

# WEBINAR

## Battered Spouse Waiver: Immigration Relief Available for Abused Immigrant Spouses of U.S. Citizens

November 18, 2021

The logo for NIWAP (National Immigration Women's Advocacy Project) is located at the bottom left of the slide. It consists of the letters "NIWAP" in a white, serif font, set against a dark red background that has a jagged, mountain-like top edge.

NIWAP

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# Introductions



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**Judge Rosemary Collins**  
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# **Poll:** Let's see who is on the webinar with us

**Please check the box that best describes you:**

- A. Victim Advocates and coalition staff
- B. Family Law Attorneys
- C. Judge/Court staff
- D. Prosecutors, law enforcement & their victim witness staff
- E. Other – type in the chat

**POLL**

# Battered Spouse Waiver: History, Purpose and Overview

# **Poll:** Have you worked with an immigrant survivor who

**Please check all boxes that apply:**

- A. Had a “green card” that ended two years after it was issued
- B. Told you that divorce would lead to losing their legal immigration status
- C. Was afraid to separate from their spouse because they needed his signature to maintain their legal immigration status
- D. Whose abusive citizen spouse had filed immigration papers for the victim that were pending

**POLL**

## Marriage Fraud Act Created Conditional Permanent Residence?

- 2-Year conditional permanent residence status for
- Immigrant spouses who apply for lawful permanent residence (LPR) based on marriage to a U.S. citizen
- For marriages of less than 2-years on approval date
- Immigrant and citizen spouses must jointly file
  - “Petition to Remove Conditions on Residence” (Form I-751) in order to extend immigrant spouse legal status to full lawful permanent residence

# When Does Conditional Residence Not Apply?

- Does not apply to marriages of longer than 2 years at the time of approval
  - Example: immigrants married LPRs
  - If close to 2-years may consider delay
    - Safety considerations
    - Role of family courts



How might family courts  
play a role?



# Immigration Relief for Abused Spouses

- Congress created two forms of immigration relief for spouses of citizens and lawful permanent residents
  - Battered spouse waiver -1990
    - Abuser filed an immigration case
    - Abusive spouse and immigrant spouse appeared together at an interview
    - Abused spouse received 2-year conditional residence
    - Joint petition/battered spouse waiver needed to attain full lawful permanent residence
    - Generally, spouses of citizens
  - VAWA self-petition -1994
    - Victim filed their own immigration case
    - Spouses of citizens and lawful permanent residents

## Battered Spouse Waiver and VAWA Self-Petition – *Both Help Same Victims*

- Help spouses, former spouses, and bigamy victim spouses
- Who are subjected to battering or extreme cruelty by
  - U.S. Citizen or lawful permanent resident spouse
- Include children of abused immigrant spouse in the application
- For abused immigrant spouses who would have “green cards” but for the abuse

# Why Did Congress Create the Battered Spouse Waiver?

- 1986 Marriage Fraud Act amendments imposed 2-year conditional residence requirement when:
  - Citizen filed papers seeking lawful permanent residence for immigrant spouse
  - Marriage under two years duration at the time case was approved
- Created 2-year conditional green card
  - Required joint request for full lawful permanent residence at the end of two years
  - Locked battered immigrant spouses in abusive marriage

## Legislative History of Battered Spouse Waiver (10/2/1990)

- Rep. Louise Slaughter
  - Provides an immigrant spouse in a *bona fide* marriage, an escape from the beatings, the insults and the fear
  - The law has acted as a deterrent to battered foreign spouses who want to leave their spouses but fear deportation if they do so
  - Stops divorce proceedings from bringing the foreign spouse back into physical proximity of the abuser with potentially serious consequences
  - Abused spouses should be sent a clearer signal that there is an escape from their dilemma and that the abusing spouse does not have complete control over their lives
- Rep. Benjamin Gillman
  - It would seem unconscionable that any human being should be required by our laws to remain in a situation in which they are abused in order to remain in legal status

