportation to make themselves immune to any risk of criminal prosecution or punishment for domestic violence.³⁵ When judges allow abusers to raise their victims' immigration status as an issue in protection order cases, or decide to not issue protection orders to victims because they are immigrants, these judges are acting to undermine the congressional intent of VAWA.

VAWA 1994's immigration relief was, however, limited to battered immigrant victims whose abusers were their citizen or legal permanent resident spouses or parents. As a result, VAWA 1994 did not extend relief to individuals who: 1) had divorced their citizen or legal permanent resident batterers; 2) were married to someone not a citizen or lawful permanent resident; or 3) were not married to their abusers.

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA)³⁶ and the Antiterrorism and Effective Death Penalty Act (AEDPA),³⁷ which severely limited legal immigration and harshly penalized violators of immigration laws.³⁸ Notwithstanding the restrictive nature of these Acts, statutory language in IIRAIRA preserved access to VAWA's immigration protections, increased availability

²⁷ H.R. REP. NO. 103-395, at 26 (1993); Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 110 (2002).

²⁸ H.R. REP. NO. 103-395, at 26.

²⁹ *Id.*

³⁰ *Id.* at 26-27.

³¹ H.R. REP. NO. 103-395, at 26-27; Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 110 (2002).

³² As part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Congress added to the Violence Against Women Act's [hereinafter VAWA] immigration protections certain confidentiality provisions barring the INS or Justice Department officials from releasing any information about the existence of a VAWA immigration case to any person, including the abuser. This guaranteed that battered immigrants could file for relief under VAWA without their abuser's knowledge. IIRAIRA § 384, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended at 8 U.S.C. 1367).

³³ Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 113 (2002).

³⁴ Violence Against Women Act of 1994 § 40703(a), 8 U.S.C.A. § 1254(a) (amending INA § 244(a)) (repealed 1996)[hereinafter VAWA 1994].

³⁵ Orloff & Kaguyutan at 113 (citing VAWA 1994 § 40701(a), 8 U.S.C. § 1154(a)(1) (amending INA § 204(a)(1)); VAWA 1994 § 40703(a), 8 U.S.C.A. § 1254(a) (amending INA § 244(a)) (requiring petitioners to demonstrate a history of battery or extreme cruelty by the citizen or lawful permanent resident as a criterion of the petition) (repealed 1997)).

³⁶ IIRAIRA, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C.).

³⁷ Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8 U.S.C.).

³⁸ Orloff & Kaguyutan, at 118.

Protection Orders

of public benefits for battered immigrant spouses and children of U.S. citizens and lawful permanent residents, and secured some further legal protections for battered immigrants.³⁹ Despite restricting immigrant access to benefits generally through the 1996 Professional Responsibility and Work Opportunity Reconciliation Act (PRWORA),⁴⁰ in IRAIRA, Congress added battered immigrants to the list of non-citizens who were “qualified aliens,” authorized to receive federal and state public benefits.⁴¹ Congress did this because it recognized that battered immigrants would not be able to leave their abusers, cooperate in their abusers’ prosecutions, or seek protection orders or other relief from the courts without independent economic stability.⁴² Without battered immigrant access to the public benefits safety net, the congressional purposes of VAWA 1994 would have been frustrated.⁴³

VAWA 2000 and the U-Visa

VAWA 1994 is an important piece of federal legislation, created to help reduce domestic violence and to protect immigrants abused by U.S. citizen or lawful permanent resident spouses.⁴⁴ This legislation, taken along with the VAWA 2000 amendments,⁴⁵ enabled a much broader range of battered immigrants to attain lawful permanent residence (green cards) without the cooperation of their abusive spouse or intimate partner.⁴⁶ For battered immigrant victims and children abused by citizen or lawful permanent resident spouses or parents, VAWA’s immigration provisions provide two forms of relief: VAWA self-petitions⁴⁷ and VAWA cancellation of removal.⁴⁸

