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FAMILY VIOLENCE AND U.S. IMMIGRATION LAW: NEW DEVELOPMENTS

by

LAUREN GILBERT*

The last months of the Clinton Administration were marked by a number of measures designed to enhance legal protections for battered immigrants and their children. Although the last U.S. Congress of the 20th Century had held out the promise of major immigration reforms,[1] in the end, perhaps the most significant immigration legislation enacted was the Battered Immigrant Women Protection Act of 2000, signed into law by President Clinton on October 28, 2000 as part of the Victims of Trafficking and Violence Protection Act of 2000.[2] This new law expands protections already available to the abused immigrant spouses and children of U.S. citizens and lawful permanent residents under the 1994 Violence Against Women Act (VAWA)[3] and removes many of the obstacles to self-petitioning, adjustment of status, and relief from removal that resulted from the 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA").[4] It also creates a nonimmigrant U visa for noncitizens who have suffered substantial abuse as a result of criminal activity—including victims of domestic violence and sexual abuse—but who are not eligible for residency under VAWA's self-petitioning or cancellation provisions.[5]

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On December 7, 2000, the Attorney General and the INS also proposed new rules that would recognize domestic violence as a basis for asylum in certain cases where a country was unable or unwilling to protect the victim from her abuser.[6] The proposed rules called into serious question without explicitly overruling the Board of Immigration Appeals' ("BIA") 1999 decision in *Matter of R-A-*, which denied asylum to a Guatemalan woman because the persecution she suffered was, according to the majority, not recognized by U.S. asylum law.[7] Then, on January 19, 2001, Clinton's last full day in office, Attorney General Janet Reno vacated *Matter of R-A-*, sending it back to the BIA to reconsider in light of the proposed rules, thus opening the way for new asylum claims involving domestic violence.[8]

This BRIEFING, an update of the March1998 IMMIGRATION BRIEFINGS, *Family Violence and the Immigration and Nationality Act*,[9] by this same author, will examine immigration remedies for battered spouses and children under the Immigration and Nationality Act ("INA"). Part I will briefly examine the power and control tactics used against immigrant spouses and children. Part II will provide an overview of family-based immigration and examine the new requirements for self-petitioning and VAWA adjustment of status. Part III will discuss the requirements for VAWA suspension of deportation and cancellation of removal. Part IV will discuss special rules for conditional residents who have been abused. Part V will briefly discuss new naturalization rules for the battered spouses and children of United States Citizens (USCs). Part VI will examine the availability of the new U visa for victims of domestic violence ineligible under VAWA's self-petitioning and cancellation provisions. Finally, Part VII will analyze the circumstances under which domestic violence survivors may be eligible for asylum.

POWER AND CONTROL TACTICS AGAINST IMMIGRANT SPOUSES

The most prevalent form of violence within the family is the violence of the husband against the wife.[10] The United Nations Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, has noted that domestic violence, like other forms of violence against women, is a manifestation of the historically unequal power relations between men and women. Domestic violence is a pervasive practice that cuts across geographic boundaries, races, classes and cultures. It relies on intimidation and fear to subordinate women.[11] In many societies and cultures, the family traditionally had been considered a private haven, a retreat where people find security and shelter, free from arbitrary state intervention.[12] Yet research shows that for many women and children, the family also has been a site of unspeakable violence, where notions of the sanctity of the family have justified the use of domestic violence to perpetuate male dominance.[13]

Immigrant women are particularly vulnerable to abuse at the hands of citizen or permanent resident spouses, on whom they often depend for their immigration status. Because of language and cultural barriers, these women often are unaware of their legal rights and are dependent on their spouses for information about their legal status. Some of the techniques typically used by the abuser in such situations include:

- *Using citizenship or residency privileges.* Failing to file papers to legalize her immigration status; withdrawing or threatening to withdraw papers filed for her residency.
- *Coercion and threats.* Threatening to report her to the INS to get her deported, or threatening to

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withdraw the petition to legalize her immigration status.

- *Using children.* Threatening to separate her from her children.
- *Economic abuse.* Threatening to report her if she works without a green card; intimidating her at her workplace.
- *Emotional abuse.* Denigrating her, playing mind games, lying about her immigration status, calling her racist and/or sexist names.
- *Intimidation.* Hiding or destroying important papers (such as passports, birth certificates, marriage certificates, and health care cards).[14]

Prior to passage of the 1994 Violence Against Women Act, immigration law tended to exacerbate the situation faced by battered immigrants trapped in abusive relationships, where the law itself became one more weapon of power and control.[15]

IMMIGRATION REMEDIES FOR BATTERED SPOUSES AND CHILDREN

In 1994, President Clinton enacted the Violence Against Women Act (VAWA) as part of the Violent Crime Control and Law Enforcement Act of 1994.[16] It was intended to stop violence against women and prevent future abuse. The immigration provisions amended the Immigration and Nationality Act ("INA") to allow battered immigrant spouses and children to become lawful permanent residents ("LPRs") without having to depend on their U.S. citizen ("USC") or LPR abusers.[17] Prior to VAWA, when abusers would refuse to petition for their spouses and children or would threaten to withdraw pending petitions or adjustment applications, their victims had no relief. VAWA offers two forms of relief to the abused spouses and children of USCs and LPRs:

1. It allows spouses and children to self-petition for legal status and eventually to apply for legal residency without having to rely on their USC or LPR abusers
2. If the INS places them into proceedings before an immigration judge, they are eligible for VAWA *suspension of deportation* or VAWA *cancellation of removal*, if continuously present in the United States for at least three years[18]

VAWA did not provide any protection, however, to the battered spouses and children of non-U.S. citizens or nonresidents. The only conceivable remedy for persons in this situation was to apply for political asylum. To make matters worse, in 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA).[19] The new law imposed harsh new penalties on criminal aliens and on intending immigrants who remain in the United States or attempt to enter or reenter without lawful status.[20] It also legislated a one-year filing deadline for asylum seekers.[21] Although the new law exempted battered spouses from some of its harsher aspects, IIRAIRA undermined many of the protections afforded by VAWA. It permitted INA Section 245(i) [8 USCA § 1255(i)], which allowed the beneficiaries of approved petitions to adjust their status in the United States, to sunset. It also imposed a three-year bar to admission on persons unlawfully present in the United States for six months to a year, a ten-year bar on persons unlawfully present for a year or more, and permanent bars on other immigration violators. It created a stop-time rule for immigrants placed into proceedings before they had accrued the requisite continuous physical presence to apply for relief from removal.[22] Harsh new penalties for criminal aliens adversely affected many VAWA applicants, including women who would lose their eligibility under VAWA if their abusive spouse lost his status, and VAWA applicants convicted of retaliating against their abusers.[23]

The Battered Immigrant Women Protection Act of 2000 removes many of the obstacles to eligibility for self-petitioning, adjustment of status, and relief from removal for abused immigrant spouses and children, creating certain waivers and exceptions to the grounds of inadmissibility. It also creates the U visa for abused aliens not in lawful immigration status who have suffered substantial physical or mental abuse as a result of certain criminal activity, including domestic violence survivors not married to their abusers or whose abuser is not a USC or LPR.[24]

◆ A Brief Review of Family-Based Immigration

The Immigration and Nationality Act (INA) provides for the admission of two categories of aliens, immigrants and nonimmigrants. Nonimmigrants, such as students, tourists, agricultural workers, and diplomats, come to the United States for a specified purpose and period of time. Immigrants come to the United States to take up residence. The four major categories of legal immigrants are:

- Family-sponsored immigrants;
- Employment-based immigrants;
- Diversity immigrants;
- Refugees and asylees[25]

Applying for residency for family-sponsored immigrants is a two-part process.[26] The sponsoring U.S. citizen or lawful permanent resident (the "petitioner") submits an I-130 Petition for Alien Relative on behalf of the intending immigrant ("the beneficiary").[27] After the petition is approved, the beneficiary becomes eligible for *adjustment of status* in the U.S. or for an immigrant visa through *consular processing* overseas.[28] U.S. citizens can petition for their *immediate relatives*. This includes spouses, unmarried children under 21, and, for petitioners 21 or older, parents. [29] All other qualifying relationships fall within the *preference categories*.[30] For USCs, there are no numerical limitations on the number of visas available for immediate relatives, who are eligible to adjust status or consular process immediately.[31] Under the family-sponsored preference categories, permanent residents can petition for spouses, children and unmarried sons and daughters and USCs can petition for other close relatives, including brothers, sisters, and married and unmarried sons and daughters.[32] These preference categories are subject to annual ceilings, however, and there are often long backlogs.[33] Petitioners seeking to immigrate immediate relatives must file a separate I-130 petition for each family member. That is, the spouse and children of immediate relatives cannot immigrate as derivatives.[34] For the preference categories, the spouse and unmarried children (under 21) of the principal beneficiary can immigrate as derivatives of the principal, without having to file a separate I-130.[35] We summarize below these different categories and reproduce the current visa bulletin, which indicates the priority dates for the different preference categories, depending on country of origin.[36] The priority date indicates the date the I-130 petition was originally filed or received by the INS ("receipt date").[37] This means that visas are currently available for persons with approved petitions who filed on or before that date. These individuals are now ready for the second step: consular processing overseas or adjustment of status to permanent residency in the United States.

Summary of Immediate Relative and Preference Categories

IMMEDIATE RELATIVES: spouses, unmarried children under 21, and, the parents of petitioners 21 or older

FAMILY-SPONSORED PREFERENCES:

First: Unmarried Sons & Daughters of Citizens: 23,400 plus any numbers not required for fourth preference.

Second: Spouses & Children, & Unmarried Sons and Daughters of Permanent Residents: 114,200, plus number (if any) by which worldwide family preference level exceeds 226,000, and any unused first preference numbers:

A. Spouses and Children: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;

B. Unmarried Sons and Daughters (21 years of age or older): 23% of the overall second preference limitation.

Third: Married Sons & Daughters of Citizens: 23,400, plus any numbers not required by first and second preferences.

Fourth: Brothers and Sisters of Adult Citizens: 65,000, plus any numbers not required by first three preferences.

VISA BULLETIN – PRIORITY DATES – MARCH 2001

FAMILY PREFERENCES

	All Chargeability Areas Except Those Listed Separately	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	01 Mar 99	01 Mar 99	01 Mar 99	22 Apr 94	22 May 88
2A	22 Sep 96	22 Sep 96	22 Sep 96	22 Oct 94	22 Sep 96
2B	22 Jun 93	22 Jun 93	22 Jun 93	15 Oct 91	22 Jun 93
3rd	08 May 96	08 May 96	08 May 96	15 Jul 95	15 Nov 87
4th	01 Oct 89	01 Oct 89	08 Mar 88	01 Oct 89	01 Aug 79

◆ Self-Petitioning Under the Violence Against Women Act

Although a VAWA self-petitioner can file an I-360 self-petition without relying on her abusive USC or LPR spouse or parent, at the adjustment phase she is subject to similar rules regarding immediate relatives and preference categories as other family-based immigrants. It is important to keep these rules in mind. That is, the self-petitioning spouse or child of a U.S. citizen is immediately eligible to adjust or consular process, while the spouse or child of a lawful permanent resident or the son or daughter of a USC or LPR must wait until his or her priority date becomes current.[38]

One key difference is that the approved VAWA self-petitioner has legal status: she usually receives Deferred Action and can receive employment authorization while waiting for a visa to become available.[39] Moreover, if the abusive spouse or parent has previously filed an I-130 petition for the abused spouse or child, the self-petitioner can recapture the old priority date for adjustment purposes, even if the I-130 application has been withdrawn or denied.[40] Furthermore, if the self-petitioner has an I-485 adjustment application pending based on a previously filed I-130 petition, the approved self-petitioner should be able to adjust without having to file a new adjustment application.[41]

Battered spouses can also include their children as derivatives, regardless of whether the spouse is married to a USC or LPR.[42] The Immediate Relative rules regarding derivatives do not apply. Furthermore, under the new law, derivative children will convert to the appropriate preference category if they marry or age out before obtaining their lawful residency.[43]

Basic Requirements for Self Petitioners. VAWA amended § 204(a)(1) of the Immigration and Nationality Act (INA) to allow certain abused spouses and children to self-petition for permanent residency. Children can either file their own petitions, if they were also the victims of battery or extreme cruelty, or they can be included on their parent's application as derivatives.[44]

Requirements for Spouses. Currently, to be eligible to self-petition, the noncitizen spouse or intending spouse of a USC or LPR must demonstrate the following:

- That the marriage or intended marriage was entered into in good faith
- That during the marriage, the noncitizen spouse or his or her child has been battered by or been the subject of extreme cruelty committed by the USC or LPR spouse
- Residence, past or present, with the USC or LPR spouse
- Either (1) current residence in the United States or (2) if living abroad, that the abusive spouse is an employee of the U.S. government or

a member of the uniformed services or subjected the noncitizen or the noncitizen's child to battery or extreme cruelty in the United States

- Good moral character[45]

Requirements for Children. The alien child of an abusive USC or LPR must establish:

- Past or present residence with the USC or LPR parent
- That during that residence, the child has been battered by or been the subject of extreme cruelty committed by the USC or LPR parent; and
- Either (1) current residence in the U.S. or (2) if living abroad, that the abusive parent is an employee of the U.S. government or a member of the uniformed services or subjected the child to abuse in the United States
- Good moral character[46]

The requirement under the prior law that the self-petitioner show that removal would result in extreme hardship to the self-petitioning spouse or his or her child, or to the self-petitioning child, was eliminated by the Battered Immigrant Women Protection Act of 2000.[47]

The Marriage Requirement for Self-Petitioning Spouses. The self-petitioner must be the spouse or "intended spouse" of an abusive U.S. citizen or lawful permanent resident.[48]

Marriage Valid in the Place it was Performed. A spousal relationship exists if the marriage was valid in the place where it was performed or celebrated.[49] Thus, the INS recognizes not only traditional marriages, as evidenced by a marriage certificate and marriage ceremony, but customary and common law marriages, if they are recognized and meet the requirements in the country or state where they were celebrated.[50] The one exception is where the United States deems the marriage to be against public policy.[51] Regarding common law marriage, if a self-petitioner was never formally married to her abuser, but she and her abuser lived together in a country or one of the few U.S. states that recognize common law marriage, she may qualify as a self-petitioning spouse, if she meets that state's or country's requirements for a common law marriage. Currently, eleven states and the District of Columbia recognize common law marriages. These states include Alabama, Colorado, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Texas and Utah.[52] Each state has its own set of legal requirements, which the applicant must review. Some states and the District of Columbia, for example, require a present intent to marry.

Bigamous Marriages Not a Bar. VAWA II allows abused individuals in bigamous relationships to self-petition if they can prove that they are *intended spouses*. An *intended spouse* is someone:

- Who believed that he or she married a U.S. citizen or lawful permanent resident;
- Who entered into the intended marriage in good faith, and not solely for the purpose of procuring an immigration benefit; and
- With whom a marriage ceremony was actually performed,
- *But* whose marriage is not legitimate solely because of the bigamy of the abusive USC or LPR.[53]

◆ **Practice Pointer:** Note that this provision *does not* protect self-petitioners who did not properly terminate their own prior marriages. It protects self-petitioners where the *abuser* did not properly terminate his or her own prior marriage, and where the self-petitioner believed she was entering into a valid marriage at the time it was celebrated. It also *does not protect common law spouses*, but only intending spouses where a marriage ceremony was actually performed.

Divorce No Longer a Bar. Under prior law, a self-petitioner had to be married to her USC or LPR abuser at the time the self-petition was filed.[54] Once the application was properly filed, divorce from the abuser would not (and still does not) affect the application.[55] Unfortunately, many individuals were barred from self-petitioning either because their abusers obtained a divorce before the self-petition was filed, or because they sought legal assistance from legal services providers who failed to properly advise them regarding VAWA's requirements. Under the new law, a self-petitioner is not barred from self-petitioning if her marriage to a USC or LPR was legally terminated within the last two years and the self-petitioner can show a connection between the legal termination of the marriage and battering or extreme cruelty by the USC or LPR spouse.[56]

Death of U.S. Citizen Abuser Not a Bar. The spouse of a deceased U.S. citizen abuser can still self-petition if her abusive USC spouse died within the last two

years.[57] There is no requirement (as there is for other widows or widowers) that the couple were married for at least two years before the U.S. citizen's death. Note, however, that this provision does not protect the widows and widowers of lawful permanent residents.[58]

Remarriage of Approved Self-Petitioner Not a Bar. VAWA 2000 provides that the remarriage of a former spouse or the marriage of a self-petitioning child shall not serve as a basis for revoking an *approved* self-petition.[59] Note, however, that the married son or daughter of a lawful permanent resident does not fall within any preference category and appears to have no means of adjusting status to lawful residency. It would appear that, in order for the married son or daughter with an approved self-petition to be eligible to adjust, the LPR abuser must naturalize (thus converting the son or daughter to the third preference category) or the married son or daughter must divorce (thus restoring the son or daughter to 2B preference status). In the meantime, the married son or daughter should be able to maintain his or her deferred action status and eligibility for work authorization.

Good Faith Marriage. Once the existence of the marriage or intended marriage has been establish, the self-petitioner must prove that she entered into the marriage in good faith.[60] VAWA 2000 did not make any substantive changes to this requirement. The self-petitioner must prove by a preponderance of the evidence that the couple married for the principal purpose of sharing a life together, and not solely to obtain an immigration benefit.[61] Evidence of a good faith marriage can include but is not limited to:

- Wedding pictures and other records of the ceremony
- Photos, letters, telephone bills, and other evidence of courtship
- A lease, utility bills, or other records showing the couple lived together
- Insurance policies including the self-petitioner as a beneficiary
- Joint credit cards or bank accounts
- Joint tax returns
- Birth certificates of children born of the relationship
- The self-petitioner's own detailed affidavit or declaration[62]

In VAWA cases, the INS must apply the "any credible evidence" standard in determining whether a marriage was bona fide.[63] Where evidence is limited or not available, which is not unusual in situations involving domestic violence, the INS must consider the self-petitioner's detailed affidavit, which should describe in detail the courtship and life together with the abuser.

Battery or Extreme Cruelty. The self-petitioning spouse must prove that during the marriage, she or her child was battered or subjected to extreme cruelty by the USC or LPR spouse.[64] Similarly, a self-petitioning child must demonstrate that he was battered or subjected to extreme cruelty by the USC or LPR parent.[65] For a self-petitioning spouse, the abuse must have occurred during the marriage.[66] A self-petitioning child must show that he resided with the abuser at some point, but, under VAWA 2000, the abuse need not have occurred while the child and the abuser were residing together.[67] The language of the statute and the regulatory provisions make it clear that the abuse can be either physical or psychological. INS regulations indicate:

> ...the phrase "was battered by or was the subject of extreme cruelty" includes, but is not limited to, being the victim of any act or threatened act of violence, including an forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves may not initially appear violent but that are part of an overall pattern of violence.[68]

Thus, violence towards pets or physical objects may be considered violence against the self-petitioner, if it is designed to instill fear or submission.

Evidence of the abuse may include but is not limited to:

- The self-petitioner's own detailed affidavit
- Copies of temporary and final protective orders
- Shelter records and other evidence that the abuse victim sought shelter
- Counseling records
- Medical records of the abuse

- Photographs of a visibly injured victim and any property damage, together with an affidavit
- Police reports
- Other reports of judges and other court officials
- Affidavits of witnesses to the violence
- Letters from clergy to whom the violence was reported
- School records, if abuse mentioned to teachers, school counselors, principal, etc.
- Expert affidavits from psychologists or counselors
- Other forms of credible evidence[69]

Residence with the Abuser. VAWA 2000 enacted several significant changes to the residency requirements for self-petitioners. Under *prior law*, the self-petitioner had to show that:

- She was currently residing in the United States; and
- She had resided in the United States with the USC or LPR abuser.[70]

Self-petitioners compelled to flee the United States to escape their abusers were not able to self-petition. Similarly, the abused spouses and children of U.S. military or government officials posted abroad also were barred, if they had never lived with their abuser in the United States.

