

To: Jennifer Ho, Kevin Solarte, Michelle Aronowitz, Danielle Bastarache, Sam Pearson and Althea Forester, U.S. Department of Housing and Urban Development
 From: Leslye E. Orloff, National Immigrant Women's Advocacy Project¹
 Date: December 2, 2016
 Re: Housing Provider Determinations of Battering or Extreme Cruelty for I-130 Applicant Battered Spouses and Children

Background

Immigrant victims of domestic violence and trafficking face one of the most difficult battles for survival and recovery. Their ability to end domestic violence, flee their abusers and have their abusers brought to justice is hampered by language and cultural barriers, extreme isolation, a lack of information regarding their legal rights, and a lack of access to legal assistance.² Obtaining safe, secure, and permanent housing is crucial to a battered immigrant's ability to successfully escape the abuse and break the cycle of violence. Without this basic necessity, battered women and trafficking victims, having no other place to call home, often feel trapped within their abusive relationships or are forced to return to their abusers.³ Recognizing these hardships, Congress passed the Violence Against Women Act (VAWA) in 1994, which included specific provisions designed to help battered immigrants escape their abusive U.S. citizen or legal permanent resident spouses and parents.⁴

Over the course years in legislation passed in 1996, 2000, 2005 and 2013 Congress increasingly expanded protections for this group of immigrant victims of spouse abuse and child abuse. In February 2003 Congress instructed the Department of Homeland Security (DHS) and the Department of Housing and Urban Development (HUD) to work together in order to provide public and assisted housing benefits battered VAWA self-petitioners and battered spouses and children who are applicants for family based visa petitions (I-130). In May of 2005 DHS provided HUD information on how HUD was to communicate with DHS to verify cases of Battered Immigrant Women.⁵

Housing Providers will verify eligibility of VAWA self-petitioners and I-130 visa applicants through SAVE using "Institute Additional Verification" in the SAVE system, completing the memo field with "Verify VAWA Self-Petition" or "Verify I-130 Visa Petition" and uploading copies of the victims DHS forms (I-360 self-petition, I-130 family based visa petition, or I-797 Notice of Action).

¹ This memo was prepared based on the following publication: Leslye E. Orloff and Soraya Fata, *Qualified Alien Immigrant Victims of Domestic Violence Access to Public and Assisted Housing: The Need for HUD Issued Guidance* (June 2, 2014 and March 1, 2009)

² H.R. REP. NO. 103-395

³ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L.REV. 993-1002 (1993).

⁴ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 40001-702, 108 Stat. 1796, 1902-55 (1994); The reach of VAWA was expanded in 2000 to cover victims of human trafficking.

⁵ See Letter sent by Pearl S. Chang of the policy staff at the Department of Homeland Security, Citizenship and Immigration Services responsible for implementing VAWA to Patricia S. Arnaudo Office of Public Housing – Management & Occupancy Division, U.S. Department of Housing and Urban Development on May 5th 2005. (Letter discusses the fax back system that was replaced with verification at the USCIS office in Buffalo, New York)

The DHS response will take 3-5 business days and no longer than a month. When the housing provider receives confirmation of VAWA self-petitioning status from DHS the victim is eligible for public and assisted housing to the same extent as all other housing recipients and applicants. No proration shall be applied to VAWA self-petitioners. VAWA self-petitioners also receive the full range of protections available to any other victim of domestic violence, sexual assault, stalking or dating violence in house guaranteed by VAWA.

When housing providers receive verification from DHS regarding a battered immigrant's I-130 visa applicant, housing providers will need to determine whether the applicant has been "battered or subjected to extreme cruelty." Eligibility for housing benefits for battered immigrants with I-130 visa applications requires both:

- DHS verification of the I-130 and
- Evidence of battering or extreme cruelty

Determination of Battery or Extreme Cruelty Applies Only in Family Based Visa Petition I-130 Cases⁶

In I-130 family based visa petition cases after receiving verification of from DHS, HUD will need to determine whether the immigrant victim applying for public or assisted housing has been a victim of battering or extreme cruelty. The following discussion will assist HUD in making battering or extreme cruelty that are consistent with the definitions of this terminology used by other federal government agencies.

