



U.S. Immigration
and Customs
Enforcement

February 1, 2007

MEMORANDUM FOR All OPLA Chief Counsel

FROM: William J. Howard 
Principal Legal Advisor

SUBJECT: VAWA 2005 Amendments to the Immigration and Nationality Act and 8 U.S.C. § 1367.

On January 5, 2006, President Bush signed into law the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat 2960 (2006) (VAWA 2005). This lengthy bill contained a variety of provisions affecting the work of the Department of Homeland Security (DHS), and particularly U.S. Immigration and Customs Enforcement (ICE). These new amendments and provisions of law affect a variety of cases, including cases not specifically involving domestic violence.

This memorandum provides information on the significant changes made primarily by title VIII of VAWA 2005 to the Immigration and Nationality Act (INA) and other related provisions of law, and identifies the corresponding practice considerations and decisions facing ICE attorneys. For example, special care should be taken to comply with confidentiality provisions.

Because the new amendments and provisions of law are both technical and numerous, background information such as legislative history has been placed in endnotes to this memorandum. Unless specifically noted, the changes discussed herein went into effect on January 5, 2006. A complete copy of VAWA 2005 is available in the Legislative Counsel folder on DocuShare at (b)(7)(E). Questions regarding this guidance should be directed in the first instance to your Chief Counsel or Deputy Chief Counsel, who may in turn refer questions to the Enforcement Law Division of the Office of the Principal Legal Advisor (OPLA) at (202) 514-(b)(7)(E).

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1 INA § 101(a) – VAWA Self-Petitioner Definition Added

1.1 TECHNICAL CHANGE: VAWA 2005 defines a new category of aliens in the INA: the VAWA self-petitioner. VAWA 2005 § 811 adds a new INA § 101(a)(51), which reads as follows:

- (51) The term “VAWA self-petitioner” means an alien, or a child of the alien, who qualifies for relief under—
- (A) clause (iii), (iv), or (vii) of section [204(a)(1)(A)];
 - (B) clause (ii) or (iii) of section [204(a)(1)(B)];
 - (C) section [216(c)(4)(C)];
 - (D) the first section of Pub. L. 89-732 (8 U.S.C. § 1255 note) [80 Stat. 1161 (1966)] (commonly known as the Cuban Adjustment Act) as a child or spouse who has been battered or subjected to extreme cruelty;
 - (E) section 902(d)(1)(B) of the Haitian Refugee Immigration Fairness Act of 1998 [(HRIFA)] (8 U.S.C. § 1255 note)[, Pub. L. No. 105-277, § 901, 112 Stat. 2681, 2681-538 (1998)];
 - (F) section 202(d)(1) of the Nicaraguan Adjustment and Central American Relief Act [(NACARA), Pub. L. No. 105-100, 111 Stat. 2160, 2193 (1997)]; or
 - (G) section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [(IIRIRA).] (division C of Pub. L. 104-208) [110 Stat. 3009, 3009-546 (1996

1.2 PRACTICE CONSIDERATIONS: OPLA Assistant Chief Counsels (ACCs) should be aware of the various statutory provisions under which an alien may qualify for VAWA self-petitioner status. Specifically, ACCs should review the possible applicability of VAWA when working with cases involving:

1. Alien spouses (and their children) of United States citizens, or those whose marriage was not legitimate because of the citizen’s bigamy, who have been battered or subject to extreme cruelty. (INA § 204(a)(1)(A)(iii));
2. Alien children of United States citizens who have been battered or subject to extreme cruelty by the citizen. (INA § 204(a)(1)(A)(iv));
3. Alien parents of United States citizens who have been battered or subject to extreme cruelty by the citizen. (INA § 204(a)(1)(A)(vii));¹
4. Alien spouses (and their children) of Lawful Permanent Residents, or those whose marriage was not legitimate because of the LPR’s bigamy, who have been battered or subject to extreme cruelty. (INA § 204(a)(1)(B)(ii));
5. Alien children of LPRs who have been battered or subject to extreme cruelty by the LPRs. (INA § 204(a)(1)(B)(iii));

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6. Aliens who were given conditional permanent resident status under INA § 216 and who receive a hardship waiver removing the conditions of such status based upon battery or extreme cruelty by the United States citizen or LPR spouse who petitioned for the alien. (INA § 216(c)(4)(C));
7. Cuban spouses or children who have been battered or subjected to extreme cruelty;
8. Spouses, children, and unmarried sons and daughters of aliens whose status was adjusted to that of an alien lawfully admitted for permanent residence under HRIFA § 902(a), as well as spouses and children battered or subject to extreme cruelty by a HRIFA § 902(a) alien;ⁱⁱ
9. Spouses, children, and unmarried sons and daughters of aliens whose status was adjusted to that of an alien lawfully admitted for permanent residence under NACARA § 202(a), as well as spouses and children battered or subject to extreme cruelty by a NACARA § 202(a) alien;ⁱⁱⁱ and
10. Aliens eligible for repapering, or all aliens eligible for pre-IIRIRA suspension of deportation under NACARA § 203.^{iv}

2 INA § 101(f) – Good Moral Character Definition Changed

2.1 TECHNICAL CHANGE: VAWA 2005 § 822 alters a previously incorrectly cited section precluding an alien from establishing “good moral character” under INA § 101(f)^v by changing the precluded section from INA § 212(a)(9)(A) – *i.e.*, aliens who were inadmissible because of a previous deportation or removal – to INA § 212(a)(10)(A) – practicing polygamists. INA § 101(f)(3) now renders aliens ineligible to establish good moral character if they are inadmissible under INA § 212(a)(10)(A) as practicing polygamists. *See* VAWA 2005 § 822(c)(1); INA § 212(a)(10)(A). Conversely, the technical correction now allows aliens who were inadmissible under INA § 212(a)(9)(A) – *i.e.*, aliens who were inadmissible because of a previous deportation or removal – to establish good moral character. This change is retroactive to 1990 as if included in § 603(a)(1) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5082 (1990). *See* VAWA 2005 § 822(c)(2).

2.2 PRACTICE CONSIDERATIONS: As a result of this change, aliens who are inadmissible under INA § 212(a)(10)(A) are no longer eligible for relief from removal that involves a good moral character requirement, such as cancellation of removal, most VAWA relief, or voluntary departure at the conclusion of removal proceedings, unless they meet the criteria for a waiver under INA §§ 204(a)(1)(C) or 240A(b)(2)(C). INA §§ 204(a)(1)(C) and 240A(b)(2)(C) permit an alien to qualify for good moral character provided the act or conviction was connected to the alien’s having been battered or subjected to extreme cruelty, although certain bars may continue to apply.

3 8 U.S.C. § 1367 – Confidentiality and Prohibited Sole Source Provisions Relating to VAWA Aliens

3.1 TECHNICAL CHANGES: VAWA 2005 makes several key changes to the confidentiality and prohibited sole source provisions relating to aliens who seek immigration benefits based upon domestic violence, trafficking, or certain other statutorily enumerated crimes.