VAWA 2000 requires that self-petitioners meet the following residency requirements:

1. Spouses, intending spouses, and self-petitioning children must be residing or have resided in the past with the abusive USC or LPR spouse or parent;[71]

2. Spouses, intending spouses, and children of abusive USCs and LPRs either must be residing in the United States, or, if outside the United States, they must show one of the following:

   - The abusive spouse or parent in an employee of the U.S. government
   - The abusive spouse or parent is a member of the armed forces
   - The abuser subjected the alien spouse or child, or the alien spouse's child to battery or extreme cruelty in the United States[72]

Thus, the abused spouses and children of U.S. government officials or members of the military can self-petition, even if they have never been to the United States or if they come to the United States without their abusers. Other abused spouses and children living abroad can also self-petition as long as their USC or LPR abuser subjected them to battery or extreme cruelty in the United States in the past. At some point, the self-petitioner and the abuser must have resided together.[73] It is not essential, however, that the abuse occurred while the self-petitioner and the abuser were residing together.[74]

Status of the Abuser—U.S. Citizen or Lawful Permanent Resident. Only the spouses and children of U.S. citizens and lawful permanent residents are eligible to self-petition. The self-petitioning provisions do not protect the spouses and children of undocumented immigrants or of nonimmigrants, such as students, tourists, diplomats, religious workers, or persons on business visas. As we discuss further below, in certain exceptional cases involving serious violence or psychological abuse, these individuals may be eligible for a U visa or asylum. Abused and abandoned children may also be eligible for Special Immigrant Juvenile Status.[75]

Loss of Status. Previously, the abusive spouse or parent had to be a U.S. citizen or lawful permanent resident both at the time the self-petition was filed and at the time it was approved.[76] Under VAWA 2000, in cases where the abuser is no longer a U.S. citizen or lawful permanent resident, the self-petitioner can still apply as long as the abusive spouse or parent, within the last two years, lost or renounced U.S. citizenship "related to an incident of domestic violence"[77] or lost lawful permanent residency status "due to an incident of domestic violence."[78]

These provisions were designed to address the harsh effects of IIRAIRA, which made domestic violence a deportable offense for which no waiver was available. VAWA self-petitioners who successfully pressed criminal charges against their LPR abusers could find themselves in the untenable position of having lost their ability to self-petition because their abusers were ordered removed or deported.[79] VAWA 2000 attempts to remedy this harsh effect. Nonetheless, it remains to be seen how the INS will interpret

the phrase "due to an incident of domestic violence". Will it only cover those situations where the abuser is ordered removed because of a domestic violence conviction? Or will it also cover those situations where there is some nexus between the domestic violence and the abuser's removal?

Change in Status. Under VAWA 2000, if an abusive LPR spouse or parent naturalizes, a pending or approved self-petition will be automatically reclassified as a self-petition filed by the spouse or child of a U.S. citizen, even if the abusive spouse or parent's naturalization occurred after divorce or the termination of parental rights.[80] Spouses and children no longer are subject to visa backlogs, and can file for adjustment. Under the old law, spouses and children were required to refile to take advantage of the abuser's change in status, but only if they were still eligible.

Proof of Status. The self-petitioner must establish that the abuser is (or was) either a U.S. citizen or lawful permanent resident. Primary evidence of the abuser's status includes a U.S. birth certificate, U.S. passport, naturalization certificate, or residency card. The INS recognizes that evidence normally available to family based petitioners may not be readily accessible to self-petitioners because of the dynamics of domestic violence.[81] The law requires that the INS and EOIR apply the liberal "any credible evidence" standard to all VAWA applications.[82] If the primary evidence is not available to the self-petitioner, the INS is required to check its own computer records and paper files to verify the abuser's immigration status.[83] Ultimately, however, the burden is on the self-petitioner to prove the status of her abuser.

Good Moral Character. Both VAWA self-petitioners and cancellation applicants must demonstrate that they are persons of good moral character.[84] A finding of good moral character is a statutory as well as a discretionary matter.[85] INA § 101(f) provides that certain persons are not eligible to be considered of good moral character because of their status or their commission of certain acts.[86] VAWA 2000 made several important changes in this regard, however, easing the requirements for self-petitioners who could show a connection between the abuse they had suffered and such acts or convictions.[87] INA 204(a)(1)(C) will now provide that, notwithstanding INA § 101(f), if an offense listed below would be waivable for purposes of determining the self-petitioner's admissibility under INA § 212(a) or deportability under INA § 237(a), the Attorney General can still find the self-petitioner to be of good moral character if the self-petitioner can demonstrate the requisite connection between the act or conviction and the battery or extreme cruelty.[88]

GOOD MORAL CHARACTER

INA Sec. 101(f) Provision	Waiver Available?
Is or was a habitual drunkard	Yes – INA §212(g)(3) waives §212(a)(1)(iii)
Engaged in prostitution during the last ten years	Yes – INA §212(h) waives §212(a)(2)(D)
Is or was involved in the smuggling of persons under INA Sec. 212(a)(6)(E)	Yes – INA §212(d)(11) – if immediate familymember involved
Was or is a practicing polygamist	No? – See INA §212(a)(9), making practicing polygamists inadmissible
Crimes of moral turpitude	Yes – INA §212(h) waives §212(a)(2)(A)(I)
Multiple crimes for which aggregate sentence was five years or more	Yes – INA §212(h) waives §212(a)(2)(B)
Has violated laws relating to controlled substances	Yes – INA §212(h), *but only for simple possession of 30 grams or less of marijuana*
Earns income from illegal gambling or has been convicted of two or more gambling offenses	Yes – INA §212(h) waives §212(a)(2)(D)
Has given false testimony for purposes of obtaining immigration benefits	Yes – INA §212(i) & INA §237(a)(1)(H), except for false claims to citizenship
Has been incarcerated for 180 days or more	Yes – INA §212(h) in general
Has been convicted *at any time* of aggravated felony, as set forth in INA §101(a)(43)	No waiver available

In addition to demonstrating the absence of a statutory bar to good moral character, the self-petitioner must provide sufficient information to allow the INS to conclude that the she is a person of good moral character. The INS has established a three-year good moral character test for self-petitioners. That is, the self-petitioner must submit police clearance letters for any place where the applicant has lived for six months or more.[89] If the applicant has a criminal charge or conviction, she must also submit certain court documents, including the charging document, the indictment and the disposition of the case. An INS examiner can find that an applicant is statutorily eligible, but still make a discretionary determination that the applicant has not demonstrated good moral character.[90]

In addition to the Police Clearance Letters, the applicant's own personal statement is key to establishing good moral character.[91] If a self-petitioner has committed or been charged with one of the offenses described above, it is critical that she explain the circumstances in her personal statement, demonstrating the connection between the offense in question and the abuse. Where there is no statutory bar, the examiner must consider all countervailing factors, including positive equities and the applicant's situation as a victim of domestic violence. In clean cases, the Police Clearance Letter and the applicant's own statement should be enough. In more complicated cases where there are previous convictions, criminal charges, or other negative indicators, the self-petitioner should include affidavits or letters from friends, neighbors, churches and community organizations that attest to her good moral character.[92]

Special Issues Concerning Children. Special issues arise in matters involving children.

Self-Petitioning Children. The self-petitioning child must be unmarried and under 21 years of age when the self-petition is filed.[93] He or she must be the child of the abusive USC or LPR parent, but need not be the child of a self-petitioning spouse. (Stepchildren qualify as children if the parent-child relationship was formed when the child was under 18.)[94] The 2000 amendments added an automatic conversion provision for the children of USCs, under which the child of a USC whose self-petition is filed or approved before the child turns 21, shall, upon turning 21, be considered a petitioner under the family first, second, or third preference categories, whichever is appropriate, with the same priority date assigned to the self-petition.[95] Self-petitioning children of LPRs who turn 21 had automatically converted to 2B classification as unmarried sons and daughter under the old law.[96] Similarly, if the self-petition of the child of a USC or LPR has been approved, the subsequent marriage of the child will not be the basis for the revocation of an approved self-petition.[97] Marriage will result in the married son or daughter of a USC being considered a petitioner under the third preference category, with the same priority date as the original self-petition. No new petition is required to be filed, and the approved self-petitioner is eligible for deferred action and work authorization while awaiting a current priority date and adjustment of status.[98] Presumably, the son or daughter of an LPR who has an approved self-petition and subsequently marries will have no means to adjust to LPR status until the LPR parent naturalizes or unless the son or daughter obtains a divorce, but will retain deferred action status and be eligible for work authorization.

Derivative children. Children of the abused spouse who are unmarried and under age 21 qualify for derivative status provided they are included on the spouse's self-petition.[99] They are not required to have been the victims of abuse. The non-abused spouse of a USC or LPR is eligible to self-petition based on battery or extreme cruelty to her child, regardless of her child's immigration status and regardless of the child's relationship to the abuser.[100] Under the 2000 law, a derivative child, upon attaining 21 years of age, will be considered a petitioner under the first, second, or third family preference categories, and be eligible for deferred action and work authorization.[101] As discussed above, if an abusive spouse is or was a USC and the derivative beneficiary of an approved self-petitioner marries before adjusting to LPR status, the derivative son or daughter's status would automatically convert to the third preference category.[102] If, however, the abuser is an LPR, the derivative's marriage would appear to result in the revocation of an approved self-petition. For these reasons, where the self-petitioning spouse has derivative children, it may be prudent to also file a self-petition for a child who has suffered abuse or extreme cruelty, including children who have not been physically abused themselves, but who have witnessed abuse against their parent.

Procedure for Self-Petitioning. The VAWA self-petition currently is submitted on INS Form I-360.[103] The INS is in the process of developing a special VAWA self-petition form, tentatively called the I-911 form. A self-petitioner's application should be clearly

organized, assembled, and tabbed (at the bottom) and include the following:[104]

- **A 2-3 page cover letter**, which should provide a roadmap for the INS examiner, describing how the self-petitioner satisfies each requirement of the Act and the evidence to support it; the cover letter should also reference any previous I-130 applications filed on the self-petitioner's behalf, and include a copy of the receipt notice or other INS correspondence if available

- **A G-28 Notice of Entry of Appearance** by the attorney or BIA accredited representative

- **A completed I-360** application form

- **$110 money order** or cashiers check, made payable to the INS, attached to the I-360

- **Table of Contents and/or tabbed divider sheets** indicating how the supporting evidence satisfies each requirement of the Act: Petitioner's Affidavit; Qualifying Abuser; Good Faith Marriage; Good Moral Character; Battery or Extreme Cruelty; Proof of Residence, etc.

- **The self-petitioner's detailed affidavit or declaration**, which should describe, in her own words, her relationship with the abuser, the history of abuse, and any extenuating circumstances going to good moral character

- **Proof of the petitioner's identity or status**, such as a birth certificate or passport

- **Proof of the qualifying relationship to the USC or LPR.** Self-petitioning spouses should include the marriage certificate and divorce certificates of prior marriages. Self-petitioning children should include their birth certificate, the parents' marriage certificate if the child is a stepchild, and other proof of parentage, such as baptismal records, child support orders, child custody records, and so on[105]

- **Proof of the abuser's status**, such as a U.S. birth certificate, naturalization certificate, residency card, previously filed I-130 petition, etc.[106]

- **Proof of good faith marriage** if the self-petitioner is a spouse, including (in addition to the applicant's own statement) evidence of courtship (phone bills, letters), wedding pictures, birth certificates of children born of the marriage, joint property or leasehold interests, bank accounts, income tax returns, utility bills, etc.[107]

- **Proof of battery or extreme cruelty**, including (in addition to the applicant's own statement) temporary and final protection orders; police records; criminal and arrest records; medical records; photographs; affidavits from social workers, shelter workers, counselors, or clergy[108]

- **Proof of residency together**, including (in addition to the applicant's own statement) police reports, joint bank accounts, utility bills, insurance records, school records, letters from neighbors, letters from clergy or community organizations, etc.[109]

- **Proof of good moral character**, including the self-petitioner's own statement and a Police Clearance Letter for every place the self-petitioner has lived for six months or more during the last three years[110]

Filing the Application. The self-petitioner completes INS Form I-360 and mails it with the $110 fee to the following address:

Immigration and Naturalization Service
Vermont Service Center
Attn: Family Service Products Line (VAWA)
P.O. Box 9589
St. Albans, VT 05479-9589[111]

Note: Low-income persons can request a fee waiver. An application is not considered to be properly filed, however, until it is received by the Vermont Service with the correct fee or until the fee waiver is granted.[112] Application for a fee waiver could also raise questions at the adjustment phase regarding whether the self-petitioner is likely to become a public charge.

Receipt Dates, Priority Dates and Pending Adjustment Applications. Once the application is properly filed, the INS issues a receipt notice, which includes the receipt date and the applicant's priority date. The receipt date is the same as the priority date if a family-based petition has never been filed for the self-petitioner. A self-petitioner may, however, recapture an old priority date, if an approvable petition was previously filed on the self-petitioner's behalf, even if the old petition was eventually withdrawn or denied.[113] Moreover, as noted earlier, if the self-petitioner has an

I-485 adjustment application still pending based on a previously filed I-130 petition, the approved self-petitioner should be able to adjust based on the old I-485 application.[114] Where the abuser has filed an I-130 and I-485 for the abused spouse or child which is still pending, we strongly encourage the abused spouse or child to self-petition, and to advise the local INS as soon as the I-360 receipt notice is received, providing them with a copy of the receipt notice in order to preserve the pending adjustment application. If the abuser subsequently attempts to withdraw the I-130 petition, the INS cannot deny the I-485 adjustment application based on the abuser's actions, but must hold it open until the self-petition is adjudicated.[115]

Adjudication of the Self-Petition. Self-petitions are adjudicated at the Vermont Service Center by a cadre of INS examiners who have been well trained in the dynamics of domestic violence.[116] The Vermont Service Center first reviews the application to determine whether the applicant is *prima facie* eligible.[117] That is, has the applicant stated facts which, if proved, would lead to approval of the self-petition? If she is determined to be *prima facie* eligible under VAWA, she becomes eligible for public benefits as a "qualified alien."[118] Prima facie eligibility, however, does not ensure an ultimate grant. The INS Examiner in Vermont will review the self-petition on the merits, including the documentary proof. If an application is well-assembled, satisfies each of the requirements, and provides the adjudicator with a clear roadmap, it is not unusual for the INS to grant based on the initial application. If the examiner needs additional evidence, he or she will issue a *Notice of Action*. The applicant currently has sixty days to respond, but can request an additional sixty day extension.[119] If the INS does not approve based on this additional evidence, the INS will issue a Notice of Intent to Deny, setting forth the reasons for the intended denial. The applicant has additional time to respond to this Notice, before a Denial is issued.[120]

Approval of the Self-Petition. If the Vermont Service Center decides to approve a self-petition, it issues a Form I-797 Approval Notice. This generally includes an Initial Grant of Deferred Action.[121] If an applicant is granted deferred action status, the INS should not take steps to remove the individual while her application for residency is pending. The Vermont Service Center also notifies the approved self-petitioner that he or she may submit an I-765 application for employment authorization. Together with the I-765 application, the applicant should also submit a statement of economic necessity, including basic information on assets, income and expenses.[122] Employment authorization is issued in one-year increments. Initial assessments of deferred action are valid for 15 months, and requests for extensions of deferred action generally will be granted until the self-petitioner is able to obtain permanent residence.[123] This is especially important for the spouses and children of lawful permanent residents, who may have to wait years for their priority dates to become current.

Denial of the Self-Petition. If a self-petition is denied, the applicant has thirty days to file a Motion to Reconsider or Reopen with the Administrative Appeals Unit.[124] It may be more effective, however, to file directly with the Vermont Service Center, which has been trained in domestic violence and works effectively with advocates to resolve problem cases.[125] The fee is $110.00, but you may request a fee waiver, especially if the INS Examiner appears to be in error.[126] At this stage, you may want to consult with Gail Pendleton of the National Lawyers Guild's National Immigration Project, who has been very effective in working with VSC supervisors to resolve problem cases. Her e-mail address is nipgail@nlg.org.

◆ Adjustment of Status of VAWA Self-Petitioners

When INA § 245(i) sunsetted on January 15, 1998, many self-petitioners became ineligible to adjust status to lawful permanent residency in the United States.[127] These included persons present without inspection as well as the spouses and children of LPRs who had been lawfully admitted but who had worked without authorization or violated the terms of their visas. Although some VAWA self-petitioners were able to recapture old priority dates if their spouse or parent had filed a petition on their behalf by the January 14, 1998 deadline,[128] many more were required to consular process. They faced the prospect, however, of triggering the 3 and 10-year unlawful presence bars, unless they could demonstrate a clear connection between the abuse they had suffered and their illegal entry or immigration violation.[129]

VAWA 2000 made important changes in this regard. It provides for adjustment of status for persons with approved VAWA self-petitions and expands the waivers of certain inadmissibility grounds. Under these new provisions, approved self-petitioners need not have been inspected and admitted or paroled into the United States in order to adjust status.[130] Although

applicants still must demonstrate that they are not inadmissible, VAWA 2000 expands waivers of certain inadmissibility grounds.[131] Approved self-petitioners also are not required to pay the $1,000 adjustment penalty fee. Furthermore, if the abuser naturalizes, the previously filed self-petition of his spouse or child is reclassified as a self-petition filed by the immediate relative of a U.S. citizen, even if the naturalization occurs after divorce or termination of parental rights.[132]

In order to adjust status in the United States, a self-petitioner must demonstrate that she has an approved self-petition, that she is otherwise admissible, and that a visa is immediately available to her.[133] This means that either she is an immediate relative, and thus eligible to adjust immediately, or her priority date is current. Her priority date will be listed on her approval notice. To determine if it is current, she should consult the current Visa Bulletin at www.travel.state.gov.

Procedure for Applying for Adjustment of Status. If the self-petitioner does not have an adjustment application pending based on a previously filed I-130 petition, the applicant should submit a completed I-485 adjustment application with the local INS District Office for herself and each derivative family member.[134] The fee is $220 for adults, and $140 for children under fourteen.[135] Each adjustment applicant requires a separate application and fee, and should also include a completed G-325A biographic information form.[136] Derivative children can be accompanying or following to join. This means that the applicant can also submit her children's adjustment applications within the three month period after she is granted lawful permanent residency.[137] If she does not file for them within this period, she will need to petition for them through the family-based preference system, which will take years. With the applications, she also should include a $25 fingerprint fee for each person fourteen years or over.[138] The application should include a copy of the I-797 approval notice, a copy of the I-360 application listing the derivative children, and two INS-style photos for each applicant.

The applicant will be scheduled by the INS to take her fingerprints at an Application Support Center ("ASC"). She then will receive a notice scheduling her for an adjustment interview at the District Office. This can take a matter of months or a number of years, depending on the local office's backlog. If the applicant has an old adjustment application pending, she can request that she be scheduled for an interview based on the old I-485.[139] She should bring a copy of her I-797 approval notice to the local office. If she has moved and her file is in another INS office, she should request that the local office obtain her file. She can forward a similar request to the office where her file is located, together with a copy of her approval notice and her filed I-485.