# Battered Spouse Waiver

- Helps immigrant spouses with 2-year conditional residence (green cards)
  - Whose citizen spouse filed a family visa petition for them
- Requires proof of:
  - Battering or extreme cruelty to immigrant spouse or immigrant spouse's child or step-child
  - Good faith marriage
- Waives
  - Joint filing requirement with abusive citizen spouse
  - Two-year wait to full lawful permanent residence

# Battered Spouse Waiver Case Process

- Battered immigrant spouse eligible if:
  - Still married
  - Marriage has been terminated
- VAWA confidentiality protections
  - Abusive spouse not involved or present at interviews
- Any credible evidence rules apply
  - Cannot prioritize “primary” evidence in adjudications
  - Victim submits declaration similar to VAWA self-petition
  - Any other additional evidence of
    - Battering and/or extreme cruelty
    - Good faith marriage

# Comparison BSW and VAWA Self-Petition

## Battered Spouse Waiver

- Citizen/LPR spouse *filed immigration petition* for abused spouse and their children (together or within 90 days)
- Victim files the BSW
- Proof:
  - Battering or extreme cruelty
  - Spouse or their child/step-child
  - Good faith marriage
  - Evidence of abuser's status

## VAWA Self Petition

- Citizen/LPR *spouse never filed or withdrew immigration petition* for abused spouse and their children
- Victim files self-petition
- Proof:
  - Battering or extreme cruelty
  - Spouse or their child/step-child
  - Good faith marriage
  - Evidence of abuser's status
  - **Good moral character**
  - **Residence with the abuser**



# Proof of Battered Spouse Waiver Eligibility

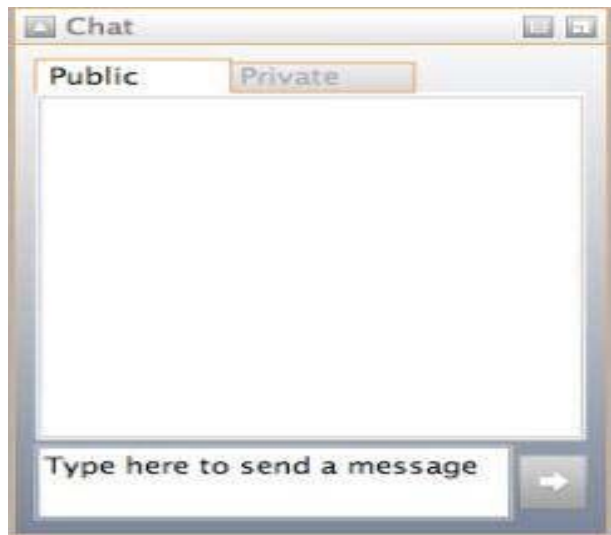
What types of actions by the perpetrator fall into the definition of battering?



# “Battering” Crimes

- VAWA: felony or misdemeanor crimes of violence
  - Element of the offense, the use, attempted, use, or threatened use of physical force
  - Felony that by its nature involves substantial risk of physical force
  - Against a person or property of a person
- Examples:
  - Physical abuse
  - Domestic violence
  - Child abuse
  - Sexual assault
  - Stalking
  - Dating violence
  - Other acts covered under state domestic or family violence laws
  - Includes threats and attempts

What types of actions by the perpetrator fall into the definition of extreme cruelty?



