

To: Amanda Baran, Chief, Office of Policy and Strategy
Rena Cutlip Mason, Chief, Humanitarian Affairs Division

From: Leslye E. Orloff, Adjunct Professor and Director
National Immigrant Women's Advocacy Project, American University, Washington College of Law

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RE: Improving 8 U.S.C. 1367 VAWA Compliance and Avoiding Harm to Abused Spouses and Children in I-130 Family Based Visa Petition Cases and I-485 Family Based Adjustments

NIWAP is writing about a proposed approach USCIS should take that will substantially improve VAWA confidentiality (8 U.S.C. 1367) compliance by USCIS, ICE, and DHS as a whole. When we drafted the VAWA confidentiality protections in 1996 then Senator Biden and Congresswoman Patricia Schroeder fully understood that victims needed to receive VAWA confidentiality protections as early as possible if these protections were going to be able to interrupt and protect victims from abusers using immigration related abuse against their victims.

Congress, the Immigration and Naturalization Services, and the Department of Homeland Security (DHS), including the United States Citizenship and Immigration Services (USCIS) have all taken many steps and issued very helpful policies to implement the 8 U.S.C. 1367 protections.¹ However, there remains one area of statutory protections that have yet to be implemented in any meaningful way. Although the 8 U.S.C. 1367 as a matter of statute offers protection from reliance on perpetrator provided information for abused spouses, children, and step-children whether or not the victim has filed any 8 U.S.C. 1367 protected immigration case, as a practical matter unless and until a victim files a case that can be entered into the DHS 384 VAWA confidentiality system, victims seldom receive 8 U.S.C. 1367 protections.

The reason for this is that USCIS and immigration enforcement officials can claim that they did not or could not have known that the source of the information they relied upon to deny the victim's immigration application or the tip that led to an enforcement action came from a prohibited source. This is the significant gap in the implementation of 8 U.S.C. 1367's statutory protections that this memo is being submitted to help correctly fill.

Recommendation: USCIS must issue policies and ideally amend regulations so that I-130 and I-485 adjudicators cannot deny family based applications for marriage fraud unless they have first screened that immigrant spouse for battery or extreme cruelty using a standard set of screening questions and have provided the immigrant spouse an opportunity to respond to allegations of marriage fraud. The screening tool that USCIS requires be used by adjudicators must be developed based on evidence-based research.

VAWA Confidentiality Background

To undermine the effectiveness of immigration related abuse used by perpetrators to control their immigrant spouses and children, 8 U.S.C. 1367 barred immigration officials from relying upon perpetrator provided information adversely against the victim in adjudicating the victim's immigration

¹ Alina Husain, Daliana Gomez Garcia, and Leslye Orloff, VAWA Confidentiality: Statutes, Legislative History, and Implementing Policy (June 7, 2022) <https://niwaplibrary.wcl.american.edu/pubs/vawa-confidentiality-statutes-leg-history>.

case and in taking any actions related to removing the victim from the United States.² 8 U.S.C. 1367 protections were designed to protect abused spouses, children, and step-children of U.S. citizens and lawful permanent residents the moment there is a spousal, parent/child, or stepparent/stepchild relationship and there is battering or extreme cruelty.³ The protections take effect upon creation of the relationship and initiation of battering or extreme cruelty, no filing is required and battered spouses, children and stepchildren are protected whether or not, and before, they begin the process of filing for immigration relief.⁴

Current 8 U.S.C. 1367 Challenges in Family Based Applications and Adjustments

At USCIS one of the most common case types in which information from a prohibited source can be easily obtained and used by untrained, unknowing, or unsuspecting USCIS adjudicators and interviewers is in the family based visa and adjustment of status adjudication and interviewing process. In most instances, the adjudicators who decide family based visa applications (I-130) and adjustments (I-485) have little or no training on the dynamics of domestic violence or child abuse, some may mistake typical signs of abuse, coercive control, or extreme cruelty in a relationship as evidence of fraud. Others may downplay, ignore, or fail to credit evidence of domestic violence from immigrant victims due to the officer's own biases and mistaken beliefs about domestic violence, same-sex marriages, or immigrants from certain countries, religions, or cultures. In the worst cases this leads USCIS officials to take and credit evidence obtained solely from the citizen or lawful permanent resident abusers and rely on the abuser's version about the "facts" about the relationship as "evidence" of marriage fraud.