Battery or Extreme Cruelty Defined. The federal definition of a victim of family violence is "battered or subject to extreme cruelty."⁷ Battery or extreme cruelty should be defined by HUD consistently with the manner in which this term has been defined by other federal agencies interpreting the Violence Against Women Act (e.g. DHS, HHS, Social Security Administration).

An individual has been subjected to "battery" or "extreme cruelty" if they are a victim of:

- physical acts that resulted in, or threatened to result in, physical injury to the individual⁸;
- sexual abuse;⁹
- sexual activity involving a dependent child,

⁶ In I-360 VAWA self-petitioning cases this determination has been or is being made by the Department of Homeland Security's U.S. Citizenship and Immigration Services in the course of adjudicating the VAWA self-petition.

⁷ 42 U.S.C. § 608(a)(7)(C)(iii) (1996) (Family Violence Option and Hardship Exception); 608(a)(7)(C)(iii); Sec. 402. [42 U.S.C. 602] (a)(7)(B) For purposes of the Social Security Regulations, Domestic violence has the same meaning as the term "battered or subjected to extreme cruelty", as defined in section 408(a)(7)(C)(iii). See also Family Violence Option, State by State Summary, Legal Momentum to see which states have adopted the Federal definition of extreme cruelty.

⁸ See VAWA self-petitioning regulations 8 CFR 204.2 (c)(2)(vi); 8 CFR 216.5 (e) (3) (i). See also U visa regulations 72 Fed. Reg. No. 179, 53014, 53016, 53017, 53018 (September 17, 2007). 22 CFR 41.12. Under U visa regulations DHS in evaluating battering or extreme cruelty considers both the harm to the victim and the abuse inflicted by the perpetrator. DHS also takes into consideration pre-existing physical injuries or conditions that may have been aggravated by the abuse. Under both the U visa and the self-petitioning regulations DHS considers a series of abusive acts taken together may constitute substantial physical or mental abuse although none of the acts alone would rise to that level.

⁹ See 8 CFR 204.2 (c)(1)(vi). The qualifying abuse must rise to the level of "battery or extreme cruelty." The statutory definition of these terms includes sexual abuse, sexual exploitation, rape, molestation, forced prostitution, and incest (if the victim is a minor).

- being forced as the caretaker relative or a dependent child to engage in nonconsensual sexual acts or activities;
- threats of, or attempts at, physical or sexual abuse;
- mental abuse¹⁰; or
- neglect or deprivation of medical care.¹¹
- Harassment¹²
- Damage to property¹³
- Stalking¹⁴

Proving Battery or Extreme Cruelty – Any Credible Evidence Standard. Verifying battery or extreme cruelty should be conducted using the “any credible evidence”¹⁵ standard prescribed by Congress to all VAWA adjudicators. Using this standard will promote consistent adjudications with the manner in which DHS adjudicates matters.¹⁶ This standard requires a housing official to accept *any credible evidence* provided, including affidavits from the applicant¹⁷ or others to demonstrate battery or extreme cruelty.¹⁸ The housing provider, accepts all evidence provided as does DHS and other benefits granting agencies and then makes a determination about the credibility of the evidence provided. This allows victims the greatest flexibility to prove eligibility based in the safest means possible without requiring specific forms of evidence that the abuser may control and the victim may not be able to safely access.