Adjustment and the Grounds of Inadmissibility
The primary purpose of the adjustment interview is to establish that the self-petitioner is eligible for adjustment of status and that she is otherwise admissible. Now that VAWA 2000 allows approved self-petitioners to apply for adjustment of status, the focus of the interview will be on the applicant's admissibility under INA §212(a). If an adjustment applicant will require a waiver, she should be prepared to submit her waiver application on Form I-601.[140] An applicant should be well-prepared to address each admissibility issue that an examiner may raise, but should not raise the issue *sua sponte*. Sympathetic examiners, particularly in VAWA cases, may not make an issue out of potentially problematic areas.

The Public Health Ground of Inadmissibility. A person is inadmissible under INA Sec. 212(a)(1) who 1) has a communicable disease of public health significance, 2) is not properly vaccinated, 3) has a physical or mental disorder plus certain threatening behavior associated with that disorder, or 4) is a drug abuser or addict.[141] Prior to her adjustment interview, the adjustment applicant must obtain a medical examination from an INS-designated civil surgeon, and bring the completed I-693 and vaccine form to her interview.[142] The doctor will test her for any communicable diseases of public health significance, including tuberculosis, gonorrhea, leprosy, and HIV/AIDS.[143] Assuming that her vaccines are complete and she tests negative, she should satisfy the public health ground.

If, however, she has a health problem that makes her inadmissible under INA § 212(a)(1), she may be eligible for a waiver. Note that there is no waiver for drug abusers or addicts.[144] Prior to VAWA 2000, an applicant with a communicable disease had to show that she had a qualifying relative (USC or LPR spouse, parent, or child), in order to qualify for a waiver.[145] VAWA 2000 makes persons with approved self-petitions eligible in the Attorney General's discretion for a waiver of this ground, including persons with HIV/AIDS.[146] Like other HIV waiver applicants, they may be required to show that they are aware of the nature of their disease and its transmission, that the danger to

the public health and the possibility of the spread of the infection is minimal, and that no cost has been incurred by a government agency without its prior consent.[147] Given that the standard for granting HIV waivers is within the Attorney General's discretion, advocates should argue for a more lenient standard for VAWA applicants who have received public health care in light of the more relaxed public charge grounds discussed below, especially where there is evidence that the disease has been transmitted by an abusive spouse.

Public Charge Ground. The applicant must also demonstrate during her adjustment interview that she is not likely to become a public charge under INA § 212(a)(2). Under the statute, the Attorney General is required, at a minimum, to consider the applicant's age, health, family status, assets, resources, financial status, education and skills.[148] This has been a thorny issue with District Offices, especially in cases where the VAWA self-petitioner has received public benefits in the past. The 2000 amendments provide that, in determining whether the approved self-petitioner is likely to become a public charge, no benefits the alien may have received that were authorized under Section 501 of IIRAIRA may be considered.[149] Moreover, on January 19, 2001, the Department of Health and Human Services released a Fact Sheet to provide guidance to health and social service agencies and community based organizations regarding the eligibility of domestic violence survivors for the various programs and services funded by the Department of Health and Human Services.[150]

Section 501 of IIRAIRA classifies certain battered spouses and children as "qualified aliens", including certain VAWA self-petitioners.[151] To fall within the battered spouse or child category, the noncitizen must have been battered or subjected to extreme cruelty in the United States by a family member with whom the noncitizen resides, or the noncitizen's parent or child must have been subjected to such treatment. The noncitizen must also demonstrate a "substantial connection" between the domestic violence and the need for the benefit sought.[152] The battered noncitizen, parent or child must also have moved out of the household of the abuser, and she or her child must have begun the process of legalizing based on the petition of a spouse or parent, or based on a self-petition.[153] VAWA's *prima facie* eligibility standard allows self-petitioners to access certain public benefits as "qualified aliens" while their I-360 applications are pending.[154]

VAWA self-petitioners are exempted from the I-864 and I-134 affidavit of support requirements.[155] The applicant should obtain copies of her income tax returns, however, in order to help establish that she is unlikely to become a public charge. If she has not filed income tax returns, she needs to do so. If she owes back taxes, she should demonstrate that she has entered into a payment plan with the IRS. If her tax returns are inaccurate, she should file an amendment to her returns.

Some District Office examiners will require that VAWA applicants submit proof that they are 100% within the Health and Human Services poverty guidelines. It is important to remind the INS examiner politely that the standard is forward looking. Is the person likely to become a public charge in the future?[156] Moreover, the law and INS regulations clearly contemplate that VAWA applicants may need public benefits in order to separate from their abusers and to help them get on their feet.[157] It is not only inappropriate but illegal under VAWA 2000 for the INS to penalize these applicants at the adjustment phase for receiving benefits that the law clearly envisions. If the approved self-petitioner has not retained employment during the pendency of her adjustment application, however, this could raise public charge concerns.[158]

Criminal Grounds of Inadmissibility. VAWA 2000 makes persons with approved VAWA self-petitions eligible under INA § 212(h)(1)(C) for a special waiver of certain criminal grounds of inadmissibility. Unlike the regular 212(h) waiver, there is no requirement that the refusal to grant the waiver would cause extreme hardship to a qualifying USC or LPR spouse, parent or children.[159] On the other hand, the waiver extends to the same criminal grounds of inadmissibility as the regular 212(h) waiver.[160] Thus, as discussed above, the following criminal grounds can be waived under INA Sec. 212(h)(1)(C):

- Crimes of moral turpitude: INA § 212(a)(2)(A)(I)
- Multiple crimes for which aggregate sentence was 5 years or more: INA § 212(a)(2)(B)
- Simple possession of 30 grams or less of marijuana: INA § 212(a)(2)(A)(II)
- Prostitution and commercialized vice: INA § 212(a)(2)(D)

No waiver exists under INA § 212(h) for crimes

involving drugs and drug trafficking, except for simple possession of 30 grams or less of marijuana.[161]

VAWA 2000 also provides a waiver under INA §237(a) for certain crimes involving domestic violence by victims of domestic violence who were not the primary perpetrators of the violence.[162] Since this is not a ground of inadmissibility, and should arise only in the context of removal or deportation proceedings, it will be discussed in Part V, below.

Fraud Grounds of Inadmissibility and Deportability. The discretionary waiver of inadmissibility under INA §212(i) for procuring, seeking, or having sought a visa or admission or other INA benefit by fraud or wilful misrepresentation of a material fact is amended to provide that persons with approved VAWA self-petitions are eligible for the waiver if they demonstrate extreme hardship to themselves or to their USC, LPR, or "qualified alien" parent or child.[163] The new waiver is an important advance in that it allows a VAWA applicant to demonstrate extreme hardship to herself or to a qualified alien parent or child. The old waiver only applied to persons who could demonstrate extreme hardship to a USC or LPR spouse or parent. Qualified aliens, as discussed above, include children who are derivatives on I-360 applications.[164] The new waiver only extends to fraud or misrepresentations under INA §212(a)(6)(C)(i), however, and does not protect battered spouses or children who have made false claims to citizenship under INA §212(a)(6)(C)(ii).[165] This is one of the top priorities of advocates during the 107th Congress.

VAWA 2000 also expands the waiver of the deportability ground under INA Sec. 237(a) of having been inadmissible at the time of entry or adjustment of status, where the inadmissibility results from fraud or misrepresentation under INA §212(a)(6)(C)(i). Persons who have approved VAWA self-petitions are now eligible for this waiver under INA Sec. 237(a)(1)(H)(ii). Unlike other waiver applicants, they need not have a qualifying relative.[166]

Unlawful Presence Bars. IIRAIRA amended the INA to impose a whole new series of bars to admission on persons unlawfully present in the United States.[167] These included the 3-year bar for persons unlawfully present in the United States for six months to a year, the 10-year bar on persons unlawfully present for a year or more, and permanent bars on persons who reenter or seek to reenter without admission after having been removed or having been unlawfully present for a year or more.[168] IIRAIRA provided an exception for VAWA self-petitioners present without inspection under INA §§212(a)(6) who could demonstrate a connection between domestic abuse and their illegal entry.[169] It created a similar exception to the 3 and 10-year bars under INA §212(a)(9)(B), which are triggered when an applicant departs the United States and seeks readmission.[170] Furthermore, battered spouses and children who had entered prior to April 1, 1997, were not required to demonstrate a substantial connection between the immigration violation and the abuse under INA §212(a)(6) (illegal entry), and by implication, under INA §212(a)(9)(B)(unlawful presence), which incorporates by reference INA §212(a)(6).[171]

Nonetheless, serious problems remained. First of all, with the sun setting of 245(i), many VAWA self-petitioners were no longer eligible to adjust in the United States, thus triggering the 3 and 10 year bars when they departed the United States to consular process. Many consular officers were unfamiliar, however, with the battered spouse exceptions, particularly the exceptions to the unlawful presence rules for battered spouses and children who had entered prior to April 1, 1997, and many advocates urged their clients to avoid consular processing.[172] Also, the law provided no relief to battered spouses and children who in the past may have reentered or attempted to reenter illegally after having been unlawfully present or ordered removed.[173]

VAWA 2000 creates a new waiver to INA §212(a)(9)(C), which permanently bars any noncitizen who enters or attempts to reenter the United States illegally after having been unlawfully present for an aggregate period of more than a year or after having been ordered removed. The new waiver applies, in the Attorney General's discretion, to VAWA applicants who can show a connection between:

1. The noncitizen's battery or extreme cruelty; and
2. The noncitizen's
   a. Removal;
   b. Departure from the United States;
   c. Reentry or reentries into the United States; or
   d. Attempted reentry into the United States.[174]

The new law only requires that the VAWA appli-

cant demonstrate a "connection" between the abuse and the immigration violation to be eligible for the waiver, rather than the "substantial connection" required under INA §§ 212(a)(6) and 212(a)(9)(B). Also, notwithstanding INA § 212(a)(6), VAWA adjustment applicants who entered without admission should be eligible to adjust under INA § 245(a), without having to show a substantial connection between the illegal entry and the abuse. INA § 245(a), as amended, allows approved self-petitioners to adjust status, regardless of their immigration status and without having to pay the $1,000 penalty under § 245(i). It is also important to note that INA § 245(c), as amended, specifically exempts from its long-litany of persons ineligible to adjust, VAWA applicants with approved self-petitions.[175] Hopefully, the changes wrought by VAWA 2000 should substantially streamline the adjustment process for most approved self-petitioners.

Applicants for Adjustment of Status Under Special Legislation. VAWA 2000 also modifies provisions of the Cuban Adjustment Act, Section 202 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), and the Haitian Refugee Immigration Fairness Act (HRIFA) for certain abused spouses and children. The Cuban Adjustment Act, which allows Cubans paroled into the United States to apply for adjustment to permanent residency a year and a day after their arrival, is amended to provide that in situations where the derivative spouse or child has been battered or subjected to extreme cruelty by the principal applicant, derivative spouses and children of Cuban adjustment applicants can adjust status without proving current residence with the principal applicant.[176] Similarly, NACARA § 202, which provides for adjustment of status for certain Cubans and Nicaraguans present in the United States since December 1, 1995, and HRIFA, which provides similar relief for Haitians who applied for asylum or were granted parole prior to December 31, 1995, are amended to allow abused spouses and children of principal applicants under NACARA § 202 and HRIFA to adjust status. Abused spouses and children of principal applicants under NACARA § 202 and HRIFA are eligible to adjust status if, at the time their adjustment application was filed, they were the spouse or children of a principal whose status is adjusted under NACARA § 202 or HRIFA.[177] Abused children who turn 21 need not demonstrate presence in the United States since December 1995, as is required of sons and daughters. Abused spouses need not demonstrate that they are still married to their abusers. The principal spouse or parent must, however, eventually obtain adjustment of status under NACARA § 202 or HRIFA, and the derivative spouse or child must have been eligible as a spouse or child at the time the application was filed. The derivative spouse, child or child of the spouse must also have been battered or subjected to extreme cruelty.[178]

VAWA SUSPENSION OF DEPORTATION AND CANCELLATION OF REMOVAL

The other principle form of relief available to battered spouses and children of USCs and LPRs (as well as the non-abusive parents of abused children of USCs and LPRs) is VAWA suspension of deportation and VAWA cancellation of removal. These forms of relief are available to certain battered immigrants in deportation or removal proceedings. In 1994, VAWA created special rule *suspension of deportation* to provide a form of relief for certain battered immigrants in deportation proceedings who had been continuously physically present in the United States for at least three years.[179] In 1996, IIRAIRA reframed VAWA suspension as VAWA cancellation, with a few key differences.[180] VAWA suspension of deportation is available to persons placed in immigration proceedings prior to April 1, 1997, the effective date of IIRAIRA ("deportation proceedings"), including persons with old deportation orders. VAWA cancellation is available to persons placed into proceedings after that date ("removal proceedings").[181] A grant by the immigration judge cancels the deportation or removal of an applicant who otherwise would be deportable or inadmissible and grants the applicant lawful permanent residency.[182] The rules for waiting for visas do not apply but VAWA cancellation limits the total number of cancellation grants to 4,000 per year.[183]

Battered immigrants who call the police or seek state court protection against their abusers or who fight back during an attack may find themselves in proceedings before an immigration judge after their abuser reports them to the INS. Other battered immigrants abused by close USC or LPR family members (including unmarried women and adult sons and daughters) may be ineligible under VAWA's self-petitioning provisions. To qualify for VAWA suspension or cancellation, a battered spouse or child must demonstrate the following:

- She has been continuously physically present in the United States for three years immediately preceding the filing of her application

- She was subject to battering or extreme cruelty by her USC or LPR spouse or parent, or she is the parent of the child of a USC or LPR, and the child was subject to battering or extreme cruelty by the USC or LPR parent
- She is a person of good moral character
- Leaving the United States would cause extreme hardship to herself or her children
- She is not inadmissible under INA § 212(a)(2) (criminal grounds) or § 212(a)(3) (security grounds), and is not deportable under INA § 237(a)(1)(G) (marriage fraud); § 237(a)(2) (criminal grounds); § 237(a)(3) (document fraud and false claims to citizenship) or § 237(a)(4) (security grounds), or is eligible for a waiver

The court must consider "any credible evidence" relevant to the application.[184]

◆ Physical Presence and the Stop-Time Rule

The applicant for VAWA cancellation or suspension must show three years of continuous physical presence in the United States immediately preceding the date of application. For cancellation applicants, continuous physical presence is interrupted by a single absence of 90 days or more and by aggregate absences of 180 days or more.[185]

VAWA 2000 significantly eased the provisions regarding physical presence for cancellation applicants. First, VAWA cancellation and suspension applicants are exempt from the "stop-time rule", under which issuance by the INS of a Notice to Appear (the charging document in a removal case) stops continuous physical presence from accruing.[186] Second, VAWA 2000 provides that an applicant is not considered to have failed to maintain continuous physical presence because of certain absences if the applicant demonstrates a connection between the absence and the abuse. No absence or portion of an absence connected to the abuse counts towards the 90 or 180 day limits.[187]

◆ No Residence with Abuser

The applicant is not required to have resided with the abuser, as is required of self-petitioners.[188] Nonetheless, failure to reside with the abuser may raise questions regarding whether an applicant has committed marriage fraud, and is thus deportable under INA § 237(a)(1)(G).[189] If the spouse of a USC or LPR did not reside with her abuser, it is important that her personal statement and other documentary proof establish that her marriage was in good faith.

◆ The Marriage Requirement

A spouse or ex-spouse is not required to be married to her abuser at the time the application is filed. If a spouse or ex-spouse is applying based on violence to herself, she needs to demonstrate that the abuse took place during the marriage to the USC or LPR.[190] Also, if an applicant was not married to the abuser, but they had a child in common who was subjected to battery or extreme cruelty, the cancellation provision allows both her and her child to apply for cancellation of removal.[191] In the case of a mother who is applying for cancellation or suspension based on abuse to her child, the child must be unmarried and under the age of 21.[192]

◆ Battery or Extreme Cruelty

The standard is basically the same as it is in the context of self-petitioning. Under the new law, the battery or extreme cruelty need not have occurred in the United States.[193] On the other hand, although the "any credible evidence" standard applies in the cancellation context[194], immigration judges are likely to expect proof of domestic violence, beyond the personal statement of the applicant. Such proof may be easier to obtain if the abuse took place in the United States. *See* Part (IV)(B)(4), above, for examples of evidence of abuse. Where relief depends on battery or extreme cruelty to a child, it may be possible to argue that the psychological effect on the child of witnessing abuse to a parent, constitutes extreme cruelty to the child.

◆ Adult Sons and Daughters of USCs and LPRs are Eligible to Apply

The suspension and cancellation provisions refer to an "alien [who] has been battered or subjected to extreme cruelty by a spouse or parent" who is or was a USC or LPR.[195] Note that the eligibility criteria reference the abusive parent, rather than "child", as narrowly defined by the INA to include unmarried children under 21. This means that the sons and daughters of abusive USCs and LPRs are eligible to apply for cancellation or suspension, even if they have married or aged out.

◆ Status of the Abuser

Under VAWA 2000, to qualify for VAWA

cancellation, an applicant must have (or have had) an abusive spouse or parent who "is or was" a U.S. citizen or lawful permanent resident. Thus, unlike in the past, the abuser's loss of citizenship or residency no longer has any effect on the VAWA applicant's eligibility for relief.[196] The applicant need not show a connection between the loss of status and the abuse.[197]

◆ Good Moral Character

The applicant must demonstrate good moral character during the three year period preceding her application and good moral character at the time she is granted cancellation of removal or suspension of deportation.[198] In the past, certain acts or criminal convictions precluded a finding of good moral character. Under VAWA 2000, however, the Attorney General is not barred from finding good moral character in certain circumstances where the act or conviction was connected to the abuse, and where a waiver is otherwise warranted.[199] This issue is discussed in greater depth above.

◆ Grounds of Inadmissibility and Deportability

While applicants for adjustment under VAWA's self-petitioning provisions are subject to the various grounds of inadmissibility, cancellation of removal and suspension of deportation literally "cancel" the deportation or removal of persons otherwise inadmissible or deportable, allowing them to adjust to lawful permanent residency. Thus, for example, the public charge and public health grounds of inadmissibility do not apply to applicants for VAWA cancellation or VAWA suspension. Certain grounds, however, do apply. In addition to establishing good moral character, an applicant for VAWA suspension or cancellation must show that she is not inadmissible under INA §212(a)(2)(criminal grounds) or §212(a)(3)(security grounds), and is not deportable under INA §237(a)(1)(G)(marriage fraud); §237(a)(2)(criminal grounds); §237(a)(3)(document fraud and false claims to citizenship) or §237(a)(4)(security grounds), or is otherwise eligible for a waiver. She must also establish that she has not been convicted of an aggravated felony.[1]

In the context of removal proceedings, INS trial attorneys are likely to be much more aggressive than INS examiners in charging noncitizens with these grounds and seeking their removal. Judges will require that an applicant prove that she is not inadmissible as charged. At the initial Master Calendar Hearing, the Immigration Judge will ask the applicant to plead to the charges in the Notice to Appear. It is very important that an applicant not concede to any charges in the charging document that would make him or her ineligible for relief. If the applicant does not concede to the charges, the Judge will schedule a hearing to determine admissibility before determining what forms of relief the applicant may have available to her.[2]

The availability of waivers for certain grounds of inadmissibility, including the 212(h) waiver for certain criminal grounds, is discussed above. VAWA 2000 provided a more generous waiver of the criminal grounds of inadmissibility and deportability for VAWA *adjustment* applicants, who need not demonstrate extreme hardship to a qualifying USC or LPR spouse, parent or children. The 212(h) waiver does not appear to extend, however, to cancellation and suspension applicants.