Generally, to qualify for relief under VAWA as a self-petitioning spouse, the applicant must prove six things:⁴⁹ 1) she is the spouse of a U.S. citizen or lawful permanent resident abuser;⁵⁰ 2) the abuse took place in the United States;⁵¹ 3) she was battered or subjected to extreme cruelty during the marriage (or is the parent of a child who was battered or subjected to extreme cruelty by the U.S. citizen or lawful permanent resident spouse during the marriage)⁵²; 4) she is a person of good moral character⁵³; 5) she entered into the marriage in good faith,⁵⁴ and 6) she either currently resides *or* has resided in the past with the abuser.⁵⁵ Unlike VAWA self-petitions, which the battered immigrant may initiate at any time, VAWA cancellation of removal is a defensive mechanism used only when the immigrant has been placed in removal (deportation) proceedings.

³⁹ *Id.*

⁴⁰ “Qualified aliens” are immigrants who were made statutorily eligible by PRWORA to receive some public benefits. See PRWORA § 402 (codified as amended at 8 U.S.C. § 1612), § 403 (codified as amended at 8 U.S.C. 1613), § 431 (codified as amended at 8 U.S.C. § 1641).

⁴¹ 8 U.S.C. § 1631(f) (1999 & Supp. 2001).

⁴² Orloff & Kaguyutan, at 122.

⁴³ *Id.*

⁴⁴ Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1902-1955 (Sept. 13, 1994).

⁴⁵ Violence Against Women Act of 2000 in the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §§ 1501–1513, 114 Stat. 1464 (2000) [hereinafter “VAWA 2000”].

⁴⁶ Orloff & Kaguyutan, at 113.

⁴⁷ INA § 204(a), 8 U.S.C. § 1154(a)(1)(A)(iii)-(iv), (a)(1)(B)(ii)-(iii), 8 C.F.R. § 204.2(c), (e).

⁴⁸ INA § 240A(b)(2), 8 U.S.C. § 1229a(b), 8 C.F.R. §§ 1240.11(a), 1240.20. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996) [hereinafter IIRAIRA] renamed the “suspension of deportation” provisions to “cancellation of removal.”

⁴⁹ See 8 C.F.R. § 204.2(c)(2)(iv), (e)(2)(iv) (specifying the evidence that will support a self-petition).

⁵⁰ A self-petition may be filed if the marriage was terminated by the abusive spouse’s death within the two years prior to filing. A self-petition may also be filed if the marriage to the abusive spouse was terminated, within the two years prior to filing, by divorce related to the abuse. 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa), 8 C.F.R. § 204.2(b)(1)(ii).

⁵¹ This requirement does not apply in cases where the abusive spouse is an employee of the United States government or a member of the uniformed services of the United States.

⁵² INA § 204(a)(1)(A)(iii)(I)(bb) (citizen), (B)(ii)(I)(bb) (permanent resident); 8 U.S.C. § 1154(a)(1)(A)(iii)(I)(bb), (B)(ii)(I)(bb), as amended by VAWA 2000, § 1503(b)(1)(A) & (c)(1).

⁵³ INA § 204(a)(1)(A)(iii)(II)(bb), (iv) (citizen abuser), (B)(ii)(II)(bb), (iii) (permanent resident abuser); 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(bb), (iv), (B)(ii)(II)(bb), (iii). The good moral character requirements are listed in INA § 101(f), 8 U.S.C. § 1101(f).

⁵⁴ INA § 204(a)(1)(A)(iii)(I)(aa) (citizen), (B)(ii)(I)(aa) (permanent resident), 8 U.S.C. § 1154(a)(1)(A)(iii)(I)(aa), (B)(ii)(I)(aa).

⁵⁵ INA § 204(a)(1)(A)(iii)(II)(dd) (citizen spouse abuser), (iv) (citizen parent abuser), (B)(ii)(II)(dd) (permanent resident spouse abuser), (B)(iii) (permanent resident parent abuser), 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(dd), (iv), (B)(ii)(II)(dd), & (B)(iii), as amended by VAWA 2000 at § 1503(b)(1)(A), (2), (c)(1), (c)(2).

