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Development, History and Legislative Purpose of VAWA's "Any Credible Evidence" Statutory Requirements

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Introduction

Congress created special "any credible evidence" rules that apply to all evidence submitted by victims applying for relief and adjustment of status related to VAWA self-petitions, battered spouse waivers, VAWA cancellation of removal, VAWA suspension of deportation, T-visas, and U-visas. When creating the "any credible evidence" standard Congress recognized that spousal violence, crime victimization and trafficking uniquely affects a person's ability to explain or document her case. This is why it created the "any credible evidence" standard, the most flexible evidentiary standard codified in the immigration laws.

The "Any Credible Evidence" standard reflects an understanding of the difficulties crime victims and domestic violence victims have in overcoming and healing from the effects of trauma. The types of evidence that VAWA, T and U visa victims are required to submit to support their immigration cases often triggers resurgence in the victim of the trauma they experienced as crime victims. We understand that submitting proof of victimization and other evidence is necessary for the victim to receive approval of her VAWA, T or U visa case. However, we urge that DHS assure that all regulations and guidance issued minimize harm to victims. Harm to victims can arise in various ways. Examples include but are not limited to the following:

- Repeated retelling of the victimization or having to reprove their cases: Multiple submissions slow down the adjudication process and can cause pain, trauma and relived uncertainty for the victims.[1] At the same time it needlessly increases the workload for the Vermont Service Center, which continues to be understaffed.

- Requiring victims to obtain specific forms of documentation can place them in danger: Often abusers of immigrant victims and perpetrators of crimes against them maintain control of documents that victims need to use as evidence in their DHS case. Obtaining this evidence from abusers and crime perpetrators can be very dangerous. To the extent this can be done at all, the intervention of courts or other government authorities may be necessary, and require that the

[1] Maia Ingram, Jean D. McClelland, Valerie Hink, Jessica Martin, Montserrat Caballero, "The experiences of immigrant women who self petition for lawful permanent residence under the Violence Against Women Act" (Arizona State University, February, 2008)

perpetrator knows that the victim is seeking to secure the documentation. Requiring victims to obtain specific forms of information including but not limited to police reports, court records and statements on government letterhead can involve requiring a victim to travel back to a jurisdiction, country or a location in which the abuser or crime perpetrators lives or works. This too can place the victim in danger. Additionally, in some circumstances these authorities may have participated in the crimes committed against immigrant victims.

VAWA's "any credible evidence rules were designed to protect against these types of specific harms. All DHS regulations and DHS forms should be designed to encourage victims to prove their eligibility by the safest means possible for the victim. Victims who cannot safely access primary evidence should be able to submit secondary evidence, including their own personal statement, to prove their case. They should not be required to provide statements from civil authorities explaining the unavailability of primary evidence.

Application of Any Credible Evidence Rules to All Aspects of VAWA, T-Visa, U-Visa, Battered Spouse Waiver and INA Section 106 Applications

It is important that "any credible evidence" rules apply by statute, regulation or policy directive to all parts of a VAWA, T-visa, U-visa and INA Section 106 applicants' cases from filing through final adjudication and adjustment of status. When DHS is issuing regulations the preamble to the regulation and the regulation itself must contain language articulating "any credible evidence" options for submitting evidence to DHS. When DHS is issuing forms the instructions accompanying the form must explicitly include information encouraging applicants to submit any credible evidence to support their case and explain what options applicants have to gather and submit proof. Particularly in U-visa cases advocates and attorneys who are not immigration lawyers may be assisting victims in preparing applications. Clear language in the preamble helps to clarify any potential ambiguities in the regulatory language.

DHS, DOJ and HHS have all issued policies reflecting sensitivity to the particular problems crime victims have accessing evidence. In the context of domestic violence, sexual assault and crime victim cases these agencies have eased evidentiary rules and have generally not required submission of any specific piece of evidence. The most significant problem is the danger to the victim involved in having to risk renewed contact with an abuser, trafficker or crime perpetrator for purposes of securing needed evidence.