- 3.1.1** With the passage of § 384 of IIRIRA, Congress imposed strict confidentiality provisions on the Attorney General. This provision, codified at 8 U.S.C. § 1367(a)(2) but commonly referred to as the § 384 confidentiality provision, prohibits disclosure (other than to a “sworn officer or employee of [DHS]”) of “any information” relating to an alien who is an applicant for relief under provisions of the INA relating to domestic violence – § 101(a)(51), trafficking under 101(a)(15)(T), or violent crime under 101(a)(15)(U) – from the time the application for relief is submitted until such time as “the application for relief is denied and all opportunities for appeal of the denial have been exhausted.” 8 U.S.C. § 1367(a)(2). There are limited exceptions to this broad confidentiality provision set forth in 8 U.S.C. § 1367(b).
- 3.1.2** VAWA 2005 amends § 1367 to clarify that it applies to DHS and the Department of State. See VAWA 2005 § 817.
- 3.1.3** VAWA 2005 amends the provision that prohibits use of information from particular individuals as the sole basis for arresting or charging an alien with removability. 8 U.S.C. § 1367(a)(1) prohibits DHS from making an adverse determination of admissibility, deportability, or removability about an alien by using information furnished *solely* by a spouse or parent who has battered the alien (or the alien’s child) or subjected the alien (or the alien’s child) to extreme cruelty, or information *solely* from any of the abuser’s family members who live with the abuser. See 8 USC § 1367(a)(1)(A), (B), (C), (D).
- 3.1.4** For an alien eligible for classification under INA § 101(a)(15)(U), VAWA 2005 precludes the use of information provided solely by the perpetrator of the substantial physical or mental abuse and the criminal activity. See 8 U.S.C. § 1367(a)(1)(E).
- 3.1.5** VAWA 2005 § 817 adds a new prohibited source of information to 8 U.S.C. § 1367(a)(1)(F). Under this new provision, DHS is

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prohibited from using information provided *solely* by a trafficker or perpetrator against an alien who meets the new definition of VAWA self-petitioner, or who is otherwise applying for or has received status under the following: INA § 101(a)(15)(T) (relating to victims of a severe form of trafficking). INA § 244(a)(3) (as in effect prior to March 31, 1997) (relating to Suspension of Deportation), or § 107(b)(1)(E)(i)(II)(bb) of the Trafficking Victims Protection Act (TVPA) of 2000, Pub L. No. 106-386 Div. A, 114 Stat 1464, 1476 (2000) (relating to witnesses continuing to assist the United States in the prosecution of human traffickers). 8 U.S.C. § 1367(a)(1)(F).

- 3.1.6** VAWA 2005 § 1367(a)(1) prohibits DHS' use of information furnished *solely* by a prohibited source, such as a spouse or parent who has battered the alien or subjected the alien to extreme cruelty, or a member of the spouse's or parent's family residing in the same household who consented to or acquiesced in such battery or cruelty, unless such information has been independently corroborated.

3.2 PRACTICE CONSIDERATIONS: Under INA § 1367(a)(1)(A)-(D), ICE employees are prohibited from making an adverse determination of inadmissibility or deportability furnished solely by a prohibited source, regardless of whether the alien has applied for VAWA benefits. The corresponding VAWA field guidance from OI and DRO reminds ICE Officers to independently verify information concerning inadmissibility or deportability by checking databases instead of relying solely on the information provided by a prohibited source, such as the abuser or a member of the abuser's family residing in the same household as the alien. When cases arise involving aliens known to be applicants for VAWA, T, or U relief, ACCs should take particular care to ensure that the confidentiality provisions are not violated. Once ACCs are made aware that an alien is the beneficiary of a pending or approved VAWA, T, or U petition, they should ensure that the court is aware of any pending VAWA, T, or U issues prior to the hearing, either orally or in writing on the record. If such notification is not possible, the court should be notified as soon as is reasonable after the alien's VAWA, T, or U status is verified. If a case arises in which the applicant's safety would be at risk by disclosing the application to the court or to opposing counsel, please consult your Deputy Chief Counsel for guidance.

- 3.2.1** Independent corroboration of information concerning the inadmissibility or deportability of an abused spouse or child or a T or U status applicant should be made through objective and reliable sources such as NIIS, IBIS, and criminal records. Once corroborated, this information may be used in further action on the case, such as issuing a Notice To Appear or using the information in immigration court.

- 3.2.2** Anyone who willfully violates the confidentiality provisions is subject to “appropriate disciplinary action” and a civil money penalty of not more than \$5,000 for each willful violation. The Offices of Chief Counsel (OCCs) with a significant number of VAWA, T, or U cases may wish to designate specific attorneys to handle identified VAWA cases. (The Immigration and Naturalization Service (INS) memorandum entitled *Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA § 384* focuses on the confidentiality requirements and continues to govern ICE employee conduct. That memorandum is attached for your convenience).
- 3.2.3** The confidentiality provisions at 8 U.S.C. § 1367 contain a law enforcement exception permitting disclosure of information to law enforcement officials when used for a legitimate law enforcement purpose. *See* 8 U.S.C. § 1367(b)(2).
- 3.2.4** An adult VAWA, T, or U petitioner can execute a waiver regarding information regarding him/herself, but not as to a child beneficiary. *See* 8 U.S.C. § 1367(b)(4).
- 3.2.5** A new waiver has been added, which, upon receipt of written consent from the alien, allows government entities adjudicating VAWA, T, or U applications to communicate with various victim assistance groups. *See* 8 U.S.C. § 1367(b)(7). The agencies receiving referrals are also bound by the confidentiality provisions. *Id.*

4 INA § 212(a)(9) – Exception to Unlawful Presence

4.1 TECHNICAL CHANGE: VAWA 2005 § 802 creates a new exception to the unlawful presence bar in INA § 212(a)(9)(B). The new provision, INA § 212(a)(9)(B)(iii)(V), provides that if the alien “demonstrates that the severe form of trafficking (as that term is defined in § 103 of the TVPA⁽ⁱ⁾) was at least one central reason for the alien’s unlawful presence in the United States,” the alien shall not be inadmissible as a result of unlawful presence. Furthermore, unlawful presence may be waived if the self-petitioner can establish a connection between the alien’s battering or subjection to extreme cruelty and the alien’s removal, departure from the United States, or reentry or attempted reentry into the United States. *See* Pub. L. No. 109-271, 120 Stat. 750 (Aug. 12, 2006),.

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5 INA § 239(e) – Certificate of Compliance

5.1 TECHNICAL CHANGE: VAWA 2005 § 825(c) creates a certification of compliance requirement for Notices to Appear, where enforcement action is initiated against an alien at specific, sensitive locations.

5.1.1 This provision adds a new INA § 239(e), which reads as follows:

239(e) Certification of Compliance with Restrictions on Disclosure.—

(1) In General.--In cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1367) have been complied with.

(2) Locations—The locations specified in this paragraph are as follows:

(A) At a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services center?, or victim services provider, or a community-based organization as defined in 42 U.S.C. § 13925(a)(3) (2006)^{vii}

(B) At a courthouse (or in connection with the appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty, or if the alien is described in subparagraph (T) or (U) of section 101(a)(15).

5.1.2 Section 239(e) of the INA applies to all apprehensions occurring on or after February 5, 2006. See VAWA § 825(c)(2).

5.1.3 Anyone who willfully uses, publishes, or permits information to be disclosed in violation of this section or who knowingly makes a false certification under section 239(e) of the Immigration and Nationality Act [8 U.S.C.A. § 1229(e)] shall be subject to appropriate disciplinary action and subject to a civil money penalty of not more than \$5,000 for each such violation. (ICE's memorandum to Field Office Directors and Special Agents entitled *Interim Guidance*

*Relating to Officer Procedure Following Enactment of VAWA 2005
is attached for your convenience.)*

5.2 PRACTICE CONSIDERATIONS: If ACCs identify a case where an alien was encountered or arrested at any of the locations identified in INA § 239(e)(2), please immediately notify the OPLA Director of Field Legal Operations for specific guidance on handling the matter. This is especially important in cases in which an ACC has reason to believe that the encounter or arrest may have been based on information provided by an alien's alleged abuser. ICE is currently taking the position that it generally will not place in removal proceedings aliens encountered at these sensitive locations unless fraud, criminal activity, or national security concerns are clearly present. ICE employees must comply with the § 239(e) certification requirement even if the subject alien has not applied for or does not intend to apply for VAWA benefits. The corresponding VAWA guidance to ICE officers and agents encourages the use of prosecutorial discretion if aliens are encountered at sensitive locations because these aliens are probably genuine VAWA self-petitioners or T or U status applicants. If aliens are encountered at a sensitive location, those officers authorized to issue Notices to Appear must certify that the non-disclosure requirements have also been met.

