NIWAP

AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

To: United States Citizenship and Immigration Services, Department of Homeland Security.

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Date: March 9, 2022.

RE: Comments VAWA Self-Petitioning Section
USCIS Policy Manual, Vol. 3, Ch.2 and Ch.3.

Introduction and Overview

On February 10, 2022, U.S. Citizenship and Immigration Services (USCIS) published a policy guidance addressing Violence Against Women Act Self-Petitions. Specifically, USCIS revised Volume 3 of the Policy Manual. Volume 3, Part D of the Policy Manual is organized into six chapters, with Chapter 1 laying out the purpose, background and legislative history that led to the creation of VAWA self-petitioning; Chapter 2 addressing the eligibility requirements for VAWA self-petitioners, Chapter 3 the effect of certain life events, Chapter 4 the VAWA filing requirements, Chapter 5 the VAWA adjudication process, and Chapter 6 the post adjudicative matters.

The National Immigrant Women's Advocacy Project (NIWAP), American University, Washington College of Law, is writing to commend USCIS for issuing this Policy Manual Chapter on VAWA self-petitioning that, consistent with the Executive Order 140012 provides much needed clarification to adjudicators and applicants that promotes access to VAWA self-petitioning by helping to eliminate "sources of fear and other barriers that prevent immigrant from accessing" the path to legal immigration status that Congress created in 1994 as a key part of the Violence Against Women Act and improved in upon in legislation that became law in 1996, 2000, 2005, 2008, and 2013. This policy manual chapter is the first comprehensive resource for adjudicators and for the field since the VAWA self-petitioning implementing regulations were issued in March of 1996. Importantly, in the footnotes to this policy manual USCIS notes exactly where the prior regulations were superseded by subsequent amendments to VAWA statutes. USCIS made these annotations for many, but as will be discussed below, not all of the aspects of the 1996 regulations that were overruled by subsequent Congressional legislation.

The National Immigrant Women's Advocacy Project (NIWAP), American University, Washington College of Law, develops, reforms, and promotes the implementation and use of laws, policies and practices to improve legal rights, services and assistance to immigrant women, children and immigrant victims of domestic violence, child abuse, sexual assault, stalking, human trafficking, and other crimes. NIWAP is a national resource center offering technical assistance and training to assist a wide range of professionals - including immigration and legal services attorneys, family lawyers, victim advocates, state court judges, court staff, state court judges, police, sheriffs, and prosecutors. Over the years NIWAP staff have also provided training for immigration judges, the Board of Immigration Appeals, Department of Homeland Security (DHS) adjudication and enforcement staff who work with and/or whose work affects immigrant women, children, and immigrant crime victims. NIWAP staff was involved in drafting the protections for immigrant victims' sections of the Violence Against Women Acts of 1994, 2000, 2005 and 2013, the Trafficking Victims Protection Acts of 2000 and 2008, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). NIWAP staff have

submitted comments, legal research and suggestions to USCIS and the Immigration and Naturalization Service (legacy INA) on implementation of VAWA self-petitioning protections beginning in 1994 and battered spouse waiver protections since 1991 and have published legal and social science research articles on domestic violence, sexual assault, and child abuse experienced by immigrant women and children.

NIWAP appreciates that the detailed discussion of VAWA self-petitioning protections contained in the Policy Manual, the charts and extensive footnotes provide much needed guidance on issues for which the clarification provided will make it much easier for attorneys and advocates to assist battered and abused immigrant spouses, children, stepchildren and parents in filing VAWA self-petitions. These same clarifications and revisions should substantially improve the efficiency of USCIS VAWA self-petitioning adjudications by eliminating unnecessary Requests for Further Evidence that delay VAWA self-petitioning adjudications. By providing critical policy revisions and more information for field and adjudicators these policies literally save lives and substantially reduce the duration and severity of the abuse battered immigrant spouses, children and parents suffer while they await adjudication of their VAWA self-petitions. Research among VAWA self-petitioners has consistently found that a significant percentage of VAWA self-petitioners continue to reside in abusive homes until after they receive work authorization ranging from 37% to 43%,[1] with those who stay suffering daily (27%), weekly (21%), or monthly (24%) abuse.[2]

In these comments in Section 1. NIWAP will first briefly discuss some highlights of the areas of much needed clarification that USCIS did an excellent job including in this policy manual. In most instances USCIS took helpful language in the preamble of the original VAWA self-petition regulations and incorporated that information into this policy manual. In this first section on the definition of battery or extreme cruelty we identify key points from the preamble to the 1996 regulations on aspects of the regulations that were not superseded and remain in full force and effect that provide text that NIWAP proposes be added to the VAWA self-petitioning policy manual chapter.

These comment further address a few areas where NIWAP believes the text of the policy manual could be improved to be more legally accurate.[3] In reviewing the VAWA policy manual NIWAP identified three areas where the VAWA Chapters in the Policy Manual need to be substantially revised because the positions taken by USCIS are not positions required by statute or regulations that needlessly require victims to suffer ongoing abuse from their perpetrators in order to qualify to self-petition or that are contrary to, ignore, or render meaningless VAWA statutory amendments and VAWA legislative

[1] KRISZTINA E. SZABO, DAVID STAUFFER, BENISH ANVER, AND LESLYE E. ORLOFF, EARLY ACCESS TO WORK AUTHORIZATION FOR VAWA SELF-PETITIONERS AND U VISA APPLICANTS 21 (2014), (https://niwaplibrary.wcl.american.edu/pubs/final_report-on-early-access-to-ead_02-12; RAFAELA RODRIGUES, ALINA HUSAIN, AMANDA COUTURE-CARRON, LESLYE E. ORLOFF, AND NAWAL H. AMMAR, PROMOTING ACCESS TO JUSTICE FOR IMMIGRANT AND LIMITED ENGLISH PROFICIENT CRIME VICTIMS IN AN AGE OF INCREASED IMMIGRATION ENFORCEMENT: INITIAL REPORT FROM A 2017 NATIONAL SURVEY 87 (2018), https://niwaplibrary.wcl.american.edu/pubs/immigrant-access-to-justice-national-report

[2] RAFAELA RODRIGUES, ALINA HUSAIN, AMANDA COUTURE-CARRON, LESLYE E. ORLOFF, AND NAWAL H. AMMAR, PROMOTING ACCESS TO JUSTICE FOR IMMIGRANT AND LIMITED ENGLISH PROFICIENT CRIME VICTIMS IN AN AGE OF INCREASED IMMIGRATION ENFORCEMENT: INITIAL REPORT FROM A 2017 NATIONAL SURVEY 87 (2018), https://niwaplibrary.wcl.american.edu/pubs/immigrant-access-to-justice-national-report

[3] NIWAP identified these issues with regard to benefits eligibility for VAWA self-petitioners and the VAWA confidentiality protections covering VAWA self-petitioners and the 8 U.S.C. 1367 protections offered whether a victim has filed or plans to file a self-petition.

history. The three significant substantive revisions to the manual and one issue of importance for VAWA self-petitioners was omitted from the manual that are needed to:

- Stepchildren: Stop requiring step-children whose non-abusive natural parent died to have an ongoing relationship with their abusive stepparent at the time of filing to be eligible to apply for the humanitarian protections VAWA self-petitioner offers stepchildren;
- Making VAWA Self-Petitioning Unavailable to Victims With Aggravated Felony Convictions renders the VAWA 2000 and VAWA 2005 amendments creating the domestic violence victim waivers and the VAWA 2000 good moral character amendments unavailable to many abused spouses of citizens and lawful permanent residents whose convictions were connected to the abuse they suffered including victims who acted in self-defense or who were convicted of sealing baby food to feed their children while fleeing abuse who received one year suspended sentences; this forces abused spouses otherwise eligible to self-petition whom Congress wanted to protect with the domestic violence victim waiver into the U visa backlog by robbing them of access to self-petitioning ; and
- Remarriage: Congress in VAWA 2000 revised VAWA statutes and explained in legislative history that their intent to ensure that remarriage of VAWA self-petitioners would not impact a filed self-petition reflecting an understanding of how remarriage to a non-abusive partner can help victims heal and can play a role in improving victim safety; and
- Naturalization: In VAWA 2000 Congress amended the naturalization statute to allow spouses of U.S. citizens who are battered or subjected to extreme cruelty by their citizen spouse to not have to remain living in an abusive home and remain married to their abused to be able to naturalize in 3 years as opposed to 5 years. This provision was meant to help any abused spouse of a U.S. citizen whether the abuser filed a family-based visa petition or whether the victim filed a self-petition. Implementing policies limited these protections to VAWA self-petitioners, VAWA cancellation and Battered Spouse Waiver applicants, leaving out VAWA suspension of deportation victims and all other battered spouses of U.S. citizens.

1. VALUABLE CLARIFICATIONS AND IMPLEMENTATION THAT SUPPORTS THE COMPLIANCE OF THE POLICY MANUAL WITH THE VAWA SELF-PETITIONING PURPOSES

In this section NIWAP comments on illustrative examples of very helpful policy guidance provided by the self-petitioning chapter of the USCIS policy manual and briefly outlines how and why these policies are legally correct, remove barriers for victims, and are supported by evidence-based research. We also make some suggestions of where the language contained in the policy manual may be improved.

a. "Battery or Extreme Cruelty Definition – Chapter 2.E.

The section defining "Subjected to Battery or Extreme Cruelty" appears to have been adapted largely from the preamble to the VAWA self-petitioning regulation and the regulations at 8 C.F.R. 204.2 (c)(6). The immigration law definition of battery or extreme cruelty was first included in the battered spouse waiver legislation in 1990 and in 1994 the Violence Against Women Act (VAWA) used the same definition in the creation of VAWA self-petitions and VAWA cancellation of removal. The Immigration and Nationality Service (Legacy INS) defined the term battering or extreme cruelty in the

VAWA self-petitioning regulations and included a long explanatory and very helpful detailed preamble when INS published the regulations in the Federal Register.[4]

NIWAP appreciates that a significant number of the important concepts and explanation contained in the preamble to the regulations is now being included in the Policy Manual making it more accessible to the public and providing detailed descriptions of battery and extreme cruelty in policies government VAWA self-petitioning adjudications. This clarity of guidance will streamline VAWA self-petition adjudications, reduce RFE's and will help education District Field office staff who are still involved in VAWA adjustment of status adjudications despite Congressional directives VAWA adjustment of status and battered spouse waiver adjudications be moved from District offices to the specialized team of adjudicators in the VAWA Unit at the Vermont Service Center.[5]

NIWAP proposes a few additions that ensure that the full guidance in the preamble to the VAWA self-petitioning regulations are included in Policy Manual Section 2.E.

> i. Harm to Others as Harm to the Self-Petitioner: Evidence based research has found over the past two decades since VAWA self-petitioning was created that perpetrators of domestic violence and child abuse will harm family pets,[6] will harm, threaten or kill other family members, new partners, friends and/or persons offering help to victims,[7] and will destroy meaningful or irreplaceable property of the victim[8] as part of the pattern of domestic violence perpetrated against the victim. It is therefore important to include and expand upon language in the VAWA 1996 regulation preamble the recognized that abuse to others and "things" could constitute

[4] PETITION TO CLASSIFY ALIEN AS IMMEDIATE RELATIVE OF A UNITED STATES CITIZEN OR AS A PREFERENCE IMMIGRANT; SELF-PETITIONING FOR CERTAIN BATTERED OR ABUSED SPOUSES AND CHILDREN, 61 Fed. Reg. 13,065 - 13,066 (March 26, 1996), https://www.federalregister.gov/documents/1996/03/26/96-7219/petition-to-classify-alien-as-immediate-relative-of-a-united-states-citizen-or-as-a-preference.

[5] H.R. REP. No. 109-233, 116 (2005), https://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptshr-3402-09-22-2005. ("In 1997, the Immigration and Naturalization Service consolidated adjudication of VAWA self-petitions and VAWA-related cases in one specially trained unit that adjudicates all VAWA immigration cases nationally. The unit was created ''to ensure sensitive and expeditious processing of the petitions filed by this class of at-risk applicants . . .'', to ''[engender] uniformity in the adjudication of all applications of this type'' and to ''[enhance] the Service's ability to be more responsive to inquiries from applicants, their representatives, and benefit granting agencies.'' *See* 62 Fed. Reg. 16607– 16608 (1997). T visa and U visa adjudications were also consolidated in the specially trained VAWA unit. *See* USCIS Interoffice Memorandum HQINV 50/1, August 30, 2001, from Michael D. Cronin to Michael A. Pearson, 67 Fed. Reg. 4784 (2002). Consistent with these procedures, the Committee recommends that the same specially trained unit that adjudicates VAWA self-petitions, T and U visa applications, process the full range of adjudications, adjustments, and employment authorizations related to VAWA cases (including derivative beneficiaries) filed with DHS: VAWA petitions T and U visas, VAWA Cuban, VAWA NACARA (§§ 202 or 203), and VAWA HRIFA petitions, 214(c)(15)(work authorization under section 933 of this Act), battered spouse waiver adjudications under 216(c)(4)(C) and (D), applications for parole of VAWA petitioners and their children, and applications for children of victims who have received VAWA cancellation.").