Without policies implementing 8 U.S.C. 1367's statutory prohibitions⁵ and legislative history directing non-reliance on evidence furnished by or derived from abusers,⁶ USCIS adjudicators of I-130 and I-485 applications can seek and rely upon perpetrator provided information. They can be shielded from any enforcement repercussions because they claim that unless the victim has filed a 8 U.S.C. 1367 protected case that they can find as "384" flagged⁷ in the USCIS Central Index System, the adjudicator could not have known that the spouse they relied upon was an abuser.

8 USC 1367 Violation Example

The following 8 U.S.C. 1367 violation case example illustrates exactly the type of harm to abused immigrant spouses and children that has occurred when USCIS family based visa and family

² 8 U.S.C. Section 1367(a)(1)

³ 8 U.S.C. Section 1367(a)(1)(A), (B), (C), and (D).

⁴ PAUL VIRTUE, NON-DISCLOSURE AND OTHER PROHIBITIONS RELATED TO BATTERED ALIENS: IIRARA SECTION 384, IMMIGRATION AND NATURALIZATION SERVICE, 3 (May 5, 1997), <http://niwaplibrary.wcl.american.edu/pubs/conf-vawagov-insconfvawamemo-05-05-1997/>; See, USCIS, INSTRUCTIONS FOR APPLICATION FOR EMPLOYMENT AUTHORIZATION FOR ABUSED NONIMMIGRANT SPOUSE, 1 (July 23, 2020), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/i-765vinstr.pdf>; DEP'T OF HOMELAND SECURITY, INSTRUCTION NUMBER: 002-02-001, IMPLEMENTATION OF SECTION 1367 INFORMATION PROVISIONS, 10 (Nov. 7, 2013) <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

⁵ 8 U.S.C. Section 1367(a)(1)(A), (B), (C), and (D).

⁶ Committee on the Judiciary House of Representatives, DEPARTMENT OF JUSTICE APPROPRIATIONS AUTHORIZATION ACT, FISCAL YEARS 2006 THROUGH 2009 to Accompany H.R. 3402 122 (September 22, 2005)(Discussing section 921) <https://niwaplibrary.wcl.american.edu/pubs/hr3402leg rpt-vawa-2005-leg-history>.

⁷ DHS, DHS Broadcast Message on New 384 Class of Admission Code (December 1, 2010). <https://niwaplibrary.wcl.american.edu/pubs/dhs-broadcast-class-admission-code>.

based adjustment of status adjudicators have relied upon evidence sought from and provided solely by an abuser to deny an immigrant spouse's adjustment application for marriage fraud.

In a case involving an LGBTQ Texas marriage between a U.S. citizen abusive husband (J.C.A.) and an Afghani immigrant husband (M.A.), the citizen husband J.C.A. filed an adjustment of status I-485 application on M.A.'s behalf. At the first interview the USCIS adjudicator interviewed J.C.A. and M.A. together and did not conduct any separate interviews of M.A. and J.C.A. Then later a second interview was conducted only with the citizen husband J.C.A.

The immigrant spouse M.A. who appeared pro se in the I-485 case never received any notice of this interview and M.A. never was provided any opportunity to speak with USCIS after the first interview that he attended together with J.C.A.

J.C.A.'s physical, emotional, and immigration related abuse of M.A. had escalated to the point that by the time USCIS conducted the second interview with J.C.A., M.A. had placed his first call to 911 to get help from the police.

USCIS denied M.A.'s adjustment of status application finding that M.A.'s marriage to J.C.A. was fraudulent. It is clear from the record in this case that USCIS made its marriage fraud determination based on information provided to USCIS in a *separate, private interview with J.C.A.* Contrary to USCIS policy, Mr. M.A. was *never given an opportunity to respond* to the allegations of marriage fraud prior to his I-485 application being denied in April 2017.⁸ This marriage fraud finding could have been prevented if USCIS adjudicators were required to follow policies that implemented 8 U.S.C. 1367's statutory requirement regarding non-reliance on perpetrator provided information in all cases involving marriages and battering or extreme cruelty without regard to whether the immigrant victim spouse had filed a VAWA self-petition, VAWA cancellation of removal, or any other form of 8 U.S.C. 1367 protected case type.

In June of 2017 ICE received a tip by email from J.C.A. reporting that M.A. was undocumented and seeking ICE enforcement against M.A. Based on the "tip" from M.A.'s abusive spouse J.C.A. ICE verified that M.A.'s application for adjustment of status had been denied and M.A. was out of status, so ICE arrested and detained M.A. in July of 2017. His detention lasted for three and ½ years.

Acting pro se in his removal case M.A. repeatedly provided the immigration judge and ICE with evidence of J.C.A.'s physical and emotional abuse—including detailed declarations recounting J.C.A.'s violence toward M.A., including his efforts to out M.A.'s sexual orientation to his family and friends in Afghanistan by sending them explicit messages and intimate photos, and J.C.A.'s specific threats to attempt to get M.A. deported. This case resulted a cascade of VAWA confidentiality 8 U.S.C. 1367 violations by ICE, the immigration courts and the immigration judge.