6 INA § 240 – Exceptional Circumstances and Motions to Reopen

6.1 TECHNICAL CHANGES: VAWA 2005 makes significant amendments to INA § 240.^{viii}

6.1.1 VAWA 2005 § 813 amends the exceptional circumstances language of INA § 240 by adding battery or extreme cruelty against the alien or any child or parent of the alien to the categories of exceptional circumstances constituting excusable failures to appear. The phrase “exceptional circumstances” set forth in INA § 240(e)(1) now “refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.” INA § 240(e)(1) (2006). VAWA 2005 made clear that this change applies to all failures to appear, regardless of whether the failure to appear occurred before, on, or after the date of the enactment of VAWA 2005. *See* VAWA 2005 § 813(a)(2).

6.1.2 VAWA 2005 § 825(a)(1) eliminates INA § 240(c)(7) the motion to reopen limitations for certain aliens seeking VAWA self-petitioner status. As amended, the one motion to reopen limit of INA § 240(c)(7)(A) “shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).” VAWA 2005

§ 825(a)(1); INA § 240(c)(7)(A) (2006). Likewise, VAWA 2005 § 825(a)(2)(B) changed INA § 240(c)(7)(C)(iv) to excuse VAWA self-petitioners from “any limitation under [INA §240] on the deadlines for filing” motions to reopen. VAWA 2005 § 825(a)(2)(B); INA § 240(c)(7)(C)(iv) (2006). Thus, an alien who has previously filed a motion to reopen is not precluded by time or numerical limitations from filing a second motion to reopen related to VAWA self-petitioner status. The alien still must comply with other motion to reopen requirements, such as establishing *prima facie* eligibility for relief in the reopened proceedings.

6.1.3 VAWA 2005 § 825(a) also adds parents to the categories of aliens who can file motions to reopen without limitations. See VAWA 2005 § 813(a)(2)(A); INA § 240(c)(7)(C)(iv) (2006). It adds relief under INA § 244(a)(3) (as in effect on March 31, 1997)¹⁸ to the list of applications that can serve as the basis for a motion to reopen not subject to the limitations set out in INA § 240(c)(7). See VAWA 2005 § 813(a)(2)(B).

6.1.4 VAWA 2005 further clarifies that aliens filing motions to reopen under INA § 240(c)(7)(C)(iv) must be physically present in the United States at the time the motion is filed in order to be excused from the limitations on motions to reopen. See VAWA 2005 § 825(a)(2)(F) (adding INA § 240(c)(7)(C)(iv)(I)).

6.1.5 INA § 240(c)(7)(C)(iv) is amended to include the following language relating to stays of removal: “The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of [Title 8]) pending the final disposition of the motion, including exhaustion of all appeals, if the motion establishes that the alien is a qualified alien.” VAWA 2005 § 825(a)(2)(F); INA § 240(c)(7)(C)(iv).

6.2 PRACTICE CONSIDERATIONS: The new INA § 240(c)(7)(C)(iv) imposes an automatic stay from the date of the filing of a motion to reopen that demonstrates *prima facie* eligibility until such time as the Board of Immigration Appeals has disposed of all appeals from a denial of that motion to reopen. The automatic stay is triggered when the alien files the motion, regardless of whether the motion actually meets all the requirements for a motion to reopen or whether the alien requests a stay in the motion. If an ACC handles a VAWA case involving an alien subject to a final order of removal in which a motion to reopen is filed, the local Office of Detention and Removal Operations (DRO) should be contacted immediately and informed that a stay is in place and the alien cannot be removed. It is suggested that an e-mail be sent to local DRO personnel relaying the alien number, the fact that a stay of removal is in

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place, and the effective date of the stay. It is anticipated that issues concerning this provision would likely arise in cases where the alien's removal is imminent but for the automatic stay; if the stay of removal creates any problems relating to detention, please contact the Enforcement Law Division via email.

7 Other Motion to Reopen Issues

7.1 TECHNICAL CHANGE: Section 1506(c)(2) of the Violence Against Women Act of 2000 (VAWA 2000), Pub. L. No. 106-386 Div. B, 114 Stat 1464, 1527 (2000), outlined exceptions to the motion to reopen time limitation for aliens in pre-IIRIRA deportation proceedings. Specifically, this provision had provided that there was no time limit on the filing of a motion to reopen if the basis for the motion was for the alien to apply for VAWA self-petitioning relief (under INA § 204) or VAWA suspension (under former INA § 244). VAWA 2005 § 814(a) and § 825(b) amends this provision to eliminate limitations for certain suspension of deportation applicants.^x Additionally, VAWA 2005 § 825(b) inserts the requirement that aliens be physically present in the United States in order for the motion to reopen limitations exception to apply, and clarifies that these exceptions apply to aliens in either deportation or exclusion proceedings. See VAWA 2005 § 825(b)(2), (3); VAWA 2000 § 1506(c)(2)(B) (2006).

8 INA § 240A – Cancellation of Removal

8.1 TECHNICAL CHANGE: VAWA 2005 also amends the INA to clarify that § 237(a)(7) waiver, which waives criminal removability grounds for certain aliens whose conviction was a result of their status as a domestic violence victim, may be utilized by an immigration judge in determining eligibility for cancellation of removal for certain nonpermanent residents under INA § 240A(b)(1). See VAWA 2005 § 813(c)(1)(A). Specifically, the Attorney General may exercise the § 237(a)(7) waiver authority when considering the alien's eligibility for relief under prong (B) (relating to good moral character) or (C) (relating to the criminal removability grounds) of § 240A(b)(1). The § 237(a)(7) waiver also may be used in determining whether an alien is eligible for relief under INA § 240A(b)(2)(A)(iv), the special rule cancellation for battered spouses or children. See VAWA 2005 § 813(c)(1)(B). VAWA 2005 § 822 also made technical corrections clarifying references in the application of special physical presence pursuant to INA § 240A(b)(2)(B) and to the good moral character requirements for VAWA cancellation applicants pursuant to § INA 101(f)(3).^{xi}

9 INA § 240B – Voluntary Departure

9.1 TECHNICAL CHANGES:

9.1.1 VAWA 2005 § 812 amends INA § 240B(d) relating to the civil penalty for failure to depart. Under the new 240B(d)(2), the 10-year bar to relief eligibility for a failure to depart “shall not apply to relief under section 240A or 245 on the basis of a petition filed by a VAWA self-petitioner, or a petition filed under section 240A(b)(2), or under section 244(a)(3) (as in effect prior to March 31, 1997), if the extreme cruelty or battery was at least one central reason for the alien overstaying the grant of voluntary departure.” INA § 240B(d)(2) (2006). The *one central reason* standard requires that the evidence establish that the self-petitioner would not have committed the act or crime but for the battering or extreme cruelty.

9.1.2 Changes made by VAWA 2005 § 822 to the good moral character definition at INA §101(f)(3) now render aliens who are inadmissible under INA § 212(a)(10) ineligible for voluntary departure under INA §240B(b) (relating to voluntary departure requests made at the conclusion of removal proceedings) unless they meet the criteria for a waiver as set forth under INA §§ 204(a)(1)(C) or 240A(b)(2)(C).