VAWA 2000 did create a limited waiver under INA Section 237(a)(7) for certain victims of domestic violence. A person is deportable under INA §237(a)(2)(E) for having a conviction of domestic violence, stalking, child abuse, child neglect, child abandonment, or for violating a protective order.[3] In the past, these provisions have been used by the INS to penalize battered immigrant women in abusive relationships, including women who have acted in self-defense or violated a protective order that was intended to protect them. The new waiver is available to victims of domestic violence deportable for crimes involving domestic violence, stalking, or the violation of a protective order if:

- they were battered or subjected to extreme cruelty, *and*
- they were not the primary perpetrator of violence in the relationship, *if*
- they were acting in self-defense, *or*
- they violated a protective order intended to protect them, *or*
- they committed, were charged with, or convicted of a crime that did not result in serious bodily injury where there was a connection between the crime and the alien's having been battered or subjected to extreme cruelty.[4]

It is not uncommon for batterers to also be charged

with child abuse, and for the abused spouse to be charged with child neglect, for failure to stop the abuse. The new waiver does not extend, however, to crimes involving child abuse and child neglect, even where the child abuse charge is connected to the applicant's status as a victim of domestic violence.[5]

Where an applicant for VAWA cancellation has certain criminal convictions that are not waivable under INA Sec. 237(a)(7), the applicant should consider applying under VAWA's self-petitioning and adjustment of status provisions in order to make herself eligible for a waiver under INA Sec. 212(h). As discussed further below, persons in proceedings who meet VAWA's self-petitioning provisions are encouraged to file self-petitions with the Vermont Service Center.[6] If the self-petition is approved, the applicant can either request that proceedings be terminated so that she can adjust with the Service or file the adjustment application directly with the immigration judge.[7] As an adjustment applicant under VAWA's self-petitioning provisions, she becomes eligible for a waiver under INA Section 212(h), as amended by VAWA 2000.[8] VAWA 2000 appears to have provided substantially broader protections to VAWA self-petitioners with certain criminal convictions than it did for VAWA cancellation applicants in similar circumstances. This is one of the areas that advocates for battered immigrants will target for legislative reform.

◆ Extreme Hardship

VAWA cancellation and suspension applicants must show "extreme hardship" to themselves or the applicant's parent or child.[208] The Executive Office for Immigration Review has issued regulations on factors to be considered in assessing extreme hardship in cancellation of removal cases for battered spouses and children.[209] These are the same hardship factors that had been considered by the INS when adjudicating VAWA self-petitions, prior to VAWA 2000's elimination of extreme hardship as a requirement for self-petitions.[210] They are:

- The nature and extent of the physical or psychological consequences of abuse
- The impact of loss of access to the United States courts and criminal justice system, including, but not limited to, the ability to obtain and enforce orders of protection, criminal investigations, and prosecution of court orders regarding child support, maintenance, child custody, and visitation
- The likelihood that the batterer's family, friends, or others acting on behalf of the batterer in the home country would physically or psychologically harm the applicant or the applicant's child(ren);the applicant's needs and/or needs of the applicant's child(ren) for social, medical, mental health or other supportive services for victims of domestic violence that are unavailable or not reasonably accessible in the home country
- The existence of laws and social practices in the home country that punish the applicant or the applicant's child(ren) because they have been victims of domestic violence or have taken steps to leave an abusive household; and
- The abuser's ability to travel to the home country and the ability and willingness of authorities in the home country to protect the applicant and/or the applicant's child(ren) from future abuse.[211]

◆ New Derivative Relief for Children and Parents

Children cannot be included in a grant of cancellation or suspension to their parents.[212] Abused children must file their own applications and cannot receive legal residence by a grant to a parent. If the child has been subject to abuse, they may either file a self-petition, file their own cancellation petition, or, if abandoned or abused by both parents, they can seek status as a special immigrant juvenile.[213] Another option is for the parent granted suspension or cancellation to file a second-preference petition for the child.[214] A child (unmarried and under 21) cannot petition for his or her parent, however. A child must both naturalize and turn 21 years of age before becoming eligible to petition for a parent as an immediate relative.[215] VAWA 2000 made an important change in requiring that the Attorney General parole into the United States the children of an immigrant granted cancellation and the parents of a child granted cancellation. The parolees are entitled to employment authorization, and the parole status will last until adjudication of the parolees' application for adjustment of status.[216]

◆ New Rules for Motions to Reopen

VAWA 2000 also provides for motions to reopen removal and deportation proceedings for individuals with final orders who become eligible to self-petition or to apply for VAWA suspension of deportation or cancellation of removal, discussed in Part V below.[217]

In general, a person would be in deportation proceedings if she were placed into proceedings prior to April 1, 1997, the effective date of IIRAIRA. Persons placed into proceedings after that date would be in removal proceedings. Under VAWA 2000, where a person has a final order of deportation, there is no time limit for filing a motion to reopen, if the basis is to apply for relief under VAWA's self-petitioning or suspension of deportation provisions.[218] Where an applicant has a final order of removal, the normal 90-day deadline found at INA § 240(c)(6)(C) for filing a motion to reopen does not apply to self-petitioners or VAWA cancellation applicants, but the motion to reopen must be filed within one year of the entry of the final order of removal.[219] The Attorney General may however, in his discretion, waive that time limitation for noncitizens who demonstrate extraordinary circumstances or extreme hardship to the noncitizen's child.[220] In both cases, the motion to reopen must be accompanied by the self-petition that has been filed or will be filed with the INS upon the granting of the motion to reopen, or by an application for suspension of deportation or cancellation of removal to be filed with the Immigration Court. This amendment takes effect as if it had been included in IIRAIRA.[221]

◆ Filing Procedures

Applications for cancellation of removal or suspension of deportation can only be filed by applicants who are currently in removal or deportation proceedings, as evidenced by issuance by the INS of a Notice to Appear (on or after 4/1/97) or Order to Show Cause (pre 4/1/97).[222] An applicant with a final order who is eligible to reopen her case must file a Motion to Reopen along with her Form EOIR 42B application for relief.[223] The VAWA cancellation application is filed with the local Immigration Court on Form EOIR 42B, and the VAWA suspension application is filed on Form EOIR 40, along with a Certificate of Service, indicating that a copy of the entire application has been provided to INS District Counsel.[224] These forms can be found on the worldwide web at www.usdoj.gov/eoir/.

A complete application must be filed by each family member seeking cancellation, but an application fee of $100 will be charged, regardless of how many family members in the same proceedings are applying.[225] The completed applications should be in compliance with local Immigration Court rules. Prior to filing the application with the Court and INS District Counsel, the applicant's attorney or BIA accredited representative should "fee it in" at the local INS District Office, paying the $100 fee and $25 for fingerprints for each applicant 14 years of age or older. If the applicant is filing an I-601 waiver application, she also must include the $170 fee. The INS District Office will date stamp and fee stamp the applications. The applicant's attorney or representative should then file the date stamped and fee stamped original with the Immigration Court and a copy with District Counsel, retaining a copy with date stamps from INS District Office, INS District Counsel, and the Immigration Judge to prove that it has been properly filed.

The application should be clearly organized, paginated, and tabbed and include the following:

- **Completed EOIR Form 42B or 40**, fee stamped and date stamped by INS District Office
- **Notice of Entry of Appearance**: EOIR-28 for Judge; G-28 for INS copy
- **Biographic Form G-325A** (original to INS)
- **INS -style photo** of applicant with name and Alien number on back (photo to IJ *and* INS)
- **Detailed Table of Contents**, tabbed and paginated, which should provide the IJ and the INS with a roadmap indicating how supporting documents satisfy each element of the Act
- **Supporting documents**, including
  - **Applicant's Affidavit**
  - **Proof of qualifying relationship** to USC or LPR, including marriage certificate of spouse; birth certificate of child; other proof of parentage, including child support orders, DNA records, and child custody records; evidence of co-habitation, to overcome any marriage fraud concerns; etc.
  - **Proof of battery or extreme cruelty** to applicant/applicant's child[226]
  - **Proof of continuous physical presence** in the United States for the last three years, including utility bills, bank statements, pay stubs, school records, tax payments, leases, birth records, receipts, and any other credible evidence
  - **Proof of good moral character**, including police clearance letters, tax returns, letters from neighbors, clergy, community organizations, etc.

- **Proof of extreme hardship** to self or to a qualifying relative, including protective orders, medical records, psychological evaluations, proof of child support payments, evidence of country conditions in country of origin, affidavits of qualifying family members, etc.

- **I-601 waiver application**, if the Judge already has found her inadmissible under one of the grounds that would preclude eligibility, but she is eligible for a waiver

◆ Placing Applicants into Removal Proceedings

For applicants who appear to be eligible for VAWA cancellation but who are not in removal proceedings, one option to carefully consider is asking the INS to issue a Notice to Appear placing the applicant in proceedings, where she can pursue her claim.[227] A detailed letter should be sent to the INS investigations unit setting forth the basis for relief. This option should only be considered, however, in the strongest cases where a candidate is clearly eligible and where there are strong equities and good documentation in her favor. Generally, a draft EOIR 42B application should be prepared ahead of time, including the declaration and supporting documents, to assess ahead of time any potential problems with the case. It also is important to fully advise an applicant of the risks involved in seeking cancellation, and the costs and benefits of waiting versus moving forward.

◆ Applicants in Proceedings

Immigration proceedings are adversarial court proceedings where the applicant's representative presents witnesses and evidence through direct testimony which is subject to cross-examination by INS District Counsel. In general, testimony can include the applicant's own testimony, testimony of any witnesses to the abuse, testimony of character witnesses, and ideally, testimony from a domestic violence expert, psychologist, or victim's advocate who has worked with the victim or victims and can testify to the abuse and/or the hardship endured.

VAWA cancellation and suspension cases are far more complicated cases than VAWA self-petitioning, and should only be handled by lawyers or BIA accredited representatives with substantial experience in immigration court, and when other options are not available. Where an applicant is in proceedings but appears to be eligible for relief under VAWA's self-petitioning provisions, the applicant should file an I-360 application with the Vermont Service Center. If the self-petition is approved, this may not only be compelling evidence of the applicant's eligibility for cancellation or suspension, but could be a basis for the Immigration Judge to terminate court proceedings so that the applicant can file for adjustment with the INS. A handful of judges around the country also have allowed some VAWA applicants in proceedings with approved self-petitions to adjust in court, but this does not appear to be a common practice.

◆ Prohibition Against Use of Information Provided by an Abuser

IIRAIRA § 384 prohibits the INS or the Immigration Judge from making an adverse determination on admissibility or deportability using information furnished solely by an abuser.[228] This section is applicable not only in VAWA adjustment and cancellation cases, but in any immigration matter. It also prohibits use by or disclosure to anyone of any information which relates to a VAWA self-petition, application for cancellation of removal or suspension of deportation, or a battered spouse waiver by a conditional resident.[229] This provision is designed to prevent the INS from relying on information provided by an abuser to deny a VAWA applicant adjustment, to place a battered immigrant into proceedings, or to allow an abuser access to information on her case. Anyone who wilfully permits information to be disclosed under this section is subject to a civil money penalty of no more than $5,000.[230] The INS has issued a helpful memo interpreting this provision.[231] It is important that advocates review this memo, and that they use it to educate the INS and Immigration Judges and to challenge the INS when it denies battered immigrants relief or places them into proceedings based on a tip provided by an abuser.

CONDITIONAL RESIDENTS

If the abusive spouse refuses to file a petition, withdraws the application or refuses to attend an adjustment interview, the applicant's only relief will be to see if she qualifies to self-petition or seek cancellation of removal. Problems can also arise, however, where an immigrant spouse has obtained conditional residency through marriage, but where, after two years, the petitioning spouse refuses to apply to remove these conditions, as required by law. Immigration law provides a special waiver (Form I-751) for

battered spouses so that they can remove the conditions on their residency without having to rely on their abuser. It also provides a similar waiver for persons whose marriage has terminated, but who entered the marriage in good faith, and for persons who would face extreme hardship if removed.[232]

Many immigrant spouses who immigrate through marriage to a U.S. citizen must first obtain "conditional permanent resident" status before they achieve the "unconditional" rights of other permanent residents. "Conditional" status is imposed on aliens who obtain LPR status if that status is based on a marriage that occurred within two years of their (1) entering the U.S. as a permanent resident; or (2) adjusting to permanent resident status within the United States.[233] Within 90 days of the the end of the two-year period, the couple must file a "joint petition" (Form I-751) to have the condition removed.[234] If the INS grants the petition, the conditional resident spouse is accorded full LPR status.[235]

If however, the petitioning spouse refuses to cooperate in filing the joint petition, the conditional resident may be eligible for a waiver of the joint petitioning requirement. A battered immigrant woman can terminate her conditional resident status without the aid of her abusive spouse by obtaining a battered spouse waiver.[236] To do this, she must file the Form I-751 and show that she has been battered by, or subjected to extreme cruelty committed by the citizen or lawful permanent resident spouse; or, that her child has been battered or subjected to extreme cruelty by the citizen or LPR spouse.[237]

If the woman is a conditional resident without a strong case of battery or abuse, she may be able to obtain a good faith marriage or extreme hardship waiver. To qualify for the good faith waiver, the applicant must show that the marriage has legally ended through divorce or annulment and that it was entered into in good faith.[238] To qualify under the extreme hardship provision, the applicant must show that she would face hardship if returned to her country, but for reasons that occurred during the period that the applicant was admitted for conditional status.[239]

NEW NATURALIZATION RULES FOR BATTERED SPOUSES AND CHILDREN OF USCs

VAWA 2000 also relaxes naturalization requirements for the abused spouse or child of a U.S. citizen who obtains lawful permanent residency "by reason of his or her status as a spouse or child of a United States citizen who battered him or her or subjected him or her to cruelty . . .".[240] This would appear to encompass the following:

- Battered spouses and children of USCs who obtain residency as VAWA self-petitioners
- Battered spouses and children of USCs granted VAWA cancellation of removal or suspension of deportation
- Conditional permanent residents who remove conditions through a battered spouse waiver

Such individuals may apply for naturalization after three years of residing continuously in the United States after being lawfully admitted for permanent residence.[241]

THE U VISA

When Congress passed the Battered Immigrant Women Protection Act of 2000, it also created a unique new immigration remedy for battered immigrants and other noncitizen victims of crime who have suffered substantial physical or mental abuse and are willing to cooperate with government officials investigating or prosecuting these crimes. Congress acknowledged in creating the U visa that immigrant women and children who are victims of crimes "must be able to report these crimes to law enforcement and fully participate in the investigation of the crimes . . . and the prosecution of the perpetrators."[242] Perpetrators cannot be held accountable, however, if they can avoid prosecution by threatening to have their victims deported.

◆ Basic Requirements

A U visa applicant must demonstrate the following:

- The applicant "has suffered substantial physical or mental abuse as a result of having been a victim of [certain] criminal activity" listed in the statute
- The applicant possesses information concerning the criminal activity in question
- The applicant has been, is being, or will be helpful to an official or authority investigating or prosecuting the activity
- The activity either took place in the United

States or took place outside the United States but violated U.S. law[243]

◆ Criminal Activity Defined

The definition of "criminal activity" is broad and encompasses the following (or any similar activity): rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation (FGM), being held hostage, peonage, involuntary servitude, slave trade, kidnaping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, or attempt, conspiracy or solicitation to commit any of the above.[244]

◆ Who Benefits?

Victims of criminal activity who can benefit from this new law include women and children victims of domestic violence; domestic workers subject to abuse from their employers; trafficking victims; and victims of sexual abuse in the workplace.[245] The law is available to those who have been, are being or will be "helpful" to those investigating or prosecuting an activity, regardless of whether they serve as witnesses or whether the investigation or prosecution results in a conviction.[246] Up to 10,000 noncitizens may be issued U visas each fiscal year.[247] This limit shall only apply to the principal applicants and not to their spouses, children or, in the case of noncitizen children, their parents.[248] The Attorney General can also grant status to certain close family members, including the spouse, child, or in the case of a noncitizen child, the parent of a U visa applicant, in order to avoid extreme hardship to that family member.[249] The application must include a certification by the investigating or prosecuting authority that the investigation or prosecution would be harmed without the assistance of the spouse, child or parent.[250]

◆ Visa Applicant Controls the Process

Both the INS and the Department of State may adjudicate U visa applications. Recipients of U visas need not be outside the United States to apply. Unlike S visas, which also benefit individuals who cooperate in the prosecution of certain crimes, one key difference with the U visa is that the victim, not a prosecutor, controls the application process.[251] In acting on any U visa petition, the consular officer or the INS must consider "any credible evidence" relevant to the petition.[252]

◆ Certification by Investigating or Prosecuting Authority

The application must include a certification by a Federal, State or local law enforcement official, prosecutor, judge, or other Federal, state or local authority investigating the criminal activity that the applicant has been, is being, or is likely to be helpful in investigating or prosecuting the criminal activity in question.[253] Although regulations have not yet been issued regarding the process for applying for a U Visa or the form or content of this certification, advocates are urging potential U Visa applicants to not to wait for implementing regulations but to take steps to gather evidence and to obtain the necessary certification by the investigating or prosecuting authority while the case and the evidence are still fresh.[254]

◆ Deferred Action and Work Authorization

The recipient of a U visa receives deferred action and become eligible for work authorization if she or he can demonstrate economic necessity. Those with U visas are considered to be in temporary resident status.[255]

◆ Eligibility for Adjustment to Lawful Permanent Resident

The U visa also creates a special avenue for adjustment to lawful permanent residency for those with approved U visas who can show that they have been continuously physically present in the United States for at least three years since receiving the U visa and that humanitarian grounds or the public interest justify their continued presence.[256] A U visa recipient outside the United States for any single absence greater than 90 days or any aggregate absences exceeding 180 days will be deemed to have failed to maintain continuous physical presence unless the absence was in order to assist in the investigation or prosecution or was otherwise justified.[257]

◆ Waiver of Grounds of Inadmissibility

The U visa provisions also provide for a broad waiver of the grounds of inadmissibility. The Attorney General, in his discretion and when it is in the public or national interest to do so, can waive virtually any of the grounds of inadmissibility, with the one exception of INA § 212(a)(3)(E)(governing Nazi persecutors and other perpetrators of genocide).[258] It is at least arguable that this broad waiver will also apply to adjustment applicants.