Protection Orders

To qualify for relief, she must first generally meet the other requirements that are necessary for a complete VAWA self-petition. In addition, she must have been physically present in the U.S. for three years immediately preceding the filing of the application for cancellation of removal and she must show extreme hardship to herself or her children if she is deported.⁵⁶ Also, unlike the requirements for VAWA self-petitioners, cancellation of removal does not require that the applicant was ever married to be abuser, only that she is the parent of the abuser's child.⁵⁷

In addition to the VAWA self-petition, VAWA 2000 also created the U-Visa, a nonimmigrant visa for immigrant victims of crime.⁵⁸ This new visa offers relief to individuals without immigration status where the victim has:

“suffered substantial physical or mental abuse as a result of criminal activity . . . possesses information about the criminal activity. . . [and] has been helpful, is being helpful, or is likely to be helpful . . . [in] investigating or prosecuting the criminal activity.”⁵⁹

This legislation was enacted with the dual purpose of “strengthen[ing] the ability of law enforcement agencies to detect, investigate and prosecute cases of domestic violence, sexual assault, trafficking and other crimes... committed against aliens,” and offering protection to victims of such offenses.⁶⁰ If granted, this visa gives the applicant immediate legal immigration status as a nonimmigrant and it also provides a pathway to lawful permanent residency in the long-term.

Generally, in preparing a U-Visa application, a nonimmigrant must prove four things: 1) that a crime occurred; 2) that as a result of that crime, she suffered substantial physical or mental injury; 3) that she is being, will be, or has been helpful in a criminal investigation or prosecution; and 4) that a governmental official has certified her helpfulness.⁶¹ Evidence to support VAWA self-petitions, cancellation of removal, or U-Visa applications may include a variety of types of evidence.⁶² Such evidence may include, but is not limited to photocopies; the victim's testimony; copies of any protection order issued for the applicant or her children; medical records documenting abuse; abuser's arrest records for domestic violence; and affidavits from neighbors, friends, shelter workers, or police attesting to the battery, or having witnessed injuries sustained by applicant as a result of abuse.

Protecting Victims: Domestic Violence Statutes and Judicial Accountability

It is critical that judges are aware of the severe impact of domestic violence on victims and make efforts to remain informed about recent domestic violence legislation.⁶³ Judges can play a leadership role in educating attorneys and the community at large about domestic violence issues and the civil and legal remedies that exist for victims.⁶⁴ Cultural and linguistic barriers within the justice system hinder access to the legal system for immigrant victims of domestic violence. For these reasons, it is particularly important that judges play a

⁵⁶ See INA § 240A(b)(2)(A); 8 U.S.C. § 1229b(b)(2)(A).

⁵⁷ Compare with INA §204(a)(1)(A)(iii), B(ii); 8 U.S.C. § 1154(a)(1)(A)(iii), (B)(ii).

⁵⁸ See VAWA 2000, Pub. L. No. 106-386, §§ 1501–1513, 114 Stat. 1464 (2000); U visa qualifying criminal activity includes, but is not limited to: rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, stalking, 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, fraud in foreign labor contracting, solicitation to commit any of the above-mentioned crimes, or any similar activity in violation of federal, state, or local criminal law. INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U). See BREAKING BARRIERS, U Visa Chapter.

⁵⁹ INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U); see BREAKING BARRIERS, U Visa Chapter.

⁶⁰ 146 Cong. Rec. S10188 (daily ed. Oct. 11, 2000) (The Violence Against Women Act of 2000 Section by Section Summary).

⁶¹ 8 U.S.C. § 1184(p)(1).

⁶² 8 U.S.C. § 1184(p)(4).