9.2 PRACTICE CONSIDERATIONS: Motions to reopen filed by aliens who have VAWA self-petitioner status should not be opposed on the basis of an alien’s ineligibility to adjust status resulting from a failure to voluntarily depart if the alien establishes a clear nexus between abuse and the alien’s overstay of the voluntary departure grant. Where an analysis of whether abuse constituted a “central reason” for the alien’s overstay involves a factual investigation, offices should exercise discretion both in light of the alien’s past experiences as well as the confidentiality provisions set forth at 8 USC § 1367, discussed above in Section 3. *See supra* Section 3 (“Confidentiality Provisions Relating to VAWA Aliens”).

10 Eligibility for Adjustment of Status Under the Cuban Adjustment Act (CAA), NACARA, and HRIFA

10.1 TECHNICAL CHANGES:

10.1.1 VAWA 2005 § 823 amends the CAA to extend eligibility for LPR status to certain non-Cuban alien spouses whose marriage was terminated as a result of death or abuse.^{xii} Under the new provision in the CAA, non-Cuban spouses who have resided with a Cuban who adjusted status under the CAA will continue to be treated as eligible for adjustment consistent with the CAA for two years after the death

of the Cuban, or, if later, until January 5, 2008 – two years from the enactment of VAWA 2005.^{xiii} Additionally, non-Cuban spouses who have resided with a Cuban who adjusted status under the CAA and whose marriage has been terminated will continue to be treated as eligible for adjustment consistent with the CAA for two years after the termination of the marriage or, if later, until January 5, 2008, if “there is demonstrated a connection between the termination of the marriage and the battering or extreme cruelty by the Cuban alien.” VAWA 2005 § 823; CAA (2006).

- 10.1.2** VAWA 2005 § 815(a) amends NACARA § 202 by permitting spouses and children of principal aliens – that is, aliens who were eligible for adjustment under § 202(a) of NACARA – to self-petition for LPR status if the derivative alien was battered or subjected to extreme cruelty: the right to self-petition occurs regardless of whether the principal alien was actually adjusted.^{xiv} See VAWA 2005 § 815(a); NACARA § 202(d)(1)(B)(ii) (2006). Aliens now eligible for adjustment under NACARA § 202(d)(1)(B)(ii) have until July 5, 2007 to file adjustment applications – 18 months from the January 5, 2006 enactment of VAWA 2005. See VAWA 2005 § 815(a); NACARA § 202(d)(1)(E) (2006). Because applications for adjustment of status under NACARA can be adjudicated by the Attorney General, it follows that applications under this new provision of NACARA can also be adjudicated in proceedings before immigration judges.
- 10.1.3** Similarly, VAWA 2005 § 824 expands eligibility for adjustment for certain aliens under HRIFA. This provision amends HRIFA § 902(d)(1)(B)(ii) by permitting spouses and children of principal aliens – that is, aliens who were eligible for adjustment under § 902(a) of HRIFA – to self-petition for LPR status if the derivative alien was battered or subjected to extreme cruelty; again, the right to self-petition occurs regardless of whether the principal alien actually adjusted.^{xv} See VAWA 2005 § 815(a)(2); HRIFA § 902(d)(1)(B)(ii) (2006). Aliens now eligible for adjustment under HRIFA § 902(d)(1)(B)(ii) also have until July 5, 2007 to file adjustment applications. See VAWA 2005 § 815(a); HRIFA § 902(d)(1)(E)(2006). Because applications for adjustment of status under HRIFA can be adjudicated by the Attorney General, it follows that applications under this new provision of HRIFA can also be adjudicated in proceedings before immigration judges.

10. 2 PRACTICE CONSIDERATIONS:

- 10.2.1** The Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002), amended various provisions of the INA, particularly §§ 201(f) and 203(h), to preserve child status for certain alien children beneficiaries who surpass the maximum age threshold during the processing of their applications. VAWA 2005 § 805(b) extends these “age out” protections to “self-petitioners” and “derivatives of self-petitioners.” The phrase “self-petitioner” should be interpreted to apply to aliens who qualify for VAWA self-petitioner status, and therefore includes aliens who self-petition under the CAA, NACARA and HRIFA. Interestingly, by applying this “age out” protection to battered relatives of CAA, NACARA and HRIFA principal aliens, VAWA 2005 provides more access to relief for aliens alleging battery or extreme cruelty than those aliens who do not allege abuse. This appears to be a departure from the historical rationale for VAWA, which had been to equalize the situation for battered spouses and children.
- 10.2.2** An OCC may agree to exercise appropriate prosecutorial discretion (*i.e.*, moving for termination without prejudice or non-opposing a motion to administrative close) with respect to an alien in removal proceedings who establishes *prima facie* eligibility for VAWA, T, or U self-petitioner status under the new VAWA adjustment provisions discussed herein, in order to permit such aliens to pursue I-360 status before USCIS. *Cf.* Memorandum from Principal Legal Advisor William J. Howard to Chief Counsel, *Prosecutorial Discretion* (Oct. 24, 2005); Memorandum from the INS Office of General Counsel to Regional Counsel and District Counsel, *Administrative Closure of EOIR Proceedings for Aliens Eligible to Adjust Status Under NACARA* (Dec. 31, 1997). In the event that the case is administratively closed and the alien’s application for VAWA is later approved by USCIS, the court may remand the case in order for the alien’s adjustment to be similarly adjudicated.

11 Miscellaneous Provisions

11.1 Bar to Petitioning for Abusers

- 11.1.1** VAWA 2005 specifically precludes aliens who obtain VAWA self-petitioner status, or who had the status of a (T) or (U) nonimmigrant under INA § 101(a)(15), from filing a subsequent petition for lawful status for the individual who committed the battery, extreme cruelty.

or trafficking against the alien or the alien's child. *See* VAWA 2005 § 814(e); INA § 204(a)(1)(L).

11.2 Changes Related to Children/Minors

11.2.1 Similar to the Child Status Protection Act provisions, the VAWA "age out" provision contained in INA § 204(a)(1)(D) permits aliens who surpassed the maximum age while their application to obtain relief as a battered child of a United States citizen (or child of an abused spouse) was pending, to continue to retain eligibility for relief. *See* VAWA 2005 § 805(a).

11.2.2 VAWA 2005 § 805(a) amends INA § 204(a)(1)(D) to extend the "age out" protection to battered children of LPRs (and derivative children of battered spouses of LPRs) who reach 21 years of age while their VAWA self-petitions (or parent's self-petition) are pending, thereby allowing them to continue to remain eligible for self-petitioner status and adjustment of status following their 21st birthdays.

11.2.3 VAWA 2005 § 805(c) amends INA § 204(a)(1)(D) to permit aliens who would have qualified for VAWA self-petitioner status as battered children of United States citizens on the day before their 21st birthday to self-petition for VAWA relief between the ages of 21 and 25. However, such aliens must demonstrate that the "abuse" was "at least *one central reason*" for the delay in filing the self-petition. *See* INA § 204(a)(1)(D)(v) (2006). (See section 9.1.1 for *one central reason* standard).

11.2.4 The definition of child, contained at INA § 101(b)(1)(E)(i), historically required adopted children to have been adopted under the age of 16 and to have lived with their adopted parents for two years. VAWA 2005 § 805(d) eliminated the two-year cohabitation requirement for adopted children who have been battered or subject to extreme cruelty by the adopting parent or by a family member of the adopting parent residing in the same household. *See* INA § 101(b)(1)(E)(i) (2006).

11.2.5 Juveniles seeking special immigrant juvenile status who allege battery, abuse, neglect or abandonment receive special consideration under the newly created INA § 287(h). This provision, added by VAWA 2005 § 826, provides that aliens seeking consent to special immigrant juvenile status pursuant to INA § 101(a)(27)(J) cannot be compelled to contact the abuser (or a family of the alleged abuser) as

part of the consent process. Additionally, DHS cannot directly contact the abusive parent, although ICE attorneys can use objective and reliable information, such as phone records, to show that communication occurred between the alien and the alleged abuser.