[6] NATIONAL SHERIFF'S ASSOCIATION, ANIMAL CRUELTY AND DOMESTIC VIOLENCE https://www.sheriffs.org/animal-cruelty-and-domestic-violence (last visited Mar. 7, 2022) (89% of women who had companion animals during an abusive relationship reported that their animals were threatened, harmed or killed by their abusive partner.)

[7] SHARON G. SMITH, KATHERINE A. FOWLER, AND PHYLLIS H. NIOLON, INTIMATE PARTNER HOMICIDE AND COROLLARY VICTIMS IN 16 STATES: NATIONAL VIOLENT DEATH REPORTING SYSTEM, 2003–2009, 104,3 Am. J. Public Health, 461-6 (2014) https://pubmed.ncbi.nlm.nih.gov/24432943/; DOBASH RP, DOBASH RE. WHO DIED? THE MURDER OF COLLATERALS RELATED TO INTIMATE PARTNER CONFLICT, 18,6 Violence Against Women, 662- 71 (2012), https://pubmed.ncbi.nlm.nih.gov/22831847/

[8] D. KELLY WEISBERG, PROPERTY DAMAGE IN THE DOMESTIC VIOLENCE CONTEXT, 22 Domestic Violence Rept. 17 (2016) https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2542&context=faculty_scholarship

acts of extreme cruelty against the self-petitioner or their child. Other persons can include family members, or person who provide shelter or aid to victims.

Amend the sentence in the Battery or extreme cruelty list in Policy Manual Section 2.E to read:

"Acts aimed at some other person, pet, property, or thing may be considered abuse if the acts were deliberately used to perpetrate extreme cruelty against the self-petitioner or the self-petitioner's child."[9]

ii. Stalking, Criminal Treats and Attempts and Threats With Weapons: Stalking, attempted criminal acts, criminal threats and threats with weapons are crimes under state civil protection order[10] and criminal laws.[11] These acts are crimes but do not strictly fall within the Webster's Dictionary definition of "battery." These acts are criminal and should be addressed in the Policy Manual as part of the continuum of battery or extreme cruelty. Stalking, use of or threats with weapons, and threats to kill are lethality factors that contribute to an assessment of the dangerousness of the abuser.[12] For these reasons, the Policy Manual's description of battery or extreme cruelty needs to address these crimes. We suggest adding in Policy Manual Section 2.E.1. before the last sentence of the second paragraph:

"Other crimes included in state protection order and state criminal laws governing domestic violence, child abuse and family violence and attempts and treats to commit these crimes are considered to fall within the continuum of battery or extreme cruelty under U.S. immigration laws. Examples include but are not limited to: stalking, use of weapons, threats with weapons, threats to kill, threats to commit crimes against the victim, family members, or children, and attempts to commit battery or other crimes."

iii. Ability to Submit Documentary Proof of Non-Qualifying Abuse: The preamble to the VAWA self-petitioning regulations included very helpful information about the ability of VAWA self-petitioners to submit documentary proof of abuse "non-qualifying abuse". Non-qualifying abuse is abuse of a spouse that occurred before or the qualifying marriage. It also includes abuse of a child or parent that occurred that occurred before the qualifying relationship began (e.g. before the stepparent/stepchild relationship was created or before the adoption for a child was completed). To ensure that self-petitioners know that they can submit evidence of "non-qualifying" abuse that did not occur during the qualifying

[9] Adopted from 61 Fed. Reg. 13,065 (March 26, 1996), https://www.federalregister.gov/documents/1996/03/26/96-7219/petition-to-classify-alien-as-immediate-relative-of-a-united-states-citizen-or-as-a-preference (updated to address evidence-based research on the range of persons at risk of harm).

[10] *See* DOMESTIC VIOLENCE RESTRAINING ORDERS, WOMENSLAW.ORG, https://www.womenslaw.org/laws/general/restraining-orders (last visited Mar. 7, 2022).

[11] *See* CRIMES, WOMENSLAW.ORG, https://www.womenslaw.org/laws/general/crimes (last visited Mar. 7, 2022).

[12] JACQUELYN C. CAMPBELL, DANIEL W. WEBSTER, AND NANCY GLASS, THE DANGER ASSESSMENT: VALIDATION OF A LETHALITY RISK ASSESSMENT INSTRUMENT FOR INTIMATE PARTNER FEMICIDE, J. of Interpersonal Violence (2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7878014/.

relationship the Policy Manual should insert the following before the last paragraph of Policy Manual Chapter 2.E:

"A self-petitioner is not precluded from submitting documentary proof of non-qualifying abuse with the self-petition. Evidence of battering or extreme cruelty or other abuse occurring before or after the qualifying relationship ends can be used to establish a pattern of abuse and violence and to bolster claims that qualifying abuse also occurred."[13]

iv. Totality of the Circumstances and Full History of Abuse: In adjudicating whether a VAWA self-petitioner has met their burden of proof for each eligibility requirement VAWA's any credible evidence rules require that adjudicators consider the totality of the evidence presented and the full history of domestic violence and abuse which includes all of the battering or extreme cruelty perpetrated against the self-petitioner and/or the self-petitioner's child in the case. This includes consideration of qualifying abuse and non-qualifying abuse and the history of abuse in the relationship.

At several points in the USCIS Policy Manual Chapters on VAWA self-petitioning (Chapter 2.G.3 and 2.G.4; Chapter 3.E.1 and 3.G.1) USCIS explicitly directs adjudicators to consider the "totality of the circumstances," the "totality of the evidence," the "full history of domestic violence," and the "full history of battering or extreme cruelty." This approach is consistent with the goals of Congress when it created VAWA's any credible evidence rules. This approach is important because the evidence presented in a VAWA self-petition case can contribute to the totality of the evidence to meet different eligibility requirements. For example, proof of battering or extreme cruelty that an adjudicator determines to be credible can also provide credible evidence that contributes to the finding that the victim's marriage to the abusive citizen or LRP spouse was a good faith marriage.

To ensure that adjudicators apply this approach to all VAWA evidentiary requirement the following language should be added as the last sentence of Chapter 5 Adjudication 5.B.1 Standard of Proof:

"In determining whether a VAWA self-petitioner met this burden of proof on each eligibility requirement, adjudicators must consider the full history of battering or extreme cruelty and domestic violence, the totality of the circumstances in the case, and the totality of the evidence presented."

[13] 61 Fed. Reg. 13,066 (March 26, 1996), https://www.federalregister.gov/documents/1996/03/26/96-7219/petition-to-classify-alien-as-immediate-relative-of-a-united-states-citizen-or-as-a-preference.

Non-qualifying abuse is abuse occurring before or after the marriage. In cases involving stepparents and stepchildren since the relationship does not end with divorce (or death as will be discussed below) the non-qualifying abuse would be abuse that occurred prior to the formation of the stepparent/stepchild relationship.

NIWAP also suggests that before the last sentence of the first paragraph of Section 5.B.2 Any Credible Evidence the following sentence should be added:

"In considering any credible evidence and the credibility and weight evidence is to be given, officers must consider the full history of battering or extreme cruelty and domestic violence, the totality of the circumstances in the case, and the totality of the evidence presented."

b. Correct Approach to Cases With Prior Marriage Fraud Finding

The USCIS Policy Manual Chapter 3.C.2 correctly required that adjudicators of VAWA self-petitioning cases are required to "make a separate and independent determination" as to whether the self-petitioner previously engaged in marriage fraud. Over the more than three decades since Battered Spouse Waiver laws were enacted and the more than two decades since VAWA self-petitioning was created with a specially trained unit of adjudicators with training on domestic violence, adjudicators outside of the VAWA unit remain unable to recognize common patterns of domestic violence. This lack of training and understanding of the dynamics of domestic violence leads to delays, denials and unnecessary requests for further evidence in Battered Spouse Waiver and VAWA self-petitioning adjustment of status cases.[14] The lack of domestic violence training and ability to detect common signs of domestic violence can also lead untrained adjudicators to unlawfully rely solely on information provided by an abusive citizen spouse to make marriage fraud findings in an I-485 visa adjustment of status case of an immigrant spouse who entered the U.S. on a fiancé visa.

In one illustrative case[15] USCIS officials conducted a separate private interview with the perpetrator citizen spouse and never gave the immigrant victim spouse any opportunity to respond to the marriage fraud allegations before the I-485 was denied for marriage fraud. The USCIS adjudicators never screened the immigrant spouse for domestic violence victimization, which could have revealed that the level of domestic violence in the marriage had risen to the point that the victim had twice called police for help and filed police reports by the time of I-485 case was decided and denied for marriage fraud. This case demonstrates how spouse abuse victims can end up with marriage fraud findings based on prohibited source information that violates VAWA Confidentiality prohibitions (8 U.S.C. 1367(a)(1)). Section 8 U.S.C. 1367(a)(1) precludes USCIS officials from relying on perpetrator provided information and applies to all marriages without regard to whether the immigrant victim spouse knows about, is in the process of filing for, or has filed for crime victim-based immigration relief including VAWA self-petitions, VAWA cancellation of removal, or a Battered Spouse Waiver.

For this reason, requiring in any case where there has been a prior marriage fraud finding by an adjudicator specially trained in domestic violence is essential. When a VAWA unit adjudicator

[14] U.S. CITIZENSHIP AND IMMIGRATION SERVICES, SECTION 384 OVERVIEW AND DISTRICT RETURNS ON VAWA-BASED FILINGS, 2-37 (2014) https://niwaplibrary.wcl.american.edu/pubs/foia-bsw-district-office-training. (Examples include: relying on abuser provided information prohibited by VAWA confidentiality laws (8 U.S.C. 1337); District officers did not know VAWA self-petitioners had 2 years after divorce or the abuser's loss of status to self-petition and did not know that self-petitioning children were eligible to file after they turned 21 so long as their application was filed before the child turned age 25; District officers also lacked knowledge of VAWA self-petitioning bigamy protections; additionally District Officers failed to comply with USICS policies requiring supervisor review and signature on all revocation requests.).

[15] S*ee* AMICUS CURIE BRIEF FOR RESPONDENT M.A. at 14-15 (Mar. 23, 2020), https://niwaplibrary.wcl.american.edu/pubs/amicus-brief-matter-of-ma-with-amici-march-23-2020.

examines whether the prior finding of marriage fraud is correct, they do so applying the VAWA any credible evidence rules and assess whether marriage fraud occurred in the context of the abusive marital relationship and after considering the totality of the evidence in the case. This is the correct approach.

USCIS should consider requiring that all adjudicators deciding I-130 visa petitions and I-485 adjustments of status be required to:

- Screen any immigrant against whom USICS is considering issuing a marriage fraud finding for battering or extreme cruelty. A simple easy to deliver set of questions could be develops and uniformly used based on the evidence-based screening questions used by health care professionals. This provides the immigrant spouse an opportunity to disclose the abuse;[16]
- If the immigrant reveals battering or extreme cruelty USCIS adjudicators shall consider that evidence in deciding how to rule on the I-130 or I-485 application; and
- Provide the immigrant spouse with an opportunity to rebut the marriage fraud evidence by issuing a Request for Further Evidence and/or a Notice of Intent to Deny.

c. Examples of Correct Application of VAWA's Any Credible Evidence Rules

VAWA's any credible evidence rules were created to remove barriers that inflexible evidence rules could create for VAWA self-petitioners and other immigrant survivors filing for relief under the T and U visa programs.[17] When Congress created VAWA self-petitioning in 1994 one of the key provisions included in the statute were the VAWA any credible evidence rule that were needed to statutorily rescind the battered spouse waiver's strict and unworkable evidentiary requirements[18] and replace them with any credible evidence rules that provided VAWA self-petitioners the flexibility needed to apply for and receive the protections afforded by VAWA self-petitioning statutes without requiring victims to:

- Place themselves in danger in their attempts to obtain specific forms of evidence that were under the perpetrators control;

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[16] A recommended list of screening tools from which DHS Subject Matter Experts can identify questions that have been validated by evidence-based research for domestic violence and sexual assault are:

(1) One of the assessment instruments listed by the CDC in *Intimate Partner Violence and Sexual Violence Victimization Assessment Instruments for Use in Healthcare Settings*; (*see* https://www.cdc.gov/violenceprevention/pdf/ipv/ipvandsvscreening.pdf**).**

(2) Validated Screening Tests available from the Kaiser Family Foundation. **(**AMRUTHA RAMASWAMY, USHA RANJI AND ALINI SALGANICOFF, INTIMATE PARTNER VIOLENCE (IPV) SCREENING AND COUNSELING SERVICES IN CLINICAL, *Appendix Table 2: Screening Tests* (2019) https://www.kff.org/report-section/intimate-partner-violence-ipv-screening-and-counseling-services-in-clinical-settings-appendices/).