# “Extreme Cruelty”

- Anything criminal = battering rather than extreme cruelty
- Coercive control = extreme cruelty
  - Strategies designed to establish domination and retain control over another person using
    - Fear, dependence, and deprivation of basic rights and liberties
- Examples of Extreme Cruelty
  - Intimidation
  - Degradation
  - Isolation
  - Controlling, monitoring another’s movements
  - Immigration-related abuse
  - Cyber violence
  - Economic abuse
  - Threats to harm children, pets, family members
  - Withholding food, shelter, medicine, sleep deprivation
  - Religious persecution

# What Adjudicators Look For As Evidence of Extreme Cruelty

- Dynamics of the relationship
- Victim's sense of well being before the abuse
- Specific acts during the period of abuse:
  - Verbal abuse
  - Possessiveness
  - Social Isolation
  - Humiliation/degradation
  - Acts of coercive control
  - Pattern or intent of perpetrator to obtain compliance from or control over the victim
- Victim's quality of life and ability to function after the abuse

# Immigration Law Definition of Domestic Violence (Battering or Extreme Cruelty)

## Battering

- Physical violence against
  - Spouse/intimate partner
  - Child
- Use of a weapon
- Sexual abuse & assault
- Stalking
- Other acts defined as domestic violence under state law
- Attempts or threats to do any of these actions

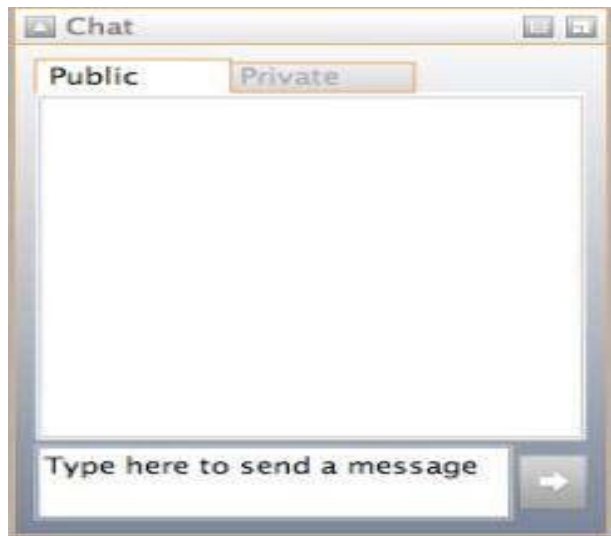
## Coercive Control = Extreme Cruelty:

- Strategies designed to retain control or establish domination through fear, dependence, deprivation, isolation, immigration related abuse
- Deprivation of basic necessities
- Controlling regulating, monitoring the victim
- Compelling through force, intimidation threats to abstain or engage in conduct against victim's will

## Extreme Cruelty:

- Withholding medicine or medical care
- Adultery with a minor
- Financial abuse, seeking to destroy victim's credit
- Accusations of infidelity
- Using children as a tool
- Emotional abuse causing physical or psychological harm

How would you prove  
battering or extreme  
cruelty?





# Proof of Battering or Extreme Cruelty

- Affidavits of:
  - Victim, witnesses, family members
  - Professionals: victim advocates, social workers, health care providers
- Photos
  - Injuries
  - Physical changes in victim over time
- Court orders: protection orders, findings in custody, divorce, child welfare, other court cases
- Police reports
- Medical records
- Forensic evaluations and mental health records

How and in what types of cases can state court judges help document extreme cruelty?





USCIS will examine the evidence that marriage was entered into good faith with extra scrutiny when a divorce or annulment has taken place.

# Good Faith Marriage

*Standard of proof:* whether at the time of entering into the marriage, the couple intended to establish a life together

- Intent *at the time of the marriage*
- Their subjective state of mind
- May or may not have a basis in love
- Did they intend to establish a life together?
- Separation, even after a short marriage
  - Is not proof that marriage was fraudulent

# Heterosexual and Same-Sex Marriages Treated Equally Under the Law

- Some immigrants in same-sex marriages come from countries where hiding sexual preference was required to avoid death
- People in same-sex marriages may have had previous heterosexual marriages and had children
- Male victims due to abuse and shame may be less likely to:
  - Seek police intervention or press charges
  - Have friends who know about sexual preferences particularly bi-sexuality

## **Poll:** What facts provide evidence of a good faith marriage?

**Please check all boxes that apply:**

- A. Children
- B. Battering or extreme cruelty
- C. Love letters
- D. Coercive Control
- E. Residence with the abuser