11.3 Addition of Self-Petitioning Parents

11.3.1 VAWA 2005 also adds self-petitioning alien parents of United States citizens (or former citizens who lost or renounced citizenship within the past two years) to the list of immediate relative aliens eligible to self-petition, if the alien can establish that he or she was battered or subjected to extreme cruelty by his or her United States citizen child, if the alien is a person of good moral character, and if the alien resided with their abusive U.S. citizen son or daughter. *See* VAWA 2005 § 816; INA § 204(a)(1)(A)(vii). As with other petitions, USCIS will be responsible for adjudicating the self-petition.

11.4 Employment Authorization

11.4.1 VAWA 2005 § 814(b) amends the INA to make all approved VAWA self-petitioners eligible for employment authorization, and indicates that they may be issued an Employment Authorization Document (EAD). *See* INA § 204(a)(1)(K). This provision is problematic in that it could be read to allow for employment authorization of approved VAWA self-petitioners who are inadmissible or otherwise ineligible to adjust status (similar to adjudication of an I-130 petition, adjudication of self-petitions does not address whether a form I-485 filed by the alien could be approved), including aliens who may be in ICE custody for criminal or security-related grounds of removability. However, USCIS has taken the position that it will not grant deferred action or employment authorization to an approved self-petitioner who has no legal basis to remain in the United States (*e.g.* if he or she is determined to be statutorily ineligible for adjustment or has been denied adjustment).

11.4.2 VAWA 2005 also gives the Secretary of Homeland Security discretionary authority to grant employment authorization to spouses or children who have been battered or subject to extreme cruelty by nonimmigrant aliens admitted under subparagraphs (A), (E)(iii), (G) or (H) of INA § 101(a)(15), including spouses or children who are “following to join” such nonimmigrants. This is done through the addition of a new § 106 to the INA. *See* VAWA 2005 § 814(c); INA § 106(a) (2006). Significantly, however, the new INA § 106(b)

provides that the “grant of employment authorization pursuant to [the new INA § 106(a)] shall not confer upon the alien any other form of relief.” Thus, aliens receiving employment authorization under this section will have to separately prove eligibility for any other form of VAWA relief, or other relief under the INA.

11.5 T and U Nonimmigrant Status Issues

11.5.1 VAWA 2005 § 821 amends T and U nonimmigrant status provisions by setting forth a maximum initial period of 4 years for an alien to be in such status. That period can be extended based upon certification by the agency investigating the criminal activity that the alien’s presence is needed to assist in the investigation or prosecution. See VAWA 2005 § 821. This provision also makes various conforming amendments to the INA relating to T and U status. See *id.* at (c).

11.5.2 Section § 801 of VAWA 2005 clarifies that to qualify for T nonimmigrant status the alien must cooperate in either a federal, state, or local investigation. This section also adds to the categories of individuals who may follow to join the alien subsequent to the alien’s classification under INA § 101(a)(15)(U), and eliminates the requirement of establishing extreme hardship for aliens following to join a U nonimmigrant status alien. INA § 212(d)(13) and (14) are amended to clarify that it is the Secretary of Homeland Security who has authority to adjudicate waivers of inadmissibility for T and U nonimmigrants.

11.5.3 VAWA 2005 § 803 amends INA § 245(l) to clarify the roles of the Attorney General and Secretary of Homeland Security in adjudicating adjustment of status applications for T and U nonimmigrants. Additionally, VAWA 2005 § 804 amends TVPA § 107 to further clarify the roles of the Attorney General and Secretary of Homeland Security.

11.6 International Marriage Broker Regulation Act of 2005

11.6.1 In subtitle D of VAWA 2005, § 831 *et seq.*, Congress passed the International Marriage Broker Regulation Act of 2005. See Pub. L. No. 109-162, § 831 *et seq.*, 119 Stat. 2960, 3066 (2006) (IMBRA). This provision placed limitations on the number of fiancée petitions under INA § 101(a)(15)(K) that could be filed by a given petitioner, as well as requiring that such petitions generally be filed two years apart.

11.6.2 These provisions also require the Secretaries of Homeland Security and State to provide information to fiancée aliens regarding the petitioner's background and about domestic violence resources in the United States. These provisions require marriage brokers to conduct certain criminal records checks of their United States clients and provide certain information to aliens about these checks. It also prohibits marriage brokers from providing certain information about aliens under the age of 18, and limits use and disclosure of information.

11.6.3 While the majority of the IMBRA provisions do not relate to the work of ICE, please take note of the civil penalties and criminal penalties that may be imposed on marriage brokers for failure to comply with IMBRA provisions. These are set out in VAWA 2005 § 833(d)(5)(A) and (B), respectively. Penalties that apply to any person who “knowingly discloses, uses, or causes to be used any information obtained by an international marriage broker as a result of the obligations imposed on it” under the IMBRA are discussed in VAWA 2005 § 833(d)(3)(C). ICE agents may seek advice on these provisions during the course of their investigations.

ⁱ This provision was added by VAWA 2005 § 816.

ⁱⁱ HRIFA § 902(d)(1)(B) includes all spouses, children, and unmarried sons and daughters of aliens whose status was adjusted to that of an alien lawfully admitted for permanent residence under HRIFA § 902(a), as well as spouses and children battered or subject to extreme cruelty by a HRIFA § 902(a) alien. However, legislative history indicates that Congress intended INA § 101(a)(51)(E) to reference only to those aliens in HRIFA § 902(d)(1)(B)(ii), which applies to spouses or children of aliens who adjusted or who were eligible for adjustment under HRIFA §902(a), where the spouse, child, or child of the spouse was battered or subjected to extreme cruelty by the HRIFA § 902(a) alien.

ⁱⁱⁱ NACARA § 202(d)(1)(B) includes all spouses, children, and unmarried sons and daughters of aliens whose status was adjusted to that of an alien lawfully admitted for permanent residence under NACARA § 202(a), as well as spouses and children battered or subject to extreme cruelty by a NACARA § 202(a) alien. However, legislative history indicates that Congress intended INA § 101(a)(51)(F) to reference only to those aliens in NACARA § 202(d)(1)(B)(ii), which applies to spouses or children of aliens who adjusted or who were eligible for adjustment under NACARA § 202(a), where the spouse, child, or child of the spouse was battered or subjected to extreme cruelty by the NACARA § 202(a) alien.

^{iv} This provision arguably extends relief to a large number of aliens, such as aliens eligible for repapering or all aliens eligible for pre-IRIRA suspension of deportation under NACARA § 203. Legislative history indicates that Congress intended INA § 101(a)(51)(G) to reference only IRIRA § 309(c)(5)(C)(i)(VII), which provides certain battered aliens with the ability to obtain “special rule” suspension of deportation.

^v In section 301(b) of IIRIRA, Congress redesignated the ground of deportability relating to practicing polygamists from paragraph (9) to (10) of INA § 212(a). However, when this change was made, a corresponding change to the good moral character definition was not made; as a result, after IIRIRA INA § 101(f)(3) precluded aliens from establishing good moral character who were inadmissible under INA § 212(a)(9)(A) – that is, aliens who were inadmissible because of a previous deportation or removal, VAWA 2005 § 822 made the technical correction to INA § 101(f)(3) that IIRIRA had omitted: it deletes the reference to INA § 212(a)(9)(A) and inserts instead a reference to INA § 212(a)(10)(A). See VAWA 2005 § 822(c)(1); INA § 101(f)(3) (2006).

^{vi} The TVPA defines “severe forms of trafficking in persons” as follows:

- (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

TVPA § 103(8) (2000); 22 U.S.C. § 7102(8) (2000).