¹⁰ Extreme cruelty includes “being the victim of any act or a threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation incest (if the victim is a minor) or forced prostitution shall be considered acts of violence. See VAWA self-petitioning regulations: 8 CFR 204.2 (c)(2)(vi); 8 CFR 216.5 (e) (3) (i). See also U visa regulations 72 Fed. Reg. No. 179, 53014, 53015, 53016, 53018 (September 17, 2007). 22 CFR 214.14(a)(8) and (b)(1). (Under the U-visa regulations, DHS defines “mental abuse” as “injury or harm to or impairment of the emotional or psychological soundness of the victim.” This encompasses a wide range of mental harm. USCIS considers both the severity of the injury suffered by the victim and the severity of the abuse inflicted by the perpetrator in its evaluation. Extreme cruelty can include the following conduct; intimidation and degradation, economic and employment-related abuse, social Isolation, sexual abuse, immigration-related abuse; possessiveness and harassment.

¹¹ 1996 Welfare Reform legislation contained special protections for battered women. The two special provisions designed to help battered women were the “hardship” exception to the 60-month limit on assistance under TANF and the Family Violence Option that allows states to offer TANF to battered women for longer than the 5 year maximum benefit. Under the Family Violence Option states can grant good cause waivers to battered TANF recipients allowing them to opt out of time limits and welfare to work requirements. See *Sec. 408(a)(7)(C)(iii)*.

¹² Domestic violence can include harassment, or “acts that, in and of themselves, may not initially appear violent but that a part of an overall pattern of violence.” 8 CFR 204.2 (c)(2)(vi); 8 CFR 216.5 (e) (3) (i). Such acts can include: following the victim; threatening the victim; calling the victim names; preventing the victim from leaving the room or from calling the police; interfering with the victim’s living; making unwanted telephone calls to the victim; moving within two blocks of the victim’s house; loitering in front of the battered women’s shelter where the victim is staying; or contacting the petitioners employer. See Klein, Catherine F. and Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, Hofstra Law Review, Summer 1993 vol. 21.

¹³ See Klein, Catherine F. and Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, Hofstra Law Review, Summer 1993 vol. 21.

¹⁴ See Klein, Catherine F. and Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, Hofstra Law Review, Summer 1993 vol. 21.

¹⁵ See 8 C.F.R. 204.2(c)(2)(i), (iii), (v), (vi), (vii), 8 C.F.R. § 244.9 (a).

¹⁶ See 8 C.F.R. 204.2(c)(2)(i), (iii), (v), (vi), (vii), 8 C.F.R. § 244.9 (a).

¹⁷ A victim’s story, told in her own words, is one of the primary methods of proving battery or extreme cruelty Both the Department of Homeland Security (DHS) and Health and Human Services (HHS) often considers a victim’s credible story as sufficient proof of abuse. Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 63 Fed. Reg. 61344, 61369 (November 17, 1997).

¹⁸ See 8 C.F.R. 204.2(c)(2)(i), (iii), (v), (vi), (vii), 8 C.F.R. § 244.9 (a).

The Interim Guidance issued by the Attorney General governing benefits adjudications in cases of immigrant victims instructs that:¹⁹

“an applicant may submit his or her own affidavit, under penalty of perjury (it does not have to be notarized), describing the circumstances of the abuse, and the benefit provider has the discretion to conclude that the affidavit is credible, and, by itself or in conjunction with other evidence, provides relevant evidence of sufficient weight to demonstrate battery or extreme cruelty.”

The Interim guidance further explains that:²⁰

“The benefit provider should bear in mind that, due to the nature of the control and fear dynamics inherent in domestic violence, some applicants will lack the best evidence to support their allegations (*e.g.*, a civil protection order or a police report). Thus, the benefit provider will need to be flexible in working with the applicant as he or she attempts to assemble adequate documentation. In determining the existence of battery or cruelty, it is important that the benefit provider understand both the experience of intimate violence and the applicant's cultural context. The dynamics of domestic violence may have inhibited the applicant from seeking public or professional responses to the abuse prior to applying for benefits needed to enable the applicant to leave the abuser. For many cultural groups, going to outsiders for help is viewed as disloyalty to the community and an embarrassment to the family. In some cultures, for example, women have been conditioned to accept the authority and control of their husbands. Thus, there may be little independent documentary evidence of the abuse; the benefit provider should be sensitive to the needs and situation of the abused applicant when reviewing allegations and evidence of abuse.”