**POLL**

# Evidence of Good Faith Marriage

- Children
- *The battering or extreme cruelty*
- Coercive Control
- Residence with the abuser
- Evidence about:
  - How the parties met
  - How the relationship developed
  - Love letters, texts, social media posts
  - Burden of proof higher for shorter marriages
- No need for ongoing documentation from the time of marriage to:
  - Time of separation or present date

# Why Self-Petitioners May Lack “*Traditional Evidence*” of Good Faith Marriage

- 1998 Paul Virtue memo recognizes problems for battered women safely accessing documentary evidence
- Victim may have fled the marital home
- Abusive spouse
  - Controls finances, important documents
  - Did not put the victim spouse’s name on the lease, mortgage, utility bills, titles to cars, insurance
- Obtaining *traditional evidence* can tip off the perpetrator
- Lack of *traditional evidence* can be corroborating evidence of:
  - Battering
  - Extreme cruelty
  - Coercive control
- Civil protection orders and family court discovery can be used to obtain traditional evidence



In what types of cases  
could would a state court  
judge document the  
existence of a marriage?



## Common Law Marriage Recognized Under Immigration Law Where Valid Under State Law

- A common law marriage is one in which a couple lives together for a period of time and considers themselves as "married," but without ever going through a formal ceremony or getting a marriage license.
- 8 states and the District of Columbia
  - DC, CO, IA, KS, MT, NH, RI, TX, UT

# VAWA Confidentiality Protections for Battered Spouse Waiver Cases

# VAWA Confidentiality “Section 384” Protections and Prohibitions

- Prohibits making adverse determinations based on information from prohibited sources
  - Member of batterer's family/household
  - Spouse/parent/adult child who battered or subjected to extreme cruelty the noncitizen or their child
  - Member of family/household of the individual who battered the non-child or subjected the child to extreme cruelty
- Prohibits disclosure of information about
  - The existence of the case
  - Information contained in the case
  - Case outcomes

# VAWA Confidentiality Protections For Survivors of Abuse Including:

- Battered spouses, children or parents of a U.S. Citizens
- Battered spouses and children of lawful permanent residents/green card holder
- Conditional permanent residents who apply to become lawful permanent residents based on
  - A waiver for *hardship* or
  - Battered/extreme cruelty

# In Both VAWA Self-Petitions and Battered Spouse Waiver Cases:

- USCIS Adjudicators Cannot
  - Use “squeal” letters from the abuser, the abuser's family or the abuser's household members
  - Cannot use statements made by the abuser to USCIS
- USCIS Adjudicators can you use?
  - Information from an independent, 3rd party source
  - Not fruit of the poisonous tree
  - Information from the self-petitioner (new and historical)

# VAWA Confidentiality Prohibits Disclosure of

- Any information about
  - VAWA self-petitions
  - VAWA cancellation of removal
  - VAWA suspension of deportation
  - Battered spouse/child waivers
    - Hardship waivers
  - Abused spouse Sec. 106 work authorization
  - U visas
  - T visas
  - Continued presence
- “Disclosure prohibition includes information as basic as the fact that there is a filing”

# Limited Exceptions to Disclosure

- Require recipient to continue to protect the confidentiality of the information
  - Census information
  - Legitimate law enforcement or national security purpose
  - Judicial review of victim's immigration case
  - Applicant waives the confidentiality
  - Public benefits victim seeks
  - Congressional oversight authority



What are the implications  
for family courts?



