The Legal Issues Confronting Conditional Resident Aliens Who Are Victims of Domestic Violence: Past, Present, and Future Perspectives

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I. INTRODUCTION

The effects of domestic violence are devastating wherever they are found. However, the consequences are particularly overwhelming when the victim of abuse is also a conditional resident alien. The current legal framework for conditional resident status for aliens seeking immigration benefits based on marriage inadvertently has exacerbated the difficulties faced by victims of spousal abuse. In the hands of an abusive spouse who has control over the alien spouse's immigration status, threat of deportation becomes a powerful weapon. For these immigrants, language and cultural barriers increase isolation, and present them with greater obstacles to breaking away from the cycle of violence than those that other victims face.

This article explores the legal issues that confront this vulnerable category of immigrants in light of past, present, and future perspectives. After a brief overview of domestic violence generally, this article examines the impact of the United States immigration laws—particularly the effects of a conditional residency framework—on victims of spousal abuse. This article then addresses legislative efforts specifically undertaken to ameliorate the adverse impact of conditional status on domestic violence victims. This article also assesses the legal issues still remaining due to deficiencies in both the legislation and the regulations implementing the legislation. Finally, this article examines current legislative efforts designed to provide greater protections for immigrant victims of spousal abuse.

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Although both men and women can be either the perpetrators or victims of family violence, this article focuses solely on female victims.

II. DOMESTIC VIOLENCE AS A NATIONAL ISSUE

The fundamental unit on which American society is built is the family. In addition, the right to privacy in the conduct of family matters is recognized as worthy of constitutional protections.[1] In recent years, however, there has been increasing awareness of a major social issue raised by conduct in the context of family relationships: namely, domestic violence.

The serious and pervasive nature of domestic violence throughout the United States has elicited increasing legislative and public concern. One indicator of public awareness of this disturbing problem was that Congress mandated that a comprehensive study of the issue be conducted—the Attorney General's Task Force on Family Violence, which issued its report in September 1984.[2] The Task Force found that domestic violence occurs widely among families in every socio-economic class in the United States, is a problem of increasing magnitude, and is cyclical in nature with violence begetting violence from one generation to the next.[3]

Although statistics on domestic violence in the United States are staggering, these statistics are extremely conservative because incidents of family abuse are vastly underreported. There are a variety of reasons, such as fear of reprisals, for the underreporting of domestic violence within the family setting.[4] Notwithstanding the incomplete record of all incidents of family abuse, according to Federal Bureau of Investigation reports, for example, almost twenty percent of all homicides are perpetrated by family members.[5] In addition, one-third of domestic violence cases

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1 *E.g.*, Roe v. Wade, 410 U.S. 113 (1973) (the constitutional right to privacy in family matters includes a woman's right to terminate her pregnancy); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (constitutional protections of the integrity of the family unit against arbitrary government interference encompass an expanded definition of "family").

2 ATT'Y GEN.'S TASK FORCE ON FAMILY VIOLENCE, U.S. DEP'T OF JUSTICE, FINAL REPORT (1984) [hereinafter ATT'Y GEN.'S TASK FORCE].

3 *Id.* at 2. Task Force findings were based on the public testimony of nearly 300 witnesses, on written testimony of hundreds of family violence victims, professionals and volunteers nationwide, on literature searches, and on interviews with victims and experts. *Id.* at 156-57.

4 Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 617 (1991) (describing the pervasiveness of wife abuse and its impact on United States immigration laws).

5 ATT'Y GEN.'S TASK FORCE, *supra* note 2, at 19.

involve felonies, such as rape and aggravated assault (i.e., attacks in which victims suffer serious bodily injury).[6]

Although men may be victims of domestic violence, in the majority of cases the victim is a woman. A National Crime Survey conducted in the mid-1980s found a ratio of thirteen to one of women to men assaulted by their spouses, and in 1991, thirty to forty percent of female murder victims were killed by their husbands.[7] A woman is battered every fifteen seconds in the United States.[8] In ninety-six percent of reported cases, she is battered by her husband or boyfriend.[9] Domestic violence is the single largest cause of injury to women in the country.[10] In 1991, for example, in excess of 21,000 domestic crimes against women were reported to the police each week nationwide, and more than 450,000 women, along with their children, were given emergency shelter upon fleeing their homes.[11]

Studies show that most battered women experience multiple assaults. The frequency and severity of injuries increase over time,[12] with the most dangerous period being when the woman tries to leave her home or initiate divorce proceedings. Women are seventy-five percent more likely to be killed by an abusive spouse at or after separation.[13] Pregnancy also increases the frequency of assaults, with twenty-five to forty-five percent of battered women being abused during pregnancy.[14]

III. DOMESTIC VIOLENCE AS AN IMMIGRATION ISSUE

Family unity is a fundamental policy underlying United States immigration laws and, therefore, the Immigration and Nationality Act (INA)[15] confers certain immigration benefits based on marriage to a United States citizen or legal perma-

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6 H.R.J. Res. 178, 103d Cong., 1st Sess. (1993), *reprinted and discussed in* 139 CONG. REC. H8485-86 (daily ed. Oct. 26, 1993) (proposing that October 1993 and 1994 be designated as "National Domestic Violence Awareness Month," in recognition that nationwide efforts to help victims of family violence need to be expanded).

7 Calvo, *supra* note 4, at 618.

8 Deeana Jang, *Triple Jeopardy: The Plight of Battered Immigrant and Refugee Women*, 19 IMMIGR. NEWSL. 6 (1990) (describing the special problems faced by female immigrants who are domestic violence victims, and their need for accessible and culturally-relevant services).

9 *Id.*

10 H.R.J. Res. 178, *supra* note 6, at H8486.

11 *Id.*

12 Calvo, *supra* note 4, at 618.

13 H.R.J. Res. 178, *supra* note 6, at H8486.

14 *Id.*

15 8 U.S.C. §§ 1101-1524 (1990).

nent resident (LPR).[16] Marriage to a United States citizen allows an alien to enter the country as an "immediate relative" exempt from the usual numerical restrictions placed on obtaining a visa.[17] As well as enabling the alien to obtain an entry visa almost immediately (usually within three months), this status provides certain other benefits. For example, the spouse of a citizen can apply for naturalization after residing in the United States for three years instead of the five years otherwise required.[18] Additionally, marriage to an LPR places the alien in the second of four family-based categories of immigrants, considerably shortening the wait for a visa.[19]

In 1986, however, legislators' growing concerns about a perceived increase in fraudulent marriages (i.e., those entered into solely for the purpose of gaining immigration benefits) led to passage of the Immigration Marriage Fraud Amendments (IMFA).[20] In an effort to ensure that marriage to an alien was *bona fide*, and under the theory that a marriage's duration for at least two years proved its legitimacy, IMFA confers merely *conditional* resident status for a two-year period on an alien seeking immigration benefits based on a marriage of less than two years.[21]

Before IMFA's passage, when a United States citizen or LPR petitioned for the permanent residency of an alien spouse, this status was conferred unconditionally, regardless of the length of the marriage.[22] Under IMFA, however, the United States citizen or LPR spouse has to file an initial petition with the Immigration and Naturalization Service (INS) in order for the alien spouse to receive *conditional* resident status. The date of obtaining this status, not the date of the marriage,

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16 Christopher T. Shaheen, *Immigration Marriage Fraud Amendments of 1986: The Overlooked Immigration Bill*, 10 HARV. WOMEN'S L.J. 319, 319 (1987) (discussing the effects on rights to marital privacy of Congressional attempts to limit marriage fraud).