⁶³ Michael J. Voris, *The Domestic Violence Civil Protection Order and the Role of the Court*, 24 AKRON L. REV. 423, 432 (1990).

⁶⁴ *Id.*

Protection Orders

role in assuring that their courts are accessible to all victims of domestic violence abused in or living in their jurisdiction, without regard to the immigration status, national origin, or language spoken by the victim.⁶⁵

Disappointingly, despite extensive efforts to raise awareness in the legal community on the importance of protecting victims of intimate partner violence, judges in some jurisdictions have refused to award protection orders to undocumented immigrant victims of domestic violence, wrongly believing that the order can confer legal immigration status upon the victim. This practice is contrary to the mandate of domestic violence statutes in every U.S. jurisdiction and is dangerous for victims, their children, and the communities in which the abusers of immigrant victims are not held accountable for their criminal actions.

State domestic violence statutes base the issuance of a protection order on the existence of an underlying criminal act against the victim. Abuse that serves as the basis for a protection order includes, but is not limited to assault, battery, burglary, kidnapping, criminal trespassing, interference with child custody, sexual assault, rape, threats and attempts to do violence or bodily harm, interference with personal liberty, unlawful or forcible entry into a residence, child abuse, false imprisonment, stalking, harm to pets, and destruction of property.⁶⁶ Further, some states will issue protection orders based on emotional abuse and harassment, even though such actions may not have directly caused physical harm to the victim.⁶⁷

In granting protection orders, the National Council of Juvenile and Family Court Judges recommends that judges issue any constitutionally defensible relief that is necessary to provide the victim with sufficient protection from ongoing abuse.⁶⁸ By interpreting their statutory mandate broadly, courts have the power necessary to craft remedies that will counter the wide variety of perilous situations faced by victim of domestic violence. In 1988, the court in *Powell v. Powell* articulated a philosophy embraced by enlightened courts and legislatures across the country.⁶⁹ The *Powell* court held that the domestic violence statute must be interpreted broadly in light of its purpose, explaining that courts have broad discretion to fashion any remedy appropriate to stop violence and to effectively resolve the matter.⁷⁰ Quoting a report issued by the District of Columbia Council, Committee on the Judiciary, the *Powell* court noted, “It has been stated repeatedly ... that the current interpretation ... by the local courts has been extremely narrow, such that truly effective remedies are not ordered in some cases.”⁷¹

When victims of domestic violence present evidence of domestic violence and of a qualifying relationship with their abuser, proving that they statutorily qualify for a protection order, courts must assume the role of an impartial fact finder and issue protection orders. The potential that any other action may be filed in family or criminal court, or with immigration authorities, regarding these parties is not an issue that should properly affect the adjudication of protection order relief.

In 1994, the National Council on Juvenile and Family Court Judges published a Model Code on Domestic and Family Violence that outlined the best practices for family court judges handling domestic violence cases. Section 304 of the Model Code specifically states that petitioners for protection orders are “not barred

⁶⁵ See 42 U.S.C. § 2000d; Executive Order 13166 (federal requirements on language access to Limited English Proficiency persons).

⁶⁶ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 807, 849 (1993); see, e.g., CONN. GEN. STAT. ANN. § 46B-38A(3); D.C. CODE ANN. § 16-1002; LA. REV. STAT. ANN. § 46:2132; N.Y. FAM. CT. ACT § 812..

⁶⁷ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 807, 866-73 (1993); see, e.g., 10 DEL. CODE ANN. § 1041 (“engaging in a course of alarming or distressing conduct in a manner which is likely to provoke a violent or disorderly response or which is likely to cause humiliation, degradation, or fear in another person”); IDAHO CODE § 39-6303; 725 ILL.COMP.STAT. 5/112A-3; MINN. STAT. ANN. § 518B.01; MO. REV. STAT. § 455.010; NEV. REV. STAT. ANN. § 33.018; N.J. REV. STAT. § 2C:25-19; N.M. STAT. ANN. § 40-13-2 (including telephone contact and repeatedly driving by residence or workplace); N.Y. Fam. Ct. Act § 812(1); R.I. GEN. LAWS § 15-15-1 (criminal statute); W. VA. CODE § 48-27-202; WIS. STAT. ANN. § 813.122.