# How BSW Cases Obtain VAWA Confidentiality Protection

- Victim files a Battered Spouse Waiver
- Within 72 hours assigns receipt number & sends file to California or Vermont Service Centers who will
  - Determine and note safe address
  - Enter the case into the Central Index System with a “384” code alert

Differences in How Cases are  
Adjudicated:  
Battered Spouse Waivers  
vs. VAWA Self-Petitions

# NIWAP BSW Survey April (2016)

- 391 Battered Spouse Waiver Cases in 49 states
- 44% had children included in their applications
- Higher rates of battering and sexual assault than VAWA self-petitioners
  - Battering & sexual assault
    - BSW 68%; VAWA 38%
  - Battering
    - BSW 29%; VAWA 45%
  - Extreme Cruelty alone
    - BSW 4.1%; VAWA 8.1%

# Victims Who Stay With Abusers Until BSW Decided: 19% - Reasons for Staying

- Economic dependence 82%
- Fear of deportation 65%
- Fear BSW would be denied 43%
- Fear abuser would not sign joint petition 42%
- Fear of losing children 40%
- Fear of losing work authorization 37%

# Abuse Experienced by Victims Who Stayed

- Battery and/or sexual assault incidents, threats, attempts 98%
- Economic abuse 95%
- Stalking 65%
- Abuser took or destroyed victim's passport 38%
- Threats, attempts or incidents of child kidnapping 27%
- This abuse happened daily 32% or weekly 44%

# Battered Spouse Waiver Applicant's Justice System Involvement

- 59% called police for help and filed police report
- 55% obtained protection orders
- 55% sought divorce
- 40% offered assistance in a criminal case
- 34% sought custody
- 31% sought child support
- 59% sought justice system help before filing

# How Adjudication of BSWs Differs From VAWA Self-Petitions

- 43% adjudication wait times of 1-2 years when VAWA self-petitions were under a year
- Adjudication times were longer when adjudicators required a 2<sup>nd</sup> interview
  - 1<sup>st</sup> interview prior to green card with abusive spouse
- Approval rates without interview varied by service center: CA 34% vs. VT 66%
- Intensive training of VAWA Unit adjudicators only
  - District office adjudicators conducting interviews often do not understanding that regulations are out of date with statute



# VAWA Unit Officers Receive Intensive Training In:

- Domestic violence (types, recognition and evidence)
- Requirements for immigrant relationships
- Victim-based eligibility requirements
- Confidentiality issues
- Any credible evidence requirement and restrictions

# Any Credible Evidence in Battered Spouses or Child Waiver Cases

- What evidence is credible decided on a case-by-case basis
- USCIS cannot give more weight to primary evidence and evidence provided in court documents, medical reports, police reports, and other official documents
- Conditional residents are encouraged, **but not required**, to provide affidavits from more than one person
- Are afforded ample opportunity to add to the evidence submitted in support of the waiver
- Adjudicators determine each case based on the facts and circumstances of that case only, taking into account the limitations that pertain to a battered spouse or child

# BSW Interview Challenges

- Lack of training and understanding of domestic violence dynamics - Interviewer
  - Minimized the abuse 46%
  - Asked why victim stayed or used staying as evidence that abuse did not occur 51%
- Questioned validity of the marriage when
  - Abuser had been arrested for domestic violence 30%
  - Case contained evidence of physical or sexual assault 27%
  - Parties had children in common 22%
  - Victim was granted a protection order 10%
- Re-traumatized victims during interviews 38%

## “Any Credible Evidence” of the Standard of Proof Applies to:

- Good faith marriage
- Battery and/or extreme cruelty

*“Persons who have been subjected to such treatment may have difficulty in discussing their experiences. While it is almost always necessary to discuss the abusive events with the applicant, such discussions should be carried on in a professional manner which does not further abuse the applicant by forcing him or her to unnecessarily re-live abusive episodes.”*

## Violations of Any Credible Evidence Rules

- Not following VAWA any credible evidence rules
  - Using absence of police reports against victims 48%
  - Requesting/requiring medical records 33%
  - Requesting/requiring mental health evaluations 11%
- VAWA confidentiality violations
  - Reliance on perpetrator provided information

If you are representing a battered spouse waiver applicant, how do you prepare your case to overcome these challenges?