17 8 U.S.C. § 1151(b)(2)(A)(i) (1991) (immediate relatives not subject to numerical limitations on visas are the spouses, children, and parents of United States citizens).

18 *Id.* § 1430(a) (allowing the alien spouse of a United States citizen to apply for naturalization after three years of continuous residence following lawful admission).

19 *Id.* § 1153(a)(2)(A) (designating the preference allocation of immigrant visas for family-sponsored immigrants who are the spouses of permanent resident aliens).

20 Immigration Marriage Fraud Amendments of 1986 (IMFA), Pub. L. No. 99-639, 100 Stat. 3537 (1986) (codified as amended at 8 U.S.C. § 1186a (Supp. II 1990)) (establishing requirements for aliens seeking immigration benefits based on qualifying marriages less than two years old).

21 8 U.S.C. § 1186a (Supp. II. 1990) (setting out the IMFA requirements of conditional permanent resident status).

22 Michelle J. Anderson, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401, 1412 (1993) (proposing that the conditional residency framework of IMFA exacerbated the control over alien wives by abusive spouses).

begins the clock on the two-year conditional period.[23] Thus, existence of the marriage during the wait for a visa does not count. Once conditional status on the basis of marriage is granted, the alien cannot seek adjustment of status to unconditional LPR on any other statutory ground.[24] The alien's right to remain legally in the United States, therefore, depends on the success of the marital relationship for two years.[25] If, during the conditional period, the marriage is found to be fraudulent or is judicially terminated (creating a presumption of fraud), it is mandatory that legal immigration status be terminated and the alien be placed in deportation proceedings.[26] The INS has the burden of proving by a preponderance of the evidence that one of the conditions for terminating legal status has been met.[27]

During the 90-day period before the second anniversary of obtaining conditional status, the alien and the sponsoring spouse have to file a joint petition to remove the conditions, and both have to attend an interview if so requested.[28] Failure to do so terminates legal status and places the alien in deportation proceedings.[29] Thus, under IMFA, the sponsoring spouse has complete control over the alien's status as a legal resident. An immigrant woman cannot gain legal immigration status if her citizen or LPR husband does not file the appropriate petitions, which he can withdraw at any time.[30] In addition, the sponsor is the only party with standing to appeal a denial.[31]

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23 8 U.S.C. § 1186a(a)(1). This section reads, in pertinent part, "[A]n alien spouse . . . shall be considered, *at the time of obtaining the status of an alien lawfully admitted* for permanent residence, to have obtained such status on a conditional basis . . . ." (emphasis added). *Id.*

24 8 U.S.C. § 1255(d) (stating that "[t]he Attorney General may not adjust . . . the status of an alien lawfully admitted to the United States for permanent residence on a conditional basis under [8 U.S.C. § 1186a].").

25 Joe A. Tucker, *Assimilation to the United States: A Study of the Adjustment of Status and the Immigration Marriage Fraud Statutes*, 7 YALE L. & POL'Y REV. 20, 29 (1989) (discussing deficiencies of IMFA as a mechanism to deter marriage fraud).

26 8 U.S.C. § 1186a(b)(1) (addressing termination of conditional resident status on a finding that the qualifying marriage was improper).

27 *Id.* § 1186a(b)(2) (providing for a hearing in deportation proceedings if an alien's resident status is terminated).

28 *Id.* § 1186a(c)(1)(A),(B) (describing the requirements of timely joint petition and interview for removal of conditional status).

29 *Id.* § 1186a(c)(2) (termination of permanent resident status for failure to file joint petition or have personal interview).

30 Calvo, *supra* note 4, at 606.

31 *Id.*

IMFA provided for two limited types of discretionary waivers of the joint petition requirement, to be filed at any time during the two-year conditional period.[32] These apply when the alien can demonstrate either that extreme hardship will result from deportation, or that the marriage was entered into in good faith, but terminated by the alien for good cause, and the alien was not at fault in failing to meet the joint petition requirements.[33]

Neither of these waivers, however, satisfactorily address the plight of conditional residents who are victims of domestic violence. Thus, IMFA provisions inadvertently create a framework under which battered immigrant spouses have two choices: remain in abusive marriages until the conditions of their resident status are removed, or leave and risk deportation if the sponsoring spouse withdraws the petition or the alien's waiver request is denied. This situation provides a powerful weapon for abusers to keep their spouses trapped.

A. The Adverse Impact Created by IMFA on Battered Immigrant Women

IMFA's conditional residency framework inadvertently exacerbates the difficulties faced by alien women who are victims of domestic violence. These problems include social isolation and dependence on abusive spouses, cultural barriers to seeking help, fears of deportation, concerns for their children, language barriers, and the inadequacy of available waivers of joint petition requirements.

The social isolation often experienced by an abused alien spouse makes her particularly vulnerable in a situation of domestic violence.[34] This isolation comes from two sources. First, isolation comes from the dynamics of the abuse itself. The battering spouse seeks to remove his wife's sense of autonomy, isolate her socially, and deprive her of financial and other resources to increase her dependence on him, and thus gain the power to control her.[35] Second, a recent immigrant may be in the United States without other family or friends. Unfamiliarity with the language and culture may make establishing social relationships difficult, thereby further increasing her isolation.[36]

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32 *Id.* at 608-09.
33 *Id.* at 609.
34 *Id.* at 619.
35 *Id.*
36 *Id.*

The abused alien spouse also may face cultural barriers that prevent her from seeking help. Her cultural orientation may be one that accepts spousal abuse as customary, as is the case in some Asian and South American cultures.[37] For example, many Asian cultures subscribe to a traditional belief that a woman is her husband's property and that she must obey him. Many Latinas believe that their husbands have the right to abuse them.[38] Additional problems are created when domestic violence is a cultural "norm" because the abused spouse has been raised to accept a *status quo* that offers no recourse. Also, violence in the marital relationship may be considered to be an intensely "private" problem. Discussion of such matters even among family members, not to mention with outsiders, can be viewed as humiliating and as a source of family disgrace.[39] Some cultures also see divorce as shameful.[40] Thus, cultural mores may contribute to an environment in which an immigrant woman feels alone and powerless to escape abuse.

Because IMFA places control over the alien's immigration status in the hands of the citizen or LPR spouse, fear of deportation is another barrier to leaving an abusive marriage. Large numbers of immigrant women are trapped in violent homes by abusive spouses who use the threat of deportation to maintain control over them.[41] In surveys of alien women in San Francisco, many of the sixty percent of Korean, twenty-four percent of Latina, and twenty percent of Philippina participants who had experienced domestic violence cited dependence on their husbands for their legal status as a major problem.[42] This dependence presents an obstacle to an immigrant woman leaving a relationship with an abusive husband.