⁸ The USCIS Policy Memorandum PM-602-0085, Requests for Evidence and Notices of Intent to Deny, at 3-4 (June 3, 2013) was in effect at the time M.A.'s I-485 application was adjudicated. ("Under 8 CFR 103.2(b)(16)(i), if a decision adverse to the individual is based on derogatory information, and the individual is unaware that the information is being considered, the officer must advise the individual of this information and offer him or her an opportunity to rebut it before the decision is rendered."),

M.A. ultimately secured representation of pro bono counsel who filed an application for VAWA cancellation of removal and a VAWA self-petition on M.A.'s behalf. Even after the VAWA cancellation case was filed, ICE continued to communicate with J.C.A. about M.A.'s case and to submit declarations and other evidence obtained from J.C.A. According to a social media post by J.C.A. boasting about his role in M.A.'s immigration case, Government officials even went as far as to offer to get "drinks" with J.C.A. when M.A.'s removal proceedings concluded.

Perhaps most egregious, after M.A. filed an application for VAWA Cancellation based on the abuse perpetrated by J.C.A., ICE used an affidavit obtained from J.C.A. to advocate for denial of M.A.'s VAWA cancellation case. The immigration judge improperly considered and relied upon the affidavit of J.C.A. to deny M.A.'s VAWA cancellation of removal application. From the record it appears that the immigration judge also used the USCIS marriage fraud finding as a negative factor that led the judge to deny all forms of immigration relief to M.A. including VAWA cancellation, asylum, withholding of removal and relief under the Convention Against Torture (CAT). M.A. appealed and the BIA in denying M.A.'s appeal explicitly refused to consider all of the 8 U.S.C. 1367 violations and issues in the case.

Notably, M.A. was only released from detention due to COVID-19 policies to drastically reduce the population. Ultimately, after M.A.'s VAWA self-petition was approved, counsel for M.A. was able to negotiate with attorneys for ICE to move to dismiss removal proceedings and was able to file for M.A.'s application with USCIS for adjustment of status as an approved VAWA self-petitioner.

Recommendations to Improve 8 U.S.C. 1367 Compliance

To fully implement 8 U.S.C. 1367's non-reliance on abuser provided information provisions under 8 U.S.C. Section 1367 USCIS must:

- Issue policies, and ideally regulations, requiring that adjudicators of I-130 family based visa petitions and I-485 adjustment applications may not deny an application for marriage fraud using any information furnished by or derived from the U.S. citizen or lawful permanent resident spouse unless:
 1. The adjudicator conducts a separate interview with the noncitizen spouse to screen for battering or extreme cruelty using a standardized evidence-based screening tool.⁹ In this interview USCIS must give the immigrant spouse an opportunity to reveal information about the abuse, battering or extreme cruelty they and/or their child suffered, the impact of the abuse, and any credible evidence they would like to submit for consideration as to the abuse and the validity of the marriage;
 - a. The evidence-based screening tool provide the noncitizen spouse the opportunity to reveal information regarding:
 - i. Details about the battering or extreme cruelty they, their child, and/or their stepchild suffered;

⁹ NIWAP can provide USCIS with evidence-based research and sample tools that could be used to develop this USCIS required evidence-based screening tool and would welcome the opportunity to assist USCIS subject matter experts in developing this screening tool.

- ii. 911 calls made to the police regarding the domestic violence or child abuse;
 - iii. Protection orders issued; or
 - iv. Any other court orders or findings of administrative agencies regarding the domestic violence or child abuse suffered.
 - 2. At this interview the adjudicator must obtain a safe address at which USCIS can communicate with the noncitizen spouse and for all future communications about this case USCIS shall use this address in addition to sending notices to the petitioners and counsel's address;¹⁰ and
 - 3. Under 8 CFR 103.2(b)(16)(i), ensure that if a finding of marriage fraud is being considered against the noncitizen spouse based on derogatory information from the citizen spouse, require adjudicators:
 - a. To presume that the noncitizen spouse is unaware that the information is being considered; and
 - b. Advise the noncitizen spouse of the information and offer them an opportunity to rebut the information before any decision is rendered.¹¹
- Create a screening tool designed to detect domestic violence developed from evidence based domestic violence screening tools being used for years in health care settings, by therapists and by social science researchers to screen for domestic violence.¹²
 - When evidence of potential battering or extreme cruelty is revealed through the screening, USCIS must provide the immigrant spouse an opportunity to submit evidence of the battering or extreme cruelty and the impact on the victim and any children. Victims must be able to provide any credible evidence of the battering or extreme cruelty and the validity of the marriage.