Since the application for adjustment of status will usually be filed between three and four years after a victim has been awarded a U or T visa or in the case of VAWA may need to be filed over 7 years after the VAWA case has been initially granted, victims will have moved on in rebuilding their lives. Many will have moved away from the jurisdiction in which the crime occurred to be closer to a support network of friends and family. Their ability to heal can be strengthened when they move away from the places that are constant reminders of the abuse. Any regulations or rule that requires the victim to return to the place where the crime occurred or where their perpetrator may be

present or where they may have to travel to a place where U.S. laws (e.g. protection orders) cannot protect them violate "any credible evidence rules."

Legacy INS first encountered this issue when implementing self-petitioning created by VAWA 1994. For purposes of proving good moral character INS was considering requiring VAWA self-petitioners to secure police clearance letters form every jurisdiction in which they had lived for more than 6 months. This would have required that victims who have moved to an undisclosed location in another city or state to escape abuse to return to travel back to the community in which their abusers lived to apply for and receive police clearance letters. Most jurisdictions required that an applicant apply in person at the police department to receive a police clearance letter. Requiring police clearance letters as the only method of proving that the applicant did not have a criminal history placed victims in danger. Senator Kennedy wrote to INS advocating that INS consider adding an alternative method of obtaining criminal record information that did not require victims to travel. When INS issued VAWA self-petitioning regulations they adopted this approach and provided an alternate safe way for victims to obtain documentation without having to travel away from the locations where they are currently living safely.[2]

Why The "Any Credible Evidence" Standard Was Created As Part of VAWA 1994

Congress created the most liberal evidentiary standard in the immigration laws for VAWA cases: the "any credible evidence" standard. *See, e.g.*, INA § 244(a)(3) (as in existence before 1997); INA § 240A(b)(2)(D), 8 USC § 1229(b)(2)("[i]n acting on applications under this paragraph, the Attorney General *shall* consider any credible evidence relevant to the application," emphasis supplied). Although Congress intended the Attorney General to interpret the "any credible evidence" standard, that interpretation must give the statute its intended ameliorative effect.[3]

The VAWA provisions of the INA eased the evidentiary standard for suspension applications filed by battered immigrants, recognizing that victims of abuse often lack access to evidence in their abuser's control and that immigrant victims of abuse may lack specific forms of corroborative evidence of abuse. Under the eased standard, the Attorney General must "consider ***any credible evidence*** relevant to the application" of a battered immigrant seeking suspension of deportation.[4] Congress created VAWA, U visa and T-visa protection for battered immigrants, trafficking victims and crime victims in recognition of serious and unique social, economic, and emotional difficulties they face. Under the Illegal Immigration Reform and Immigrant Responsibility Act amendments, Congress left this suspension remedy virtually unchanged and retained the mandate that, "[i]n acting on applications under this paragraph, the Attorney General *shall* consider any credible evidence relevant to the application."[5]

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[2] Volume 61 No 58 Federal Register March 26, 1996 page 13075
[3] *See* H.R. Rep. No. 395, 03rd Cong., 1st Sess., at 25.(1993).
[4] 8 U.S.C. § 1254(g) (emphasis added).
[5] INA § 240A(b)(2), 8 U.S.C. § 1229b(b)(2) (emphasis added).

VAWA 1994 created a special evidentiary standard that DHS and immigration judges were required to use when adjudicating cases of battered immigrants in VAWA self-petitioning, VAWA suspension of deportation and battered spouse waiver cases. VAWA 2000, TVPA 2000, and VAWA 2005 applied these same evidence rules to adjudication of U-visa, T-visa, VAWA cancellation of removal, and the full range of VAWA self-petitioning cases.[6] This standard was created and imposed on all VAWA related adjudications in a reaction to the position legacy INS took when implementing the 1990 battered spouse waiver amendments. In the context of battered spouse waiver legacy INS adopted a regulatory approach that was unworkable, insensitive and contrary to congressional intent.[7] In doing so, the INS of that time demonstrated a lack of understanding about and a lack of willingness to learn about the dynamics of domestic violence experienced by immigrant women. By regulation, the INS created an extremely narrow requirement that battered immigrant women submit an affidavit of a licensed mental health professional in order to prove extreme cruelty and qualify for the battered spouse provisions.[8]

This approach was not feasible for most battered immigrants. First, because of their abuser's control over all family funds, most had no access to the economic resources needed to pay for a mental health evaluation.[9] Second, few mental health professionals had the requisite domestic violence training, cultural competency and language abilities to conduct evaluations the INS required for proof of extreme cruelty in these cases.[10] Third, this approach mistakenly focused extreme hardship inquiry on the effect the domestic violence had on the victim instead of on the perpetrator and his abusive conduct.