Concern for the welfare and custody of children of the relationship is another major factor in preventing a battered immigrant woman from leaving an abusive marriage.[43] If the abusive spouse has her legal status terminated (or she never obtained conditional resident status in the first place because her husband did not file the initial petition on her behalf), she becomes undocumented and subject to deportation. If she is undocumented and she leaves her spouse, she cannot work to

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37 Maxine Yi Hwa Lee, *A Life Preserver for Battered Immigrant Women: The 1990 Amendments to the Immigration Marriage Fraud Amendments*, 41 BUFF. L. REV. 779, 782-83 (1993) (discussing the reasons that prevent many immigrant women from leaving abusive relationships).

38 *Id.* at 783.

39 *Id.* at 783-84.

40 Margaret M.R. O'Herron, *Ending the Abuse of the Marriage Fraud Act*, 7 GEO. IMMIGR. L.J. 549, 559 (1993) (arguing for further legislative changes to ameliorate the effects of IMFA on immigrant spousal abuse victims).

41 H.R.J. Res. 178, *supra* note 6, at H8486.

42 Calvo, *supra* note 4, at 618.

43 *Id.* at 619.

provide for herself and for her children.[44] It is extremely unlikely that she would consider leaving without her children, especially if they are also victims of his violence.[45] Threats of deportation are even more ominous if children may be left behind with the abuser.

One alternative for battered women and their children is to seek temporary safety at shelters.[46] However, this is a much more difficult course of action for alien women. Even assuming that they are able to find out that such resources exist, and that they actually leave the home, and that space is available at a shelter, immigrant women may still face significant language barriers.[47] Many shelters do not have staff or volunteers who speak foreign languages, and therefore, cannot accommodate women who do not speak English.[48] Even if translators are available, many aliens may be reluctant to talk to them for fear of lack of confidentiality and that their whereabouts might be disclosed to their abusive spouses. The Task Force recommended that shelters should accommodate the varied cultural, ethnic, and religious backgrounds of family violence victims, and should be especially sensitive to communication barriers.[49]

The difficulties that IMFA's conditional residency framework places on abused alien spouses are not alleviated by the waiver provisions of the joint petition requirements. The "extreme hardship" waiver does not provide effective relief to battered spouses for several reasons. One reason is that it is very difficult to meet the "extreme hardship" standard.[50] Under IMFA, the Attorney General can consider circumstances occurring only during the period that the alien was admitted for permanent residence on a conditional basis.[51] Although being subjected to domestic violence during this time undoubtedly presents extreme hardship to the alien, the inquiry is whether her *deportation* would result in extreme hardship. Unless she can argue that her children will be left with the abusive spouse if she were deported, she will be hard-pressed to show that her *removal* would create extreme hardship. Also, the INS is likely to find extreme hardship only in exceptional cases where a combination of factors present an overwhelmingly sympathetic

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44 *Id.* at 622.
45 *Id.* at 621.
46 Jang, *supra* note 8, at 8.
47 *Id.*
48 *Id.*
49 ATT'Y GEN.'S TASK FORCE, *supra* note 2, at 51.
50 Jang, *supra* note 8, at 7.
51 Lee, *supra* note 37, at 789.

situation.[52] Additionally, an adverse INS adjudication would be difficult to overturn, since abuse of discretion is the limited standard of judicial review applied, with the majority of cases resulting in affirmance of agency decisions.[53]

The "good faith/good cause" waiver, which has since been modified,[54] likewise presented problems for domestic violence victims. First, this waiver required that the marriage be judicially terminated; if the couple were merely separated, the applicant was ineligible.[55] Also, since the alien had to be the moving party, this requirement created a race to the courthouse to be the first to file.[56] It also put the abused spouse at a distinct disadvantage, because not only was initiating divorce proceedings a dangerous time for a battered woman,[57] she also had to find affordable family law services, especially difficult if she needed bilingual help.[58] Although the INS has recognized domestic violence as "good cause" for terminating a marriage, the good cause requirement still presented proof problems if the couple lived in a "no-fault" divorce jurisdiction.[59]

IV. THE 1990 AMENDMENT TO IMFA

In November, 1990, the Immigration Act of 1990 (the 1990 amendment) was enacted in an attempt to ameliorate the negative impact that IMFA had on domestic violence situations.[60] For purposes of this article, the 1990 amendment contained two important provisions. First, the requirements of the good faith/good cause waiver were modified.[61] Second, the amendment added a "battered spouse/child" waiver.[62] The extreme hardship waiver established under IMFA, however, was left unchanged.[63] After passage of the amendment several legal issues still remained problematic for abused immigrant women in conditional status.

Under the amended "good faith" waiver, both the requirements of proving the legitimacy of the marriage at its inception and of proving its termination remain.

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52 Tucker, *supra* note 25, at 39-40.
53 *Id.*
54 *See infra* notes 61, 64-68 and accompanying text.
55 Lee, *supra* note 37, at 789-90.
56 *Id.* at 790.
57 H.R.J. Res. 178, *supra* note 6, at H8486.
58 Jang, *supra* note 8, at 7.
59 *Id.*
60 Pub. L. No. 101-649, § 701, 104 Stat. 4978 (1990) (codified at 8 U.S.C. § 1186a(c)(4) (1991)).
61 8 U.S.C. § 1186a(c)(4)(B) (1991) (modifying requirements for a "good faith" waiver).
62 *Id.* § 1186a(c)(4)(C) (establishing requirements for a "battered spouse/battered child" waiver).
63 *Id.* § 1186a(c)(4)(A).

However, the conditional resident no longer has to be the moving party in the divorce, and does not have to show that the divorce was granted for good cause.[64] Additionally, the alien may apply for this waiver once divorce proceedings have commenced, even if the proceedings have not yet been finalized.[65] Although it is unlikely that the INS will adjudicate the application until the divorce is final, it behooves the alien to apply at this time because, in the interim, the alien receives an automatic extension of conditional permanent resident status for up to six months.[66] If necessary, additional extensions may be granted until the final divorce decree is issued.[67] A conditional resident who qualifies under the new provision, but whose waiver application was denied under the previous requirements (e.g., she was not the moving party in terminating the marriage, or could not prove good cause), may move for reconsideration of her case to have the conditions of her resident status removed, and deportation proceedings terminated.[68]

The 1990 amendment added a new waiver provision, the "battered spouse/child" waiver.[69] This waiver was established to ensure that victims of domestic violence (whether spouse or child) would no longer be trapped in abusive relationships by the threat of losing legal resident status.[70] "Abused spouses should be sent a clearer signal that there is an escape from their dilemma and that the abusing spouse does not have complete control over their lives."[71] Unlike the good faith waiver, the battered spouse waiver does not require the domestic violence victim to be divorced or separated.[72] If the alien can show that she or her children have been battered or

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64 *Id.* § 1186a(c)(4)(B) (The Attorney General may remove the conditional basis of permanent resident status for an alien failing to meet the joint petition and interview requirements if the alien demonstrates that "the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated . . . and the alien was not at fault in failing to meet the requirements . . . .").

65 AUSTIN T. FRAGOMEN, ET AL., IMMIGRATION PROCEDURES HANDBOOK, 11-01, 11-102 (1994 ed.) (explaining procedures for family-based petitions).

66 *Id.* at 11-102.