# Best Practices for Choosing Among a Battered Spouse's Waiver Options

- ✓ Battered spouse waiver
- ✓ Divorce
- ✓ Extreme Hardship

# Which box do you check?

## *Waiver or Individual Filing Request*

My conditional residence is based on my marriage or my parent's marriage to a U.S. citizen or lawful permanent resident, I am unable to file a joint petition with my spouse or my parent's spouse, because:

- 1.c.  My spouse is deceased.
- 1.d.  My marriage was entered in good faith, but the marriage was terminated through divorce or annulment.
- 1.e.  I entered the marriage in good faith, and, during the marriage, I was battered, or was the subject of extreme cruelty, by my U.S. citizen or lawful permanent resident spouse.
- 1.f.  My parent entered the marriage in good faith, and, during the marriage, I was battered, or was subjected to extreme cruelty, by my parent's U.S. citizen or lawful permanent resident spouse or by my conditional resident parent.
- 1.g.  The termination of my status and removal from the United States would result in an extreme hardship.



# Standard Process for Moving from 2-Year Conditional Residence to Lawful Permanent Residence

# Timeframe is Important

- Couples who are still married must “jointly” file to remove conditions within 90 days of the date 2-year LPR status expires
  - If timely filed status automatically extended
  - Limited exceptions for missing the deadline
  - Spouse must sign the application
- If immigrant spouse does not file
  - Becomes deportable
  - Unless can show extraordinary circumstances

# Evidence for Joint Petition

1. Proof the marriage was legal in the jurisdiction where it took place
2. Proof the marriage has not been terminated
  - If viable marriage = they both sign
  - If they are separated or divorce proceedings = submit pleadings, will get RFE for spouse's signature
3. Proof that marriage was not entered to get lawful permanent resident status
4. Proof that no fee was paid
5. USCIS may interview the couple



An immigrant spouse can file a waiver on multiple grounds.



What if divorce proceedings have been or will be initiated but the divorce will not be final before the expiration of conditional residence?

# Waiver is Available if No Longer Married

- Should file waiver at any time before, during, or after the 90-day window
- Must show:
  1. Good faith marriage but the marriage has terminated, or spouse died; and/or
  2. Good faith marriage , but the conditional resident or her child was subject to battery or extreme cruelty; and/or
  3. Termination of conditional residence would cause extreme hardship

# Differences Among Options: VAWA Confidentiality

- Red flag on case for non-reliance on perpetrator provided information
- No release of information about case
- Applies to:
  - Battered spouse waiver
  - Hardship waiver filed by abuses spouse
  - *Does not apply to divorce waiver*

## Some Public Benefits Access for VAWA Self-Petitioners & Battered Spouse Waiver Applicants

- Public and assisted housing
- Post-secondary educational grants & loans
- Access to most subsidized child-care
- Receive payments for providing foster care
- FEMA individual family grants and disaster unemployment
- Job opportunities for low-income individuals
- Adoption assistance
- Low income and residential energy assistance programs
- Supportive housing for the elderly or disabled
- Disability benefits
- Assistance to developmentally disabled
- Social services block grant programs



# Federal Means-Tested Public Programs Have Most Limited Immigrant Access:

- **TANF**
  - 5 yr. bar if entered the U.S. after August 22, 1996
- **Medicaid and Child Health Insurance Program**
  - Health Care reform opened-up access to immigrants who are “lawfully present”
- **Food Stamps**
  - “Qualified Immigrants” 5-year bar post August 22, 1996, and children
- **SSI**
  - Lawful permanent residents only if 40 quarters or work credit + “qualified immigrant” status and 5-year bar if entered the U.S. after August 22, 1996
  - Refugee
  - Trafficking victim
  - Veteran and “qualified immigrant” spouses, children

# Differences Between Waiver Options: Public Benefits Access

## **Battered Spouse Waiver**

- 5-year bar to federal means-tested public benefits
- Get access to state funded benefits offered to qualified abused immigrants (8 states)
- BSW sufficient for 1 year deeming exception
- BSW approval = permanent exemption from deeming