(3) Danger Assessment Tool. (*Id.* at *Appendix Table 3: Danger Assessment Tool, Jacqueline C. Campbell,* Danger Assessment Tool. *See also* https://www.dangerassessment.org/).

(4) Screening tools recommended by the National Health Resource Center on Domestic Violence. (*Futures Without Violence*, IPV Screening and Counseling Toolkit https://www.futureswithoutviolence.org/ipv-screening-and-counseling-toolkit/).

[17] For a complete analysis of VAWA's any credible evidence statute and its legislative history *see* https://niwaplibrary.wcl.american.edu/pubs/call-for-consistency-mandatory-undermines-vawa

[18] It is important to note that although VAWA 1994 superseded parts of the battered spouse waiver regulations, the battered spouse regulations have never been amended to reflect the statutory changes. *See* Battered Spouse Waiver Regulations 8 C.F.R. 216.5 Annotated Overruled Provisions (2021) https://niwaplibrary.wcl.american.edu/pubs/8-cfr-216-annotated-for-overruled-provisions

- Require that the victim will have to return to the community where the victimization occurred and where their perpetrator may still reside to obtain evidence for the victim's VAWA self-petitioning case;
- Delay filing self-petitions until they could secure access to these forms of evidence; or
- Necessitate multiple submissions to USCIS in response to requests for further evidence that slowed down the adjudication process and caused pain, trauma and relived uncertainty for victims.[19]

i. Proof of Termination of Prior Marriages – Chapter 2.B.2

NIWAP appreciates how the Chapter 2.B.2 of VAWA Chapter of the Policy Manual discussing Self-Petitioning Spouse addresses proof or the dissolution of prior marriages. The Policy Manual requires a VAWA self-petitioner who was previously married to provide proof of the dissolution of the self-petitioner's prior marriage as evidence that the self-petitioner was legally free to marry. However, with regard to the abuser's prior marriages the policy manual allows self-petitioners to submit evidence of the termination of the abusive spouse's prior marriages *if available.* When the VAWA self-petitioner cannot safely obtain this evidence the policy manual directs that the victim can alternatively proceed with their self-petition as an intended spouse. This is an excellent example of proper application of VAWA's any credible evidence rules and an understanding of the important role policy manuals can play in directing applicants and adjudicators to viable alternatives present in the statute and regulations.

ii. Bigamists and Intent – Chapter 2.B.2 *Intended Spouse*

Another related helpful clarification is in Chapter 2.B.2 Intended Spouse. Here the Policy Manual chapter confirms and adopts the prior INS 2002 policy[20] explaining correctly that the victim is not required to provide evidence in the abusive spouse's intent at the time of the marriage. This approach allows victims to safely self-petition by providing evidence and proof of their own that they have access to and not having to go through a difficult process of process of proving their abuser's intent.

d. Self-Petitioning Spouse Whose Child Was Abused – Chapter 2.B.2

This section of the policy manual provides very helpful information that clearly confirms that noncitizen parent whose child is abused can file a VAWA self-petition without regard to whether the child that was abused was the abuser's child. However, the rights to self-petition as a parent whose child has been abused is an area of self-petitioning law that NIWAP receives a lot of technical assistance

[19] MAIA INGRAM, DEBORAH JEAN MCCLELLAND, JESSICA MARTIN, MONTSERRAT F. CABALLERO, MARIA THERESA MAYORGA AND KATIE GILLESPIE, EXPERIENCES OF IMMIGRANT WOMEN WHO SELF-PETITION UNDER THE VIOLENCE AGAINST WOMEN ACT, 16 Violence Against Women, 858-880 (2010), https://niwaplibrary.wcl.american.edu/pubs/imm-exp-self-petition-vawa.

[20] ELIGIBILITY TO SELF-PETITION AS AN INTENDED SPOUSE OF AN ABUSIVE U.S. CITIZEN OR LAWFUL PERMANENT RESIDENT, MEMORANDUM FROM JOHNNY N. WILLIAMS, EXEC. ASSOC. COMM'R, U.S. DEP'T OF JUST. TO THE REG'L DIR. (Aug. 21. 2002) https://niwaplibrary.wcl.american.edu/pubs/imm-gov-dojmemowilliamseligibilityselfpetitionspouseofanabusiveuscitizen-08-21-02

calls on and we learn in trainings many do not fully understand. We case many cases in which an immigrant parent of an abused child who is eligible to self-petition do not believe they are eligible. This section of the policy manual can play an important role by providing a bulleted list of common scenarios in which a noncitizen parent is eligible to self-petition due to abuse of their child. This issue can be very confusing for victim, victim advocates and victim attorneys to understand. Suggested modifications of the Policy Manual –

First, the last line of the current policy manual for this section should be amended to read as follows:

> "If the self-petition is based on a claim that the self-petitioner's child was battered or subjected to extreme cruelty committed by the U.S. citizen or LPR, the self-petitioner should submit evidence of the relationship to the abused child, such as the child's birth certification, *a marriage license or certificate as proof the stepparent/stepchild relationship*, or other evidence demonstrating the relationship."

After this sentence add the following next text:

> *"To qualify to self-petition as the parent of an abused child, the victim must:*
>
> - *Be married to or the intended spouse of a U.S. citizen or lawful permanent resident; and*
> - *The victim's child must have been abused.*
>
> *Examples of when a noncitizen is eligible to self-petition based on abuse of their child include when the abused child is:*
>
> - *The noncitizen's natural child and the abuser's stepchild;*
> - *A child the noncitizen and abuser have in common;*
> - *The abuser's natural child and the noncitizen's stepchild;*
> - *The abuser's natural child adopted by the noncitizen;*
> - *The noncitizen's natural child adopted by the abuser.*
>
> *The noncitizen parent or stepparent of the abused child is eligible to self-petition without regard to the citizenship or immigration status of the abused child. The abused child need not be also filing a self-petition for the noncitizen parent or stepparent to qualify."*

e. Helpful Clarifications Regarding Residence with the Abusive Relative – Chapter 2.F

USCIS' handling of the "Residence with the Abusive Relative" section of the manual is a very good illustration of the clarity with which the VAWA USCIS Policy Manual Chapters have identified provisions in the 1996 VAWA self-petitioning regulations that have been superseded by statute or have been overruled by emerging case law that applied nationally promotes consistency in VAWA self-petitioning adjudications and access to VAWA self-petitioning protections abused spouses, children and parents. Both case law, and USCIS are correct and consistent with the legislative goals of VAWA in removing the limitations previously imposed by regulation, policy or USCIS practice that interpreted the VAWA "residence together" requirement as being tied to specific time limitations "during the

qualifying relationship"[21] or geographic limitations "in the United States."[22] Both of those prior requirements not imposed by statute has the effect of excluding abused spouses and children from VAWA protections who were otherwise eligible to self-petition.

When noncitizen spouses, children, stepchildren, parents, or step-parents battered or subjected to extreme cruelty by U.S. citizens or lawful permanent residence by such limitations imposed by policy or overruled regulations becomes trapped in abusive family relationships with no way out which is exactly what VAWA self-petitioning was designed to remedy.

Section F "Residence with the Abusive Relative" recognizes that battering and extreme cruelty in abusive relationships is a pattern abusive behaviors that continue and evolve over time and become more and more dangerous and severe.[23] Victims who struggle to leave abusive relationships often leave and return many times before achieving some physical separation from the abuser.[24] Physical separation from the abuser often causes abuse to escalate.[25] Allowing victims to prove residence with the abuser at any time in the past, including before the marriage and at any place in the past inside or outside of the United States is the correct approach. It facilitates victims' ability to meet the "residence with the abuser" requirement without regard to the steps the victim may have taken to escape the abuser or the abuser's actions to exert coercive control and power over the victim.

This section contains helpful clarification that for VAWA self-petitioners residing in the U.S. at the time of filing the residence with the abuser could have occurred either in the U.S. or abroad. NIWAP suggests that the following clarifying language be added:

> *"Similarly, for VAWA self-petitioners authorized to file their VAWA self-petition from outside of the United States need only prove that they resided with the abuser and that residence could have been either in the U.S. or abroad. Victims who were battered or subjected to extreme cruelty that occurred in the U.S. who are at the time of filing residing abroad, the residence could have occurred in the U.S. or abroad. Residence with the abuser could likely be exclusively abroad when the abuse was perpetrated a family member who is or was employed by the U.S. government or who are or were members of the U.S. military stationed outside of the U.S."*

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[21] *See* Dartora v. U.S., No. 4:20-CV-05161-SMJ (E.D.W.A. June 7, 2021). *See* Bait It v. McAleenan, 410 F. Supp. 3d 874 (N.D. Ill. 2019). *See* Hollingsworth v. Zuchowski, 437 F. Supp. 3d 1231 (S.D. Fla. 2020).

[22] *See* Hernandez v. Ashcroft, 345 F.3d 824, 825 (9th Cir. 2003). (The pattern of battering or extreme cruelty occurred both inside and outside of the United States)

[23] *See* PETER G. JAFFEE, ET AL., COMMON MISCONCEPTIONS IN ADDRESSING DOMESTIC VIOLENCE IN CHILD CUSTODY DISPUTES, Juvenile & Family Ct. J. 57, 59–60 (2003). ("[S]eparation may be a signal to the perpetrator to escalate his behavior in an attempt to continue to control or punish his partner for leaving.").

[24] *See* CAMPBELL, J., PREDICTION OF HOMICIDE OF AND BY BATTERED WOMEN, IN, J. CAMPBELL (ED.), ASSESSING THE RISK OF DANGEROUSNESS: POTENTIAL FOR FURTHER VIOLENCE OF SEXUAL OFFENDERS, BATTERERS, AND CHILD ABUSERS, Thousand Oaks, CA: Sage 93-113 (1995); CAMPBELL, J., WEBSTER, D., KOZIOL-MCLAIN, J., BLOCK, C., CAMPBELL, D., CURRY, M., RISK FACTORS FOR FEMICIDE IN ABUSIVE RELATIONSHIPS: RESULTS FROM A MULTI-SITE CASE CONTROL STUDY, Am. J. of Public Health, 93(7), 1089-1097 et al. (2003); *and* MCFARLANE, J., CAMPBELL, J., WILT, S., SACHS, C., ULRICH, Y., & XU, X., STALKING AND INTIMATE PARTNER FEMICIDE, Homicide Studies, *3*(4), 300-316. (1999).

[25] *See* TINA HOTTON, SPOUSAL VIOLENCE AFTER MARITAL SEPARATION, Statistics Canada, Catalogue no. 85-002, 1 (2001); MICHELLE L. TOEWS & AUTUMN M. BERMEA, "I WAS NAÏVE IN THINKING, 'I DIVORCED THIS MAN, HE IS OUT OF MY LIFE'": A QUALITATIVE EXPLORATION OF POST-SEPARATION POWER & CONTROL TACTICS EXPERIENCED BY WOMEN, J. of Interpersonal Violence 3 (2015); *see also* RUTH E. FLEURY, ET AL., WHEN ENDING THE RELATIONSHIP DOESN'T END THE VIOLENCE: WOMEN'S EXPERIENCES OF VIOLENCE BY FORMER PARTNERS, 6 Violence Against Women 1363, 1364–65 (2000) (explaining how separation from the abuser often results in more acts of violence).

f. Connection Between Battering or Extreme Cruelty for Good Moral Character – Chapter 2.G

Another positive feature of the VAWA Chapter of the Policy Manual is that USCIS applied the same approach in determining whether these is a connection between the abuse and it took to "residence with the abuser" discussed above. The Policy Manual correctly requires that adjudicators of self-petitions much consider the full history of abuse in the case and determining whether there is a connection between the disqualifying act or conviction and the battering or extreme cruelty the victim suffered. Since the full pattern of battering or extreme cruelty in an abusive relationship is seldom contained to solely within the confines of the dates of the marriage or other abusive family relationship considering convictions and other disqualifying acts whenever they occurred and their connection to the battering or extreme cruelty is consistent with Congressional intent in creating the VAWA's good moral character approach, the domestic violence victim waiver, and the range of other special inadmissibility and good moral character waivers created for VAWA self-petitioners. Thus, USICS correctly directs its adjudicators to consider convictions and other potentially disqualifying acts that occurred before or after the qualifying relationship may have been formed or dissolved and those act's connection to the full pattern of battering or extreme cruelty in the relationship.