67 *Id.*

68 Balsillie, Board of Immigration Appeals Interim Decision 3175 (May 12, 1992).

69 Lee, *supra* note 37, at 792.

70 H.R. Rep. No. 723, 101st Cong., 2d Sess. pt. 1, at 78 (1990); 136 CONG. REC. H8642 (daily ed. Oct. 2, 1990) (statement of Rep. Louise Slaughter (D-N.Y.) [hereinafter Statement of Rep. Slaughter]). Rep. Slaughter was instrumental in establishing the battered spouse/child waiver provision.

71 Statement of Rep. Slaughter, *supra* note 70, at H8642 (noting that the waiver is intended for an abused conditional resident spouse or child, or for a conditional resident spouse seeking to protect an alien or citizen child from abuse).

72 Lee, *supra* note 37, at 794.

subjected to extreme cruelty by the citizen or LPR spouse during a *bona fide* marriage, she is eligible for the waiver.[73]

While the Attorney General is normally given full discretion to decide waiver applications, Congress clearly intended battered spouse waiver requests to be granted when battery or extreme cruelty is demonstrated.[74] Congress curtailed the Attorney General's discretion in these cases by limiting denials to "rare and exceptional circumstances such as when the alien poses a clear and significant detriment to the national interest."[75]

Abused alien spouses who now qualify for waiver of the joint petition requirements, but whose applications were denied because they did not meet the criteria of the other available waivers, may file either a new waiver application, a motion to reopen based on evidence of abuse, or a motion to reconsider based on the change in the law.[76]

A. Post-Reform Problems Remaining

Although the battered spouse waiver furthers Congressional intent by making it easier for abused conditional residents to achieve legal permanent status without having to remain trapped in abusive marriages, some significant problems remain. These problems stem from two sources: deficiencies in the legislation itself, and application of the battered spouse waiver provision as it has been interpreted in the regulations implementing that legislation.

By enabling a battered spouse to waive the joint petition requirement, the 1990 amendment loosens the hold an abusive spouse has over his wife's immigration status. However, he still retains considerable control. For example, even assuming he filed the initial petition, the amendment does not prevent the abusive spouse from withdrawing it at any time before the conditions are lifted.[77] Once the petition is revoked, the alien loses her legal status to remain in the United States.

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73 8 U.S.C. § 1186a(c)(4)(C) (1991). (Providing that the Attorney General may remove the conditional basis of permanent resident status if the alien shows that "the qualifying marriage was entered into in good faith by the alien spouse and during the marriage the alien spouse or child was battered by or was the subject of extreme cruelty perpetrated by his or her spouse or citizen or permanent resident parent and the alien was not at fault in failing to meet the [joint petition] requirements . . . .").

74 H.R. Rep. No. 723, *supra* note 70, at 78-79; Statement of Rep. Slaughter, *supra* note 70, at H8643.

75 *Id.*

76 Lee, *supra* note 37, at 795.

77 Calvo, *supra* note 4, at 606.

As an undocumented alien, she is subject to deportation, and is unauthorized to work.[78] Thus, she may have no means by which to support herself if she leaves the abusive relationship.

The amendment also fails to address the situation of an abused alien who is undocumented because her sponsoring spouse never filed the initial petition to begin her conditional status. In the alternative, the alien may have entered the United States as a nonimmigrant, married a citizen or LPR more than two years ago, but failed to adjust to immigrant status, and thus became undocumented when her nonimmigrant visa expired.[79] Consequently, the battered spouse waiver does not help undocumented aliens, who may remain trapped in domestic violence situations for fear of deportation if they leave.[80]

Significant concerns about abused aliens are also raised by the INS interim rule and final regulation interpreting and implementing the 1990 amendment.[81] The major issues are how "battery" and "extreme cruelty" are defined, evidentiary requirements, the adequacy of provisions to ensure confidentiality, and due process concerns.

1. Definitional Problems

The terms "battery" and "extreme cruelty" are not expressly defined in the 1990 amendment, possibly to prevent restrictions on their application. Given that the applicant has the burden of proving abuse, the definition in the final regulation raises two concerns.[82] First, the terminology used in the regulation, "any act or threatened act of violence . . . *which results or threatens to result in physical or mental injury*," focuses the inquiry not on the existence of the abuser's violent conduct, but rather on the effect this conduct has on the victim.[83] Second, although the legislation uses the term "extreme cruelty," the regulation reads "extreme *mental* cruelty."[84] According to Representative Slaughter, the statutory language was chosen

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78 *Id.* at 622.

79 Lee, *supra* note 37, at 802 n.154.

80 *See id.*

81 Conditional Basis of Lawful Permanent Residence for Certain Alien Spouses and Sons and Daughters; Battered and Abused Conditional Residents, 56 Fed. Reg. 22,635 (1991) (codified at 8 C.F.R. § 216.5 (1992)).

82 8 C.F.R. § 216.5(e)(3)(i) (1992). These terms are defined as including, but "not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor) or forced prostitution shall be considered acts of violence." *Id.*

83 *Id.* (emphasis added).

84 8 U.S.C. § 1186a(c)(4)(C) (1991) (emphasis added).

deliberately to reflect Congressional intent of encompassing more than mental abuse.[85] This discrepancy is significant because of the difference in evidentiary requirements between physical and mental abuse established under the INS final regulation.[86]

2. Evidentiary Requirements

The legislative history of the battered spouse waiver does not indicate any Congressional intent to distinguish between physical and mental abuse for purposes of evidentiary requirements. Indeed, to the contrary, the House Report made clear that a variety of types of evidence of abuse should be accepted.[87] The amendment itself requires only that evidence be "credible."[88] The regulation, however, makes a distinction between the types of evidence needed to support a claim of physical abuse and one of extreme mental cruelty. Because the regulation gives a single definition of abuse, it may not always be clear into which category each case falls. This becomes a critical determination, however, given the different evidentiary requirements.

Documentation of physical abuse required under the regulation follows almost verbatim the House Report description intended to apply generally to all battered spouse waiver applicants.[89] Obtaining this documentation of domestic violence, however, may present difficulties for some battered spouses. Many victims of abuse are unaware of, or are afraid to go to, shelters or other support services.[90] Cultural and language barriers, embarrassment, and fears of deportation or reprisals from their batterers may prevent them from reporting abuse, or from seeking restraining

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85 Lee, *supra* note 37, at 793 n.98 (noting Rep. Slaughter's objection to the terminology used by the INS of "extreme mental cruelty" as inconsistent with the statutory language and Congressional intent).

86 8 C.F.R. § 216.5(e)(3)(iii) ("Evidence of physical abuse may include, but is not limited to, expert testimony in the form of reports and affidavits from police, judges, medical personnel, school officials and social service agency personnel."); 8 C.F.R. § 216.5(e)(3)(iv) (stating that the INS "is not in a position to evaluate testimony regarding a claim of extreme mental cruelty provided by unlicensed or untrained individuals. Therefore, all waiver applications based upon claims of extreme mental cruelty must be supported by the evaluation of a [recognized] professional . . . .").

87 H.R. Rep. No. 723, *supra* note 70, at 78-79, reads, in pertinent part: "Evidence to support a battered spouse/child waiver *can include, but is not limited to*, reports and affidavits from police, medical personnel, psychologists, school officials, and social service agencies." (emphasis added).