◆ Regulations Pending

The INS has not yet issued proposed or interim regulations for implementation of this new law. It is not known, at this point, where the U Visas will be adjudicated, or what form or forms will be used. Advocates have urged the INS to designate the Vermont Service Center as the best locale for adjudicating U Visas, in light of that Center's experience in dealing with victims of domestic violence.[259]

DOMESTIC VIOLENCE AS A BASIS FOR ASYLUM

Undocumented women and children living in the United States who have been severely abused by members of their family, who face ongoing abuse or even death if they return to their countries, but who are not eligible for relief under VAWA should carefully consider filing an asylum claim.[260] This is still an area very much in flux, and it is important to emphasize at the outset that asylum claims involving domestic violence have infrequently been recognized by the INS Asylum Office or the Immigration Court. As this article was being written, the government was reviewing public comments on proposed rules issued on December 7, 2000 by the INS and the U.S. Attorney General, that would provide guidance in evaluating asylum claims involving domestic violence.[261] With the future of the proposed rules uncertain under the next Administration, on Friday, January 19, 2001, in one of her last acts, Attorney General Janet Reno vacated *Matter of R-A-*, a controversial 1999 decision by the Board of Immigration Appeals denying asylum to a Guatemalan woman who had suffered years of severe abuse in Guatemala at the hands of her Guatemalan husband. She sent it back to the BIA to reconsider in light of the proposed rules, thus opening the way for new asylum claims involving domestic violence.[262]

◆ Eligibility for Asylum Under Current Standards

Asylum is a remedy available to individuals who have been persecuted or who face persecution in their countries because of their race, religion, nationality, political opinion, or membership in a particular social group. They must demonstrate either that they were persecuted in the past or that there is a reasonable possibility ("a well-founded fear") that they would be persecuted in the future if they went back to their countries. The persecution can be by the government or by a group or individual the government is unable or unwilling to control. Asylum seekers must also present evidence that their persecutor was motivated to harm them *at least in part* "on account of" a protected ground: their race, religion, nationality, political opinion, or particular social group.[263]

In 1996, with passage of IIRAIRA, Congress imposed new requirements on asylum seekers in the United States.[264] They must now apply for asylum within a year of their arrival in the United States or demonstrate extraordinary or changed circumstances for why they did not apply within the year.[265] Also individuals who arrive at a U.S. port of entry without valid travel documents are subjected to "expedited removal". Although asylum seekers are entitled to a "credible fear" interview by an immigration officer, they may be returned home to their countries without ever seeing an immigration judge.[266] IIRAIRA also gave the Attorney General broad discretion to establish additional limitations and conditions under which an asylum seeker can be found ineligible for asylum.[267] Pursuant to regulations, asylum seekers also must demonstrate that they were not firmly resettled in a third country prior to entering the United States to be found eligible for asylum.[268] Finally, they must demonstrate that they do not fall within one of the other exceptions to asylum eligibility (persecution of others, threat to national security, particularly serious crime, serious non-political crime outside the United States).[269]

To summarize, an asylum seeker must prove the following:

- The harm she suffered in the past or fears if she returns is serious enough to constitute "persecution"
- She was either persecuted in the past or there is a reasonable possibility that she would face persecution if she were to return

She was persecuted by the State or by a group or individual the government is unable or unwilling to control

- Her persecutor was motivated to persecute her, at least in part, because of her race, religion, nationality, political opinion, or membership in a particular social group, *or* because of what he *perceived* to be her race, religion, nationality, political opinion, or membership in a particular social group
- She was not firmly resettled in a third country prior to arriving in the United States

- She does not fall within one of the other exceptions:
  - She has not engaged in the persecution of others
  - She has not committed a particularly serious crime that would make her a danger to the community
  - She has not committed a serious non-political crime outside the United States
  - She is not a danger to U.S. security[270]

◆ Asylum Claims Involving Domestic Violence

A critical advance in the area of women's human rights has been the recognition that women's rights are human rights. Women often experience human rights abuses that are "particular to their gender", including rape, molestation, domestic violence, sexual harassment, and sexual slavery. Furthermore, many of the serious harms faced by women are not inflicted in a public forum but are cultural or customary practices, including violence in the home, that are imposed by members of women's families or communities.[271] In 1995, the INS, following Canada's lead, adopted Considerations for Asylum Officers Adjudicating Asylum Claims from Women (hereinafter, "INS Gender Guidelines").[272] These guidelines recognize that women often experience types of persecution different from those faced by men, and cite domestic violence as one form of gender-related persecution that can be the basis for an asylum claim.[273]

Although these guidelines apply to Asylum Officers, they have had a persuasive impact on many immigration and federal court judges around the country. Following issuance of the INS Gender Guidelines, a growing number of asylum officers and Immigration Judges across the country began to grant asylum claims based on domestic violence.[274] Nonetheless, many adjudicators and policymakers did not recognize these claims as falling within the refugee definition, even under the most compelling circumstances. They tended to see domestic violence as a private family matter outside the scope of refugee protection.[275]

For years, practitioners awaited a definitive ruling from the Board. The Board's long-awaited decision in *Matter of R-A-*, Interim Decision 3403 (1999) was far worse, however, than advocates or even the INS could have imagined. Although the 10-5 majority found that R-A- had been persecuted and that her government had failed to provide adequate protection, it determined that she was not persecuted *because of* a protected ground, *ie.*, political opinion or membership in a particular social group.[276] The decision, which was appealed to the Ninth Circuit Federal Court of Appeals, was immediately condemned by immigrant and domestic violence advocates across the country as contrary to established principles of human rights and U.S. asylum law. In January 2000, 100 *amici curiae* supported the request by Rodi Alvarado that the Attorney General certify and reverse *Matter of R-A-*.[277]

On December 7, 2000, in the waning days of the Clinton Administration, the U.S. Attorney General and the INS issued proposed rules which provide guidance in adjudicating asylum claims based on domestic violence.[278] The proposed rules call into serious question much of the Board's reasoning in *Matter of R-A-* without explicitly overruling it.[279] Advocates also called on Janet Reno to overrule *Matter of R-A-* before leaving office. On January 19, 2001, Janet Reno vacated *Matter of R-A-*, sending it back to the Board to reconsider in light of the proposed rules.[280] It is unclear, however, what the future holds for these proposed rules. The deadline for providing written comments to the proposed rules was January 22, 2001, two days after the new Administration took office.[281] It will be up to the Bush Administration to review the comments and issue final rules.

Despite Janet Reno's decision to vacate *Matter of R-A-*, until the future of the proposed rules becomes more certain, attorneys and other representatives should carefully weigh their clients' options in considering whether to bring an asylum claim based on domestic violence. For clients who are in removal proceedings and have no other options, asylum may well be a remedy worth pursuing. For clients who are not in proceedings but are facing their 1-year filing deadline, it will depend on how strong their case is. They may wish to go ahead and file, recognizing that it will be an uphill battle. It is very important that clients make this decision themselves, and that their attorneys and representatives fully advise them of the risks and consequences.

Filing and Interviewing with the INS Asylum Office.[282] If your client decides to proceed with her asylum application, but has never been in removal or deportation proceedings before an Immigration Judge, she would file her I-589 application with the Immigration and Naturalization Service. She should file three copies of her application with the appropriate

regional INS Service Center, as indicated on the I-589 instructions. Within 1 - 2 months, the Service Center will schedule her for an interview with the local INS Asylum Office. She will receive a notice of her interview in the mail. She will need to attend the interview with an interpreter if she is not fluent in English. Her attorney or BIA accredited representative can not also serve as her interpreter. Her case can be denied if she does not come with an interpreter, although usually it is rescheduled for a second interview.[283]

The Asylum Officer will meet with the asylum seeker, her representative, and the interpreter in his or her office. This is a non-adversarial interview designed to obtain all the information needed to make an accurate assessment of the asylum seeker's case.[284] The Asylum Officer is not a judge, and may not even be a lawyer. Some officers are very sympathetic to asylum seekers. Others are less so. An outstanding documentary on the role of Asylum Officers in the application process is the PBS film "Well-Founded Fear" by Shari Robertson and Michael Camerini. Excerpts can be viewed on the PBS website at www.pbs.org/pov/wellfoundedfear.[285] An applicant will not know who her Asylum Officer is until the day of her interview.

One of the key issues the Asylum Officer will need to establish is whether the asylum seeker is credible. Many cases are denied because of inconsistencies between what the asylum applicant puts in her asylum application and what she tells the asylum officer. Asylum officers may see many applicants with fabricated claims. Thus, it is often hard to convince them that an applicant is telling the truth. The Asylum Officer must also determine whether the applicant meets the standard for asylum discussed above.[286]

The Asylum Officer will ask your client a number of questions about her application. The first set of questions are generally about biographical information. The INS will then ask the applicant detailed questions about her claim. These questions are designed to elicit details about the case, to test credibility, and to determine if the applicant meets the legal standard for asylum.

The lawyer or representative will have the opportunity to make a brief closing argument at the end of the interview, and to bring up any issues that the Asylum Officer did not address.[287] The representative, however, is usually not allowed to intervene during the interview. On the other hand, if, for example, the interpreter inaccurately translates something your client has said, you may want to interject, and suggest that your client repeat her statement so that it can be properly translated.

It is critical that a client is well-prepared and that you keep the legal standard for asylum in mind in preparing the asylum applicant for her interview and in developing your theory of the case, especially cases involving domestic violence.

When the interview is over, the Asylum Officer will schedule the asylum applicant for an appointment to pick up the INS decision on her case two weeks following the date of the interview.[288] The asylum applicant must return to the Asylum Office with her interpreter to pick up the decision. If the INS decides to approve her application, she will receive a "Recommended Approval". With this, she can apply for employment authorization.[289] Following a background check, which takes approximately 4-8 weeks, she will receive the Final Approval and be considered an "asylee". A year after she receives her grant of asylum she will be eligible to apply for Lawful Permanent Residency.[290] If she returns to her country before she receives her residency, this may be considered an abandonment of her asylum status.[291]

The Role of the Immigration Court. If your client is not recommended for approval by the Asylum Office, two things can happen. If your client is still in legal status at the time of the decision, she will receive a Denial, which will include detailed reasoning regarding the Asylum Officer's decision, but she will not be placed in proceedings before a Judge.[292] Once her legal status expires, however, the INS can move to place her in proceedings. At that point, she can renew her application with the Immigration Judge.

If your client no longer is in legal status, her case will not be denied, but "referred" to the Immigration Court.[293] She will receive a Notice to Appear when she returns for her decision, which she will be required to sign, which will include a date for her first Master Calendar Hearing. The purpose of the Master Calendar Hearing is to determine the charges the INS has made against her, what kind of relief she is requesting, and to set a date for an Individual Hearing.[294] If your client has not already applied for asylum with the Asylum Office, the Judge will set a date by which she must file her asylum application.[295] *Your client must attend all her hearings.* If she does not appear for any of her court hearings, she will be issued a Final Order of

Removal *In Absentia*, which may prevent her from applying for any form of immigration relief in the future.[296]

An asylum seeker will have a second opportunity at her Individual Hearing to present her asylum case before the Immigration Judge. This is like a trial, where her attorney or representative will ask her questions to help her to tell her story, where she can present witnesses and evidence, and where the INS Trial Attorney will act as a prosecutor, cross-examining her regarding her case. The Immigration Judge will issue a formal decision, which either side can appeal to the Board of Immigration Appeals.[297]

Eligibility for Employment Authorization. An asylum applicant is not eligible to apply for Employment Authorization until her case has been pending for 150 days.[298] 150 days is measured from the date the application was first filed with the INS or the Immigration Judge. This is the "Received Date" on the Notice of Action your client receives from the INS or the date stamped on the application filed with the judge. The only exception to this 150 day rule is for persons who are "paroled" into the United States under INA Sec. 212(d)(5). An asylum applicant cannot be granted work authorization until her case has been pending 180 days. If the applicant does anything to delay the case, including asking the Immigration Judge for a continuance or for more time to file her application, or for a date later than the date the judge proposes for the full hearing, this will stop the clock.[299] The 180-day clock will not start again until proceedings commence. If the Immigration Judge denies the case before 180 days have passed, the applicant cannot obtain work authorization while her case is on appeal.[300] If the Judge grants the case but the INS appeals, she can obtain work authorization while her appeal is pending.

The Importance of Case Theory. Some of the strongest asylum applications have a good *case theory*. The theory of the case is the legal argument that ties together the facts of your case with the legal standard for winning asylum.[301] That is, all the key facts of your case must help prove:

1) **Persecution**: your client was persecuted or there is a reasonable possibility that she would be persecuted if she were sent back

2) **State Action**: that her persecutor was either the State or a group or individual the government was not able or willing to control

3) **Nexus**: that her persecutor was motivated to persecute her, at least in part, because of what he perceived to be her race, religion, nationality, political opinion, or membership in a particular social group, whether or not she actually possessed that characteristic

◆ Proving Persecution

Your client must show either *past persecution* or that she has a *"well-founded fear" of persecution* if returned to her country.[302] The U.S. Supreme Court ruled that a "well-founded fear" meant a reasonable possibility that the applicant would face persecution if returned to her country. The asylum applicant does *not* need to prove that it is more likely than not (ie., greater than 50%) that she would be persecuted. Rather, would a reasonable person in her same circumstances fear persecution if she were to return?[303]

You must first show that the harm your client suffered or fears is serious enough to constitute persecution. Although the asylum statute does not define persecution, case law has established that persecution is "the infliction of suffering or harm upon persons who differ in a way regarded as offensive."[304] Persecution is considered an extreme concept that does not include every type of conduct society regards as offensive.[305] The harm or suffering need not be physical, but can include other violations of human rights, including psychological torture, the imposition of severe economic disadvantage, or the deprivation of liberty, food, housing, employment, and other essentials.[306]

The proposed asylum rules clarify that the persecutor does not have to have an intent to harm or punish for persecution to exist.[307] For example, in *Matter of Kasinga*, the Immigration Appeals found that a young woman from Togo qualified for asylum based on her fear of being subjected to Female Genital Mutilation, even though practitioners in her society believed they were performing an important cultural ritual.[308] Rather, the asylum seeker must demonstrate that the harm is objectively serious and that it is experienced by the applicant as serious harm.[309]

In developing the facts of your client's case, it is important to work with her to help her remember and describe in as much and as graphic detail as possible each incident of domestic violence and psychological abuse. Often this will be difficult for your client, and will force her to relive much of the trauma she experienced. Victims of severe physical and psychological

abuse may suffer from Post-Traumatic Stress Disorder, and it may be best for your client to obtain counseling while her case is pending, and as needed thereafter. Also, it will be very helpful to include any other documentation of abuse that is available, including medical records, police reports, court records, expert affidavits, and information on country conditions. If she receives counseling, her counselor should, at a minimum, be willing to prepare an affidavit and ideally, testify regarding the abuse your client has experienced.[310]

The declaration or affidavit that you will prepare for a domestic violence asylum applicant will in many ways be similar to the declaration prepared for your VAWA applicant. The key difference is that the incidents of abuse will have occurred, in most cases, in the client's home country. (There may be situations where the abuse occurred in the United States, but where she fears he will follow her back to her country. In these situations, your client may also want to consider the U visa, discussed below.) It will be much harder to develop an asylum claim based on domestic violence in cases of extreme cruelty but where there is no physical violence, although there may be cases involving severe psychological torture or deprivation of freedom, food, housing, and so forth, that will rise to the level of persecution. It is best to include each incident of violence in the initial draft with as much detail as possible. The declaration can be edited later on to ensure its relevance to your case theory.

In *Matter of R-A-*, for example, the applicant included graphic and disturbing detail of the abuse. This was helpful in proving persecution, and the Board concluded that the "severe injuries sustained by the respondent rise to the level of harm sufficient (and more than sufficient) to constitute 'persecution.'" The Board summarizes some of its findings as follows:

> ... One night, he woke the respondent, struck her face, whipped her with an electrical cord, pulled out a machete and threatened to deface her, to cut off her arms and legs, and to leave her in a wheelchair if she ever tried to leave him... When the respondent could not give 5,000 quetzales to him when he asked for it, he broke windows and a mirror with her head... Whenever he could not find something, he would grab her head and strike furniture with it. Once, he pistol-whipped her. When she asked for his motivation, he broke into a familiar refrain, "I can do it if I want to."[311]

On the other hand, as will be discussed further below, although the Board found past persecution and lack of state protection by the Guatemalan authorities, it also found that R-A-'s abuser had not persecuted her for a protected ground, but rather, beat her whenever he felt like it.[312] In presenting the facts of your client's case, it is critical to keep in mind your case theory and to focus on those incidents of domestic violence that occurred on account of a protected ground.

◆ Proving State Action (or Inaction)

In order for the harm suffered to be persecution, it must be inflicted either by the government or a person or group the government is unable or unwilling to control.[313] The applicant has the burden of showing that the persecutor was the State or an entity the government either could not or would not control.[314] *Matter of R-A-* recognized that harm inflicted by a family member can be persecution where the applicant is unable to obtain meaningful assistance from government authorities in connection with the abuse.[315] The proposed rules would call on the immigration judge or asylum officer to determine "whether the government has taken reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to state protection."[316] They list the types of evidence that the Asylum Officer or Immigration Judge should consider in determining whether the standard has been met.[317] These factors are useful in preparing your client's case. After each factor, we have indicated some of the information that would be helpful to gather in proving a lack of state protection:

- Government complicity with respect to the infliction of harm or suffering

  Was the persecutor a state official? Did the government fail to intervene out of deference to this individual?

- Attempts by the applicant to obtain protection by government officials and the government's response

  Did the applicant call the police or seek court protection? How many times? How did the police and/or court respond?

- Official action which is perfunctory

  Did, for example, the police respond to a call but fail to take further action? Was the abuser arrested? If the applicant filed a complaint, did the court fail to take remedial action?

- A pattern of government unresponsiveness

  Summarize some of the examples raised above.

- General country conditions and the denial of services

  Are there specific laws protecting victims of domestic violence? Are these laws enforced? Are there domestic violence shelters? Counseling services?

- Government policies regarding the harm at issue

  What role do government agencies play in combating domestic violence? Does the government have an official policy on domestic violence? What types of public pronouncements have government officials made?

- Any steps the government has taken to prevent the harm

  See above.