^{vii} A community-based organization is one that:

- (A) focuses primarily on domestic violence, dating violence, sexual assault, or stalking;
- (B) has established a specialized culturally specific program that addresses domestic violence, dating violence, sexual assault, or stalking;
- (C) has a primary focus on underserved populations (and includes representatives of these populations) and domestic violence, dating violence, sexual assault, or stalking; or
- (D) obtains expertise, or shows demonstrated capacity to work effectively, on domestic violence, dating violence, sexual assault, and stalking through collaboration.

^{viii} As amended, the relevant portions of INA § 240 read as follows:

(b) Conduct of proceeding

...

(5) Consequences of failure to appear

...

(C) Rescission of order

[An *in absentia*] order may be rescinded only--

- (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section). . . .

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

...

(c) Decision and burden of proof

...

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

...

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

...

(iv) Special rule for battered spouses, children, and parents

Any limitation under this section on the deadlines for filing such motions shall not apply--

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of [INA] section 204(a)(1)(A), clause (ii) or (iii) of [INA] section 204(a)(1)(B), [INA] section 240a(b), or [INA] section 244(a)(3) (as in effect on March 31, 1997):

(II) if the motion is accompanied by a cancellation of removal application to be filed with the [Secretary of Homeland Security] or by a copy of the self-petition that has been or will be filed with [USCIS] upon the granting of the motion to reopen:

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in [8 U.S.C. § 1641(c)(1)(B)]) pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

...

(e) Definitions

In this section and [INA § 240A]:

(1) Exceptional circumstances

The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

INA § 240 (2006).

^{ix} INA § 244(a)(3) (1997) reads:

(a) Adjustment of status for permanent resident; contents

As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than alien described in subparagraph (B) or (D) of section 1251(a)(4) of this title [dealing with security and related grounds]) who applies to the general for suspension of deportation and--

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(3) is deportable under any law of the United States except section 1251(a)(1)(G) of this title [marriage fraud] and the provisions specified in paragraph (2) [criminal offenses under 1251(a)(2), failure to register or falsification of documents under 1251(a)(3), or security and related grounds under 1251(a)(4)]; has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application; has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or LPR (or is the parent of a child of a United States citizen or LPR and the child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent); and proves that during all of such time in the United States the alien was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or the alien's parent or child.

[^] As a result of these amendments, VAWA 2000 § 1506(c)(2)(A) now reads:

(i) In general.--Notwithstanding any limitation imposed by law on motions to reopen or rescind deportation proceedings under the Immigration and Nationality Act (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1101 note))--

(I) There is no time limit on the filing of a motion to reopen such proceedings, and the deadline specified in section 242B(c)(3) of the Immigration and Nationality Act (as so in effect) does not apply

(aa) if the basis of the motion is to apply for relief under clause (iii) or (iv) of section 204(a)(1)(A) of the Immigration and Nationality Act, clause (ii) or (iii) of section 204(a)(1)(B) of such Act, or section 244(a)(3) of such Act (as so in effect); and

(bb) if the motion is accompanied by a suspension of deportation application to be filed with the Secretary of Homeland Security or by a copy of the self-petition that will be filed with the Department of Homeland Security upon the granting of the motion to reopen; and

(II) any such limitation shall not apply so as to prevent the filing of one motion to reopen described in section 240(c)(7)(C)(iv) of the Immigration and Nationality Act.

(ii) Prima facie case.--The filing of a motion to reopen under this subparagraph shall only stay the removal of a qualified alien (as defined in section 431(c)(1)(B) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (8 U.S.C. 1641(c)(1)(B))) pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

VAWA 2000 § 1506(c)(2)(A) (2006).

^{xi} As a result of the changes made by VAWA 2005, INA § 240A(b)(2)(B), which discusses physical presence requirements, reads as follows:

(B) Physical presence

Notwithstanding subsection (d)(2) of this section, for purposes of subparagraph (A)(ii) or for purposes of [8 U.S.C. § 1254(a)(3)] (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence if the alien demonstrates a connection between the absence and the battering or extreme cruelty perpetrated against the alien. No absence or portion of an absence connected to the battering or extreme cruelty shall count toward the 90-day or 180-day limits established in subsection (d)(2) of

this section. If any absence or aggregate absences exceed 180 days, the absences or portions of the absences will not be considered to break the period of continuous presence. Any such period of time excluded from the 180-day limit shall be excluded in computing the time during which the alien has been physically present for purposes of the 3-year requirement set forth in this subparagraph, subparagraph (A)(ii), and section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

INA § 240A(b)(2)(B) (2006). Additionally, INA § 240A(b)(2)(C) was amended by striking the phrase “(A)(i)(III)” and inserting in its place “(A)(iii)”. *See* VAWA 2005 § 822(b).

^{xii} Following the amendments, the Cuban Adjustment Act § 1 states the following:

That, notwithstanding the provisions of section 245(c) of the [INA], the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least one year, may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence. Upon approval of such an application for adjustment of status, the Attorney General shall create a record of the alien's admission for permanent residence as of a date thirty months prior to the filing of such an application or the date of his last arrival into the United States, whichever date is later. The provisions of this Act shall be applicable to the spouse and child of any alien described in this subsection, regardless of their citizenship and place of birth, who are residing with such alien in the United States, except that such spouse or child who has been battered or subjected to extreme cruelty may adjust to permanent resident status under this Act without demonstrating that he or she is residing with the Cuban spouse or parent in the United States. In acting on applications under this section with respect to spouses or children who have been battered or subjected to extreme cruelty, the Attorney General shall apply the provisions of [INA] section 204(a)(1)(J). An alien who was the spouse of any Cuban alien described in this section and has resided with such spouse shall continue to be treated as such a spouse for 2 years after the date on which the Cuban alien dies (or, if later, 2 years after the date of enactment of [VAWA] 2005 [Jan. 5, 2005]), or for 2 years after the date of termination of the marriage (or, if later, 2 years after the date of enactment of [VAWA] 2005 [Jan. 5, 2005]) if there is demonstrated a connection between the termination of the marriage and the battering or extreme cruelty by the Cuban alien.

Cuban Adjustment Act § 1 (2006).

^{xiii} It should be noted that the new definition of VAWA self-petitioner established under INA § 101(a)(51) does not include aliens who adjust under the Cuban Adjustment Act after the death of their spouse, because INA § 101(a)(51)(D) requires adjustment under the Cuban Adjustment Act “as a child or spouse who has been battered or subjected to extreme cruelty” in order to be classified as a VAWA self-petitioner. *See* Cuban Adjustment Act; INA § 101(a)(51)(D) (2006).

^{xiv} As amended and as applicable to abused and battered aliens, NACARA § 202(d)(1) reads as follows:

(1) In general.--The status of an alien shall be adjusted by the Attorney General to that of an alien lawfully admitted for permanent residence, if--

(A) the alien is a national of Nicaragua or Cuba

(B) The alien--

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(i) is the spouse, child, or unmarried son or daughter of an alien whose status is adjusted to that of an alien lawfully admitted for permanent residence under subsection (a) [of NACARA § 202], except that in the case of such an unmarried son or daughter, the son or daughter shall be required to establish that the son or daughter has been physically present in the United States for a continuous period beginning not later than December 1, 1995, and ending not earlier than the date on which the application for adjustment under this subsection is filed; or

(ii) was, at the time at which an alien filed for adjustment under [NACARA § 202(a)], the spouse or child of an alien whose status is adjusted, or was eligible for adjustment, to that of an alien lawfully admitted for permanent residence under [NACARA § 202(a)], and the spouse, child, or child of the spouse has been battered or subjected to extreme cruelty by the alien that filed for adjustment under [NACARA § 202(a)];

(C) the alien applies for such adjustment and is physically present in the United States on the date the application is filed;

(D) the alien is otherwise admissible to the United States for permanent residence, except in determining such admissibility the grounds for inadmissibility specified in paragraphs (4), (5), (6)(A), (7)(A), and (9)(B) of section 212(a) of the [INA] shall not apply; and

(E) applies for such adjustment before April 1, 2000, or, in the case of an alien who qualifies under subparagraph (B)(ii), applies for such adjustment during the 18-month period beginning on the date of enactment of [VAWA 2002 - Jan. 5, 2006].