88 Statement of Rep. Slaughter, *supra* note 70, at H8642.

89 8 C.F.R. § 216.5(e)(3)(iii) (evidentiary requirements for claims of physical abuse).

90 Jang, *supra* note 8, at 8.

orders or medical attention.[91] Thus, they may not have the necessary documentation.[92]

On the other hand, although providing documentation of physical abuse may pose problems in some cases, there must be some evidentiary standard by which to establish eligibility for the waiver in order to identify fraudulent claims. Since the INS accepts a range of sources of evidence, it seems likely that most victims of physical abuse face reasonable proof requirements. For example, they could submit personal affidavits from friends or neighbors who can corroborate their claims.[93]

The issue becomes more difficult, however, for battered-spouse waiver applicants claiming "extreme mental cruelty," for whom the regulation has set out stricter evidentiary requirements. The regulation mandates that these applications "must be supported by the evaluation of a professional recognized by the [Immigration and Naturalization] Service as an expert in the field."[94] The regulation goes on to identify the only professionals recognized by the INS for this purpose as "[l]icensed clinical social workers, psychologists, and psychiatrists . . . ."[95] Thus, it is clear that "the field" refers to that of mental health rather than to that of domestic violence.

The mental health professional's evaluation of the applicant's claim is not just one piece of evidence that is taken into consideration in adjudicating the waiver request, but rather it is the sole determining factor on which the outcome entirely depends.[96] The interim rule prior to the final regulation's codification sets out the rationale for requiring professional evaluation of a claim of extreme mental cruelty.[97] Whereas physical abuse often is visible and more easily documented, mental or emotional abuse may be difficult to determine objectively.[98] Thus, the INS does not have the expertise to assess evidence presented on this issue by nonprofessionals. Personal affidavits from individuals who are not mental health professionals, therefore, are not accepted.

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91 *Id.*

92 If their injuries force them to get medical help, it would seem likely that victims of abuse would fabricate how they were hurt. Thus, medical records may indicate medical personnel's suspicions, but may not document actual evidence of physical abuse.

93 Martha F. Davis & Janet M. Calvo, *INS Interim Rule Diminishes Protection for Abused Spouses and Children*, 68 INTERPRETER RELEASES, 665, 668 n.2 (1991).

94 8 C.F.R. § 216.5(e)(3)(iv) (evidence needed to support mental abuse allegations).

95 8 C.F.R. § 216.5(e)(3)(vii).

96 8 C.F.R. § 216.5(e)(3)(vi) ("The Service's decision on extreme mental cruelty waivers *will be based* upon the evaluation of the recognized professional.") (emphasis added).

97 56 Fed. Reg. 22,635, *supra* note 81.

98 *Id.*

During the comment period, the INS received 180 written responses to the interim rule, most from organizations serving battered women and immigrants.[99] Each opposed the evidentiary requirements for proving extreme mental cruelty on the grounds that these curtailed the benefits Congress intended the waiver to provide.[100] The comments emphasized the burden that having to obtain evaluation by a mental health professional places on an abused immigrant spouse.[101] One hurdle is the common reluctance to confide in "outsiders" about an intensely private and painful matter. Another hurdle is confidentiality concerns.[102] The greatest problem, however, is access. The regulation is silent as to who must pay for the evaluations. Presumably, as applicants have the burden of proving mental abuse, they are responsible for the costs. Applicants frequently do not have the resources to pay for professional evaluations.[103] There is an additional difficulty for those who do not speak English because they must find bilingual professionals or have the evaluations conducted through an interpreter.

The INS has tried to balance two needs: First, the need to make compliance with evidentiary requirements for the battered spouse waiver as simple and fair as possible; and second, the need to prevent aliens from fraudulently taking advantage of the provision to gain immigration benefits.[104] There are some alternatives to evaluation by a mental health expert, however, that would provide reliable objective evidence to "weed out" fraud, and yet also give abused spouses more accessible means by which to prove the validity of their claims. One would be evaluation by individuals trained in the area of domestic violence. The mental health professionals designated by the INS as experts may have no particular expertise in assessing psychological and emotional abuse, and thus may not be the most appropriate judges.[105] On the other hand, counselors or other individuals who are skilled and experienced in working specifically with family violence victims would be in a better position to make more accurate determinations.[106] Additionally, access could be increased if the necessary professional fees were supplemented by the government, or if professionals volunteered their services.

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99 Anderson, *supra* note 22, at 1416.
100 *Id.*
101 *Id.*
102 *Id.*
103 Davis & Calvo, *supra* note 93, at 668.
104 56 Fed. Reg. 22,635, *supra* note 81.
105 Davis & Calvo, *supra* note 93, at 669 n.2.
106 *Id.*

Another alternative is for INS officials to be trained to do the evaluations. However, this option probably would present too great an administrative burden in time and expense. A third way is for government-appointed consultants to conduct the examinations. Under the regulation, the INS currently reserves the right to request additional evaluations by experts of its choosing.[107] Thus, the mechanism to implement this option is already in place. Another alternative is to allow other types of objective evidence to corroborate claims, which the INS would still evaluate for credibility, such as affidavits from shelters, clergy, and community workers.[108]

The INS requires a professional evaluation because of the subjective nature of the mental effects of abuse.[109] The statute, however, focuses on whether the citizen or LPR spouse has engaged in abusive behavior, not on the alien spouse's mental or emotional response to that behavior.[110] As was noted in the Task Force Report, "[t]he legal response to family violence must be guided primarily by the nature of the abusive act, not the relationship between the victim and the abuser."[111] If the focus of the INS inquiry was made consistent with that of the legislation, the relevant determination (i.e., the abusive spouse's conduct) would be measurable by an objective standard. This would present no more difficulty for INS officials than other determinations the INS is accustomed to making, such as whether a marriage is *bona fide*, or whether extreme hardship would result from deportation.[112]

The INS does not require evidence from licensed professionals in any other type of immigration adjudication.[113] Indeed, in political asylum cases, the applicant's testimony alone, if unrefuted and credible, may be sufficient to prove the requisite fear of persecution.[114] The standard that an individual seeking asylum must meet is that a "reasonable fact finder would have to conclude that the requisite fear of persecution existed."[115] An abused alien spouse is analogous to an individual seeking asylum because both are victims of the fear of persecution, which fre-

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107 8 C.F.R. § 216.5(e)(3)(vi) (1992) (stating that the INS "reserves the right to request additional evaluations from expert witnesses chosen by the Service").

108 Lee, *supra* note 37, at 799-800.

109 56 Fed. Reg. 22,635, *supra* note 81; Davis & Calvo, *supra* note 93, at 668-69.

110 Davis & Calvo, *supra* note 93, at 669.

111 ATT'Y GEN.'S TASK FORCE, *supra* note 2, at 4.

112 Calvo, *supra* note 4, at 633.

113 Lee, *supra* note 37, at 799.

114 *Id.*

115 INS v. Elias-Zacharias, 112 S. Ct. 812, 815 (1992).

quently they are not able to document extensively. Whether an alien has been subjected to extreme mental cruelty by her spouse, regardless of the effect it had on her, is an issue of fact that should be amenable to objective determination by the INS without expert evaluation. Individuals seeking entry to the United States under the asylum provisions have not yet obtained comparable status to conditional residents because the latter are already living in the United States. Conditional residents, therefore, should not be held to a more stringent standard to prove that they are victims of abuse.