## **Divorce or Hardship Waivers**

- 5-year bar to federal means-tested public benefits
- No access to state funded qualified abused immigrant benefits
- I-130 petition and prove battering or extreme cruelty
- Must obtain court order recognizing abuse for permanent exemption from deeming

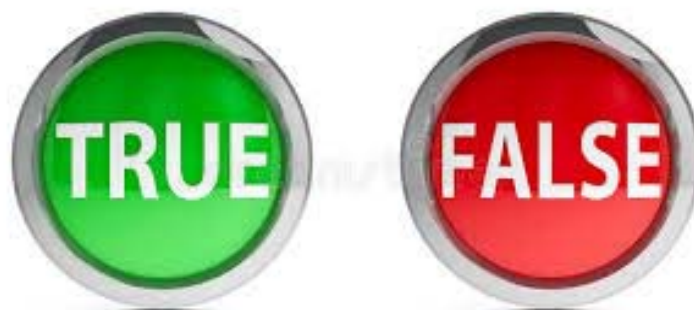
If during a USCIS interview a victim who initially filed jointly, notifies the adjudicator they are applying for battered spouse/child waiver adjudicators should:

- Inform the survivor that they will need to withdraw the jointly filed I-751 and re-file a new 1-751 based on abuse or extreme cruelty
- Ask the survivor to provide a written statement requesting the withdraw
- Survivor will provide a withdrawal acknowledgment letter with a copy of their written statement
- Identify a safe address
- Shift to “credible evidence standard”

# If Conditional Resident is a Battered Spouse

- Can file battered spouse waiver while still married
- While still living with abuser
  - VAWA confidentiality laws keep abuser from being able to learn that the case was filed





A battered immigrant spouse can file a VAWA self-petition when they have also filed a battered spouse waiver.



Under what circumstances  
would you want to also file a  
VAWA self-petition?

# Considerations

- Where is the application adjudicated?
- What happens if it is denied?
- What is the burden proof?
- Who is making the decision?
- Is my client protected by VAWA Confidentiality?

What types of orders could a battered immigrant spouse seek from a family court that would support their battered spouse waiver application?





# Resources, Training and Technical Assistance

# COP Family Law Outreach

## Opportunity for Family Law Attorneys

- Monthly peer engagement to share best practices, experiences, and strategies on how to better represent immigrant survivors in family court cases.
- Led by NIWAP's expert faculty and partners
- Password-protected website with additional materials only for COP members

- Register here:

<https://www.surveymonkey.com/r/TVGDCCV>

# COP Advocate Outreach

## Opportunity for Victim Advocates

- One-hour interactive webinars where advocates will learn best practices from colleagues and other subject matter experts
- Access to a password-protected website with additional materials only for COP members
- Register here:  
<https://www.surveymonkey.com/r/BBHR3X3>

# Join the National Judicial Network



- If you are a judicial officer -- *Please Join the National Judicial Network*  
<https://niwaplibrary.wcl.american.edu/national-judicial-network>
- Register here: <https://www.surveymonkey.com/r/VGY9VJM>

# Training Materials and Tools

- Recording of this webinar and materials <https://niwaplibrary.wcl.american.edu/bsw-training-materials>
- Materials include:
  - Battered spouse waiver legislative history
  - All battered spouse waiver related government publications
  - Training materials, evidence lists, manual chapters, comparison tools, articles discussion battered spouse waiver cases
  - Research on battered spouse waivers

# Technical Assistance

- Contact NIWAP for free technical assistance
  - Call: 202-274-4457
  - Email: [info@niwap.org](mailto:info@niwap.org)
- Materials library:  
<http://niwaplibrary.wcl.american.edu>
  - Contains over 2,000 free resources related to immigrant crime victims
- Subscribe to NIWAP's newsletter:  
<https://secure.campaigner.com/CSB/Public/Form.aspx?fid=1682905&ac=fohe>

# Evaluations