2. Correcting Legally Inaccurate or Misleading Information in the Policy Manual and Clarifying Location of the VAWA Unit at the Vermont Service Center

a. Prima Facie Determinations and Public Benefits

Understanding how decisions made during the VAWA self-petition immigration process requires an analysis of how prima facie determinations, deferred action, and work authorization impact access to state and federally funded public benefits. What benefits a VAWA self-petitioner is eligible to receive depends on the state they reside in, when they first entered the U.S. and the state or federal public benefits program for which they are applying. Also state laws that have been enacted since 1996[26] and the e Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA)[27] have significantly

[26] For an overview of some of the larger public benefits programs and when they VAWA self-petitioners are eligible, *see* Leslye E. Orloff, State-Funded Public Benefits Comparison Chart (2021) https://niwaplibrary.wcl.american.edu/pubs/state-benefits-comparison-chart. For more detailed information by state and by public benefits program *see* NIWAP, *All State Public Benefits Charts and Interactive Public Benefits Map (2022) https://niwaplibrary.wcl.american.edu/all-state-public-benefits-charts.

[27] Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA), Public Law 111-3. Section 214 of CHIPRA permits States to cover certain children and pregnant women in both Medicaid and the Children's Health Insurance Program (CHIP) who are "lawfully residing in the United States." This lawfully residing standard has been written into some state public benefits law and Driver's License laws. On July 1, 2010 the center for Medicare and Medicaid Services at the U.S. Department of Health and Human Services defined lawfully residing in its memo: Medicaid and CHIP Coverage for "Lawfully Residing" Children and Pregnant Women. https://niwaplibrary.wcl.american.edu/pubs/pb-gov-hhslawfullyresidingmedicaid-07-01-10-also-in-qualified-immigrants. The following immigrants are lawfully present for purposes of health care for children and pregnant women:

"(1)A qualified alien as defined in section 431 of PRWORA (8 U.S.C. §1641);

(2) An alien in nonimmigrant status who has not violated the terms of the status under which he or she was admitted or to which he or she has changed after admission;

(3) An alien who has been paroled into the United States pursuant to section 212(d)(5) of the Immigration and Nationality Act (INA) (8 U.S.C. §1182(d)(5)) for less than 1 year, except for an alien paroled for prosecution, for deferred inspection or pending removal proceedings;

transformed access to public benefits for immigrant survivors. Thus, relying only on the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)[28] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996(IIRAIRA)[29] provides legally inaccurate information on benefits access for VAWA self-petitioners. NIWAP recommends rewriting the two paragraphs in Chapter 5.4 to read as follows (amendments in italics).

After receipting a self-petition, USCIS first determines whether the evidence submitted establishes prima facie ("at first look") case.[30] Self-petitioning spouses and children and any listed derivative beneficiaries may be considered "qualified aliens" eligible for certain *federal and state funded* public benefits if they can establish a prima facie case for immigrant classification or have an approved self-petition. *A*lthough USCIS issues prima facie determinations for self-petitioning parents of U.S. citizens, they are not included in the definition of "qualified aliens" in the statute[31] *which can limit their benefits eligibility. However once any self-petitioner and any listed derivative beneficiaries receive deferred action or employment authorization they are considered lawfully present for federal and state public benefits increasing their access to certain state or federal public benefits.* ~~and are, therefore, ineligible for public benefits as "qualified aliens." !~]~~

USCIS does not make a prima facie determination for self-petitions filed from outside the United States. Self-petitioners who are outside the United States are not eligible for U.S. public benefits. ~~Note that~~

(4) An alien who belongs to one of the following classes:
(i) Aliens currently in temporary resident status pursuant to section 210 or 245A of the INA (8 U.S.C. §§1160 or 1255a, respectively);
(ii) Aliens currently under Temporary Protected Status (TPS) pursuant to section 244 of the INA (8 U.S.C. §1254a), and pending applicants for TPS who have been granted employment authorization;
(iii) Aliens who have been granted employment authorization under 8 CFR 274a.12(c)(9), (10), (16), (18), (20), (22), or (24);
(iv) Family Unity beneficiaries pursuant to section 301 of Pub. L. 101-649, as amended;
(v) Aliens currently under Deferred Enforced Departure (DED) pursuant to a decision made by the President;
(vi) Aliens currently in deferred action status; or
(vii) Aliens whose visa petition has been approved and who have a pending application for adjustment of status;
(5) A pending applicant for asylum under section 208(a) of the INA (8 U.S.C. § 1158) or for withholding of removal under section 241(b)(3) of the INA (8 U.S.C. § 1231) or under the Convention Against Torture who has been granted employment authorization, and such an applicant under the age of 14 who has had an application pending for at least 180 days;
(6) An alien who has been granted withholding of removal under the Convention Against Torture;
(7) A child who has a pending application for Special Immigrant Juvenile status as described in section 101(a)(27)(J) of the INA (8 U.S.C. § 1101(a)(27)(J));
(8) An alien who is lawfully present in the Commonwealth of the Northern Mariana Islands under 48 U.S.C. § 1806(e); or
(9) An alien who is lawfully present in American Samoa under the immigration laws of American Samoa."

[28] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (1996).
[29] Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, 110 Stat. 3009 (1996).
[30] *See* 8 CFR § 204.2(e)(6).
[31] *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (1996).

b. VAWA Confidentiality Protections

Chapter 5.D of the Policy Manual Chapter on Adjudication significantly mischaracterizes the protections available to noncitizen crime victims under federal VAWA confidentiality laws (8 U.S.C. Section §1367). VAWA confidentiality provides three different forms of protection for immigrant crime victims including those eligible to file VAWA self-petitions:

- Perpetrator Provided Information Bar: VAWA confidentiality bars DHS all officers, attorneys, and employees from making an adverse determination of admissibility or deportability against a noncitizen using information furnished solely by a prohibited source associated with the battery or extreme cruelty, sexual assault, stalking, human trafficking or other U visa covered crime victimization, *regardless of whether the noncitizen has filed a VAWA self-petition, VAWA cancellation of removal, VAWA suspension of deportation, Battered Spouse Waiver or for T or U nonimmigrant status*. 8 U.S.C. §1367(a) precludes reliance upon perpetrator provided information in the following cases when:
    - A noncitizen or the noncitizen's child was subjected to battering or extreme cruelty by a person who is the noncitizen's spouse, parent, or stepparent.[32]
        - This means that VAWA confidentiality applies when there is battering or extreme cruelty and one of the following has occurred:
            - There is a marriage creating the spousal or stepparent/stepchild relationship or
            - A child is born or adopted
            - 8 U.S.C. §1367(a)(1)(A) applies to all marriages and parent child relationships even when the victim does not qualify to self-petition because the perpetrator spouse or step-parent is not a U.S. citizen or lawful permanent resident.
    - The perpetrator is a member of the spouse's or parent's family residing in the same household as the noncitizen who has battered the noncitizen or the noncitizen's child or subjected the noncitizen or the noncitizen's child to extreme cruelty when the spouse or parent consented to or acquiesced in such battery or cruelty and the noncitizen parent did not actively participate in the abuse of their child.[33]

- Enforcement Location Bar: VAWA Confidentiality bars immigration enforcement actions against crime victims at courthouses, domestic violence shelters, rape crisis centers, family justice center, and a range of agencies that provide victim services *regardless of whether the noncitizen has filed a VAWA self-petition, VAWA cancellation of removal, VAWA suspension of deportation, Battered Spouse Waiver or for T or U nonimmigrant status*. 8 U.S.C. §1229(e) and 8 U.S.C. §1367(c).

- Protected Case Confidentiality: The VAWA confidentiality statute also prohibits DHS officers, attorneys, and employees from permitting the use by or disclosure to anyone of the existence of, actions taken in, or information or documents contained in any immigration case file involving a VAWA confidentiality protected individual (with narrowly limited exceptions) including

[32] 8 U.S.C. §1367(a)(1)(A); 8 U.S.C. §1367(a)(1)(C).
[33] 8 U.S.C. §1367(a)(1)(B).

but not limited to applications and petitions for crime victim-based immigration relief. This section goes into effect when DHS knows or has reasonable suspicion that the noncitizen has been a victim of battering or extreme cruelty.

The last sentence of the last paragraph in Chapter 5.D of the Policy Manual Chapter on Adjudication and the accompanying footnote 30 is legally incorrect for the following reasons:

- 8 U.S.C. §1367(a) protects all persons battered or subjected to extreme cruelty by a spouse;
- These protections apply whether or not an abused spouse files a VAWA self-petition or any other crime victim-based immigration case (including e.g. Battered Spouse Waiver or T visa application);[34]
- I-130 applications filed by a U.S. citizen or lawful permanent resident spouse for a noncitizen always involve a spousal relationship; and
- The noncitizen spouse due to the abuse may have decided for safety reasons to go through with the I-130 application and then to file a battered spouse waiver, rather than risk the perpetrator learning or suspecting based on how the I-130 visa application proceeds that the victim may have filed a self-petition.

NIWAP recommends that the following sentence be deleted as broad, misleading and overreaching:

~~"However, if the person does not file a self-petition, USCIS concludes they do not want be treated as a VAWA self-petitioner and the protections of 8 U.S.C. 1367 will not apply to the adjudication of any forms."~~

VAWA's confidentiality protections are more nuanced and complex, should USICS decide to replace the sentence instead of deleting it, NIWAP recommends that this action is only taken after consulting with VAWA confidentiality experts at the DHS Office on Civil Rights and Civil Liberties. NIWAP would also be willing to consult with USCIS officials in the development of alternative text should it be required.

c. VAWA Unit and VAWA Confidentiality Concerns

Of significant concern is the fact that this Policy Manual in Chapter 6 Post-Adjudicative Matters appears to be reversing a decision that INS and USCIS have kept in place for decades. Since 1997 the specially trained VAWA Unit at the Vermont Service Center has been the only Unit at USCIS responsible for adjudicating VAWA self-petitions. The staff at this Unit and all of the supervisors have received a significant investment of time in their specialized training and have developed significant expertise in adjudicating of VAWA self-petitions over the years. The expertise and the success of the VAWA Unit in effectively adjudicating VAWA self-petitioning cases in a manner that fully complies

[34] When a VAWA self-petition eligible spouse has also been trafficked by her abusive U.S. citizen spouse, the noncitizen abused spouse in almost all states will receive greater access to federal and state funded public benefits if they are granted a T visa rather than attain lawful permanent residency through a VAWA self-petition.

with the requirements of VAWA confidentiality law has been recognized by Congress,[35] USIC,[36] and well documented.[37]

The INS memo creating the VAWA Unit at the Vermont Service Center clearly articulated the importance of and the reason why the specialized VAWA Unit was created. VAWA self-petitions are "sensitive cases which require special handling."[38] "Centralizing 1-360 adjudications was motivated in part by the goal of having a small corps of officers well-trained in domestic violence issues… The nature of domestic violence and the sensitivity needed in dealing with victims are topics to which few INS officers will have had exposure... The designated officers should have the experience, discretion and communications skills to be able to balance sensitivity in dealing with true victims with vigilance against fraud."[39]

In VAWA 2005's legislative history Congress discussed in detail the importance and effectiveness of the VAWA Unit:[40]

> "In 1997, the Immigration and Naturalization Service consolidated adjudication of VAWA self-petitions and VAWA-related cases in one specially trained unit that adjudicates all VAWA immigration cases nationally. The unit was created ''to ensure sensitive and expeditious processing of the petitions filed by this class of at-risk applicants . . .'', to ''[engender] uniformity in the adjudication of all applications of this type'' and to ''[enhance] the Service's ability to be more responsive to inquiries from applicants, their representatives, and benefit granting agencies.'' See 62 Fed. Reg. 16607– 16608 (1997). T visa and U visa adjudications were also consolidated in the specially trained VAWA unit. See, USCIS Interoffice Memorandum HQINV 50/1, August 30, 2001, from Michael D. Cronin to Michael A. Pearson, 67 Fed. Reg. 4784 (Jan. 31, 2002).

Consistent with these procedures, the Committee recommends that the same specially trained unit that adjudicates VAWA self-petitions, T and U visa applications, process the full range of adjudications,

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[35] H.R. REP. No. 109-233, 116 (2005), https://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptshr-3402-09-22-2005

[36] USCIS, REVOCATION OF VAWA-BASED SELF-PETITIONS (FORMS I-360); AFM UPDATE AD10-49, 1 (Dec. 15, 2010), https://niwaplibrary.wcl.american.edu/pubs/uscis-policy-memo-on-centralization-of-revocation-of-self-petitions (In 1997, to ensure appropriate and expeditious handling of all self-petitions filed by battered spouses and children, the former Immigration and Naturalization Service implemented a centralized filing procedure by which all VAWA self-petitions are adjudicated at the VSC. The VSC adjudications officers assigned to the VAWA unit have received specialized domestic violence training and have developed expertise in adjudicating these petitions, including expertise in identifying fraudulent filings.).

[37] TAHIRIH JUSTICE CENTER, HOW TRAINING AND EXPERTISE IMPROVE VAWA IMMIGRATION CASE PROCESSING: THE EFFICACY AND LEGISLATIVE HISTORY OF THE SPECIALIZED VAWA UNIT (2015) https://niwaplibrary.wcl.american.edu/pubs/trained-adjudicators-centralized-unit.