3. Adequacy of Confidentiality Provisions

Distinctions between the legislation and the implementing regulation raise the question of whether there are adequate protections of confidentiality. The legislation included a provision directing the Attorney General to establish measures to protect the confidentiality of information contained in the waiver application about an abused spouse or children, including their location.[116] The regulation states that information will not be released without a court order or the applicant's written consent.[117] However, information may be released to any federal or state law enforcement agency (e.g., to investigate fraud) without a requirement that a legitimate need be shown.[118] No administrative procedures to ensure confidentiality are specified in the regulation. The Attorney General now requires INS officials to send any written communications with the applicant to the address the latter provides if different from the place of residence.[119] The battered spouse still may be living at home and this precaution may prevent communications from the INS from being intercepted by the abusive spouse.[120]

Given the serious consequences to the safety of domestic violence victims if confidentiality is breached, however, additional measures may be needed. Protective mechanisms might include keeping battered spouse waiver applications separate from other files and sealing them, or using other security precautions, ensuring that abusing spouses cannot gain access to information, and that access by government

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116 8 U.S.C. § 1186a(c)(4)(C) (1991) ("The Attorney General shall, by regulation, establish measures to protect the confidentiality of information concerning any abused alien spouse or child, including information regarding the whereabouts of such spouse or child.").

117 8 C.F.R. § 216.5(e)(3)(viii) (1992) (stating that information in the application shall not be released without a court order or the applicant's written consent, but that the information may be released to any federal or State law enforcement agency).

118 *Id.*

119 Lee, *supra* note 37, at 795.

120 *Id.*

officials outside the INS is limited to circumstances in which need is shown for a specific law enforcement purpose.[121]

4. Due Process Concerns

Both the 1990 amendment and the regulation implementing that amendment are silent on the issue of procedural due process safeguards for battered spouse waiver applications. Requests for any of the three types of waiver of joint petition requirements are filed with the INS regional service center director having jurisdiction over the alien's place of residence.[122] Original jurisdiction to rule on the merits of IMFA waivers rests solely with the regional director, not with the Immigration Judge (IJ).[123]

Although requiring the applicant to appear for an interview is discretionary, under current policy all waiver applications are referred to the district offices for interviews.[124] Waiver requests thus receive higher scrutiny than joint petitions, of which less than four percent are referred for interviews.[125] If the alien fails to appear for the interview without good cause, the regulation mandates that the application be denied, and deportation proceedings be initiated.[126]

Comporting with minimum due process requirements, written notice of any adverse decision on the waiver request is given to the alien, including the reasons for denial.[127] No appeal of a denial is permitted, except for review of the decision during deportation proceedings.[128] This is the alien spouse's only opportunity to be heard on the denial issue. No prior separate hearing is available, in which she may contest the termination of her legal immigrant status. If the alien did not originally file the waiver application with the regional service center director, she loses even this opportunity because the IJ then lacks jurisdiction to adjudicate it in the deportation proceeding.[129]

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121 Calvo, *supra* note 4, at 634.

122 8 C.F.R. § 216.5(c) (1991).

123 Lemhammad, Board of Immigration Appeals Interim Decision 3151, 1, 10 (May 22, 1991).

124 FRAGOMEN, *supra* note 65, at 11-102.

125 *Id.*

126 8 C.F.R. § 216.5(d) (1992) ("The director shall deny the application and initiate deportation proceedings if the alien fails to appear for the interview as required, unless the alien establishes good cause for such failure and the interview is rescheduled.").

127 8 C.F.R. § 216.5(f).

128 *Id.*

129 Lemhammad, *supra* note 123.

The INS bears the burden of proving deportability. In all other deportation cases (i.e., those involving unconditional immigrants), the standard is one of "clear, unequivocal, and convincing evidence."[130] In deportation proceedings involving *conditional* residents, however, the INS merely has to prove deportability "by a preponderance of the evidence."[131] Although this is the usual standard in civil cases (and deportation hearings are civil proceedings) it is a lower standard than the government is required to satisfy in other deportation cases. Thus, the alien spouse is afforded less procedural safeguards than other deportable (unconditional) immigrants.

What process is due, and thus whether sufficient procedural due process protections are afforded, is determined by the analysis established under *Mathews v. Eldridge*.[132] This test involves the balancing of three factors. The first factor is the private interest at stake for the conditional resident. If her immigration status is terminated, she is subject to deportation. She may have established ties to the United States, and may have to leave children behind with the abusive spouse if she is deported. She may have nowhere to go back to once she is deported. In the interim, which may be lengthy, she is undocumented and thus unauthorized to work.[133] Therefore, she may be forced to remain with, or return to, her abuser, who may thus retain control over her.

The second *Eldridge* factor is the risk of erroneous deprivation and the value of additional procedural safeguards.[134] Given the higher standard of proof requirements under the regulation placed on applicants alleging mental cruelty, as opposed to physical abuse, there appears to be significant risk of erroneous deprivation.[135] The automatic termination of conditional permanent resident status of a domestic violence victim unable to meet the joint petition requirement because her abusive spouse has refused to cooperate, and whose waiver application is denied, places her directly in deportation proceedings. There, assuming proper original filing of the waiver request, she is entitled to *de novo* review of the denial; but in the meantime, she is undocumented. An additional procedural safeguard of providing a pre-termination hearing so that the alien has an opportunity to rebut adverse findings

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130 Woodby v. INS, 385 U.S. 276, 286 (1966).

131 8 U.S.C. § 1186a(c)(3)(D) (1991) (burden of proof in deportation proceeding).

132 424 U.S. 319, 335 (1976).

133 Calvo, *supra* note 4, at 639 (discussing the review process following termination of legal permanent residence).

134 424 U.S. at 335.

135 Calvo, *supra* note 4, at 640.

would be valuable.[136] This review step would ensure a more accurate and fair determination, and possibly obviate the need for the time and expense of deportation proceedings.[137]

The third *Eldridge* factor to be weighed is the government interest at stake, and the administrative burden of providing additional safeguards.[138] The government's interest is in preventing aliens from fraudulently claiming that they are the victims of domestic violence in order to qualify for the waiver and thus receive immigration benefits (i.e., removal of the conditions of their permanent resident status) to which they are not entitled. A pre-termination hearing, in which the credibility of witnesses could be assessed and evidence presented and rebutted, would provide a forum conducive to more accurate evaluation of the validity of an applicant's allegations of abuse.[139] As to the burden this additional procedure would create, the INS already has administrative review mechanisms in place, and it might avoid the administrative costs of deportation proceedings in some cases.[140]

The issues raised by the 1990 amendment and its implementing regulation, therefore, indicated the need for further legislation to alleviate the difficulties faced by immigrant family violence victims.

IV. CURRENT STATUS AND FUTURE DIRECTIONS

Recently, further legislative efforts directed at resolving some of the remaining issues, and at providing greater legal protections for abused aliens, have been undertaken.