However, while the housing official must accept any evidence, he or she has discretion to assign more or less weight to individual pieces of evidence.²¹ This approach allows victims to safely meet each proof requirement in their application allowing them to use evidence safely accessible to them. Some victims may have police reports or medical records while others may be so isolated that the only evidence they have access to is their own affidavit and perhaps affidavits of others who may have seen their injuries or witnessed extreme cruelty.²²

A housing official should not require police reports or orders of protection to verify the existence of battery or extreme cruelty, but can accept such evidence if submitted by the victim.²³ Written

¹⁹ Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 63 Fed. Reg. 61344, 61370 (November 17, 1997).

²⁰ Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 63 Fed. Reg. 61344, 61370 (November 17, 1997).

²¹ See INA 204 (a) (1) (J).

²² INA Section 204(a)(1)(J) the VAWA credible evidence standard was created as part of VAWA 1994 to assure that immigrant victims of domestic violence to allow battered alien who files an application for relief under VAWA or the battered spouse waiver protections to “support that application with any credible evidence.” See Report 103-395 Judiciary Committee House of Representatives 103d Congress 1st Session November 20, 1993 page 38. As a result DHS in examining evidence in VAWA and U visa cases permits due consideration to be given to the difficulties some victims experience in acquiring documentation, particularly documentation that cannot be obtained without the abuser's knowledge or consent.

²³ This approach has also been adopted by state protection order statutes, which do not require as a matter of law evidence of domestic violence beyond the victim's testimony about the facts of the abuse. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801,1045, 1046 (1993). *State statutes e.g.* Ariz. Rev.

verification or documentation of the abuse from third parties, such as domestic violence advocates or social service agencies eyewitnesses may also serve evidence of battery or extreme cruelty.

The following is a non-exclusive list of ways an applicant could establish battery or extreme cruelty. Note that the list is for illustrative purposes only given that a broad range of evidence can serve as proof of battery or extreme cruelty. An applicant is not required to use any of the examples below, so that an alternative form of evidence is acceptable as long as it demonstrates battery or extreme cruelty.²⁴ We recommend that applicant cite and document all applicable factors in their applications, since the presence or absence of any one factor is not determinative. Adjudicators should weigh all relevant factors presented and consider the in light of the totality of the circumstances.²⁵ The evidence must be evaluated on a case-by-case basis, taking into account the particular facts and circumstances of each case.²⁶

Evidence of battery or extreme cruelty may include, but is not limited to:²⁷

- A victim's statement, testimony, or affidavit outlining the facts of the violence or cruelty in each incident. The statement may include dates when each incident occurred (it does not need to include specific dates), discussion of the applicant's fears and injuries, and/or the effect that each abusive incident has had on the applicant and her/his family and children;²⁸
- Reports, statements, or affidavits from: police; judges; other court officials; medical personnel; school officials; psychologists and psychiatrists; clergy; social workers; any witness; or other social service agency personnel;²⁹
- Documentation establishing a pattern of abuse and violence.³⁰

Stat. §13-3602; Del. Code Ann. tit. 10 §1043, §1045 §1041; Fla. Stat. Ann. §741.30; Ga. Code Ann. §19-13-4, §19-13-3; 750 ILCS 60/214, 60/201; Me. Rev. Stat. tit. 19-A §4007, §4005; Mich. Comp. Laws Ann. §600.2950; N.Y. Fam. Ct. Act §842, 812; Tex. Fam. Code §85.021, 82.002.