[38] PAUL VIRTUE, THEN-ACTING EXECUTIVE ASSOCIATE COMM'R OF THE INS, "SUPPLEMENTAL GUIDANCE ON BATTERED ALIEN SELF-PETITIONING PROCESS AND RELATED ISSUES," SENT TO REG'L DIRS., DIST. DIRS., OFFICERS-IN-CHARGE, AND SERV. CTR. DIRS., 2 (May 6, 1997).

[39] PAUL VIRTUE, THEN-ACTING EXECUTIVE ASSOCIATE COMM'R OF THE INS, "SUPPLEMENTAL GUIDANCE ON BATTERED ALIEN SELF-PETITIONING PROCESS AND RELATED ISSUES," SENT TO REG'L DIRS., DIST. DIRS., OFFICERS-IN-CHARGE, AND SERV. CTR. DIRS., 7 (May 6, 1997).

[40] H.R. REP. No. 109-233, 116 (2005), https://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptshr-3402-09-22-2005

adjustments, and employment authorizations related to VAWA cases (including derivative beneficiaries) filed with DHS: VAWA petitions T and U visas, VAWA Cuban, VAWA NACARA (§§ 202 or 203), and VAWA HRIFA petitions, 214(c)(15)(work authorization under section 933 of this Act), battered spouse waiver adjudications under 216(c)(4)(C) and (D), applications for parole of VAWA petitioners and their children, and applications for children of victims who have received VAWA cancellation."

Full implementation of these important Congressional Directives has never been accomplished. Battered Spouse Waiver cases still languish in District Offices handled by untrained adjudicators and have never been moved to the VAWA Unit at the Vermont Service Center as Congress directed.[41] It has been widely acknowledged by both USCIS[42] and the field[43] that there are a wide range of problems experienced by approved VAWA self-petitioners when untrained adjudicators at District Offices are responsible for adjudicating adjustment of status applications filed by VAWA self-petitioners. Additionally, District Office Trainings that the VAWA Unit conducted reveal a long list of common errors occurring at District Offices that lead to requests for revocation of approved VAWA self-petitions from District Office staff.[44] Last and most importantly, the problems that arise when adjudicators with little training and no training involving subject matter experts from outside of DHS are given the responsibility for adjudicating crime victim based immigration cases became apparent when work-sharing was implemented for processing of U visa cases at the Nebraska Service Center. Allowing U visa cases that had VAWA confidentiality protections to be adjudicated outside of the Vermont Service Center led to a myriad of problems with adjudicators who did not fully understand U visa statutes adjudicating sensitive domestic and sexual violence related cases.

NIWAP strongly recommends that the Policy Manual in Chapter 6 Post-Adjudicative Matters be revised to replace all references to "service centers" with the "VAWA I-360 Unit at the Vermont Service Center." All reference to other service centers should be totally removed.

In addition, the Policy Manual in Chapter 6 Post-Adjudicative Matters also failed to fully incorporate several useful details that were included in the 2015 Policy Memorandum on Revocation of VAWA-Based Self-Petitions (Forms I-360); AFM Update AD10-49.

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[41] KAVELL JOSEPH, AMANDA DAVIS AND LESLYE E. ORLOFF, MOVING BATTERED SPOUSE WAIVER ADJUDICATIONS TO THE VAWA UNIT: A CALL FOR CONSISTENCY AND SAFETY NATIONAL SURVEY FINDINGS HIGHLIGHTS (Feb. 6, 2017, Update Oct. 18, 2021) https://niwaplibrary.wcl.american.edu/pubs/battered-spouse-waiver-report

[42] USCIS, REVOCATION OF VAWA-BASED SELF-PETITIONS (FORMS I-360); AFM UPDATE AD10-49 1 (Dec. 15, 2010) https://niwaplibrary.wcl.american.edu/pubs/uscis-policy-memo-on-centralization-of-revocation-of-self-petitions.

[43] TAHIRIH JUSTICE CENTER, HOW TRAINING AND EXPERTISE IMPROVE VAWA IMMIGRATION CASE PROCESSING: THE EFFICACY AND LEGISLATIVE HISTORY OF THE SPECIALIZED VAWA UNIT (2015) https://niwaplibrary.wcl.american.edu/pubs/trained-adjudicators-centralized-unit.

[44] U.S. CITIZENSHIP AND IMMIGRATION SERVICES, SECTION 384 OVERVIEW AND DISTRICT RETURNS ON VAWA-BASED FILINGS, 2-37 (2014) https://niwaplibrary.wcl.american.edu/pubs/foia-bsw-district-office-training. (Examples include: relying on abuser provided information prohibited by VAWA confidentiality laws (8 U.S.C. 1337); District officers did not know VAWA self-petitioners had 2 years after divorce or the abuser's loss of status to self-petition and did not know that self-petitioning children were eligible to file after they turned 21 so long as their application was filed before the child turned age 25; District officers also lacked knowledge of VAWA self-petitioning bigamy protections; additionally District Officers failed to comply with USICS policies requiring supervisor review and signature on all revocation requests.).

CHANGES NEEDED: PURPOSES OF SELF-PETITIONING STEPCHILD/STEPPARENT RELATIONSHIPS DO NOT END WITH DIVORCE OR DEATH[45]

NIWAP was encouraged to hear that USCIS in issuing this Policy Manual Chapter 2.B.3 correctly decided to apply nationally to all self-petitioning case the ruling of the excellent well-reasoned ruling of the 7th Circuit Court of Appeals in *Arguijo v. USCIS*[46] that for self-petitioning purposes divorce did not terminate the stepparent-stepchild relationship. NIWAP and other groups working with abused children were, however, very disappointed to learn that despite the clear reasoning of the 7th Circuit opinion, USCIS failed to logically expand the ruling to ensure that death of a natural parent result in abused stepchildren a untenable and dangerous position that in order to self-petition a step child who has suffered child abuse, sexual assault, human trafficking or other abuse perpetrated by their stepparent, the stepchild must maintain a relationship with their abusive stepparent through filing of the child's self-petition or USCIS will deem then ineligible to file. The reasoning of the 7th Circuit which will be discussed in detail in this section of NIWAP's comments is legally correct and applicable to both divorce between an abused stepchild's natural parent and stepparent and to the fact that the stepchild relationship continues beyond death of the child's natural parent for the purposes of VAWA self-petitioning cases.

This section of these comments will explain why this decision by USCIS is not required, is legally incorrect, is not supported by VAWA's legislative history and goals, is unconscionable public policy, endangers abused and sexually assaulted children and undermines and delays the ability of abused noncitizen stepchildren to heal and overcome the traumatic effects of the abuse they suffered.

a. USCIS Cannot Impose by Policy an End to the Stepchild/Stepparent Relationship This Does Not Exist In Law

Under the Immigration and Nationality Act ("INA"), a "child" who can self-petition under VAWA is defined, in relevant part, to include:

> "an unmarried person under twenty-one years of age who is . . . a ***stepchild***, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred."[47]

The U.S. immigration law's applicable statute itself only qualifies the term "stepchild" by requiring that the child "had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred." 8 U.S.C. § 1101(b)(1)(B). The statute says only that stepchild status results from a marriage that happened before the child turned eighteen. The statute says nothing about how (if at all) that status ends.[48] The 7th Circuit Court of Appeals in *Arguijo* found concluded:

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[45] This section of these comments is based significantly on K&L Gates, Counsel for Amicus Curiae the National Immigrant Women's Advocacy Project, Inc., Brief of Amicus Curiae National Immigrant Women's Advocacy Project, Inc. in Support of Plaintiff-Appellant and Reversal in Arguijo v. USCIS, (July 24, 2020) https://niwaplibrary.wcl.american.edu/pubs/7th-cir-stepchild-amicus. (Attachment A).

[46] Arguijo v. USCIS, 991 F.3d 736 (7th Cir. 2021) (Attachment B).

[47] 8 U.S.C. § 1101(b)(1)(B).

[48] BRIEF OF AMICUS CURIAE NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT, INC. IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL, at 5, Arguijo v. United States Citizenship & Immigr. Servs., 991 F.3d 736, 3 (7th Cir. 2021) (No. 20-1471).

"The agency's brief pitches its argument on the word "is". That word could be conclusive if divorce or death necessarily ends a stepparent / stepchild relation, but that's the real issue. The agency assumes an affirmative answer rather than demonstrating that only an ongoing marriage permits someone to call herself a "stepchild." The district court did not make this mistake. Instead the court looked to dictionary definitions. Here is one: a stepchild is the "child of one's spouse by a previous partner." Black's Law dictionary (11th ed. 2019). No spouse, no stepchild, the district court concluded. But we read this definition (and others like it) to record how one becomes a stepchild; none of the dictionaries records common usage about how that relation ends. Cf. Medina-Morales v. Ashcroft, 371 F.3d 520, 531–32 (9th Cir. 2004) (discussing how a stepchild relation is created while leaving open the question how it ends, if it ever does). Dictionaries do not resolve this litigation."[49]

The 7th Circuit then looked at what stepchild means in other areas of the law. The one common circumstance the court noted that the obligation to provide child support generally does not extend beyond divorce and the reason stepchildren are treated differently in this context is because the support obligation under family laws runs in favor of the natural parent and a stepchild still has a natural parent or two if both child's natural parents are still alive.

In examining contexts other than child support, the 7th Circuit found that courts generally have been willing to regard the step-child relationship as independent of the marriage creating it and therefore survives termination of the marriage by either death or divorce: [50]

- Under laws governing inheritance and bequests to children, stepchildren count as children unless the will states otherwise;
- Inheritance tax cases consider stepchildren as children;[51] and
- Under the Social Security Act stepchildren do not lose "child" status when the marital relationship ends.

The Arguijo Court in the 7th Circuit determined that:

"Much the same can be said about the Violence Against Women Act. An alien child initially qualifies by becoming a stepchild of an abusive U.S. citizen, if that relation is established before the child turns 18 and the application is made before age 21. The statute does not create any "out" clauses except for the age limits—and by referring to a child who "has resided in the past" with an abusive U.S. parent the statute implies that losing a familial relation with the abuser does not cut off the option for an immigration benefit."

[49] Arguijo v. United States Citizenship & Immigr. Servs., 991 F.3d 736, 3 (7th Cir. 2021).
[50] Arguijo v. United States Citizenship & Immigr. Servs., 991 F.3d 736, 6-7 (7th Cir. 2021).
[51] For instance, *see* Depositors Tr. Co. of Augusta v. Johnson, 222 A.2d 49, 52 (Me. 1966). "The tie of affinity between step-parent and stepchild survives the death of the natural parent whose marriage had given rise to it, so that the stepchild will be taxed, in accordance with the provisions of the statute, as a stepchild within the Class A beneficiaries, and not as a stranger within the Class C beneficiaries." *See also*, Margaret M. Mahoney, Support and Custody Aspects of the Stepparent-Child Relationship, 70 Cornell L. Rev. 38 (1984).

The definition of child and stepchild under § 1101(b)(1)(B) is clear because it expressly omits any circumstances under which the stepchild relationship ends. The correctness of that definition is clearer still in the context of VAWA and its underlying purpose and history which will be discussed in the next section.

b. 7th Circuit Arguijo Court Rejected Application of "Matter of Mowrer" To VAWA Self-Petition Cases – It Endangers Children and is Contrary to VAWA's Legislative History

The identical reasoning that stepchildren are not cut off from self-petitioning by divorce must lead to the conclusion that the USCIS policy manual must be amended to state that death of the child's natural parent does not end the stepchild-stepparent relationship for VAWA self-petitioning purposes. The 7th Circuit court whole heartedly rejected USCIS' position in Arguijo that divorce ended the ability of an abused stepchild to self-petition. The 7th Circuit in Arguijo opened its consideration of USCIS' position by stating:[52]

> "Both the agency and the district judge saw that their view, coupled with a mother's death, may cut off relief to an abused youngster. Both the agency and the district judge wrote that things are not as bad as they seem, because even after divorce a person remains a stepchild as long as "a family relationship has continued to exist as a matter of fact between the stepparent and stepchild." This language comes from Matter of Mowrer, 17 I&N Dec. 613, 615 (1981). Our reaction is: Huh? If divorce ends a stepparent / stepchild relation, how can a family relationship continue "between the stepparent and stepchild"? That's possible only if divorce does not end the stepparent / stepchild relation. And if divorce does not un-make a stepchild relation that arose from a marriage, why should it matter whether a "family relationship" exists?"

The 7th Circuit continued to explain its conclusions regarding the inapplicability of Matter of Mowrer to VAWA self-petitioning cases:[53]

> "Mowrer created this standard out of whole cloth. It did not cite any provenance for this rule (other than one of the Board's earlier unreasoned decisions) and did not discuss any judicial decision that interpreted the word "stepchild." The Board of Immigration Appeals issued Mowrer long before Congress enacted the Violence Against Women Act, and neither the agency nor the district court tried to explain what sense it can make to condition immigration benefits on a stepchild's continuing familial relation with the abuser. The point of the option created by §1154(a)(1)(A)(iv) is to allow the abused child to remain in this country without subjecting herself to continued physical or sexual abuse."