◆ Proving Nexus—The "on Account of" Requirement

An asylum seeker must also prove that she was persecuted or fears persecution "on account of" her race, religion, nationality, political opinion, or membership in a particular social group. In *INS v. Elias Zacarias*, 502 U.S. 478 (1992), the United States Supreme Court ruled that the "on account of" language in the asylum statute required proof that the persecutor was motivated to act because of the applicant's race, religion, nationality, political opinion, or social group.[318] The evidence of the persecutor's motivations can be direct or circumstantial.[319] This has proven a difficult evidentiary burden for the asylum applicant, because it requires establishing the state of mind of the persecutor.[320]

Subsequent case law has established that a persecutor may have "mixed motives", and that as long as the persecutor acted "at least in part" because of a protected ground, the "on account of" requirement is satisfied.[321] A handful of cases and the proposed rules suggest that the protected characteristic must be "at the root of" or "central" to a persecutor's motives.[322] Case law also establishes the doctrine of *imputation*. This means that if a persecutor was motivated to act because of what he *perceived to be*, whether correctly or not, the victim's race, religion, nationality, political opinion, or social group, the nexus requirement is also satisfied.[323] The Proposed Rule codifies the doctrine that an applicant may satisfy the "on account of" requirement if the persecutor acts against the victim "on account of what the persecutor perceives to be the applicant's race, religion, nationality, membership in a particular social group, or political opinion."[324]

The nexus requirement has been a significant problem in asylum cases based on domestic violence, particularly where the asylum applicant argues that she was persecuted "on account of" her political opinion or membership in a particular social group. It is not enough to demonstrate, for example, that she has a political opinion regarding women's equality or belongs to a recognized social group of women opposed to male dominance. The applicant must present evidence that her abuser was motivated to harm her because of her political opinion or social group. The Board appears to have adopted a very traditional definition of political opinion and a restrictive reading of the particular social group requirement. In *Matter of R-A-*, the Board found that R-A- was not persecuted "on account of" her political opinion, because the record indicated that her husband beat her whenever he felt like it, and not because of her opposition, either stated or inferred, to domestic violence or male dominance.[325] The Board also found that the beatings were not "on account of" her membership in a particular social group because there was no evidence that the applicant's husband would harm any other member of the asserted social group ("women living in intimate relationships with male partners who believe in male dominance").[326] That is, there was no evidence that R-A-'s husband would seek to harm other women living with abusive partners.[327]

The Board appears to be more open to asylum claims involving domestic violence, where the asylum seeker can provide some evidence that she was persecuted "on account of" one of the other grounds, ie., race, religion, or nationality. In *Matter of S-A-*, the Board found that an asylum applicant was beaten by her father, a conservative Muslim, on account of religion where he beat her because of her refusal to submit to his conservative, orthodox beliefs.[328]

The proposed rules attempt to clarify the circumstances where persecution can be "on account of" membership in particular social group. They are groundbreaking in that they explicitly recognize gender as a basis for membership in a particular social group.[329] They are not as helpful in laying out the circumstances were persecution can be "on account of" political opinion.[330] However, they do recognize

the doctrine of "imputed political opinion" and extend "imputation" to the other grounds of protection.[331] Nonetheless, they are more restrictive than current case law in proposing that where a persecutor has "mixed motives", the applicant must show that her protected characteristic was "central" to her persecutor's motivation to act against her.[332]

Political Opinion and Imputed Political Opinion. The proposed rules codify the doctrine of imputed political opinion, recognized in existing case law. That is, the "on account of" requirement is satisfied if the persecutor is motivated to harm the victim because of her *actual* political opinion or because of what he *perceives to be* her political opinion.[333]

The INS Gender Guidelines describe the 9th Circuit case of *Fatin v. INS* as "mak[ing] clear that an applicant who could demonstrate a well-founded fear of persecution on account of her (or his) beliefs about the role and status of women in society could be eligible fo refugee status on account of political opinion."[334] The denial of women's rights takes many forms, including bride burning, FGM, discriminatory treatment in access to employment, education and public life, and violence in the home. When women raise objections to these practices, whether through public expression, organizational activity, defiance of the law, or in the case of domestic violence, through acts of resistance to individual experiences of oppression, this opposition should be recognized as the expression of a political opinion.[335]

In framing an argument that a victim of domestic violence was persecuted "on account of" her political opinion, the presentation of the facts of the case becomes all-important. The Board denied asylum in *Matter of R-A-*, because there was testimony on the record that R-A-'s abuser was a sick individual who beat her whenever he felt like it, and not in response to her acts of resistance to male domination.[336] In applying your case theory, it is critical that, to the extent that you can, you

- Develop your client's testimony regarding her belief in women's right to equality in the home, or at a minimum, assertions of her right to be free from physical abuse
- Demonstrate any steps she took to achieve independence or freedom from violence, either by seeking police protection, getting a job outside of the home, joining a women's group, leaving her husband, going to a shelter, or standing up to his rages
- Demonstrate, to the extent possible, how each time her abuser acted against her, he was motivated by something she did or said to achieve independence outside the home or oppose or protect herself from violence inside the home

If the facts do not support such an argument, you should explore some of the legal arguments outlined in the following sections.

Membership in a Particular Social Group. The proposed rule is groundbreaking in that it explicitly recognizes gender as a possible basis for membership in a particular social group.[337] That is, in certain societies, a woman may be persecuted on account of the fact that she is a woman, particularly in societies that subjugate women.[338] In the past, decision makers were reluctant to define a social group in terms of gender alone, and generally required gender plus something else.[339] The proposed rule codifies the BIA decision in *Matter of Acosta* by providing that "a particular social group is composed of members who share a common immutable characteristic, such as sex, color, kinship ties, or past experience, that a members either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it."[340] It also sets forth a non-exclusive set of factors that decision makers can consider in determining whether a particular social group exists:

- Members of the group are closely affiliated with each other
- Members are driven by a common motive or interest
- Voluntary associational relationship exists among members
- Group is recognized as a societal faction or recognized segment of the population
- Members view themselves as members of the group
- Society distinguishes members of the group for different treatment or status[341]

The first three factors are from the Ninth Circuit's decision in *Sanchez Trujillo*, which found that a particular social group implied a collection of people closely affiliated with each other who were actuated by some common impulse or interest.[342] This deci-

sion led to long-standing confusion in subsequent cases, by suggesting that a social group was defined by some form of voluntary associational relationship.[343] The last three factors are from *Matter of R-A-*.[344] The Board in *R-A-* found no evidence that the claimed particular social group in R-A-, women intimately involved with male partners who believe women should live under male domination, was a group recognized or understood to be a societal faction or that victims of domestic abuse viewed themselves as part of this group.[345]

The Proposed Rule indicates that, while each of these factors may be considerations, they are not prerequisites. It indicates that it also would be relevant to consider evidence of societal attitudes towards group members:[346]

- In asylum cases based on domestic violence, do societal institutions such as the courts and police fail to intervene because they view domestic violence as a private family matter?
- Do societal institutions offer fewer protections or benefits to women trapped in abusive relationships than to other victims of crime?

The key factor in determining whether a characteristic is one which defines a particular social group is whether that characteristic is immutable – either beyond the power of the individual to change or so fundamental to the individual's identity or conscience that he or she should not be required to change it.[347] The proposed rule is problematic in addressing when past experience defines a particular social group. It provides that a past experience must have been fundamental to the individual's identity at the time it occurred. It suggests, for example, that membership in a violent gang can not be the basis for membership in a particular social group, because the applicant could have refrained from joining.[348] A past experience, however, by virtue of its historic permanence, is unchangeable. It is, by definition, an immutable characteristic. The Board in *Matter of Acosta* addressed this issue by offering a past experience as one example of an immutable characteristic:

> ...The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.[349]

Based on the standard in *Matter of Acosta*, we can identify three different categories of particular social groups:

- Groups defined by an innate or unchangeable characteristic
- Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association
- Groups associated by a former voluntary status, unalterable due to its historic permanence[350]

In framing the particular social group, the advocate should examine the facts of her case, keeping the above factors in mind.[351] In some situations, there may be an overlap with the political opinion ground of protection, such as where the asylum applicant joined a women's organization, participated in protests against gender inequality, or sought assistance from a domestic violence shelter. These are easier cases. In these cases, the social group may be defined in terms of a voluntary associational relationship. To satisfy the nexus requirement, it also will be necessary to provide evidence that the applicant's husband or partner was motivated to harm her because of her activities or opinions.[352]

There may be situations, however, where an applicant was beaten by her husband, not because she did anything to oppose the violence or to assert her independence, but simply because she was a woman in a society where spouse abuse is condoned. Her first act of independence may have been leaving her abuser to flee to the United States. In these cases, the social group may be defined in terms of gender alone.[353] It will be important in these cases to examine societal attitudes towards victims of domestic violence, and to present compelling evidence of the state's and society's tolerance of spouse abuse and male dominance.

Religion. The INS, the Immigration Courts, and the BIA appear more open to asylum claims involving family violence when a religious regime is committed to upholding a particular religion or belief system, and where a victim is persecuted by family members or by members of her community because of her opposition to or failure to abide by these practices. Opposition to domestic violence in such a society, for example, may be viewed as a challenge to these values and religious practices.[354] Women's legal status in certain countries governed by the Islamic Sharia, such

as Afghanistan or Algeria, are good examples of situations where a woman may be able to articulate an asylum claim involving domestic violence based on the argument that the persecution was on account of religion. A very helpful case to read in this regard is the BIA decision in *Matter of S-A-*, Int. Dec. #3433 (June 27, 2000), in which a young Morrocan woman beaten by her father demonstrated that she had suffered past persecution and had a well-founded fear of future persecution based on her liberal Muslim beliefs which differed from her father's orthodox Muslim beliefs concerning the proper role of women in the society.[355]

Race. According to the Handbook of the United Nations High Commissioner on Refugees ("UNHCR Handbook"), race is to be understood in its widest sense to include all kinds of ethnic groups that are referred to as races in common usage.[356] It closely overlaps with nationality, discussed below. Where a society fails to protect certain women from domestic violence because of their race or ethnicity, it may be possible to argue that the persecution was on account of race or nationality.

Nationality. The UNHCR Handbook underscores that "nationality" is not to be understood only as citizenship. It includes membership of a particular ethnic or linguistic group and may overlap with race.[357] The Handbook provides that two or more ethnic or linguistic groups may exist within a single state.[358] In cases involving domestic violence, it may be possible to show that the State is willing and able to provide protection to other ethnic or linguistic nationalities to which the applicant does not belong. In such cases, it is important to include any evidence that the abuser knew that the government would not provide protection to his victim on account of her race or nationality, and may have been motivated to abuse her because of this fact.[359]

◆ Documentation

Finally, it is worth underscoring the importance of developing the strongest possible record, both for your merits hearing and any possible appeals. The record developed in the asylum case before the immigration judge will be the record that follows the asylum applicant on appeal.[360] The BIA only rarely allows in additional evidence, and to do so, it should be shown that it is new evidence that could not have been reasonably obtained during the original hearing.[361] Your client's testimony, both on direct and cross-examination, should be consistent with your theory of the case. Although, in theory, given the problems of proof faced by persons fleeing their homeland, an asylum seeker's testimony should be enough[362], it is extremely important to have corroborating evidence, wherever possible.[363] At a minimum, and in light of recent case law, this should include country condition information on the legal status of women in that particular society, and government policies and practices regarding domestic violence. Ideally, it should also include the testimony or affidavits of expert witnesses, any medical records tending to corroborate the abuse, and any evidence that the applicant sought police or court protection and the results of these efforts.

CONCLUSION

Today, immigrants who suffer abuse within the family have a broader array of options open to them than ever before. Over the course of the last decade, policymakers have become increasingly sensitive to the plight of battered immigrants, and have opened avenues to relief unavailable to most other immigrant groups. By the mid-nineties, with the passage of VAWA, Congress had provided important relief for the spouses and children of abusive U.S. citizens and lawful permanent residents; by the end of the decade, the Administration successfully had implemented new regulations and guidelines for adjudicating these cases. No relief existed, however, for battered immigrants who did not fit squarely within the traditional family-based system of immigration, including the spouses and children of undocumented immigrants and nonimmigrants, battered women who did not marry their abusers, or the intending spouses of bigamists. Furthermore, with its 1999 decision in *Matter of R-A-*, the Board of Immigration Appeals had effectively eliminated political asylum as a form of relief for spouses who fled domestic violence in their homelands.

Congress and the previous Administration have shown a remarkable willingness over the last year to think outside of the box. The intending spouses of bigamists are now eligible for relief under VAWA's self-petitioning and cancellation provisions. Crime victims who suffer severe physical or mental abuse, including victims of domestic violence, trafficking and child abuse, are eligible for a U visa, regardless of their status or the status of their abuser. *Matter of R-A-* has been vacated, thus opening the door to asylum claims based on domestic violence. This Briefing has outlined the various options currently available to

immigrants who face abuse within the family, including VAWA self-petitioning, VAWA cancellation of removal, the battered spouse waiver for conditional residents, domestic violence asylum claims, and the new U visa. The remedies and their interaction are complicated, however, and a client or her advocate should seek the advice of an experienced immigration professional before embarking on any course of action.

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1 *See, e.g.*, Latino and Immigrant Fairness Act of 2000 (S 3095) (Sept. 22, 2000).

2 The Battered Immigrant Women Protection Act of 2000 (hereinafter "VAWA 2000") became law as part of the Victims of Trafficking and Violence Protection Act of 2000 (Pub. L. No. 106-386), 114 Stat. 1464, at §§ 1501-1513.

3 Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902-1955 (hereinafter "VAWA").

4 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (hereinafter "IIRAIRA").

5 VAWA 2000, *supra* note 2, at § 1513.

6 Proposed Rule: Asylum and Withholding Definitions, 65 Fed. Reg. 76588 (Dec. 7, 2000) (hereinafter "Proposed Rule").

7 *Matter of R-A-*, Interim Dec. 3403 (1999). *See also* Proposed Rule, *supra* note 6, at 76592.

8 *In re Matter of Rodi Alvarado Pena*, Order No. 2379-2001, Office of the Attorney General (Jan. 19, 2001) (hereinafter "Reno Order").

9 L. Gilbert, *Family Violence and the Immigration and Nationality Act*, Immigration Briefings 98-3 (March 1998).

10 *See Preliminary Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 1995/85, UN Doc. E/CN.4/1995/42 ¶ 118, at 20 (Nov. 22, 1994) (hereinafter "1994 Report of the Special Rapporteur").

11 *Id.* at ¶49, at 9.

12 *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965) (allowing police "to search the sacred precincts of marital bedrooms for telltale signs of contraceptives" is "repulsive to the notions of privacy surrounding the marriage relationship").

13 *See* 1994 Report of the Special Rapporteur, *supra* note 10, ¶ 117, at 20.

14 This list is from the *Power and Control Wheel*, produced by the Family Violence Prevention Fund of San Francisco, California (who adapted it, with permission, from the Domestic Abuse Intervention Project in Duluth, Minnesota). For a compelling account of a U.S. citizen spouse's efforts to have his Philippine wife deported as a way to better exercise power and control over her without state interference, *see Matter of Sherwood*, A71 033 689 (BIA 1996) (Rosenberg, Board Member) (unpublished decision). See also IIRAIRA § 652(a)(4) ("[m]any mail order brides come to the United States unaware or ignorant of United States immigration law. Mail-order brides who are battered often think that if they flee an abusive marriage, they will be deported. Often, the citizen spouse threatens to have them deported if they report the abuse.").

15 *See, e.g.*, Janet Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 San Diego L. Rev. 593 (1991) (hereinafter Calvo, *Spouse-Based Immigration Laws*).

16 *See* VAWA, *supra* note 3.

17 *Id.* at §§ 40701-40703. *See also* INA § 204(a)(1)(A) et. seq. [8 USCA § 1154)(a)(1)(A)] and INA § 240A [8 USCA § 1229b].

18 *Id.*

19 *See* IIRAIRA, *supra* note 4.

20 *Id* at § 301(b). *See also* INA § 212(a)(9) [8 USCA § 1182(a)(9)], as amended.

21 IIRAIRA, *supra* note 4, at § 604(a). *See also* INA § 208(a)(2)(B) [8 USCA § 1158(a)(2)(B)], as amended.

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23 IIRAIRA, *supra* note 4, at § 350.

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27 *See* 8 CFR § 204.1(a)(1).

28 *See* Family-Based Immigration: A Practitioner's Guide (CLINIC 2000) (hereinafter "Family-Based Immigration") at 1.1.

29 *See* INA § 201(b)(2)(A)(i) [8 USCA § 1151(b)(2)(A)(i)].

30 *See* INA § 203(a) [8 USCA § 1153(a)].

31 INA § 201(b)(2)(A)(i) [8 USCA § 1151(b)(2)(A)(i)]. *See also* Family-Based Immigration, *supra* note 28, at 1.3.

32. *See* INA § 203(a) [8 USCA § 1153(a)].

33 *See* Family-Based Immigration, *supra* note 28, at 1.1.

34 8 CFR § 204.2(a)(4).

35 *Id.*

36 *See* U.S. State Department, Visa Bulletin (visited February 23, 2001) <http://www.travel.state.gov/visa_bulletin.html>.

37 *See* 8 CFR 204.1(c).

38 *See* 8 CFR 204.2(c)(1)(i).

39 *See* Virtue, Office of Programs, Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues (May 6, 1997), at 3, *reprinted in* 74 Interpreter Releases 971 (June 16, 1997) (hereinafter "Supplemental Guidance Memo").

40 *See*, Aleinikoff, Office of Programs, Memorandum Regarding Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents (April 16, 1996), at 2-3 (hereinafter "Aleinikoff Memo").

41 *Id.* at 3.

42 8 CFR § 204.2(c)(4).

43 *See* VAWA 2000, *supra* note 2, at § 1503(d) (to be codified as amended at INA § 204(a)(1)(D) [8 USCA § 1154(a)(1)(D)]).

44 *See* INA § 204(a)(1)(A)-(B) [8 USCA § 1154(a)(1)(A)-(B)].

45 *See* VAWA 2000, *supra* note 2, at § 1503(b)-(c) (to be codified as amended at scattered sections of INA § 204(a)(1) [8 USCA §1154(a)(1)]).

46 *Id.*

47 *See* H.R. Rep. No. 106-939, Div. B, Title V, at § 1503.

48 See VAWA 2000, *supra* note 2, at § 1503(a)-(c).

49 *See generally* Immigration Law and the Family, *supra* note 26, at § 4.02[2].

50 *Id. See also Matter of Garcia*, 16 I&N 623 (BIA 1978); *Matter of Annang*, 14 I&N 502 (BIA 1973); *Matter of L*, 7 I&N 587 (BIA 1957).

51 *See* Immigration Law and the Family, *supra* note 26, at § 4.03[2]. *See also Adams v. Howerton*, 673 F.2d 1036 (9th Cir.), *cert denied* 458 U.S. 1111 (1982).

52 *See* Legal Immigration Network, *Family Law: Common Law Marriage* (visited Feb. 15, 2001) <http://www.itslegal.com/infonet/family/common.html>.

53 *See* VAWA 2000, *supra* note 2, at § 1503(a) (to be codified as amended at INA § 101(a)(50) [8 USCA § 1101(a)(50)]); § 1503(b)(1)(A) (to be codified as amended at § 204(a)(1)(A)(iii)(II)(aa)(BB) [8 USCA § 1154(a)(1)(A)(iii)(II)(aa)(BB)]); § 1503(c)(1) (to be codified as amended at § 204(a)(1)(B)(ii)(II)(aa)(BB) [8 USCA § 1154(a)(1)(B)(ii)(II)(aa)(BB)]); § 1504(a) (to be codified as amended at INA § 240A(b)(2)(A)(i)(III) [8 USCA § 1229b(b)(2)(A)(i)(III)]).

54 INA § 204(a)(1)(A)(iii) [8 USCA § 1154(a)(1)(A)(iii)], amended by VAWA 2000, *supra* note 2, at § 1503(b)-(c). *See also* 8 CFR § 204.2(c)(ii).

55 8 CFR 204.2(c)(ii).

56 *See* VAWA 2000, *supra* note 2, at § 1503(b)(1)(A) (to be codified as amended at INA § 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) [8 USCA § 1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc)]); § 1503(c)(1) (to be codified as amended at § 204(a)(1)(B)(ii)(II)(aa) (CC)(bbb) [8 USCA § 1154(a)(1)(B)(iii)(II)(aa) (CC)(bbb)]).

57 *Id.* at § 1503(b)(1)(A) (to be codified as amended at INA § 204(a)(1)(A)(iii)(II)(CC)(aaa) [8 USCA § 1154(a)(1)(A)(iii)(II)(CC)(aaa)]).

58 *Id.* at § 1503(c)(1).

59 *Id.* at § 1507(b) (to be codified as amended at INA § 204(h) [8 USCA § 1154(h)]).

60 INA § 204(a)(1)(A)(iii) [8 USCA § 1154(a)(1)(A)(iii)]; INA § 204(a)(1)(B)(ii) [8 USCA § 1154(a)(1)(B)(ii)], as amended by VAWA 2000, *supra* note 2.

61 *Lutwak v. U.S.*, 344 U.S. 604, 611 (1953); *Matter of Soriano*, 19 I&N 764 (BIA 1988).

62 *See* 8 CFR § 204.2(c)(2)(vii).

63 *Id.*

64 *See* VAWA 2000, *supra* note 2, at § 1503(b)(1)(A) (to be codified as amended at INA § 204(a)(1)(A)(iii)(I)(bb) [8 USCA § 1154(a)(1)(A)(iii)(I)(bb)]); § 1503(c)(1) (to be codified as amended at INA § 204(a)(1)(B)(ii)(I)(bb) [8 USCA § 1154(a)(1)(B)(ii)(I)(bb)]).