²⁴ The definition of "battery and extreme cruelty" includes: being the victim of any act of a threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation incest (if the victim is a minor) or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under this rule. Acts or threatened acts that, in and of themselves, may not initially appear violent may be part of an overall pattern of violence. 8 C.F.R. § 204.2(c)(1)(vi) (2004).

²⁵ DHS and DOJ's Executive Office of Immigration Review (EOIR) both use this standard in cases of battered immigrants. See 64 FR 27856 (5/21/99) [adding §1240.58] EOIR regulations use this standard for measuring "extreme hardship." See also the DHS U-visa regulations 8 CFR 214.14 (b)(1) require that decisions are made as "case-by-case determinations." The U-visa rule sets out a number of factors that DHS will use to consider deciding whether physical or mental abuse occurred. Factors considered in U-visa cases include: the nature of the injury inflicted or suffered; the severity of the perpetrator's conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim. DHS makes it clear that "[n]o single factor is a prerequisite..." and "a series of abusive acts taken together may constitute ... physical or mental abuse although none of the acts alone would rise to that level." See U visa regulations 72 Fed. Reg. No. 179, 53014, 53018 (September 17, 2007). 22 CFR 214.14 (b)(1). ALSO CITE 9TH CIR HERNANDEZ CASE

²⁶ Id.

²⁷ Much of this list is derived from evidence routinely accepted by INS and state protection order courts in domestic violence cases. 8 C.F.R. § 204.2(C)(1). NOTE: Any of these types of information could be sufficient. Multiple types of evidence are NOT required.

²⁸ Breaking Barriers Manual, Chapter on Self-petitioning, page 17.

²⁹ <http://www.ssa.gov/pubs/10093.html>. When applying for a new social security number, one needs to submit, 1) a statement explaining why you need a new number, and 2) evidence documenting harassment or abuse. Evidence from third parties such as police, medical facilities or doctors, and describes the nature and extent of harassment, abuse or life endangerment is helpful. Other evidence may include court restraining orders and letters from shelters, family members, friends, counselors or others who have knowledge of the domestic violence or abuse.

³⁰ 8 C.F.R. § 204.2(e)(2)(iv).

- Statements of workers from a domestic violence shelter or other domestic violence programs attesting to the time the victim spent in the shelter or participating in the domestic violence program that they believe the applicant is a victim and facts they know of regarding the victim's case;³¹
- Medical records;
- Photographs of the visibly injured self-petitioner supported by affidavits;³²
- Temporary or Permanent restraining or civil protection orders;³³
- Other legal document showing legal steps taken to end the abuse.³⁴
- Evidence that the victim sought safe haven in a battered women's shelter or similar refuge;³⁵
- Police reports or records of telephone calls or visits to the victim's address. This may include; telephone calls to the police registering a complaint, a log of police runs made to the residence, copies of all tapes, reports written by officers responding to a call or other reports taken by police of violations including those not taken at the scene of the crime.
- Criminal court records if a batterer was arrested or convicted of any act of domestic violence or destruction of property relating to the victim;
- Evidence of property damage;
- Diagnostic reports from mental health professionals (Post-Traumatic Stress Disorder is NOT required);³⁶or
- Any other form of credible evidence about the history of abuser, battery, extreme cruelty, domestic violence or sexual assault;

Battery or Extreme Cruelty examples of "Any Credible Evidence"

The following is a non-exclusive list examples of "any credible evidence"³⁷ that an applicant could establish battery or extreme cruelty. The list is for illustrative purposes only. An applicant is not required to use any or any number of the

³¹ Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 63 Fed. Reg. 61344, 61369-70 (November 17, 1997). ("Evidence of battery or extreme cruelty (and in the case of a petition on behalf of a child, evidence that the applicant did not actively participate in the abuse) includes, but is not limited to, reports or affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, counseling or mental health personnel, and other social service agency personnel; legal documentation, such as an order of protection against the abuser or an order convicting the abuser of

committing an act of domestic violence that chronicles the existence of abuse; evidence that indicates that the applicant sought safe-haven in a battered women's shelter or similar refuge because of the battery against the applicant or his or her child; or photographs of the visibly injured applicant, child, or (in the case of an alien child) parent supported by affidavits. An applicant may also submit sworn affidavits from family members, friends or other third parties who have personal knowledge of the battery or cruelty.")