⁶⁸ National Council of Juvenile and Family Court Judges, Family Violence Project, *Family Violence: Improving Court Practice, Recommendations from the National Council of Juvenile and Family Court Judges*, 41 JUV. & FAM. CT. J. 17 (1990) [hereinafter Family Violence Project].

⁶⁹ 547 A.2d 973 (D.C. 1988).

⁷⁰ *Id.*

⁷¹ *Id.* at 974.

Protection Orders

from seeking an order because of other pending proceedings.”⁷² Given the explicit purpose of state domestic violence statutes to offer victims protection from ongoing abuse, and the legislative purpose of VAWA to free battered immigrant women from the endless cycle of power, control and violence, denial of protection orders to undocumented immigrant women who would otherwise qualify to receive protection orders on the basis of their immigration status constitutes an abuse of judicial discretion.

Appellate courts recognize the important role judges play in protection order cases. In an important articulation of this role, the Maryland Court of Appeals, in *Katsenelenbogen v. Katsenelenbogen*⁷³ has emphatically reaffirmed the court’s role as an impartial fact finder in protection order cases. The court held that the role of judges in issuing protection orders under the state domestic violence statute should be focused solely on determining whether the petitioner has suffered abuse at the hands of the defendant and what remedy may best protect the victim from further acts of violence.⁷⁴ Mrs. Katsenelenbogen sought a protection order on behalf of herself and her child after they were shoved and threatened with further violence by Mr. Katsenelenbogen. The trial court granted the petitioner protective relief by prohibiting her husband from further contact with her and ordering him to leave the marital home. On appeal, the intermediate appellate court vacated the protection order, in part out of concern that the order may negatively impact Mr. Katsenelenbogen in his pending divorce action. The court expressed concern that the domestic violence statute “could be used to seek an advantage with respect to issues properly determined in a divorce, alimony, or custody proceeding.”⁷⁵

The Court of Appeals of Maryland rejected this holding and cautioned courts against deviating from the obligation and essential purpose of the domestic violence statute, in which the legislature entrusted the judiciary to offer protection to victims of domestic violence.⁷⁶ In light of the statutory limitations placed on the right to relief⁷⁷ and the broad discretion of courts to fashion appropriate remedies for victims upon a finding of abuse, judges must limit themselves to “their traditional judicial role and hear both sides to the dispute fairly and without pre-judgment.”⁷⁸ The appropriate role of the judiciary in protection order cases, as accepted by courts across the country, was summarized by the court in *Katsenelenbogen* as follows:

It is likely true, as the Court of Special Appeals noted, that the issuance of a protective order and the provision of this kind of relief in it may have consequences in other litigation. A judicial finding, made after a full and fair evidentiary hearing, that one party had committed an act of abuse against another is entitled to consideration in determining issues to which that fact may be relevant. Living arrangements established as the result of a protective order may have relevance in determining custody, use and possession, and support in subsequent litigation. That is *not* the concern of the court in fashioning appropriate relief in a domestic violence case, however. The concern there is to do what is reasonably necessary—*no more and no less*—to assure the safety and well-being of those entitled to relief.⁷⁹

Granting civil protection orders to prevent further violence to survivors of abuse without consideration of the impact of the order on other pending litigation is both legally required by state protection order statutes and is consistent with the legislative intent of VAWA. VAWA contained provisions designed to foster uniform and effective procedures for issuance and enforcement of protection orders. For example, VAWA made mutual protection orders issued without notice and an opportunity to be heard unenforceable across state lines. VAWA denied jurisdictions access to domestic violence funding if courts issued mutual protection orders or charged any court fees in relation to issuance or enforcement of protection orders. Full faith and credit for protection orders was established as part of VAWA. Additionally, through VAWA, many immigrant victims

⁷² NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE 36 (1994).