> "By relying on Mowrer, however, the agency showed its unease with a rule under which divorce or death automatically ends a victim's status as a stepchild. And there is a better, more textual, reason to be skeptical of the bright line that the agency wants to draw on the date of divorce. Look back to §1154(a)(1)(A)(iv): a child "who resides, or has resided in the past, with

[52] Arguijo v. United States Citizenship & Immigr. Servs., 991 F.3d 736, 3-4 (7th Cir. 2021).
[53] Arguijo v. United States Citizenship & Immigr. Servs., 991 F.3d 736, 4-5 (7th Cir. 2021).

the citizen parent" (emphasis added) may seek immigrant status. This tells us that the child need not be living with the abusive parent at the time of the application. Maybe it also implies that divorce, which is among the principal reasons why a stepchild would stop living with an abuser, does not un-make the stepchild relation. Mowrer treated the meaning of "stepchild" as something that the Board of Immigration Appeals could define in any way it wanted. Immigration officials have considerable leeway when acting under delegated interpretive authority, see Scialabba v. Cuellar de Osorio, 573 U.S. 41 (2014) (one of many immigration cases applying Chevron deference), but the part of Mowrer that we have discussed is utterly a-textual. It also does not rest on, or implement, any policy unique to immigration law and, as we have observed, predates the Violence Against Women Act. It is not dispositive."

"The word "stepchild" does not have a single legal meaning, free of the context in which it appears. When legal language has some plasticity, the agency retains interpretive discretion—but, we repeat, *Mowrer* does not interpret the Violence Against Women Act, and the bureau that rejected Arguijo's application did not offer an independent understanding of the word. This leaves us to interpret the word on our own, and we hold that in the context of the Violence Against Women Act "stepchild" status survives divorce."[54]

In the USCIS Policy Manual VAWA Self-Petition Chapter 3 Effect of Certain Life Events, USCIS rests its requirement that stepchildren whose parents died must still be required to maintain a continuing relationship with their abusive stepparent to qualify for self-petitioning on Matter of Pagnerre (PDF), 13 I&N Dec. 688 (BIA 1971). In that case a stepchild whose biological parent died was allowed to receive approval of a family-based visa petition after the death of the child's natural parent because there was a continuing step relationship between the stepchild and the stepparent following the death of the child's biological mother. When applied to VAWA self-petitioning cases Pagnerre leads to the same dangerous and absurd results that the 7th Circuit Court of Appeals ultimately rejected in Arguijo.

In rejecting the Mowrer requirement that abused stepchildren be forced to maintain a continuing "family relationship" with their abusive stepparent in order to self-petition[55] and the USCIS position that divorce or death of the child's biological parent otherwise terminates the stepchild/stepparent relationship the court stated:[56]

"Stepchild" is hardly a new word, without legal roots. Nor is it new to common usage. Does anyone think that Cinderella stopped being the wicked stepmother's stepchild once Cinderella's natural father died, ending the marriage? She was still a stepchild even after she married Prince Charming and moved to the palace."[57]

The broad goal of the immigration protections of the Violence Against Women Act (VAWA) within U.S. immigration laws is to "remove immigration laws as a barrier that [keep] battered immigrant women and children locked in abusive relationships."[58] VAWA's legislative history recounts the plights

[54] Arguijo v. United States Citizenship & Immigr. Servs., 991 F.3d 736, 8 (7th Cir. 2021).
[55] The same would be required of abused stepchildren under the *Pargnerre* case and the position taken by USCIS in the Policy Manual.
[56] Arguijo v. United States Citizenship & Immigr. Servs., 991 F.3d 736, 5 (7th Cir. 2021).
[57] Arguijo v. United States Citizenship & Immigr. Servs., 991 F.3d 736, 4 (7th Cir. 2021).
[58] BATTERED IMMIGRANT WOMEN PROTECTION ACT OF 2000, Pub. L. No. 106-386, § 1502, 114 Stat. 1518 (2000).

of many immigrant women "caught between their desperate desire to flee their abusers and their desperate desire to remain in the United States."[59]

The overall purpose of VAWA is to offer protection for abused immigrant children and stepchildren and avert any need for the child victim to remain dependent upon or in a relationship with the abuser. The interpretation of the term "stepchild" from the broader landscape of the Immigration and Nationality Act (INA) is consistent with what Congress sought to achieve when it adopted the INA's definition of child (and stepchild) for purposes of self-petitioning under VAWA— to ensure that the victim's immigration status would not be affected by the change of status in an abusive marriage. Neither divorce nor death would cut off the ability of a stepchild, who has been battered and/or subjected to extreme cruelty by their stepparent, to file for VAWA's immigration protections.

Running a proposed legal rule or interpretation through a series of hypothetical scenarios is a valuable tool for testing the rule to assess its viability and detect errors.[60] For instance, the following hypotheticals applying USCIS's interpretation of "stepchild" reaffirms that adopting an interpretation requiring a continuing stepparent/stepchild relationship would lead to absurd results.

> Hypothetical #1: An abuser terminates a marriage by killing a stepchild's mother. Under USCIS's interpretation of "stepchild," there would need to be a continuing relationship between the stepchild and her stepfather who is her mother's murderer.
>
> Hypothetical #2: A stepchild secures a no contact civil protection order against her stepfather as a result of abuse after the death of the stepchild's biological mother. The state court order designed to protect the abused step-child would terminate contact between the stepchild and stepparents making it impossible for the stepchild to prove the ongoing family relationship that USCIS would require under the position taken in the USCIS Policy Manual's Chapter 2.B.3.

These hypotheticals expose USCIS's construction of "stepchild" for what it is: arbitrary and contrary to what Congress enacted VAWA to do. The proper, and plain and ordinary meaning of "stepchild," that NIWAP urges USCIS to revise the Policy Manual to state is as follows. Stepparent-Stepchild relationships formed by marriage between the child's biological parent and the child's stepparent do not terminate upon either divorce or death in VAWA self-petitioning cases. Stepchildren cannot be required by USICS adjudicators in VAWA self-petitioning cases to request that any evidence be submitted regarding any continuing relationship with an abusive stepparent. This approach is consistent with legislative history and helps avoid compounding the adverse effects of abuse. Limiting "stepchild" in the manner proposed by USCIS leads to the absurd result wherein abuse is allowed to continue through needless required contact, and such a result is to be avoided in construing the statute at issue.[61]

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[59] 146 CONG. REC. S10205 (daily ed. Oct. 11, 2000).

[60] CF. EUGENE VOLOKH, TEST SUITES: A TOOL FOR IMPROVING STUDENT ARTICLES, 52 J. Legal Educ. 440 (2002) ("A test suite is a set of cases that programmers enter into their [software] programs to see whether the results look right . . . The test suite is the . . . tool for proving . . . that [a] claim is sound.").

[61] *See* United States v. Ron Pair Enters., 489 U.S. 235, 242 (1989).

c. In the context of abuse, an abusive step-relationship creates enduring and psychological trauma for the victim.

As USCIS considers the request made through these comments that the USICS policy manual be revised taking the lessons learned from Arguijo, VAWA's legislative history and purpose, and the evidence-based research data that is discussed in this section to conclude and revise USCIS policies so that neither death nor divorce shall cut off abused stepchildren from VAWA self-petitioning protections. Just as the 7th Circuit explained in discussing Mowrer, Pagnerre "does not explain what sense it can make to condition immigration benefits on a stepchild's continuing familial relationship *with the abuser."*[62]

As the district court recognized, the cases from which USCIS drew its "continuing relationship" test are an "uneasy fit" in the context of an abused self-petitioner.[63] The district court states "[T]he continuing relationship requirement arose in cases that did not deal with abuse and provides an accommodation for circumstances where a strict, plain language interpretation of the statutory text leads to a harsh result."[64] The district court's statement recognizes that in the context of abuse, a "continuing relationship" could perversely "incentiviz[e] a victim to maintain a relationship with her abuser" at grave risk to the victim.[65] Making this result all the more "uneasy" is that neither the district court nor USCIS considers what science has continued to confirm: in the context of abuse, a stepparent abuser creates enduring and psychological trauma for the victim.

Children's health condition and wellbeing is affected when they experience or witness abuse as minors. These situations may affect their neurocognitive development, intellectual functioning and development, and physical actions. The physical development of the human brain is negatively affected when a child or adolescent faces maltreatment or violence, particularly when such trauma is long-term or continuing.[66] Research has indicated that suffering or witnessing abuse negatively impacts the brain's frontal lobes, which are the most important brain areas regarding executive functions. Therefore, minors who experience trauma will be intellectually behind contemporary children or adolescents without a history of trauma. As these children attain safety and grow older, they need additional time and space to heal from their impairments and developmental delays.[67]

Children and youth who are eligible for humanitarian immigration relief in the U.S. related to their experience of severe forms of crime victimization, often face additional obstacles to overcome trauma compared to adults. Since children do not have fully developed brains, they are unable to process

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[62] Arguijo v. United States Citizenship & Immigr. Servs., 991 F.3d 736, 4 (7th Cir. 2021).

[63] Arguijo v. United States Citizenship & Immigr. Servs., No. 13-CV-05751, 2020 WL 231075, at *5 (N.D. Ill. Jan. 15, 2020).

[64] *Id.*

[65] *Id*, at 7.

[66] DIANA J. ENGLISH, DAVID B. MARSHALL & ANGELA J. STEWART, EFFECTS OF FAMILY VIOLENCE ON CHILD BEHAVIOR AND HEALTH DURING EARLY CHILDHOOD, 18 J. Fam. Violence, 43 (2003); ALISSA C. HUTH-BOCKS, ALYTIA A. LEVENDOSKY & MICHAEL A. SEMEL, THE DIRECT AND INDIRECT EFFECTS OF DOMESTIC VIOLENCE ON YOUNG CHILDREN'S INTELLECTUAL FUNCTIONING, 16 J. fam. Violence, 269 (2001); JOY D. OSOFSKY, PREVALENCE OF CHILDREN'S EXPOSURE TO DOMESTIC VIOLENCE AND CHILD MALTREATMENT: IMPLICATIONS FOR PREVENTION AND INTERVENTION, 6 Clinical Child & Fam. Psychol. Rev. 161 (2003).

[67] FAIZA CHAPPELL, MEAGHAN FITZPATRICK, ALINA HUSAIN, GISELLE HASS AND LESLYE E. ORLOFF, APPENDIX E UNDERSTANDING THE SIGNIFICANCE OF A MINOR'S TRAUMA HISTORY IN FAMILY COURT RULINGS, 1-2 (2021). https://niwaplibrary.wcl.american.edu/pubs/understanding-effects-of-trauma-on-minors.

traumatic events to the same extent as adults may do. Areas of the brain that develop later include areas that are linked to higher-order, complex skills such as decision-making function and inhibition, as well as emotional regulation, future and planning skills, and impulse control.[68]

An abusive stepparent/stepchildren relationship has the same misrepresentation of authority, trust, control, and innocence as does a blood relationship. The abuse would permanently mark the victim's life, even after the marriage that afforded the abusive stepparent to commit these acts, has ended. Immigration relieves such as VAWA self-petitioning, allows stepchildren to alleviate the harmful effects of such trauma.

Divorce does not terminate the stepchildren's trauma from the abuse perpetrated by the stepparent. The trauma does not end when the stepchild manages to escape abuse and avoid contact with the abusive stepparent. Trauma can even continue despite changes due divorce, distance, or death. The INA recognizes this fact by expressly omitting any provision regarding the termination of the step-relationship once that status was created.