³² Id.

³³ Id.

³⁴ Id.

³⁵ Id.

³⁶ VAWA 1994, Title IV of the Violent Crime Control and Law Enforcement Act of 1994; Pub.L. 103-322, Stat. 1902-1955 (September 13, 1994)." See Report 103-395 Judiciary Committee House of Representatives 103d Congress 1st Session November 20, 1993 page 38. (VAWA 1994 ended the practice of immigration officials requiring evidence from licensed mental health professionals and in doing so stated that this practice "focuses the inquiry on the effect of the cruelty on the victim rather than on the violent behavior of the abuser, and it may be discriminatory against non-English-speaking individuals who have limited access to bilingual mental health professionals.")

³⁷ See 8 C.F.R. 204.2(c)(2)(i), (iii), (v),(vi), (vii), 8 C.F.R. § 244.9 (a).

examples below. An alternative form of evidence is acceptable as long as it shows battery or extreme cruelty³⁸. A broad range of evidence can serve as proof of domestic violence. This evidence may include, but is not limited to:

<ul style="list-style-type: none"> • Reports, statements, or affidavits from: <ul style="list-style-type: none"> ○ police ○ judges ○ other court officials ○ medical personnel ○ school officials ○ psychologists and psychiatrists ○ clergy ○ social workers ○ any witness ○ other social service agency personnel • Diagnostic reports from mental health professionals <ul style="list-style-type: none"> ○ Post-Traumatic Stress Disorder is NOT required³⁹ • Statements of workers from a domestic violence shelter or other domestic violence programs attesting to the time the victim spent in the shelter or participating in the domestic violence program that they believe the applicant is a victim and facts they know of regarding the victim’s case 	<ul style="list-style-type: none"> • Photographs of the visibly injured self-petitioner supported by affidavits • Documentation establishing a pattern of abuse and violence⁴⁰ • A victim’s statement, testimony, or affidavit outlining the facts of the violence or cruelty in each incident <ul style="list-style-type: none"> ○ The statement may include dates when each incident occurred (it does not need to include specific dates) ○ Discussion of the applicant’s fears and injuries ○ The effect that each abusive incident has had on the applicant and her/his family and children • Temporary or Permanent civil protection or restraining orders • Criminal protection orders or bond orders • Other legal document showing legal steps taken to end the abuse • Evidence that the victim sought safe haven in a battered women’s shelter or similar refuge 	<ul style="list-style-type: none"> • Police reports or records of telephone calls or visits to the victim’s address. This may include: <ul style="list-style-type: none"> ○ telephone calls to the police registering a complaint ○ a log of police runs made to the residence ○ copies of all tapes ○ reports written by officers responding to a call, ○ or other reports taken by police of violations including those not taken at the scene of the crime • Criminal court records if a batterer was arrested or convicted of any act of domestic violence or destruction of property relating to the victim • Any other form of credible evidence about the history of abuser, battery, extreme cruelty, domestic violence or sexual assault • Medical records • Evidence of property damage
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³⁸ The definition of “battery and extreme cruelty” includes:
 being the victim of any act of a threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation incest (if the victim is a minor) or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under this rule. Acts or threatened acts that, in and of themselves, may not initially appear violent may be part of an overall pattern of violence. 8 C.F.R. § 204.2(c)(1)(vi) (2004).

³⁹ VAWA 1994, Title IV of the Violent Crime Control and Law Enforcement Act of 1994; Pub.L. 103-322, Stat. 1902-1955 (September 13, 1994).

⁴⁰ 8 C.F.R. § 204.2(e)(2)(iv).