⁷³ *Katsenelenbogen v. Katsenelenbogen*, 775 A.2d 1249(Md. 2001).

⁷⁴ *Id.* For further discussion of *Katsenelenbogen v. Katsenelenbogen*, see Richard A. DuBose III, Comment, *Katsenelenbogen v. Katsenelenbogen: Through the Eyes of the Victim – Maryland’s Civil Protection Order and the Role of the Court*, 32 U. BALT. L. REV. 237 (2003).

⁷⁵ *Katsenelenbogen v. Katsenelenbogen*, 762 A.2d 198, 208 (1999).

⁷⁶ *Katsenelenbogen*, 775 A.2d at 1258.

⁷⁷ Relief only available to petitioners who can prove they have suffered abuse, usually by having been the victim of criminal acts committed against them by a family member.

⁷⁸ *Katsenelenbogen*, 775 A.2d at 1258.

⁷⁹ 775 A.2d. at 1258.

Protection Orders

were granted access to legal immigration status, removing barriers to accessing protection orders, criminal prosecution of their abusers, and the full range of relief open to citizens who are victims of domestic violence. The *Katsenelenbogen* court so clearly stated, all victims who qualify for protection orders must be able to receive them, irrespective of any potential effect on other litigation. This approach is correct, without regard to whether the subject of the other litigation or legal relief sought is immigration, divorce, or custody.

Federal Preemption Bars State Court Judges from Determining Outcomes of Immigration Cases

Concern that the issuance of a protection order may confer immigration status upon an undocumented victim of domestic violence is further unfounded as a matter of federal law. Regulation of immigration is exclusively a federal power, and therefore overrides any action by a state court or legislature.⁸⁰ Immigration law derives its authority from the Naturalization Clause of the Constitution. The textual requirement of the clause, that there be a single naturalization rule that is “uniform... throughout the United States,” has been interpreted to establish federal exclusivity.⁸¹ The Supreme Court, to the extent that it has considered the nature of immigration power, has repeatedly concluded that this power cannot be transferred to the states.⁸²

Since immigration falls within the exclusive jurisdiction of the federal government, a state family court’s decision to grant a protection order cannot, as a matter of law, determine the outcome of an immigration case. Furthermore, as discussed previously, while civil protection orders may provide *some* evidence to support a battered immigrant woman’s application for legal immigration status pursuant to VAWA, proof of domestic violence alone is insufficient.

Congressional intent to provide battered immigrants with unique immigration-related protective remedies is clear from the legislative history of VAWA.⁸³ Federal court precedent makes it abundantly clear that state courts cannot, and should not, as a matter of law, engage in immigration policy and decision-making.⁸⁴ Within the context of issuing protective relief for survivors of domestic violence, considering immigration issues in a protection order or other family law case would be unwise, inefficient, and could potentially result in family law decisions incorrectly based on immigration law. Such decision-making on the state level would be fundamentally discriminatory against battered immigrants, thereby eroding the anti-discrimination principle at the heart of the Constitution.⁸⁵

The total exclusivity of federal immigration is a fairly recent occurrence. Prior to the Immigration Act of 1990, state court judges had the authority, with a Judicial Recommendation Against Deportation (JRAD), to recommend against deportation.⁸⁶ JRADs were a way for the judiciary to review the decisions of the INS and to give an alien an independent means of review.⁸⁷ If the issuance of the JRAD was procedurally correct, it was binding and not subject to review.⁸⁸ In an effort to consolidate and regulate federal immigration power, Congress repealed the JRAD in 1990 and ended the ability of individual state court judges to directly affect the outcome of immigration cases. The revocation of the JRAD eliminated the power of state court judges to get involved in and materially control immigration matters. Furthermore, by removing JRAD

⁸⁰ Michael Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. Rev. 493, 509 (2001).