There are many ways in which a stepparent abuser creates enduring psychological trauma for the victim. Suffering such abuse, or even witnessing it, as a minor affects the child's health and wellbeing.[69] Even the physical development of a human brain is negatively affected. When trauma alters a child's brain, the emotional, behavioral, cognitive, social, and physical problems are enduring.[70]

Furthermore, the legislative history of VAWA reaffirms its purpose to protect and provide effective assistance to adults and children who were or continue to be victims of domestic violence, sexual assault, and child abuse. For instance, the House Judiciary Committee Report defended the right of self-petitioning for children as such:

> *Section 912. Self-Petitioning for Children*
>
> "This section ensures that immigrant children who are victims of incest and child abuse get full access to VAWA protections. Additionally, this section extends Child Status Protection Act relief to children who qualify for VAWA immigration relief."[71]

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[68] PIA PETCHEL, DIEGO A. PIZZAGALLI, EFFECTS OF EARLY LIFE STRESS ON COGNITIVE AND AFFECTIVE FUNCTION: AN INTEGRATED REVIEW OF HUMAN LITERATURE, Psychopharmachology (Berl.), (2011), *in*, FAIZA CHAPPELL, MEAGHAN FITZPATRICK, ALINA HUSAIN, GISELLE HASS AND LESLYE E. ORLOFF, APPENDIX E UNDERSTANDING THE SIGNIFICANCE OF A MINOR'S TRAUMA HISTORY IN FAMILY COURT RULINGS, 1-2 (2021). https://niwaplibrary.wcl.american.edu/pubs/understanding-effects-of-trauma-on-minors

[69] DIANA J. ENGLISH, DAVID B. MARSHALL & ANGELA J. STEWART, EFFECTS OF FAMILY VIOLENCE ON CHILD BEHAVIOR AND HEALTH DURING EARLY CHILDHOOD, 18 J. Fam. Violence 43 (2003); ALISSA C. HUTH-BOCKS, ALYTIA A. LEVENDOSKY & MICHAEL A. SEMEL, THE DIRECT AND INDIRECT EFFECTS OF DOMESTIC VIOLENCE ON YOUNG CHILDREN'S INTELLECTUAL FUNCTIONING, 16 J. Fam. Violence 269 (2001); JOY D. OSOFSKY, PREVALENCE OF CHILDREN'S EXPOSURE TO DOMESTIC VIOLENCE AND CHILD MALTREATMENT: IMPLICATIONS FOR PREVENTION AND INTERVENTION, 6 Clinical Child & Fam. Psych. Rev. 161 (2003).

[70] Decl. of David B. Thronson at 11, O.M.G. v. Wolf, D.D.C. No. 1:20-cv00786-JEB, Dkt. No. 25 (Mar. 30, 2020) (citing J. Scott, et al., A Quantitative Meta-Analysis of Neurocognitive Functioning in Posttraumatic Stress Disorder, 141 PSYCH. BULLETIN 105 (2015)).

[71] H.R. REP. NO. 109-233, 116 (2005), https://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptshr-3402-09-22-2005 .

> "Section 912(a) provides that the minor child of a U.S. citizen or permanent resident may self-petition for permanent residence if the abusive parent has died or otherwise terminated the parent- child relationship within the past 2 years (or, if later, 2 years after the date the child attains the age of 18). Also, the alien spouse of a permanent resident may self-petition for permanent residence if the abusive permanent resident spouse died within the past 2 years."[72]

d. Conclusion and Request for Revision of Policy Manual

Under the Arguijo case, USCIS will need to treat all stepchildren who are abused by their citizen or lawful permanent resident stepparents as children eligible to self-petition up until the child turns the age of 25 like all other child self-petitioners without regard to whether the marriage between the child's natural parent and their abusive stepparent continues to exist or has been terminated by death or divorce. The Congressional intent with VAWA self-petitioning is to allow immigrant victims to obtain legal relief without having to continue in an abusive relationship.

For the same reasons if the abusive stepparent dies before the abused stepchild files their self-petition, the abused stepchild will continue to be a stepchild and would continue to be able to self-petition since death does not terminate the stepparent relationship. Lastly, it is important that it remain clear that neither divorce nor death end an abused stepchild's ability to self-petition. This approach is in accord with the history and purpose of VAWA self-petitioning and the evidence-based research the enduring effect of child abuse perpetrated by a stepparent or a parent on the child's neurobiological, physical and emotional development.

Also, INA 101(b)(2) includes stepparents within the definition of "parent", "father", and "mother". Therefore, abused stepparents of U.S. citizens are eligible to apply for VAWA relief under INA 204(a)(l)(A)(vii). USCIS has determined that "the requirements for self-petitioning parents are similar to the requirements for self-petitioning children to demonstrate the required parent- child relationship."[73] Then, chapter 2(B)(4) of the Policy Manual uses the same arguments as in chapter 2(B)(3) to condition stepparents' eligibility for VAWA self-petitioning to a continuing abusive relationship. As explained above, the statute does not determine when (if at all) the stepchildren/stepparent relationship ends. Here too stepparents should be treated the same as stepchildren, allowing their eligibility to file for VAWA relief without conditioning it to a continuous abusive relationship.

We applaud the fact that USCIS is implementing the 7th Circuit's decision in the Arguijo case. Nevertheless, the requirement of an existent relationship between the victim and the abuser should not apply for VAWA purposes. Again, to support the requirement of an existent abusive relationship USCIS is using the *Matter of Pagnerre*, a decision that does not explain why immigration benefits should be conditioned to the stepparent's relationship with the abuser.

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[72] H.R. REP. NO. 109-233, 116 (2005), https://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptshr-3402-09-22-2005 .

[73] VOLUME 3: HUMANITARIAN PROTECTION AND PAROLE, PART D, VIOLENCE AGAINST WOMEN ACT [2 USCIS-PM D], 18 (Feb. 10, 2022).

Based on the Arguijo case, the history and purpose of VAWA self-petitioning and the mental health research of physical and mental abuse within a step-relationship, the following sections of the Policy Manual should be rewritten:

First, at 3 USCIS-PM D chapter 2 (B)(3) should allow VAWA self-petitioning from stepchildren even when the termination of the marriage that created the step-relationship is due death. Furthermore, it should eliminate the section that conditions the VAWA self-petitioning eligibility to an existent relationship between the stepchildren and the abusive stepparent. Thus, the *Stepchild* title of section 3 should be written as follows:

> Self-petitioning children may demonstrate a qualifying relationship if they have a step relationship with the abusive U.S. citizen or LPR parent. A step relationship is created when a child's biological or legal parent marries a person who is not the child's other biological or legal parent before the child's 18th birthday. [57] If the marriage that created the step relationship is terminated due to divorce **or death** prior to filing, the stepchild remains eligible to self-petition.[58] See Arguijo v. USCIS, 991 F.3d 736 (7th Cir. 2021), holding that divorce does not terminate a stepchild relationship for the purposes of eligibility for a VAWA self-petition.
>
> ~~If the marriage is terminated due to the death of the biological or legal parent prior to filing, the stepchild may remain eligible to self-petition if a family relationship has continued to exist as a matter of fact between the stepparent and stepchild at the time of filing.[59] See *Matter of Pagnerre* (PDF), 13 I&N Dec. 688 (BIA 1971). This case involves whether a stepdaughter qualifies as a family-based preference category relative of a U.S. citizen under INA 203(a) (3) when the marriage that created the step relationship terminated due to the death of the beneficiary's biological parent. The court found that there was a continuing step relationship in fact between the petitioner and beneficiary after the death of the beneficiary's father and approved the petition for preference classification.~~[74] (underlined text contained in footnotes)

Second, at 3 USCIS-PM D chapter 2 (B)(4) should be modified to the extent of chapter 2 (B)(3). Therefore, the *Stepparent* title on section 3 should be written as follows:

> Self-petitioning parents may demonstrate a qualifying relationship if they have a stepparent relationship with the abusive U.S. citizen son or daughter. A step relationship is created if the abused parent married the son or daughter's other biological or legal parent before the child's 18th birthday.[86] If the marriage that created the step relationship is terminated due to divorce **or death** prior to filing, the stepparent remains eligible to self-petition.[87]
>
> ~~If the marriage is terminated due to the death of the biological or legal parent prior to filing, the stepparent may remain eligible to self-petition if a family relationship has continued to exist as a matter of fact between the stepparent and stepson or stepdaughter at the time of filing.[88] See Matter of Pagnerre (PDF), 13 I&N Dec. 688 (BIA 1971). This case involves whether a stepdaughter qualifies as a family-based preference category relative of a U.S. citizen under INA~~

[74] VOLUME 3: HUMANITARIAN PROTECTION AND PAROLE, PART D, VIOLENCE AGAINST WOMEN ACT [2 USCIS-PM D], 6 (Feb. 10, 2022).

~~203(g) (a) (3) when the marriage that created the step relationship terminated due to the death of the beneficiary's biological parent.~~[75] (underlined text contained in footnotes)

GOOD MORAL CHARACTER AND THE DOMESTIC VIOLENCE VICTIM WAIVER

At 3 USCIS-PM D chapter 2 (G), the update to the policy manual states about good moral character:

NIWAP is writing this section of these comments seeking amendments to the Policy's Manual's Section on Good Moral Character. Specifically we examine the application of sections INA 204(a)(1)(C) and INA 237(a)(7) (the "Domestic Violence Victim Waiver") created by Congress in VAWA 2000 and VAWA 2005 ensure that these waivers were conditional bars that USCIS would have the discretion to waive when deciding Good Moral Character in VAWA self-petitioning adjudications including when the victim was convicted of a crime that would constitute an aggravated felony under U.S. immigration laws. The Policy Manual section on Good Moral Character 3 USCIS-PM D chapter 2 (G) treats aggravated felonies in all instances as a permanent bar to self-petitioning. This approach is legally incorrect and renders the Domestic Violence Victim waiver in INA 237(a)(7) and the special good moral character special statutory protections for self-petitioning battered immigrant spouses meaningless. Further moves into the U visa backlog otherwise eligible VAWA self-petitioners to whom Congress sought to provide the domestic violence victim waiver that could be adjudicated as part of the good moral character determination in their VAWA self-petitioning case. Adding battered spouses of U.S. citizens to the U visa backlog instead of adjudicating their VAWA self-petition aggravates the harm to these needy victims eligible for waivers by significantly delaying their access to immigration relief.

The federal law definition of "aggravated felony" in 8 USC § 1101(a)(43) includes many crimes that are misdemeanors under state criminal laws that is not at all uncommon for victims to be charged with that they plead guilty to for a range of reasons that include how the crime was related to the domestic violence they have suffered, focusing on staying out of jail so they can care for their children, and being misguided by criminal defense lawyers who do not understand the impact of the plea on the victim's immigration status. Some self-petitioners will have state misdemeanor convictions considered aggravated felonies under immigration law from pleas taken decades ago and have no other criminal record. The most common examples of self-petitioning eligible abused spouses of citizens or lawful permanent residents who will be cut off from VAWA self-petitioning protections under the Policy Manual's legally incorrect (how it is legally incorrect is discussed in detail below) interpretation include:

- A battered immigrant spouse who fled the home she shared with the abuser in the middle of the night in a show storm with her children, who stole $15 worth of baby food from a 7/11 to feed her children and who was given a one-year suspended sentence by the state court judge
    - = aggravated felony under 8 USC § 1101(a)(43)(G)-Theft
- A battered immigrant whose abusive citizen husband stole property and forced the victim to hide the stolen property with threats of harm to the abused spouse and her child receives a one-year suspended sentence from a state court judge for misdemeanor receipt of stolen property

[75] VOLUME 3: HUMANITARIAN PROTECTION AND PAROLE, PART D, VIOLENCE AGAINST WOMEN ACT [2 USCIS-PM D], 6 (Feb. 10, 2022).

- = aggravated felony under 8 USC § 1101(a)(43)(G)- Receipt of stolen property

- A battered immigrant spouse of a lawful permanent resident who called the police for help during a domestic violence incident. When the police arrived they did not obtain a qualified interpreter and instead the abuser and his sister "interpreted." The police arrested both the victim and the abuser because the abuser had scratches on his arms from when the victim was acting in self-defense. The victim was advised by counsel to plea to misdemeanor domestic violence rather than defend against the charges on the grounds of self-defense. The judge gave the victim a one-year suspended sentence and community service.
  - = aggravated felony under 8 USC § 1101(a)(43)(F)- Crime of Violence

In each of these examples the battered immigrant spouse was not the primary perpetrator of battery or extreme cruelty in the relationship. These are the most common examples of how battered immigrant spouses otherwise eligible to self-petition end up with criminal convictions connected to the domestic violence they have suffered that under the approach taken by the policy manual would be excluded from self-petitioning eligibility.

NIWAP staff was involved in drafting the protections for immigrant victims' sections of the Violence Against Women Acts ("VAWA") of 1994, 2000, 2005 and 2013 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). This includes work on VAWA 2000 and VAWA 2005 which created sections 204(a)(1)(C) and 237(a)(7). These were exactly the types of scenarios that Congress decided should have an opportunity to benefit from the domestic violence victim's waiver that special treatment offenses connected to the battering or extreme cruelty were to receive as conditional bars to good moral character for purposes of VAWA self-petition adjudications. Below we discuss the legislative history of these protection in more detail. The fundamental question that it is important to remain cognizant of is if the battered immigrant spouses described in the scenarios above are not able to access the conditional bars created by 204(a)(1)(C) and 237(a)(7), then whom were these code sections developed to protect?

We are writing to encourage USCIS to review and revise the section of the policy manual that addresses requirements for a showing of good moral character to treat aggravated felony in self-petitioning cases as a conditional bar to a good moral character finding when a self-petitioner provides under the any credible evidence rules sufficient evidence of the connection between the conviction and the battering or extreme cruelty based on the totality of the circumstances in the victim's case and the full history of battering or extreme cruelty suffered. Section 237(a)(7) further imposes a requirement that if the victim is basing her waiver request not on self-defense, but on a crime that was connected to the battery or extreme cruelty then any injury caused by the victim to the abuser must no result in "serious bodily injury." Section 237(a)(7) also notes, contrary to the policy manual, that USCIS is not limited by the criminal court record in deciding whether to grant the waiver.