NACARA § 202(d)(1) (2006).

^{xv} As amended and as applicable to abused and battered aliens, HRIFA § 902(d)(1) reads as follows:

(1) In general.--The status of an alien shall be adjusted by the Attorney General to that of an alien lawfully admitted for permanent residence, if--

(A) the alien is a national of Haiti;

(B) (i) the alien is the spouse, child, or unmarried son or daughter of an alien who is or was eligible for classification under subsection (a) [of HRIFA § 902], except that, in the case of such an unmarried son or daughter, the son or daughter shall be required to establish that the son or daughter has been physically present in the United States for a continuous period beginning not later than December 1, 1995, and ending not earlier than the date on which the application for such adjustment is filed;

(ii) at the time of filing of the application for adjustment under subsection (a) [of HRIFA], the alien is the spouse or child of an alien who is or was eligible for classification under subsection (a) [of HRIFA] and the spouse, child, or child of the spouse has been battered or subjected to extreme cruelty by the individual described in subsection (a) [of HRIFA]; and

(iii) in acting on applications under this section with respect to spouses or children who have been battered or subjected to extreme cruelty, the Attorney General shall apply the provisions of [INA] section 204(a)(1)(J).

(C) the alien applies for such adjustment and is physically present in the United States on the date the application is filed; and

(D) the alien is otherwise admissible to the United States for permanent residence, except that, in determining such admissibility, the grounds for inadmissibility specified in paragraphs (4), (5), (6)(A), (7)(A), and (9)(B) of [INA] section 212(a) . . . shall not apply.

HRIFA § 902(d)(1) (2006).



**U.S. Immigration
and Customs
Enforcement**

JAN 22 2007

MEMORANDUM FOR: Field Office Directors and Special Agents in Charge

FROM: Director John P. Torres
Office of Detention and Removal Operations

Director Marcy M. Forman
Office of Investigations

SUBJECT: Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005.

Purpose

The Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), which became effective on January 5, 2006, expanded various protections for aliens seeking immigration benefits as crime victims and amended various sections of the Immigration and Nationality Act (INA). As a result, operational units of U.S. Immigration and Customs Enforcement (ICE) will be required to follow new procedures when taking certain actions in cases involving aliens eligible to apply for VAWA benefits or T or U nonimmigrant status. This interim guidance explains how VAWA 2005 affects the current operating procedures of the Office of Investigations (OI) and the Office of Detention and Removal Operations (DRO).

Background

Congress passed the Violence Against Women Act (VAWA) of 1994 as a response to growing concerns over gender-related violence. VAWA provides that abused spouses, children, and parents of U.S. citizens or lawful permanent residents can "self-petition" to obtain lawful permanent residence. These provisions allow certain battered aliens to file for an immigrant visa in order to seek safety and independence from the abuser without the abuser's permission.

Congress subsequently passed the Victims of Trafficking and Violence Protection Act of 2000, which reauthorized the VAWA provisions of 1994 and created two new nonimmigrant categories: T status and U status. T nonimmigrant status is available to victims of "severe forms of trafficking" who are physically present in the United States or a port of entry as a result of that trafficking. U nonimmigrant status is available to aliens who have "suffered substantial physical or mental abuse" as a result of certain criminal acts. Victims eligible for VAWA benefits or T or U nonimmigrant status may seek benefits through separate applications submitted to the Vermont Service Center of U.S. Citizenship and Immigration

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Services (USCIS). This memorandum provides interim guidance concerning the expanded confidentiality protections of the VAWA 2005 and the legislation's requirement that ICE issue a certificate of compliance in certain circumstances.

Discussion

A. Definition of "VAWA Self-Petitioner"

VAWA 2005 added INA § 101(a)(51), which defines "VAWA self-petitioner" as an alien, or a child of the alien, who qualifies for relief under several provisions of the Act and generally requires that the victim be abused, battered, or subjected to human trafficking or severe mental or physical abuse. A self-petition allows the victim the opportunity to adjust status without the abuser's assistance. ICE employees should become familiar with the categories of VAWA self-petitioners and the many ways in which battered victims may adjust their status. For purposes of this interim guidance, if an officer believes there is any credible evidence that the alien may be eligible for VAWA benefits or T or U nonimmigrant status, the requirements of 8 U.S.C. § 1367, described below, must be followed along with standard operating procedure.

B. Use of Information from Prohibited Sources and Confidentiality

Section 1367(a) of Title 8 of the United States Code, as amended by VAWA 2005, prevents ICE employees from making an adverse determination of admissibility or deportability of an alien using information furnished *solely* by certain people associated with the battery or extreme cruelty, such as the abuser or a member of the abuser's family living in the same household as the victim. For purposes of this interim guidance, an adverse determination of admissibility or deportability would include placing an alien in removal proceedings or making civil arrests relating to an alien's violation of the immigration laws. Section 1367(a) also generally prohibits ICE employees from disclosing any information about a VAWA, T, or U beneficiary to anyone, especially those who might use the information to the alien's detriment, *i.e.* an abuser who may wish to have the victim removed from the United States.

Information provided *solely* by prohibited sources must be independently corroborated. Examples of prohibited sources include: the abuser in the case of a VAWA petitioner, the human trafficker in the case of a T status applicant, or the perpetrator of substantial physical or mental abuse in the case of a U status applicant. In such cases, ICE employees cannot rely solely on these sources when making an adverse determination of admissibility or deportability. This prohibition is important to note because ICE officers sometimes receive information from upset or disgruntled spouses, abusers, traffickers, or family members. An arrest based on such information would not violate § 1367 if, according to existing standard operating procedures, the ICE officer independently verifies the information (*e.g.* through an immigration database) prior to making the arrest. To avoid a possible violation of § 1367, ICE officers must verify the information provided from these prohibited sources. For example, if the abuser husband calls ICE and states that his alien wife is in the United States after being ordered removed, ICE must independently verify the prior removal and note such corroboration on Form I-213 (Record of Inadmissible/Deportable Alien).

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Section 1367 does not prevent ICE officers from making arrests of aliens believed to be in the United States illegally if the information provided by a prohibited source is independently verified. Likewise, § 1367 does not prevent ICE officers from arresting aliens who have applied for benefits under VAWA or the T or U nonimmigrant categories. Instead, § 1367 prevents ICE officers from making adverse determinations of admissibility or deportability based on information provided “solely” by a prohibited source. Simply stated, ICE officers must independently verify information and check databases at their disposal to determine the existence of any pending victim-based applications for immigration benefits. ICE officers are also reminded to consider the sources of their information and be aware that there is a possibility that the caller may be involved in an abusive or violent relationship with the alien who is the subject of the call. Accordingly, if the source of the independently verifiable information is likely an abuser or someone acting in the abuser’s capacity, the ICE officer should consider using prosecutorial discretion.