A. Strengthening the Legislative Response to Immigrant Spousal Abuse Victims

In November 1993, marking the beginning of a comprehensive federal response to domestic violence, Congress proposed passage of the Violence Against Women Act (VAWA).[141] VAWA was intended to make prevention of violence against women

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136 *Id.* at 640-41.

137 *Id.* at 641.

138 424 U.S. at 335.

139 Calvo, *supra* note 4, at 641.

140 *Id.*

141 H.R. 1133, 103d Cong., 1st Sess. (1993) (providing mechanisms and funding to deter, punish, and rehabilitate perpetrators of domestic violence, protect victims, and increase public education and awareness of this issue.).

"a major law enforcement priority."[142] VAWA later was incorporated into an omnibus crime bill, the Violent Crime Control and Law Enforcement Act of 1994,[143] and signed into law on September 13, 1994.

The House of Representatives had proposed that VAWA include provisions specifically to protect immigrant women, directed at closing some of the gaps left by the 1990 amendment.[144] The Senate version of VAWA, however, did not contain any immigration-related provisions.[145] Legislators from both Houses crafted the final immigration provisions[146] for incorporation into the Crime Control Act.[147]

Only a United States citizen or LPR spouse is authorized to petition for an alien spouse's immigration status.[148] The House immigration provisions proposed changing this situation by allowing limited categories of alien spouses to *self-petition* for immediate relative status (if married to a citizen), or for second preference family-based status (if married to an LPR).[149] The purpose of permitting the alien spouse to self-petition was to prevent the citizen or LPR from using the petitioning process as a means to control or abuse the alien spouse.[150]

The proposal would have enabled alien spouses to petition for themselves and their children in two situations.[151] First, an alien spouse could self-petition if the alien or her children have been battered or subjected to extreme cruelty by the citizen or LPR spouse during a *bona fide* marriage. In this case, the alien could self-petition if she currently lives in the United States, and is still legally married to, and at one

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142 *Developments in the Law—Legal Responses to Domestic Violence: III. New State and Federal Responses to Domestic Violence*, 106 HARV. L. REV. 1528, 1545 (1993).

143 Pub. L. No. 103-322, 108 Stat. 1796 (1994) [hereinafter Crime Control Act].

144 H.R. 1133, *supra* note 141, at Subtitle D, § 241, § 242, and § 243 (Protection for Immigrant Women).

145 Janet M. Calvo & Martha F. Davis, *Congress Nears Approval of Legislation to Protect Abused Aliens*, 70 INTERPRETER RELEASES 1665, 1669 (1993).

146 *Id.*

147 Crime Control Act, *supra* note 143, at Title IV, Subtitle G, § 40701, § 40702, and § 40703 (Protections for Battered Immigrant Women and Children). *Reprinted in* 140 CONG. REC. H8814-15 (daily ed. Aug. 21, 1994).

148 8 U.S.C. § 1154(a)(1)(A),(B) (1991) (petition for immediate relative or spousal second preference status).

149 H.R. 1133, *supra* note 141, at Subtitle D, § 241 (Alien Spouse Petitioning Rights for Immediate Relative or Second Preference Status).

150 Calvo & Davis, *supra* note 145, at 1667.

151 H.R. Rep. No. 395, 103d Cong., 1st Sess., Subtitle D, § 241 at 37-38 (1993).

time resided with, the citizen or LPR spouse.[152] Second, an alien could self-petition if the alien has been married to, and residing with, the citizen or LPR spouse in the United States for at least three years, and continues to do so, and that spouse has failed to file the petition on her behalf.[153] Otherwise, an immigrant woman whose husband refuses to file an immediate relative or second preference petition for her would have no route to permanent residence or citizenship by virtue of her marriage, and would remain undocumented and thereby subject to deportation.[154]

The House proposal on self-petitioning is one of the immigration provisions enacted in the Crime Control Act.[155] Effective on January 1, 1995, the new provision allows an alien to self-petition for unconditional permanent resident status as an immediate relative of her citizen or LPR spouse without having to depend on his sponsorship.[156] To do so, the alien must demonstrate that: (1) she is a person of good moral character; (2) she has lived in the United States with her citizen or LPR spouse; (3) she is currently residing in this country; (4) she married in good faith; (5) during the marriage the alien or her child was battered or subjected to extreme cruelty by her spouse; and (6) deportation would result in extreme hardship to her or her child.[157]

For reasons previously noted, an alien spouse could have problems showing that deportation would result in extreme hardship. The new provision, however, directs the Attorney General to consider *any* credible evidence relevant to the petition.[158] Presumably, this means that the Attorney General may now take into account circumstances occurring outside the period of conditional residence status.[159] Additionally, if the alien has a child, the alien may now meet the extreme hardship requirement by showing that her *child* would suffer extreme hardship if the mother is deported.[160]

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152 Calvo & Davis, *supra* note 145, at 1667.

153 *Id.* at 1667-68.

154 Jang, *supra* note 8, at 8.

155 Crime Control Act, *supra* note 147, at § 40701 (Alien Petitioning Rights for Immediate Relative or Second Preference Status) (amending 8 U.S.C. § 1154(a)(1)).

156 *Id.*

157 *Id.*

158 Crime Control Act, *supra* note 147, at § 40701(a)(3).

159 *Cf.* 8 U.S.C. § 1186a(c)(4) (1991) (Under IMFA, "[i]n determining extreme hardship, the Attorney General shall consider *circumstances occurring only during the period that the alien was admitted for permanent residence on a conditional basis.*") (emphasis added). This provision remained unchanged under the 1990 amendment.

160 *Cf.* 8 U.S.C. § 1186a(c)(4)(A) (stating that "[t]he Attorney General . . . may remove the conditional basis of the permanent resident status for an alien *who fails to meet the [joint petition] requirements* . . . if the alien demonstrates that . . . *extreme hardship would result if such alien is deported* . . . .") (emphasis added).

Allowing self-petitioning would still confer immigration priority based on family relationships, but the alien would not be dependent on her spouse to apply on her behalf. There is already precedence in the immigration laws for allowing an alien spouse to self-petition for permanent resident status.[161] When a citizen spouse dies without having filed the petition, the Attorney General has discretion to allow the widowed alien to self-petition, if appropriate for humanitarian reasons.[162] The rationale is that the sponsor's death was unforeseeable, and beyond the alien's control.[163] The same reasoning applies to victims of domestic violence because they can neither foresee nor control the abuse.[164] A self-petitioning system also would promote independence, and thus would reduce the degree to which abusive spouses could use the threat of deportation to keep their victims powerless.[165]

The House proposal also had included preventing abusive citizen or LPR spouses from undermining their alien spouses' self-petitioning by divorce.[166] Otherwise, divorce results in automatic revocation of an immediate relative or second preference petition.[167] To enable an abused spouse to leave the marriage without loss of immigration status, the proposal would have ensured that divorce could not be the basis for petition revocation in cases of domestic violence.[168] A provision that a petition for immediate relative status cannot be revoked solely because the marriage has been terminated likewise is included in the Crime Control Act.[169]

The second category of abused aliens for whom the House immigration provisions had proposed allowing self-petitioning,[170] also is addressed under the Crime Control Act.[171] The avenue of relief provided, however, is suspension of deporta-

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161 O'Herron, *supra* note 40, at 561.