65 *Id.* at § 1503(b)(2) (to be codified as amended at INA § 204(a)(1)(A)(iv) [8 USCA § 1154(a)(1)(A)(iv)]); § 1503(c)(2) (to be codified as amended at INA § 204(a)(1)(B)(iii) [8 USCA § 1154(a)(1)(B)(iii)]).

66 *Id.* at § 1503(b)(1) (to be codified as amended at INA § 204(a)(1)(A)(iii)(I)(bb) [; § 1503(c)(1) (to be codified as amended at INA § 204(a)(1)(B)(ii)(I)(bb)).

67 *Id.* at § 1503(b)(2) (to be codified as amended at INA § 204(a)(1)(A)(iv) [8 USCA § 1154(a)(1)(A)(iv)]); § 1503(c)(2) (to be codified as amended at INA § 204(a)(1)(B)(iii) [8 USCA § 1154(a)(1)(B)(iii)]).

68 8 CFR § 204.2(c)(1)(vi).

69 *See, e.g.*, 8 CFR § 204.2(c)(2)(iv).

70 *See* INA § 204(a)(1)(A)(iii)(I) [8 USCA § 1154(A)(1)(A)(iii)(I)]; INA § 204(a)(1)(A)(iv) [8 USCA § 1154(a)(1)(A)(iv)]; INA § 204(a)(1)(B)(ii) [8 USCA § 1154(a)(1)(B)(ii)]; INA § 204(a)(1)(B)(iii)(I) [8 USCA § 1154(a)(1)(B)(iii)(I)], amended by VAWA 2000, *supra* note 2, at § 1503(b)-(c).

71 *See* VAWA 2000, *supra* note 2, at § 1503(b)(1)(A) (to be codified as amended at INA § 204(a)(1)(A)(iii)(II)(dd) [8 USCA § 1154(a)(1)(A)(iii)(II)(dd)]); § 1503(b)(2) (to be codified as amended at INA § 204(a)(1)(A)(iv) [8 USCA § 1154(a)(1)(A)(iv)]); § 1503(c)(1) (to be codified as amended at INA § 204(a)(1)(B)(ii)(II)(dd) [8

USCA § 1154(a)(1)(B)(ii)(II)(dd)]); § 1503(c)(2) (to be codified as amended at INA § 204(a)(1)(B)(iii) [8 USCA § 1154(a)(1)(B)(iii)]).

72 *Id.* at § 1503(b)(3) (to be codified as amended at INA § 204(a)(1)(A)(v) [8 USCA § 1154(a)(1)(A)(v)]); § 1503(c)(3) (to be codified as amended at INA § 204(a)(1)(B)(iv) [8 USCA § 1154(a)(1)(B)(iv)]).

73 *Id.*

74 *Id.* at § 1503(b)(1) (to be codified as amended at INA § 204(a)(1)(A)(iii)(I)(bb) [8 USCA § 1154(a)(1)(A)(iii)(I)(bb)]); § 1503(b)(2) (to be codified as amended at INA § 204(a)(1)(A)(iv) [8 USCA § 1154(a)(1)(A)(iv)]); § 1503(c)(1) (to be codified as amended at INA § 204(a)(1)(B)(ii)(I)(bb) [8 USCA § 1154(a)(1)(B)(ii)(I)(bb)]); § 1503(c)(2) (to be codified as amended at INA § 204(a)(1)(B)(iii) [8 USCA § 1154(a)(1)(B)(iii)]).

75 *See* INA § 101(a)(27)(J) [8 USCA § 1101(a)(27)(J)]. See also 8 CFR § 204.11.

76 *See* 8 CFR 204.2(c)(1)(iii).

77 *See* VAWA 2000, *supra* note 2, at § 1503(b)(1) (to be codified as amended at INA § 204(a)(1)(A)(iii)(II)(CC)(bbb) [8 USCA § 1154(a)(1)(A)(iii)(II)(CC)(bbb)]); § 1503(b)(2) (to be codified as amended at INA § 204(a)(1)(A)(iv) [8 USCA § 1154(a)(1)(A)(iv)]).

78 *Id.* at § 1503(c)(1) (to be codified as amended at INA § 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa) [8 USCA § 1154(a)(1)(B)(ii)(II)(aa)(CC)(aaa)]); § 1503(c)(2) (to be codified as amended at INA § 204(a)(1)(B)(iii) [8 USCA § 1154(a)(1)(B)(iii)]).

79 *See, e.g.*, Gail Pendleton, Applications for Immigration Status Under the Violence Against Women Act (VAWA): 2000 Update 5 (2000) (hereinafter Pendleton Update).

80 *Id.* at § 1507(a)(2) (to be codified as amended at INA § 204(a)(1)(B)(v)(II) [8 USCA § 1154(a)(1)(B)(v)(II)]).

81 *See* Aleinikoff memo, *supra* note 40, at 5.

82 *See* INA § 204(a)(1)(H) [8 USCA § 1154(a)(1)(H)], amended by VAWA 2000, *supra* note 2, at § 1503(d) (to be codified as amended at INA § 204(a)(1)(J) [8 USCA § 1154(a)(1)(J)]).

83 Aleinikoff memo, *supra* note 40, at 5.

84 *See* VAWA 2000, *supra* note 2, at § 1503(b)(1) (to be codified as amended at INA § 204(a)(1)(A)(iii)(II)(bb) [8 USCA § 1154(a)(1)(A)(iii)(II)(bb)]); § 1503(b)(2) (to be codified as amended at INA § 204(a)(1)(A)(iv)); § 1503(c)(1) (to be codified as amended at INA § 204(a)(1)(B)(ii)(II)(bb) [8 USCA § 1154(a)(1)(B)(ii)(II)(bb)]); § 1503(c)(2) (to be codified as amended at INA § 204(a)(1)(B)(iii) [8 USCA § 1154(a)(1)(B)(iii)]).

85 *See* Kurzban, Kurzban's Immigration Law Sourcebook 554 (7th ed. 2000) (hereinafter "Kurzban's Sourcebook").

86 *See* INA § 101(f).

87 *See* VAWA 2000, *supra* note 2, at § 1503(d) (to be codified as amended at INA § 204(a)(1)(C) [8 USCA § 1154(a)(1)(C)]).

88 *Id.*

89 *See* 8 CFR § 204.2(c)(2)(v); 204.2(e)(2)(v).

90 *See* 8 CFR § 204.2(c)(1)(vii); 8 CFR § 204.2(e)(1)(vii).

91 *See* 8 CFR § 204.2(c)(2)(v); 8 CFR § 204.2(e)(2)(v).

92 *Id.*

93 *See* VAWA 2000, *supra* note 2, at 1503(b)(2) (to be codified as amended at INA § 204(a)(1)(A)(iv) [8 USCA § 1154()(1)(A)(iv)]); 1503(c)(2) (to be codified as amended at INA § 204(a)(1)(B)(iii)) [8 USCA § 1154(a)(1)(B)(iii)]. *See also* 8 CFR 204.2(e)(ii).

94 INA § 101(b)(1)(B) [8 USCA § 1101(b)(1)(B)].

95 *See* VAWA 2000, *supra* note 2, at § 1503(d)(2) (to be codified as amended at INA § 204(a)(1)(D)(i)(I)-(IV) [8 USCA § 1154(a)(1)(D)(i)(I)-(IV)]).

96 *See* Preamble to Interim Self-Petitioning Regulations, 61 Fed. Reg. 13061, 13063 (March 26, 1996) (hereinafter "VAWA Regulations") (". .an approved self-petition for a child of a lawful permanent resident of the United States will be automatically converted to an approved petition for classification as the unmarried adult son or daughter of a lawful permanent resident when the unmarried self-petitioner reaches 21 years of age.")

97 *Id.* at § 1507(b) (to be codified as amended at INA § 204(h) [8 USCA § 1154(h)]).

98 *Id.* at § 1503(d) (to be codified as amended at INA § 204(a)(1)(D)(i)(I)-(II) [8 USCA § 1154(a)(1)(D)(i)(I)-(II)]).

99 *See* INA § 204(a)(1)(A)(iii) [8 USCA § 1154(a)(1)(A)(iii)], amended by VAWA 2000, *supra* note 2, at § 1503(b)(1) (to be codified at § 204(a)(1)(A)(iii)(I) [8 USCA § 1154(a)(1)(A)(iii)(I)]); and § 204(a)(I)(B)(ii) [8 USCA § 1154(a)(I)(B)(ii)], amended by VAWA 2000, *supra* note 2, at § 1503(c)(1) (to be codified at 204(a)(1)(B)(ii)(I) [8 USCA § 1154(a)(1)(B)(ii)(I)]).

100 *Id.*

101 *Id.* at § 1503(d) (to be codified as amended at INA § 204(a)(1)(D)(i)(III)-(IV) [8 USCA § 1154(a)(1)(D)(i)(III)-(IV)]).

102 *Id.* at § 1503(d) (to be codified as amended at INA § 204(a)(1)(D)(i)(I) [8 USCA § 1154(a)(1)(D)(i)(I)].

103 8 CFR § 204.1(a)(3). *See also* Aleinikoff memo, *supra* note 40, at 2; Form I-360 Instructions (Rev. 09/11/00) (hereinafter "Form I-360 Instructions").

104 Form I-360 Instructions, *supra* note 103, at 2.

105 8 CFR § 204.2(c)(2)(ii).

106 *Id.*

107 8 CFR 204.2(c)(2)(vii).

108 8 CFR 204.2(c)(2)(iv).

109 8 CFR § 204.2(c)(2)(iii).

110 8 CFR § 204.2(c)(2)(v).

111 See Form I-360 Instructions at 4.

112 8 CFR § 204.1(d).

113 *See* Aleinikoff memo, *supra* note 40, at 2-3.

114 *Id.* at 3-4.

115 *See* Supplemental Guidance memo, *supra* note 39, at 4.

116 62 Fed. Reg. 16,607-08 (April 7, 1997), *reported on and reprinted in* 74 Interpreter Releases 606, 622 (April 14, 1997).

117 Prima Facie Review of Form I-360 When Filed by Self-

Petitioning Battered Spouse/Child," 62 Fed. Reg. 60,769-72 (Nov. 13, 1997), *reported on and reprinted in* 74 Interpreter Releases 1740, 1754 (Nov. 17, 1997) (hereinafter, "Prima Facie Review Standard").

118 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996), § 431(c), as amended by IIRAIRA, *supra*, note 4 at § 501 (hereinafter "Welfare Reform Law"). *See also* Prima Facie Review Standard, *supra* note 117.

119 *See* Pendleton Update, *supra*, note 79 at 13-14.

120 8 CFR § 204.2(c)(3)(ii).

121 *See* Supplemental Guidance memo, *supra* note 39, at 3.

122 *Id. See also* 8 CFR § 274a.12(c)(14) (allowing for work authorization for persons in deferred action status upon a showing of economic necessity).

123 Cronin, Acting Associate Commissioner, Office of Programs, Relocation to the Vermont Service Center of Pending I-360s and Related Deferred Action Determinations for Self-Petitioning Battered Spouses and Children (Dec. 22, 1998) (hereinafter "Cronin memo") (on file with author).

124 8 CFR § 103.5(a).

125 *See* Pendleton Update, *supra* note 79, at 16-17.

126 *Id.* at 17.

127 *See, e.g.*, 74 Interpreter Releases 1841 (Dec. 8, 1997); 74 Interpreter Releases 1930 (Dec. 18, 1997).

128 *See* Aleinikoff Memo, *supra* note 40, at 3.

129 *See* INA § 212(a)(6)(A)(ii); 212(a)(9)(B)(iv) [8 USCA § 1182(a)(6)(A)(ii); 1182(a)(9)(B)(iv)].

130 *See* VAWA 2000, *supra* note 2, at § 1506(a)(1)(to be codified as amended at INA § 245(a) and (c) [8 USCA § 1154(a) and (c)]).

131 *Id.* at § 1505 (to be codified as amended at scattered subsections of INA § 212(a) [8 USCA § 1182(a)]).

132 *Id.* at § 1503(e) (to be codified as amended at INA § 319(a) [8 USCA § 1430(a)]).

133 *See* INA § 245(a) [8 USCA § 1255(a)], as amended by VAWA 2000, *supra* note 2.

134 8 CFR § 245.2(a)(3).

135 8 CFR § 103.7.

136 8 CFR § 245.2(a)(3).

137 8 CFR § 204.2(c)(4).

138 Department of Justice, Fingerprint Instructions for All Benefits Applicants (visited Feb. 23, 2001) <http://www.ins.usdoj.gov/graphics/formsfee/finger/ALLAPPS1.html>.

139 *See* Aleinikoff Memo, *supra* note 40, at 3.

140 8 CFR § 212.7(a)(1).

141 INA § 212(a)(1)(A) [8 USCA § 1182(a)(1)(A)].

142 8 CFR § 245.5. *See also* INS Form I-485 Application to Register Permanent Residence or Adjust Status (Rev. 02/07/00).

143 42 CFR § 34.2(b).

144 *See* INA § 212(g) [8 USCA § 1182(g)].

145 *Id.* at § 212(g)(1) [8 USCA § 1182(g)(1)].

146 *See* VAWA 2000, *supra* note 2, at § 1505(d) (to be codified as amended at INA § 212(g)(1)(C) [8 USCA § 1182(g)(1)(C)].

147 *See*, Aleinikoff, Office of Programs, Immigrant Waivers for Aliens Found Excludable Under Section 212(a)(1)(a)(i) of the Immigration and Nationality Act Due to HIV Infection (September 6, 1995) (hereinafter "HIV Waiver Memo") at 5.

148 INA § 212(a)(4)(B) [8 USCA § 1182(a)(4)(B)].

149 *See* VAWA 2000, *supra* note 2, at § 1505(f) (to be codified as amended at INA § 212(p) [8 USCA § 1182(p)]).

150 *See* Office of the Secretary, Department of Health and Human Services, Fact Sheet: Access to HHS Funded Services for Immigrant Survivors of Domestic Violence (Jan. 19, 2001) (hereinafter "Public Benefits Fact Sheet").

151 IIRAIRA, *supra* note 4, at § 501 (codified as amended at § 431 of the Welfare Reform Law, *supra*, note 118).

152 *Id.*

153 For an excellent analysis of immigrant eligibility for public benefits, see Charles Wheeler, *Alien Eligibility for Public Benefits*, Immigration and Nationality Law Handbook (AILA 2000-01 Edition).

154 *See* 62 Fed. Reg. 60,769 (Nov. 13, 1997) (Prima Facie Review of Form I-360 When Filed by Self-Petitioning Battered Spouse/Child).

155 *See* Catholic Legal Immigration Network, *Chapter 8: Affidavit of Support*, in Family-Based Immigration: A Practitioner's Guide (2000 edition) at 8.3.

156 *See* Elizabeth Ruddick, *Memorandum: Public Charge and Battered Immigrant Women* (National Immigration Project: 1995) (on file with author) (hereinafter, "Public Charge Memo").

157 *See, e.g.*, Supplemental Guidance Memo, *supra* note 39, at pp. 3, 5-6.

158 *See* Public Charge Memo, *supra* note 156, at 1.

159 *See* VAWA 2000, *supra* note 2, at § 1505(e) (to be codified as amended at INA § 212(h)(1)(C) [8 USCA § 1182(h)(1)(C)]).

160 *Id.* at INA § 212(h) [8 USCA § 1182(h)].

161 *Id.*

162 *See* VAWA 2000, *supra* note 2, at § 1505(b) (to be codified as amended at INA § 237(a)(7) [8 USCA § 1227(a)(7)]).

163 *Id.* at § 1505(c)(1) (to be codified at INA § 212(i)(1) [8 USCA § 1182(i)(1)]).

164 *See* IIRAIRA, *supra* note 4, at § 501 (codified as amended at § 431 of the Welfare Reform Law, *supra*, note 118).

165 *See* VAWA 2000, *supra* note 2, at § 1505(c) (to be codified as amended at INA § 212(i)(1) [8 USCA § 1182(i)(1)]).

166 *See* VAWA 2000, *supra* note 2, at § 1505(c)(2) (to be codified as amended at INA § 237(a)(1)(H)(ii) [8 USCA § 1227(1)(1)(H)(ii)]).

167 *See* IIRAIRA, *supra* note 4, at § 301(b).

168 *Id.* (codified as amended at INA § 212(a)(9) [8 USCA § 1182(a)(9)]).

169 *Id.* at § 301(c) (codified as amended at INA § 212(a)(6)(A)(ii) [8 USCA § 1182(a)(6)(A)(ii)]).

170 *Id.* at § 301(b) (codified as amended at INA § 212(a)(9)(B)(iii)(IV) [8 USCA § 1182(a)(9)(B)(iii)(IV)]).

171 *See* IIRAIRA § 301(c)(2) ("The requirements of subclauses (II) and (III) of section 212(a)(6)(A)(ii) of the [INA], as inserted by paragraph (1) shall not apply to an alien who demonstrates that the alien first arrived in the United States before the title III-A effective date described in section 309(a) of this division.").

172 *See* Pendleton Update, *supra* note 79, at 19-20.

173 *Id.* at 20.

174 *See* VAWA 2000, *supra* note 2, at § 1505(a) (to be codified as amended at INA § 212(a)(9)(C)(ii) [8 USCA § 1182(a)(9)(C)(ii)]).

175 *Id.* at § 1505(a)(1) (to be codified as amended at INA § 245(c) [8 USCA § 1145(c)]).

176 *Id.* at § 1509(a).

177 *Id.* at §§ 1510(a)(1), 1511(a).

178 *Id.*

179 VAWA, *supra* note 3, at § 40703 (codified at INA § 244(a)(3) [8 USCA § 1254(a)(3)]).

180 IIRAIRA, *supra* note 4, at § 304 (codified as amended at INA § 240A(b)(2) [8 USCA § 1229b(b)(2)]).

181 *Id.* at § 309(c)(1).

182 INA § 240A(b)(2) [8 USCA § 1229b(b)(2)].

183 *Id.* at § 240A(b)(3) [8 USCA § 1229b(b)(3)].

184 *Id.* at § 240A(b)(2) [8 USCA § 1229b(b)(2)]. *See also* INA § 244(a)(3) [8 USCA § 1254(a)(3)] (amended by IIRAIRA, *supra*, note 4).

185 INA § 240A(d)(2) [8 USCA § 1229b(d)(2)].

186 VAWA 2000, *supra* note 2, at § 1504(a) (to be codified as amended at INA § 240A(b)(2)(A)(ii) [8 USCA § 1229b(b)(2)(A)(ii)]).

187 *Id.* at § 1504(a) (to be codified as amended at INA § 240A(b)(2)(B) [8 USCA § 1229b(b)(2)(B)]).

188 INA § 240A(b)(2) [8 USCA § 1229b(b)(2)].

189 *Id.* at § 240A(b)(2)(D) [8 USCA § 1229b(b)(2)(D)] (amended by VAWA 2000, *supra* note 2, at § 1504(a) (to be codified as amended at INA § 240A(b)(2)(A)(iv) [8 USCA § 1229b(b)(2)(A)(iv)]).

190 *Id.* at § 240A(b)(2)(A) [8 USCA § 1229b(b)(2)(A)].

191 *Id.*

192 *Id.*

193 VAWA 2000, *supra* note 2, at § 1504(a) (to be codified as amended at INA § 240A(b)(2)(A)(i) [8 USCA § 1229b(b)(2)(A)]).

194 INA § 240A(b)(3) [8 USCA § 1229b(b)(3)] (amended by VAWA 2000, *supra* note 2, at § 1504(a) (to be codified as amended at INA § 240A(b)(2)(D)) [8 USCA § 1229b(b)(2)(D)]).