¹⁰ We are asking that this step be included in the required procedures for all of these interviews, whether or not the noncitizen spouse initially reveals information about abuse for two domestic violence related reasons. First, abusers typically control access to the mail sent to the victim, particularly when the abuser and victim spouses continue to reside together or when the abuser has access to the victim's residence. Second, although legal ethical rules will generally obligate any immigration attorney representing the petitioner and beneficiary to conflict themselves out of the case when domestic violence is discovered in a family base petition case, too often immigration attorneys consider the citizen or lawful permanent resident spouse to be the "client" for the I-130 or I-485 case and many will continue representing the abuser and refer the victim elsewhere, so service of an RFE or NOID on the attorney does not necessarily lead to the noncitizen victim spouse receiving notice. Some times this can occur because the victim noncitizen spouse has fled the abuser and is in shelter or hiding elsewhere.

¹¹ This process provides a noncitizen abused spouse two opportunities to inform USCIS about battering or extreme cruelty, when they are screened for battering or extreme cruelty and in response to a Request for Further Evidence (RFE) or a Notice of Intent to Deny (NOID). Abused immigrant spouses who were too afraid to reveal the abuse to immigration officers at the first opportunity, will have a second opportunity when they learn of the evidence from the abusive citizen spouse accusing them of marriage fraud to reveal to USCIS adjudicators information about the abuse they have suffered.

¹² Appendix A attached describes the various forms of evidence based screening tools that the USCIS tool could be based upon. Appendices B and C both contain some suggested screening questions include attempts to adapt the evidence based research to make a tool that could be used by USCIS officials. These draft tool need to be updated to include the most recent evidence based research listed in Appendix A. NIWAP would welcome the opportunity to work with Subject Matter Experts at USCIS on the development of a tool to be used for these screenings based on the most recent evidence based research listed in Appendix A.

- Create a required online training on the dynamics of domestic violence and child abuse and 8 U.S.C. 1367 that all I-130 and I-485 adjudicators and their supervisors must take. The completion of this training must be reported and verified as part of the officer's annual performance review.
- Provide to all noncitizens the opportunity and education on how to reveal information about battering or extreme cruelty by distributing in multiple languages:
 - An informational pamphlet on domestic violence, stalking, sexual assault and child abuse with contact information of organizations that victims can call for help.¹³
- Additionally, provide to all noncitizens who disclose any information about abuse, battering or extreme cruelty DHS brochures on VAWA self-petitions, SIJS, U and T visas in multiple languages along with referral information to non-profit organizations with expertise in providing legal representation to victims of domestic violence, sexual assault, stalking, child abuse, and human trafficking. These should include:
 - DHS pamphlets on VAWA self-petitions, SIJS, U visas and T visas;
 - Information on the Legal Rights Available to Immigrant Victims of Domestic Violence in the United States;¹⁴ and
 - Referral information to non-profit organizations with expertise in providing legal representation to victims of domestic violence, sexual assault, stalking, child abuse, and human trafficking.

The approach NIWAP is proposing in the attached memo promotes compliance with VAWA confidentiality laws and a victim-centered approach. It implements 8 U.S.C. 1367 in a manner that provides noncitizen victims an opportunity to inform USCIS about the battering or extreme cruelty and it provides USCIS officials who did not know about or previously suspect that the citizen or lawful permanent resident spouse was abusive an opportunity to reevaluate the evidence in the case in light of the information on battering or extreme cruelty. This helps ensure that USCIS officers are not relying on information provided by or derived solely from the perpetrator citizen or lawful permanent resident spouse to deny I-130 or I-485 applications.

NIWAP would welcome the opportunity to work with USCIS on development of the proposed evidence-based screening tool and training video and would be happy to meet with USCIS officials and DHS experts on 8 U.S.C. 1367 VAWA confidentiality protections to discuss this proposal in more detail.

¹³ The DHS Council on Combating Gender-Based Violence (CCGBV) has already developed a pamphlet that could be distributed in these instances. It can be found here: [Gender-Based Pamphlet | Homeland Security \(dhs.gov\)](https://www.dhs.gov/gender-based-pamphlet)

¹⁴ Information on the Legal Rights Available to Immigrant Victims of Domestic Violence in the United States and Facts about Immigrating on a Marriage-Based Visa (October 27, 2010) <http://niwaplibrary.wcl.american.edu/pubs/marriage-based-legal-rights>