162 8 U.S.C. § 1151(b)(2)(A)(i) (allowing an alien, who was the spouse of a United States citizen for at least two years prior to the citizen's death, to petition to remain in immediate relative status).

163 O'Herron, *supra* note 40, at 562.

164 *Id.*

165 *Id.* at 564.

166 H.R. Rep. No. 395, *supra* note 151, at 38 (proposing that "[t]he legal termination of a marriage may not be the basis for revocation [of a self-petition for immediate relative or second-preference status in cases of abuse").

167 *Id.*

168 *Id.*

169 Crime Control Act, *supra* note 147, at § 40701(b)(2)(c) (amending 8 U.S.C. § 1154, by adding subsection (h)). "The legal termination of a marriage may not be the sole basis for revocation under [8 U.S.C. § 1155] of a petition filed under subsection (a)(1)(A) or a petition filed under subsection (a)(1)(B)." 8 U.S.C. § 1154(h).

170 H.R. Rep. No. 395, *supra* note 151, at 38.

171 Crime Control Act, *supra* note 147, at § 40703 (Suspension of Deportation) (amending 8 U.S.C. § 1254(a) (1990)).

tion rather than self-petitioning.[172] A battered immigrant may apply for suspension of deportation under this provision if she can prove that: (1) she has been physically present in the United States for at least three years immediately prior to application; (2) she was battered or subjected to extreme cruelty by her citizen or LPR spouse; (3) she is of good moral character; and (4) deportation would cause extreme hardship to her or her child.[173] This avenue is available for an abused alien who is deportable on grounds other than marriage fraud, criminal offenses, falsification of immigration documents, or national security grounds.[174] Thus, an abused alien is eligible for this relief if she is subject to deportation because she is undocumented as a result of her sponsoring spouse's failure to file the initial petition to begin her conditional residency, or of his refusal to cooperate in filing the joint petition to remove the conditions. An abused alien's eligibility for this relief after presence in the United States for three years waives the normal suspension of deportation requirement of continuous physical presence of at least seven years.[175] Application of the new provision to undocumented abused aliens may give battered spouses the freedom to leave abusive homes more readily, with less fear of deportation. If so, it would remedy a major deficiency in the 1990 amendment.[176]

Another major immigration provision proposed by the House addresses the problem raised by the regulation implementing the battered spouse waiver, that applications claiming extreme mental cruelty must be supported by the evaluation of a licensed mental health professional.[177] The House proposal sought to override this requirement by directing the Attorney General "to consider any credible evidence submitted in support" of a battered spouse waiver, regardless of whether it included expert opinion.[178] This provision likewise was adopted under the Crime Control Act.[179] This mandate removes the INS requirement of an affidavit by a licensed mental health professional in order for an alien to prove extreme mental cruelty.[180] It focuses the inquiry on the behavior of the abuser instead of on the

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172 *Id.*

173 *Id.* at § 40703(a)(3).

174 *Id.*

175 8 U.S.C. § 1254(a)(1) (1990) (setting out the eligibility criteria for suspension of deportation).

176 Lee, *supra* note 37, at 805.

177 H.R. Rep. No. 395, *supra* note 151, at 38.

178 *Id.*

179 Crime Control Act, *supra* note 147, at § 40702(a) (amending 8 U.S.C. § 1186a(c)(4) (1991)) ("[t]he Attorney General shall consider any credible evidence relevant to the [battered spouse waiver] application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.").

180 8 C.F.R. § 216.5(e)(3)(vi); *see supra* note 96.

abuse's effect on the victim, and prevents discrimination against non-English speaking women with limited access to bilingual mental health professionals.[181] Relaxing this evidentiary requirement may make it more likely that battered immigrant women with limited resources and reluctance to talk openly about their private lives will come forward. However, the 1990 legislation creating the battered spouse waiver also directs the Attorney General to "consider any credible evidence."[182] The regulation implementing the legislation nevertheless confines this directive only to the evidentiary requirements for proving physical, not mental, abuse.[183] Whether the new provision in reality will change the burden of proof for victims of mental cruelty, therefore, also must await promulgation of the implementing regulation.

In response to the issue of sufficient protections of confidentiality for battered spouse waiver applicants, the House had proposed that the Attorney General should conduct a study, and report to Congress, on the feasibility of creating effective means to preserve confidentiality of information, while allowing access for legitimate purposes.[184] The Crime Control Act incorporates this recommendation,[185] not specifically for abused immigrants, but for domestic violence victims generally.

The immigration provisions of the Crime Control Act take a major step toward closing the gaps left by the 1990 amendment and its implementing regulation. The new provisions do so by furthering efforts to prevent the immigration laws from being used as a weapon for abuse, provide more realistic options for battered immigrant women, and strengthen the message that domestic violence will not be tolerated.[186]

VI. CONCLUSION

The dynamics of family violence and the fears and pain of victims are universal, regardless of the nationalities of those involved. However, for victims who are also conditional residents and whose immigration status remains under the control of

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181 H.R. Rep. No. 395, *supra* note 151, at 38 (explaining the rationale for the House proposal).

182 Statement of Rep. Slaughter, *supra* note 70, at H8642.

183 8 C.F.R. §§ 216.5(e)(3)(iii),(iv); *see supra* note 86.

184 H.R. Rep. No. 395, *supra* note 151, at 39.

185 Crime Control Act, *supra* note 147, at Title IV, Subtitle E, § 40508(a) (directing the Attorney General to conduct a study, and transmit a report to Congress, of the means by which abusers may obtain the locations of abused spouses, and the feasibility of measures to protect the confidentiality of this information).

186 Calvo & Davis, *supra* note 145, at 1668.

their batterers, the abusive situation is worsened. In addition to the fears that all domestic violence victims face, conditional resident aliens live with a fear unique to their situation—fear of deportation. This is a powerful weapon in the hands of an abusive spouse. The fear of deportation might be reduced if bilingual individuals were available at the INS to act as ombudsmen or advocates to help abused aliens understand their options, the immigration process, and that they will not necessarily be deported if they leave an abusive relationship. Such measures might encourage domestic violence victims to come forward instead of remaining with their abusers or fleeing and becoming subject to deportation when they are undocumented.

By establishing the battered spouse waiver, the 1990 amendment did much to alleviate the problems created by IMFA's conditional residency framework. However, the sponsoring spouse still retains some control over the alien's immigration status, and the implementing regulation raises some additional issues. The immigration provisions enacted under the Crime Control Act are another important step in resolving some of these issues. However, the extent to which these provisions will, in practice, further protect alien victims of domestic violence from the power of their abusers over their immigration status, will depend on how the regulation, yet to be promulgated, implements the legislation.

Immigration policies implicate important social objectives because they attempt to balance concerns for aliens who are the victims of family violence with preventing fraud to obtain immigration benefits. The frightening proportions domestic violence has reached in the United States, however, demand an evolving process of legislative, regulatory, and judicial responses to counteract spousal abuse. In this way, the immigration laws not only will ensure adequate protections for a most vulnerable group of family violence victims—abused immigrant women—but also will guarantee that these laws cannot be wielded as a weapon against them.