The INS required battered immigrants applying for battered spouse waivers based on extreme cruelty to submit along with their application evidence from a licensed mental health professional.[11] Since the number of mental health professionals with training on domestic violence is very low and the number who also are bilingual and bicultural are even lower few battered immigrant spouses were able to obtain the required mental health professional evaluation.[12] Those living in communities where such mental health

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[6] Congressional Record, Vol.146, No.126 "Trafficking Victims Protection Act Of 2000--Conference Report" -- (Senate - October 11, 2000) [Page: S10192] "This legislation also clarifies that the VAWA evidentiary standard under which battered immigrants in self-petition and cancellation proceedings may use any credible evidence to prove abuse continues to apply to all aspects of self-petitions and VAWA cancellation as well as to the various domestic violence discretionary waivers in this legislation and to determinations concerning U visas."

[7] This provision in the regulations was criticized in comments on the interim regulations. *See* Martha Davis & Janet Calvo, *INS Interim Rule Diminishes Protection for Abused Spouses and Children*, 68 Interpreter Releases 665, 665-68 (1991).

[8] 8 C.F.R. § 216.5(e)(3)(iv)-(vii) (2001). It is important to note that this regulation still exists although overruled by statute in 1994. Neither DHS or INS have issued updated regulations reflecting this 1994 statutiory change. We assume this conflict between the statute and the regulations will be corrected when DHS issues regulatioons implementing the rest of the VAWA self-petitioning and immigratant victim work authorization regulations (INA Section 106) that reflect statutotory changes from VAWA 2000 and VAWA 2005 that have yet to be issued by DHS.

[9] Ignatius Bau & William R. Tamayo, *Immigration Marriage Fraud Amendments of 1986 (Marriage Fraud Act) and Other Related Issues, in* Domestic Violence in Immigrant and Refugee Communities: Asserting the Rights of Battered Women, 15 (Debbie Lee et al. eds., 1991). at 15.

[10] *Id.*

[11] 8 C.F.R. § 216.5(e)(3)(iv)-(vii).

[12] Ignatius Bau & William R. Tamayo, *Immigration Marriage Fraud Amendments of 1986 (Marriage Fraud Act) and Other Related Issues, in* Domestic Violence in Immigrant and Refugee Communities: Asserting the Rights of Battered Women, 15 (Debbie Lee et al. eds., 1991).

services existed were often barred access because they could not muster the financial resources to pay for the required mental health evaluation.[13] This mental health expert requirement focused on the victim's injuries rather than abuser's actions and severely limited the number of battered immigrants who had suffered extreme cruelty to be granted the relief.[14]

To correct this misinterpretation and ensure that similar regulatory errors did not happen with VAWA 1994, Congress mandated that the INS was required to accept "any credible evidence" in all VAWA and battered spouse waiver cases.[15] In the legislative history of the Violence Against Women Act of 1994's immigration provisions Congress stated:

> Recognizing legal invisibility of many immigrant survivors of domestic violence, the legislative history of VAWA 1994 stated that the INS was to accept "any credible evidence" and explicitly directed the "Attorney General to consider any credible evidence submitted in support of hardship waivers based on battering or extreme cruelty whether or not the evidence is supported by an evaluation by a licensed mental health professional."[16]

While Congress intended the Attorney General to interpret the "any credible evidence" standard, that interpretation must give the statute its intended ameliorative effect.[17] The INS General Counsel's office has articulated an "any credible evidence" standard in the context of self-petitions that reflects VAWA's purposes, which permit, but do not require, petitioners to demonstrate that preferred primary or secondary evidence is unavailable.[18] As the INS Office of the General Counsel has noted, the purpose of such flexibility is to take into account the experience of domestic violence:

> This principle recognizes the fact that battered spouse and child self-petitioners are not likely to have access to the range of documents available to the ordinary visa petitioner

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[13] *Id.*

[14] For these reasons, the Violence Against Women Act of 1994 ("VAWA 1994") imposed a new credible evidence standard for battered spouse waiver cases that forced the INS to accept any credible evidence of abuse. VAWA 1994 is part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796 (1994). This immigration provision of the VAWA is codified at INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4). The congressional history of VAWA 1994 stated that the INS was to accept "any credible evidence" and explicitly then existing the INS regulation directing the "Attorney General to consider any credible evidence submitted in support of hardship waivers based on battering or extreme cruelty whether or not the evidence is supported by an evaluation by a licensed mental health professional." H.R. Rep. No. 103-395. This credible evidence standard has since been applied to all immigration cases involving domestic violence and has been extended in the VAWA 2000 to apply in immigration cases involving immigrant crime victims. VAWA 2000, Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106.386 §§ 1504(a), INA § 240A(b)(2)(D); 8 U.S.C. § 1129b(b)(2)(D) § 1505(b)(1), INA § 237(a)(7)(B); 8 U.S.C. § 1227(a)(7)(B) § 1513(c); INA § 214(o)(4); 8 U.S.C. § 1184(o)(4).

[15] VAWA 1994, INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4).

[16] *See* H.R. Rep. No. 103-395, at 38.

[17] *See* H.R. Rep. No. 395, at 25.

[18] *See, e.g.*, 8 C.F.R. §§ 103.2(b)(2)(iii) and 204.1(f)(1). *See also See* Paul W. Virtue, Office of General Counsel, *"Extreme Hardship" and Documentary Requirements Involving Battered Spouses and Children*, Memorandum to Terrance O'Reilly, Director, Administrative Appeals Office (Oct. 16, 1998), at 6-7, *reprinted in* 76(4) Interpreter Releases 162 (Jan. 25, 1999) (hereinafter Virtue General Counsel Memo) at 7 ("[T]hat section [of the regulations] allows the battered spouse or child self-petitioner to submit 'any credible evidence' and does not require that the alien demonstrate the unavailability of primary or secondary evidence.").

> for a variety of reasons. Many self-petitioners have been forced to flee from their abusive spouse and do not have access to critical documents for that reason. Some abusive spouses may destroy documents in an attempt to prevent the self-petitioner from successfully filing. Other self-petitioners may be self-petitioning without the abusive spouse's knowledge or consent and are unable to obtain documents for that reason. Adjudicators should be aware of these issues and should evaluate the evidence submitted in that light.[19]

Thus, the General Counsel categorically states:

> A self-petition may not be denied for failure to submit particular evidence. It may only be denied on evidentiary grounds if the evidence that was submitted is not credible or otherwise fails to establish eligibility.[20]

The General Counsel also analyzes indicia of credibility. It may be "credible or incredible on either an internal or an external basis."[21] Evidence is internally consistent if it does not conflict with other evidence presented by the applicant. Evidence is externally credible when objectively corroborated. "Adjudicators should carefully review evidence in both these regards before making a credibility determination."[22] In addition, given the difficulties in collecting evidence confronting victims of domestic violence, adjudicators should give VAWA applicants "ample opportunity to add to the evidence submitted in support of the petition if necessary."[23] This approach sensibly and faithfully interprets the "any credible evidence" standards.[24]

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[19] Virtue General Counsel Memo, at 7-8.
[20] *Id.* at 7.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 8.
[24] The immigration courts and BIA have reflected the implementation of VAWA by acknowledging Congress' ameliorative intent, and reversing and remanding cases to IJs who evidence ignorance of domestic violence by misapplying the law or making adverse credibility determinations. See Matter of F-G-R (June 17, 1996) (Ex. C),24 Matter of D-G (Nov. 18, 1999) (Ex. D),24 Matter of L-H (April 4, 2002) (Ex. E)24.