This interim guidance also reminds ICE employees that they are generally prohibited from “permit[ing] use by or disclosure to anyone (other than a sworn officer or employee of [DHS])” of any information which relates to an alien who is the beneficiary of an application for relief under victim based benefits (VAWA, T or U nonimmigrant status).¹ If ICE employees know that an alien has sought such victim-based benefits, they are generally prohibited from disclosing any information to a third party. In enacting this nondisclosure provision, Congress sought to prevent, with limited exceptions, disclosure of *any information* relating to beneficiaries of applications for VAWA benefits (battered spouses or children) or for T or U nonimmigrant status, including the fact that they have applied for benefits. The disclosure of certain information is permitted in limited circumstances. Those circumstances include disclosure for legitimate law enforcement purposes, statistical purposes, and benefit granting or public benefit purposes. See 8 U.S.C. § 1367(b) (listing exceptions to general nondisclosure rule). In short, ICE employees must not reveal any information concerning an alien’s T, U, or VAWA application unless an exception to the general nondisclosure requirement applies. The nondisclosure limitation ends when the application for relief is denied and all opportunities for appeal of the denial have been exhausted.

C Sensitive Location Certificate of Compliance Requirement

VAWA 2005 added new INA § 239(e), which requires the completion of a certificate of compliance in certain cases. INA § 239(e) states, in relevant part.

(1) In general

In cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of section 384 of the IIRIRA of 1996 (8 U.S.C. § 1367) have been complied with.

(2) Locations

¹ For additional information concerning the non-disclosure of information relating to VAWA beneficiaries, please see *Memorandum of Paul W. Virtue, INS Acting Executive Associate Commissioner, Non-Disclosure and Other Prohibitions Relating to Battered Aliens, IIRIRA § 384, May 5, 1997.*

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The locations specified in this paragraph are as follows:

(A) At a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization.²

(B) At a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is described in subparagraph (T) or (U) of section 101(a)(15) of this title [8 U.S.C. § 1101(a)(15)]

This provision applies to all apprehensions occurring on or after February 5, 2006.

Section 239(e) requires ICE to certify that the agency has independently verified the inadmissibility or deportability of an alien that was encountered at these specified sensitive locations. In practical terms, when ICE officers encounter aliens at these sensitive locations and ultimately issue a Notice To Appear, the officers must ensure that they have independently verified the inadmissibility or deportability of that alien and must not permit any unauthorized disclosure of information about the alien.

The file must bear information adequately alerting the officer or agent who is preparing the NTA that the INA 239(e) certification requirement could be implicated. Moreover, in complying with 8 U.S.C. § 1367, the file must bear sufficient information to permit the issuing officer or agent to make a reliable assessment that, in fact, the prohibited source and nondisclosure provisions of § 1367 have been complied with. Accordingly, ICE officers or agents must record on the Form I-213 whether the alien was encountered at a sensitive location, whether information related to the alien's admissibility or deportability was supplied by a prohibited source, whether and how such information was independently verified, and an acknowledgment that, if applicable, the nondisclosure requirements have been complied with.

The certificate of compliance requirements reflects congressional intent that ICE proceed cautiously when making an arrest or otherwise physically encountering an alien at one of the sensitive locations without objective evidence that the alien is in the United States in violation of the immigration laws and that victims of battery, abuse, trafficking, and extreme cruelty be protected. In this regard, ICE officers encountering such individuals are to verify information through use of all databases at their disposal, including CLAIMS. For INA § 239(e) purposes,

² A community based organization means an organization that:

- (A) focuses primarily on domestic violence, dating violence, sexual assault, or stalking;
- (B) has established a specialized culturally specific program that addresses domestic violence, dating violence, sexual assault, or stalking;
- (C) has a primary focus on underserved populations (and includes representatives of these populations) and domestic violence, dating violence, sexual assault, or stalking; or
- (D) obtains expertise, or shows demonstrated capacity to work effectively, on domestic violence, dating violence, sexual assault, and stalking through collaboration.

See 42 U.S.C. § 13925(a)(3) (2006).

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ICE officers must then issue a certificate of compliance if the alien was encountered at a sensitive location and ICE issued a Notice To Appear. The certificate of compliance must be completed by an officer or agent authorized to issue Notices To Appear after reviewing the information contained on the I-213 and confirming the prohibited source information was independently verified. See 8 C.F.R. § 239.1 (2006). The certificate may simply state "I certify that, to the best of my knowledge and belief, section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. § 1367) has been complied with." The certificate of compliance language may be typed or printed on the NTA. Failure to complete a certificate of compliance may subject the officer and ICE to civil penalties and disciplinary action for violating 8 U.S.C. § 1367.

ICE officers are discouraged from making arrests at these sensitive locations absent clear evidence that the alien is not entitled to victim-based benefits. Aliens encountered at rape crisis centers, domestic violence centers, or any of the sensitive locations noted in INA § 239(e) are likely to be genuine VAWA self-petitioners. While INA § 239(e) does not prohibit arrests of aliens at sensitive locations, it is clear that Congress intended that cases of aliens arrested at such locations be handled properly given that they may ultimately benefit from VAWA's provisions. ICE officers should consider prosecutorial discretion in cases of aliens encountered at sensitive locations unless exigent circumstances exist. Examples of exigent circumstances include criminal activity, fraud, terrorism, or where there are extraordinary reasons for arresting aliens at sensitive locations.

If an officer is unsure whether a particular personal encounter or apprehension requires a certification of compliance under INA § 239(e), the officer should consult the local Office of Chief Counsel (OCC). If time does not permit, the officer should consult his or her immediate supervisor for assistance.

Questions about the information provided in this memorandum may be directed to the local OCC or to the Enforcement Law Division (202-514-2895). Specific victim assistance questions may be directed to (b)(6),(b)(7)(C) ICE Victim-Witness Coordinator, at 202-616-

(b)(6),(b)(7)(C)

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**U.S. Immigration
and Customs
Enforcement**

December 15, 2015

Leslye Orloff
National Immigrant Women's Advocacy Project
4910 Massachusetts Ave NW
Washington, DC 20016

RE: ICE FOIA Case Number 2015-ICFO-91320

Dear Ms. Orloff:

This letter is the final response to your Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement (ICE), dated August 12, 2015. You have requested copies of the following records:

The confidential ICE OPLA guidance memorandum for ICE trial attorneys on the Violence Against Women Act (VAWA)

ICE has considered your request under the FOIA, 5 U.S.C. § 552.

A search of the ICE Office of the Principal Legal Advisor (OPLA) for records responsive to your request produced 27 pages that are responsive to your request. After review of those documents, ICE has determined that 24 pages will be released in their entirety. Portions of 3 pages will be withheld pursuant to Exemptions of the FOIA as described below.

ICE has applied FOIA Exemptions 6 and 7(C) to protect from disclosure the names, e-mail addresses, and phone numbers of DHS employees contained within the documents.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right to privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

FOIA Exemption 7(C) protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them

U.S. Department of Homeland Security
500 12th St SW, Stop 5009
Washington, DC 20536



U.S. Immigration
and Customs
Enforcement

revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate. As such, ICE has determined that the privacy interest in the identities of individuals in the records you have requested clearly outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into this determination.

You have the right to appeal ICE's determination and should you wish to do so, please send your appeal following the procedures outlined in the DHS regulations at 6 Code of Federal Regulations § 5.9 and a copy of this letter to:

U.S. Immigration and Customs Enforcement
Office of Principal Legal Advisor
U.S. Department of Homeland Security
Freedom of Information Act Office
500 12th Street, S.W., Stop 5900
Washington, D.C. 20536-5900

Your appeal must be received within 60 days of the date of this letter. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

Provisions of the FOIA and Privacy Act allow us to recover part of the cost of complying with your request. In this instance, because the cost is below the \$14 minimum, there is no charge.¹

If you need to contact the FOIA office about this matter, please call (866) 633-1182 and refer to FOIA case number **2015-ICFO-91320**.

Sincerely,

A handwritten signature in black ink that reads "Bradley E. White".

Catrina M. Pavlik-Keenan
FOIA Officer

Enclosure(s): 27 pages.

¹ 6 CFR § 5.11(d)(4).