⁸¹ *Id.* at 544, n.215.

⁸² *Id.* at 532. See, e.g., *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (“The power to regulate immigration is unquestionably exclusively a federal power.”); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889) (stating that federal immigration power is “incapable of transfer” and “cannot be granted away”); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1876) (“The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.”).

⁸³ H.R. REP. NO. 103-395, at 26 (1993); Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women*, 10 AM. U. J. GENDER SOC. POL’Y & L. 95, 110 (2002).

⁸⁴ Wishie at 552.

⁸⁵ *Id.* at 553.

⁸⁶ Lisa Fine, *Preventing Miscarriages of Justice: Reinstating the Use of “Judicial Recommendations Against Deportation”*, 12 GEO. IMMIGR. L.J. 491, 506 (1998).

⁸⁷ *Id.*

⁸⁸ *Id.*

Protection Orders

authority from state court judges, Congress indicated its intention to empower the federal government with exclusive control over immigration. Against this background, it is clear that by issuing a protection order behalf of an undocumented battered immigrant woman or any non-citizen battered woman, the state court judge issuing that order is not, as a matter of federal law, engaging in an action that will control whether or not a battered immigrant can receive an immigration benefit.

Furthermore, it is important for courts to understand how abusers of immigrant victims use control over immigration status as an effective tool to perpetuate their power to continue abuse.⁸⁹ When courts allow abusers to raise the immigration status of victims in protection order or other family court proceedings, courts in effect support the abusers' use of this tool to exert power and control over their non-citizen victims. It is exactly this form of power and control over immigrant victims that VAWA's immigration provisions were designed to prevent. Virtually all undocumented immigrant victims of domestic violence who qualify under state law to receive a protection order will qualify for a form of VAWA or U-Visa related immigration relief. When abusers tell courts that victims are seeking protection orders to qualify for immigration relief that they otherwise would not be able to attain, this is simply not true. Often it is the case that the undocumented immigrant victim could have attained legal status through the abusive citizen or lawful permanent resident spouse, former spouse or parent, were not the abuser using power over the immigration case against the victim. Other immigrant victims of domestic violence qualify for immigration relief as crime victims, willing to cooperate with law enforcement in the criminal prosecution of their abusers.

VAWA and U-Visa immigration relief provide battered immigrant women a means to accessing legal immigration status without their abusers' help, cooperation or knowledge. However, to access this relief, immigrant victims must meet relatively high burdens of proof, with one element of required proof being proof of abuse. Civil protection orders are accepted as one form of proof of abuse by the batterer for VAWA self-petitions, cancellation of removal, and the U-Visa applications. While CPOs alone are insufficient to confer immigration status upon an undocumented battered woman, they may be used, along with other forms of evidence, in a battered women's application for legal status. C Nevertheless, in each instance, the victim must submit many other forms of evidence in order to receive an immigration benefit, which can include proof of a valid marriage, and of good moral character or proof of cooperation in a criminal investigation or prosecution.

Courts must not decline to offer immigrant victims and their children the critical life saving protection available through civil protection orders. There is no statutory basis for such a denial if an immigrant victim otherwise qualifies for a protection order. Immigrant victims of domestic violence crimes must have the same access to protection as all other family violence victims. Any other result would be contrary to the purpose of all state protection order statutes as well as, contrary to the express purpose of the federal VAWA immigration provisions.

⁸⁹ See generally Symposium, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. POVERTY LAW & POL'Y 245, 292-95 (2000). For further discussion see BREAKING BARRIERS, Dynamics Chapter.

Protection Orders

National Immigrant Women's Advocacy Project (NIWAP, pronounced *new-app*)
American University, Washington College of Law
4910 Massachusetts Avenue NW · Suite 16, Lower Level · Washington, DC 20016
(o) 202.274.4457 · (f) 202.274.4226 · niwap@wcl.american.edu · wcl.american.edu/niwap