195 INA § 240A(b)(2)(A).

196 VAWA 2000, *supra* note 2, at § 1504(a) (to be codified as amended at INA § 240A(b)(2)(A)(i) [8 USCA § 1229b((b)(2)(A)]).

197 *Id.*

198 INA § 240A(b)(2)(C) [8 USCA § 1229b(b)(2)(C)] (amended by VAWA 2000, *supra* note 2, at § 1504(a) (to be codified as amended at INA § 240A(b)(2)(A)(iii) [8 USCA § 1229b(b)(2)(A)(iii)])).

199 VAWA 2000, *supra* note 2, at § 1504(a) (to be codified as amended at INA § 240A(b)(2)(C) [8 USCA § 1229b(b)(2)(C)]).

200 INA § 240A(b)(2)(D) [8 USCA § 1229b(b)(2)(D)] (amended by VAWA 2000, *supra* note 2, at § 1504(a) (to be codified as amended at INA § 240A(b)(2)(A)(iv) [8 USCA § 1229b(b)(2)(A)(iv)])).

201 *See, e.g.*, Anker, Law of Asylum in the United States 538 (3rd edition 1999) (summary of removal proceeding process).

202 VAWA 2000, *supra* note 2, at § 1505(e) (to be codified as amended at INA § 212(h)(1)(C) [8 USCA § 1182(h)(1)(C)]).

203 *Id.* (to be codified as amended at INA § 212(h) [8 USCA § 1182(h)]).

204 *Id.*

205 *Id.*

206 INA § 237(a)(2)(E) [8 USCA § 1227(a)(2)(E)].

207 VAWA 2000, *supra* note 2, at § 1505(b)(1) (to be codified as amended at INA § 237(a)(7) [8 USCA § 1227(a)(7)]).

208 *See* INA § 240A(b)(2)(E) [8 USCA § 1229b(b)(2)(E)] (amended by VAWA 2000, *supra* note 2, at § 1504(a) (to be codified as amended at INA § 240A(b)(2)(A)(v) [8 USCA § 1229b(b)(2)(A)(v)])). *See also* INA § 244(a) (repealed by IIRAIRA, *supra* note 4, at § 308(b), except in the case of proceedings commenced prior to effective date of IIRAIRA, *supra* note 4, at § 309(c)(1)).

209 *See* 8 CFR § 240.58(c).

210 *See* Preamble, 61 Fed. Reg. 13061, 13067 (March 26, 1996) (Self-Petitioning for Certain Battered or Abused Spouses and Children).

211 8 CFR § 240.58(c). For helpful guidance on establishing extreme hardship, see also Virtue, General Counsel, "Extreme Hardship" and Documentary Requirements Involving Battered Spouses and Children (Oct. 16, 1998) (hereinafter "Extreme Hardship Memo").

212 *See* INA § 240A(b)(2)-(3) [8 USCA § 1229b(b)(2)-(3)].

213 *See* INA § 101(15)(J) [8 USCA § 1101(15)(J)].

214 *See* INA § 204(a)(1)(B)(i). [8 USCA § 1154(a)(1)(B)(i)]

215 *See* INA § 201(b)(2)(A)(i) [8 USCA § 1151(b)(2)(A)(i)].

216 *See* VAWA 2000, *supra* note 2, at § 1504(b) (to be codified as amended at INA § 240A(b)(4) [8 USCA § 1229b(b)(4)]).

217 *Id.* at § 1506(c).

218 *Id.* at § 1506(c)(2).

219 *Id.* at § 1506(c)(1) (to be codified as amended at INA § 240(c)(6)(C)(iv) [8 USCA § 1229a(c)(6)(C)(iv)]).

220 *Id.*

221 *Id.* at § 1506(c)(1)(B).

222 *See* 8 CFR § 240.11(a)(1).

223 *See* VAWA 2000, *supra* note 2, at § 1506(c) (to be codified as amended at INA § 240(c)(6)(C)(iv) [8 USCA § 1229a(c)(6)(C)(iv)]).

224 8 CFR § 240.20.

225 8 CFR § 103.7(b).

226 *Supra* at III(B)(4).

227 *See* Supplemental Guidance Memo, *supra* note 39, at

6 ("INS district offices shall promptly issue a Notice to Appear to any alien who makes a credible request to be placed in proceedings in order to raise a claim for cancellation of removal under section 240A(b)(2).").

228 IIRAIRA, *supra* note 4, at § 384(a)(1).

229 *Id.* at § 384(a)(2).

230 *Id.* at § 384(c).

231 Virtue, Office of Programs, Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA § 384 (May 5, 1997), *reprinted in* 74 Interpreter Releases 795 (May 12, 1997) (hereinafter "Non-Disclosure Memo"). *See also* Pendleton Update, supra note 79, at 17.

232 INA § 216(c)(4) [8 USCA § 1186a(c)(4)]. *See also* 8 CFR § 216.5.

233 INA § 216(g) [8 USCA § 1186a(g)].

234 INA § 216(d)(2)(A) [8 USCA § 1186a(d)(2)(A)].

235 INA § 216(c)(3)(B) [8 USCA § 1186a(c)(3)(B)].

236 INA § 216(c)(4)(C) [8 USCA § 1186a(c)(4)(C)]. *See also* 8 CFR § 216.5(e)(3).

237 8 CFR § 216.5(a).

238 8 CFR § 216.5(e)(2).

239 8 CFR § 216.5(e)(1).

240 *See* VAWA 2000, *supra* note 2, at § 1503(e) (to be codified as amended at INA § 319(a) [8 USC § 1430(a)]).

241 *Id.*

242 VAWA 2000, *supra* note 2, at § 1513(a)(1)(B).

243 *Id.* at § 1513(b)(3) (to be codified at INA § 101(a)(15)(U)(i) [8 USCA § 1101(a)(15)(U)(i)]).

244 *Id.* at § 1513(b)(3) (to be codified at INA § 101(a)(15)(U)(iii) [8 USCA § 1101(a)(15)(U)(iii)]).

245 *Id.* at § 1513(a)(1)(A).

246 *Id.* at § 1513(b)(3) (to be codified at INA § 101(a)(15)(U)(i)(III) [8 USCA § 1101(a)(15)(U)(i)(III)]).

247 *Id.* at § 1513(c) (to be codified at INA § 214(o)(2) [8 USCA § 1184(o)(2)]).

248 *Id.*

249 *Id.* at § 1513(b)(3) (to be codified at INA § 101(a)(15)(U)(ii) [8 USCA § 1101(a)(15)(U)(ii)]).

250 *Id.* at § 1513(c) (to be codified at INA § 214(o)(1) [8 USCA § 1184(o)(1)]).

251 Gail Pendleton, Leslye Orloff and Leni Marin, *Implementing the New U Visa: Views of the National Network on Behalf of Battered Immigrant Women* (2000) (on file with this author) (hereinafter "National Network Position Paper").

252 VAWA 2000, *supra* note 2, at § 1513(c) (to be codified at INA § 214(o)(4) [8 USCA § 1154(o)(4)]).

253 *Id.* at § 1513(c) (to be codified at INA § 214(o)(1) [8 USCA § 1184(o)(1)]).

254 National Network Position Paper, *supra* note 251, at 6.

255 VAWA 2000, *supra* note 2, at § 1513(c) (to be codified at INA § 214(o)(3) [8 USCA § 1184(o)(3)]).

256 *Id.* at § 1513(f) (to be codifed at INA § 245(l)(1) [8 USCA § 1255(l)(1)]).

257 *Id.* at § 1513(f) (to be codified at INA § 245(l)(2) [8 USCA § 1255(l)(2)]).

258 *Id.* at § 1513(e) (to be codified at INA § 212(d)(13) [8 USCA § 1182(d)(13)]).

259 National Network Position Paper, supra note 251, at 2.

260 *See* Anker, Kelly, & Gilbert, *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify As Refugees Under United States Asylum Law*, 11 Georgetown Immig. L. J. 709 (Summer 1997) (hereinafter "Domestic Violence Asylum Claims"). *See also* Anker, Law of Asylum in the United States 258 - 261 , 388 - 394 (3rd Edition 1999) (hereinafter "Anker").

261 *See* Proposed Rule, *supra* note 6.

262 *See* Reno Order, *supra* note 8.

263 *See* INA § 101(a)(42)(A) [8 USCA § 1101(a)(42)(A)]. *See also Matter of S-P-*, Interim Dec. 3287 (BIA 1996) at 4.

264 IIRAIRA, *supra* note 4, at § 604 (codified as amended at INA § 208).

265 *Id.* (codified as amended at INA § 208(a)(2)(B) [8 USCA § 1158(a)(2)(B)]).

266 *Id.* at § 302 (codified as amended at INA § 235(b)(1)(A) [8 USCA § 1225(b)(1)(A)]). *See also* Schrag & Pistone, *Asylum Changes and Expedited Removal*, in Understanding the 1996 Immigration Act 2-1 (Federal Publications, 1997).

267 Id. at § 604(codified as amended at INA § 208(b)(2)(C) [8 USCA § 1158(b)(2)(C)]).

268 8 CFR § 208.13(d), as amended.

269 IIRAIRA, *supra* note 4, at § 604 (codified as amended at INA § 208(b)(2) [8 USCA § 1158(b)(2)]).

270 INA § 101(a)(42)(A) [8 USCA § 1101(a)(42)(A)]; INA § 208 [8 USCA § 1158]. *See also* 8 CFR Part 208.

271 *See* Domestic Violence Asylum Claims, *supra* note 260, at 711.

272 *See* INS Office of International Affairs, Considerations for Asylum Officers Adjudicating Asylum Claims from Women (May 26, 1995) (hereinafter INS Considerations), reported on and reproduced in 72 Interpreter Releases 771, 781 (June 5, 1995).

273 *Id.* at 4.

274 *See Matter of PR* (IJ May 23, 1997) (York, Pa.) (granting asylum to woman from India who had been beaten and abused by her mother-in-law, culminating in attempt to set her on fire); *Matter of Sharmin*, A73 556 833 (IJ Sept. 27, 1996) (New York, NY) (granting asylum to Bangladeshi woman victim of domestic violence), *reported on in* 74 Interpreter Releases 174 (Jan. 27, 1997); Matter of A- and Z-, A72 190 893, A72 793 219 (IJ Dec. 20, 1995) (Arlington, Va.) (granting asylum to a woman from Sierra Leone who had been beaten repeatedly by her husband over period of approximately two years); *In re T-A-* (San Francisco Asylum Office Nov. 1996) (asylum granted to Honduran woman subject to beatings, rape and related abuses by her father since she was a small child).

275 *See, e.g., Matter of Pierre*, 15 I&N Dec. 461 (BIA 1975); *Matter of A-*, A72 988 567 (BIA Feb. 1, 1996), *reported on in* 73 Interpreter Releases 895-896 (July 8, 1996).

276 *Matter of R-A-, supra* note 7, at 19-24.

277 *See* Brief of Amici Curiae in Support of Request for Certification and Reversal of the Decision of the Board of Immigration Appeals in In re R-A-, (Interim Dec. No. 3403) (January 21, 2000).

278 Proposed Rule, *supra* note 6.

279 *Id.* at 76592.

280 Reno Order, *supra* note 8.

281 Proposed Rule, *supra* note 6, at 76588.

282 For a thorough discussion of procedures for filing for asylum with the INS Asylum Office or in Immigration Court, *see* Anker, *supra* note 260, at Appendix A, p. 523 *et seq.*

283 8 CFR § 208.9(g).

284 8 CFR § 208.9(b).

285 *See* Public Broadcasting Service, Well-Founded Fear: A Film by Shari Robertson and Michael Camerini (visited February 22, 2001) <http://www.pbs.org/pov/wellfoundedfear>.

286 8 CFR § 208.9(c).

287 8 CFR § 208.9(d).

288 *Id.*

289 8 CFR § 208.7(a)(1).

290 INA § 209(a) [8 USCA § 1159(a)]. *See also* 8 CFR § 209.1.

291 INA § 208(c)(2)(D) [8 USCA § 1158(c)(2)(D)].

292 8 CFR § 208.14(b)(3). *See also* 8 CFR 208.17.

293 8 CFR § 208.14(b)(2).

294 *See* Anker, *supra* note 260, at 540.

295 *Id.* at 542.

296 INA § 240(b)(5)(A) [8 USCA § 1229a(b)(5)(A)].

297 INA § 240(c)(4) [8 USCA § 1229a(c)(4)].

298 8 CFR § 208.7(a)(1).

299 8 CFR § 208.7(a)(2).

300 8 CFR § 208.7(a)(1).

301 For an excellent discussion of the importance of case theory, *see* Binny Miller, *Give Them Back Their Lives: Client Narrative and Case Theory*, 93 Michigan Law Review 485 (1994).

302 *See* INA § 101(a)(42) [8 USCA § 1101(a)(42)]. *See also* 8 CFR § 208.13.

303 *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-431 (1987).

304 *See Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969).

305 *See Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993).

306 *See* Anker, *supra* note 260, at 233-243.

307 Proposed Rule, *supra* note 6, at 76590.

308 *See Matter of Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996).

309 Proposed Rule, *supra* note 6, at 76597 (to be codified at 8 CFR § 208.15).

310 For a helpful overview of the use of psychological assessments in asylum cases, *see* F. Barton Evans III, *Forensic Psychology and Immigration Court: An Introduction*, Immigration & Nationality Law Handbook (2000-2001 edition).

311 *In re R-A-, supra* note 7, at 4.

312 *Id.* at 21.

313 INA § 101(a)(42) [8 USCA § 1101(a)(42)].

314 8 CFR § 208.13.

315 *In re R-A-, supra* note 7, at 11.

316 Proposed Rule, *supra* note 6, at 76597 (to be codified if amended at 8 CFR § 208.15(a)).

317 *Id.*

318 *INS v. Elias Zacarias*, 502 U.S. 478, 483 (1992)

319 *Id.* at 483.

320 *See* Harvard Immigration and Refugee Clinic, Comments on Proposed Rule 7 (Jan. 19, 2001) (hereinafter "Harvard Comments on Proposed Rule") (available from author).

321 *See Turubac v. INS*, 182 F.3d 1114, 1119 (9th Cir. 1999); *Borja v. INS*, 175 F.3d 732, 735 (9th Cir. 1999); *Fengchu Chang v. INS*, 119 F.3d 1055, 1065 (3d Cir. 1997); *Harpinder Singh v. Ilchert*, 63 F.3d 1501, 1510 (9th Cir. 1995); *Osorio v. INS*, 18 F.3d 1017, 1928-9 (2nd Cir. 1994); *Matter of S-P-*, Interim Dec. 3287, at 4(BIA 1996); *Matter of V-T-S-*, Interim Dec. 3308, at 4 (BIA 1997).

322 *See Gebremichael v. INS*, 10 F.3d 28, 35 (1st Cir. 1993) (alien must show that one of the five characteristics is "at the root of persecution"). *See also Jing Ying Li v. INS*, 92 F.3d 985, 987-88 (9th Cir. 1996); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626-27 (1st, 1985) ("root of persecution" standard later cited as authority in *Gebremichael, supra*, applied in withholding case); *Kunden Singh v. INS*, 965 F. Supp. 724, 729 (D. Md. 1997); *In re R-*, 20 I. & N. Dec. 621, 624 (BIA 1992).

323 *See INS v. Elias-Zacarias, supra* note 318, at 482 ("nor is there any indication (assuming, arguendo, it would suffice) that the guerrillas erroneously believed that Elias Zacarias' refusal was politically based"); *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992) (Canas II) ("Imputed political opinion is still a valid basis after Elias-Zacarias."); *Surinder Singh v. Ilchert*, 69 F.3d 375, 379 (9th Cir. 1995); *In re. S-P-*, Interim Dec. 3287, at 1, 5-6 (BIA 1996).

324 Proposed Rule, *supra* note 6, at 76597-8 (to be codified if amended at 8 CFR § 208.15(b)).

325 *Matter of R-A-, supra* note 7, at 13-14.

326 *Id.* at 17.

327 *Id.*

328 *Matter of S-A-*, Interim Dec. 3433 (June 27, 2000).

329 *See* Proposed Rule, *supra* note 6, at 76593, 76598.

330 *Id.* at 76592, 76597-8.

331 *Id.* at 76597-8.

332 *Id.* at 76598.

333 *Id.* at 76597-8.

334 INS Considerations, *supra* note 272, at 11.

335 *See* Anker, *supra* note 260, at 370-371.

336 *Matter of R-A-, supra* note 7, at 12.

337 *See* Proposed Rule, *supra* note 6, at 76593, 76598 (to be codified if amended at 8 CFR § 208.15(c).

338 *Id.* at 76593-76595.

339 *See, e.g., Gomez v. INS*, 947 F.2d 660, 664 (2nd Cir. 1991); INS Considerations, *supra* note 272, at 13-15.

340 *See* Proposed Rule, *supra* note 6, at 76598 (to be codified if amended at 8 CFR § 208.15(c)(1).

341 *Id.* (to be codified if amended at 8 CFR § 208.15(c)(3)).

342 *Id.* at 76594.

343 *See* Anker, *supra* note 260, at 382-3; *see also* Harvard Comments on Proposed Rule, *supra* note 320, at 11.

344 *Matter of R-A-, supra* note 7, at 15-18.

345 *Id. See also* Proposed Rule, *supra* note 6, at 76594.

346 *See* Proposed Rule, *supra* note 6, at 76599 (to be codified if amended at 8 CFR § 208.15(c)(3)).

347 *See Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). *See also* Harvard Comments on Proposed Rule, *supra* note 320, at 12.

348 *See* Proposed Rule, *supra* note 6, at 76595, 76598 (to be codified if amended at 8 CFR § 208.15(c)(2)).

349 *See Matter of Acosta, supra* note 347, at 233. *See also* Harvard Comments on Proposed Rule, *supra* note 320, at 12.

350 *See Canada v. Ward* (1993) 2 S.C.R. 689, 739. *See also Fatin v. INS, supra* note 305, at 1242; Harvard Comments on Proposed Rule, *supra* note 320, at 12.

351 For a helpful discussion of framing domestic violence asylum claims, *see* Goldberg & Cisse, *Practice Advisory: Asylum and Gender: Matter of R-A-*, 18 AILA Monthly Mailing 103 (Feb. 2000) (hereinafter "Practice Advisory").

352 *See* Anker, *supra* note 260, at 370-371.

353 *See* Domestic Violence Asylum Claims, *supra* note 260, at 742-743.

354 *See* Practice Advisory, *supra* note 351, at 107.

355 *Matter of S-A-*, Interim Dec. 3433 (June 27, 2000). *See also* Regina v. Immigration Appeal Tribunal and Secretary of State for the Home Department *ex parte* Syeda Khatoon Shah, 1997 Immigr. A.R. 145 (Q.B. Nov. 11, 1996) (Pakistani woman fearing being sentenced to death under Muslin Sharia law, based on husband's anticipated false accusation of adultery).

356 United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ¶68 (1979) (hereinafter "UNHCR Handbook").

357 *Id.* at ¶74.

358 *Id.* at ¶75.

359 *See* Practice Advisory, *supra* note 351, at 107-108.

360 *See* 8 CFR § 240.47.

361 *See, e.g.*, 8 CFR § 3.2(c).

362 *See In re Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987).

363 *Matter of S-M-J-*, Interim Dec. 3303, at 5-6, 12 (BIA 1997) (Board found that applicant could be found credible but not to have met her burden of proof where her evidence was general and she failed to provide corroboration of central, specific facts and events easily subject to verification).