The Policy Manual imposes an interpretation of that returns to the statutes enacted as part of IIRAIRA in 1996 and treats sections 237(a)(7) and 204(a)(1)(C) as if they were never included in VAWA to offer a give USCIS the discretion to decide on a case-by-case basis whether a battered woman who was convicted of domestic violence or a theft offence related to the abuse would who was otherwise eligible would be able to self-petition. The Policy Manual ignore the VAWA 2000 and VAWA 2005 amendments designed to provide relief and a remedy of VAWA self-petitioning for exactly these battered immigrants so that they may be able to demonstrate good moral character despite these convictions. While certain victims with conditional bars may be able to obtain a waiver under the

Domestic Violence Victim Waiver, we are concerned about the impact on victims described above of the text at Volume 3, Part D, Chapter 2(G)(3) in the policy manual, which states:

> INA 101(f) lists the classes of persons who are statutorily barred from being considered a person of good moral character. Self-petitioners who fall under certain categories under INA 101(f) are permanently barred from establishing good moral character.
>
> Permanent bars apply to a self-petitioner:
>
> - *Who has at any time on or after November 29, 1990 been convicted of an aggravated felony;* or
> - Who at any time has engaged in conduct described in INA 212(a)(3)(E) (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or INA 212(a)(2)(G) (relating to sever violations of religious freedom). (emphasis added).
>
> Other bars, however, are not permanent in nature and are considered "conditional bars." Conditional bars are triggered by specific acts, offenses, activities, circumstances, or convictions under INA 101(f) that occurred in the 3-year period immediately preceding the filing of the self-petition. When a conditional bar is triggered, USCIS has discretion to make a finding of good moral character despite an act or conviction falling under the conditional bar.
>
> These self-petitioners may still be considered persons of good moral character if:
>
> - The act or conviction is waivable for purposes of determining inadmissibility or deportability; and
> - The act or conviction was connected to the self-petitioner's having been battered or subjected to extreme cruelty.[76]

The application of the Domestic Violence Victim Waiver in this section of the policy manual update is incorrect because after VAWA 2000 and VAWA 2005, the waiver was made available to victims who committed an aggravated felony in connection to the victim's experience of domestic violence.[77] If the waiver is only available only to individuals facing conditional bars, it dismisses Congress's intent in creating the Domestic Violence Victim Waiver and renders the waiver largely ineffective.

The Domestic Violence Victim Waiver was enacted with the purpose of protecting victims who commit a crime in connection to the domestic violence that they face by their abusive U.S. citizen and lawful permanent residency spouses. Excluding victims who have committed aggravated felonies means that an array of victims who had limited options when faced with abuse are unable to access the Domestic Violence Victim Waiver. "Aggravated felony" as defined under the Immigration and Nationality Act includes crimes of violence for which the term of imprisonment is at least one year and theft offenses for which the term of imprisonment is at least one year.[78]

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[76] VOLUME 3: HUMANITARIAN PROTECTION AND PAROLE, PART D, VIOLENCE AGAINST WOMEN ACT [2 USCIS-PM D], Section (G)(3) [Evaluating Good Moral Character] 26 (Feb. 10, 2022).

[77] INA § 237 (a)(7)(A)(i)(III)(bb); 8 U.S.C. § 1227(a)(7)(A)(i)(III)(bb).

[78] 8 U.S.C. §§ 1101(a)(43)(F)-1101(a)(43)(G).

Many victims face they types of criminal convictions described in the examples above. VAWA 2005 included language to fully fix this problem. A provision in VAWA 2005 (the "Incorporation Provision") addressed these circumstances by clarifying that removability can be waived under section 237(a)(7) if the immigrant was acting in self-defense.[79] Though the section was specifically addressing VAWA Cancellation, it is clear from the text of the statute that Congress intended the clarification to apply to VAWA self-petitioners as well. The Incorporation Provision plainly applies to the entirety of 8 U.S.C. section 1229b(b)(2)(A)(iv), including to individuals convicted of an aggravated felony, and not just to the Inadmissibility and Deportability Provisions.

The legislative history of VAWA 2000 and the VAWA 2005 Incorporation Provision supports the assertion that Congress intended the Domestic Violence Victim Waiver to apply to victims who have been convicted of aggravated felonies. When the Violence Against Women Act was first signed in 1994, Congress amended immigration laws to provide certain noncitizen family members of abusive U.S. citizens and lawful permanent residents (LPRs) the ability to self-petition for immigrant classification without the abuser's knowledge, consent, or participation in the immigration process. Shortly thereafter, in 1996 IIRAIRA created section 237(a)(2)(E) of the Immigration & Nationality Act, which lists crimes of domestic violence as a ground for deportation.

By the time VAWA 2000 was being drafted, it had become clear that there was a need for a waiver for domestic violence victims so that those victims were not subject to the new domestic violence ground of deportation that IIRAIRA created. When Congress reauthorized VAWA in 2000, Congress addressed this problem by drafting the Domestic Violence Victim Waiver provision.[80] The Domestic Violence Victim Waiver ensures that the Attorney General[81] is "not limited by the criminal court record" in adjudicating battered immigrant victims who acted in self-defense, and is able to consider the full context of the abuse suffered in the relationship considered by the court adjudicating their eligibility for the Domestic Violence Victim Waiver.[82]

Congress intended to allow battered immigrant women the opportunity to "use any credible evidence" to support the domestic violence discretionary waivers, including the Domestic Violence Victim Waiver. The VAWA 2000 legislative history states as follows: [83]

> "[I]n an effort to strengthen the hand of victims of domestic abuse, in 1996 Congress added crimes of domestic violence and stalking to the list of crimes that render an individual deportable. This change in law has had unintended negative consequences for abuse victims because despite recommended procedures to the contrary, in domestic violence cases many officers still makes dual arrests instead of determining the primary perpetrator of abuse. A battered immigrant may well not be in sufficient control of his or her life to seek sufficient counsel before accepting a plea agreement that carries little or no jail time without understanding its immigration consequences well and may proceed to turn the abuse victim into the INS. To resolve this problem, section

[79] 8 U.S.C. § 1229b(b)(5).

[80] *See* VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000, Pub. L. No. 106-386, 114 Stat.1525 § 1505(b) (2000) [hereinafter VTVPA 2000].

[81] It is important to note that at the time this legislation was passed both the Immigration and Naturalization Service and the Immigration Courts were part of the U.S. Department of Justice. Thus, when referring to the Attorney General in the statue the intent was make the waivers and good moral character provisions applicable to VAWA self-petitions, VAWA cancellation of removal and VAWA suspension of deportation cases.

[82] *See* VTVPA 2000, § 1505(b).

[83] 146 CONG. REC. S10192 (2000).

> 1505(b) of this legislation provides the Attorney General with discretion to grant a waiver of deportability to a person with a conviction for a crime of domestic violence or stalking that did not result in serious bodily injury and that was connected to the abuse suffered by a battered immigrant who was not the primary perpetrator of abuse in a relationship. In determining whether such a waiver is warranted, the Attorney General is to consider the full history of domestic violence in the case, the effect of the domestic violence on any children, and the crimes that are being committed against the battered immigrant. Similarly, the Attorney General is to take the same types of evidence into account in determining under sections 1503(d) and 1504(a) whether a battered immigrant has proven that he or she is a person of good moral character and whether otherwise disqualifying conduct should not operate as a bar to the finding because it is connected to the domestic violence, including the need to escape an abusive relationship."

This legislative history demonstrates Congress's intent that the Domestic Violence Victim Waiver broadly apply and assure that adjudicators hearing Domestic Violence Victim Waiver requests would be required to hear evidence about the totality of the battering in the relationship in determining that the victim should be granted the Domestic Violence Victim Waiver in her VAWA self-petition case.

However, by 2005 it was apparent that battered immigrant victims were unable to gain access to waivers they needed to claim protection as VAWA cancellation of removal and also in some cases as VAWA self-petitioners. In order to enable the original intent behind the addition of the Domestic Violence Victim Waiver, Congress added the VAWA Incorporation Provision, which broadly applies the Domestic Violence Victim Waiver to the entirety of 8 U.S.C. section 1229b(a)(2)(A)(iv). Congress's intent behind the VAWA Incorporation Provision was to allow the Domestic Violence Victim Waiver to apply as broadly as possible to allow battered immigrant victims to claim the benefit of VAWA self-petition.[84] The legislative history of VAWA 2005 notes that, "Due to a drafting error, immigration judges could not utilize many of these waivers and exceptions [created by VAWA 2000]."[85] While the section refers to VAWA Cancellation of removal, it is clear that the intent was to remedy the application of the Domestic Violence Victim Waiver in all discretionary VAWA circumstances, including VAWA self-petitions.

Failing to recognize Domestic Violence Victim Waivers for battered immigrant spouses of U.S. citizens and lawful permanent residents who have been convicted of aggravated felonies would render the Domestic Violence Victim Waiver to VAWA self- petitions meaningless because it would exclude a significant number of women who committed aggravated felonies in connection to the abuse that they suffered. This includes the examples provided above. Failing to provide these abused spouses of U.S. citizens and lawful permanent residents with access to a waiver directly contradicts the purpose of the Domestic Violence Victim Waiver, which is to protect victims whose convictions are the result of the abuse that they have suffered. To exclude abused immigrant spouses with aggravated felonies from this protection is to render the Domestic Violence Victim Waiver highly ineffective.

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[84] *See* 151:162 CONG. REC. S13765 (2005) (statement of Senator Biden (DE), "Department of Justice Appropriations Authorization Act, Fiscal Years 2006-2009.") *and* 151:164 CONG. REC. E2606 (2005) (statement of Representative Conyers (MI), "Department of Justice Appropriations Authorization Act, Fiscal Years 2006-2009,")

[85] H.R. REP. No. 109-233, 125 (2005), https://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptshr-3402-09-22-2005. The section goes on to note that, "Judges are expected to continue to exercise discretion, where appropriate, in determining ultimate eligibility for the waivers and exceptions, taking into account the ameliorative intent of these laws."

Excluding battered immigrant spouses abused by their citizen or lawful permanent resident spouses who ended up with aggravated felonies that were related to the abuse they suffered precludes the opportunity to consider the full context of harm that the victim faced, the conviction's connection to the abuse, and precludes DHS adjudicators from exercising discretion to grant the battered immigrant victim a self-petition after fully considering the statutory waivers in INA Sections 237(a)(7) and 204(a)(1)(C) that were designed by Congress to be available for battered immigrant self-petitioners.

Treating aggravated felonies as a permanent bar contradicts the point of the Domestic Violence Victim Waiver, which is to protect battered immigrants who may have faced significant challenges in the criminal legal system. Battered women who are forced to resort to violence in order to protect themselves frequently face significant hurdles in criminal proceedings.[86] Further, the VAWA self-petition relief is critical for immigrant victims who are especially vulnerable to domestic violence and the criminal consequences of defending themselves. VAWA self-petition and the Domestic Violence Victim Waiver, as intended by Congress, must be applied in a way that provides maximum protection for battered immigrant women. Immigrant women face significant obstacles in escaping abusive relationships and fear of jeopardizing their immigration case or removal from the United States often traps them in abusive relationships.[87] The Domestic Violence Victim Waiver should broadly apply to adequately protect battered immigrant victims, including those who are convicted of an aggravated felony that is connected to the battering or extreme cruelty they suffered or escaping abusive homes.

Making NIWAP's requested improvement to the "Good Moral Character" section of the proposed new Policy Manual would have a meaningful impact on the lives of immigrant victims of domestic violence who will be better able to access the VAWA self-petitioning relief that Congress created for their protection. By implementing this change, the result will be that more victims of domestic violence who face limited options because of abuse will have more protections to leave abusive relationships and build a life with their children separate from their abusers. Victims will no longer be trapped in abusive relationships because of the negative immigration consequences of their criminal convictions. Further, they will not be forced into the U visa backlog.

This is the outcome Congress envisioned in when writing the VAWA 2000 and VAWA 2005 amendments. NIWAP recommends that the good moral character section of the Policy Manual on VAWA self-petitioning be amended to read as follows:

> INA 101(f) lists the classes of persons who are statutorily barred from being considered a person of good moral character. Self-petitioners who fall under certain categories under INA 101(f) are permanently barred from establishing good moral character.
>
> Permanent bars apply to a self-petitioner:
>
> - Who at any time has engaged in conduct described in INA 212(a)(3)(E) (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of

[86] *See, e.g.*, CAROL JACOBSEN ET AL., BATTERED WOMEN, HOMICIDE CONVICTIONS AND SENTENCING: THE CASE FOR CLEMENCY, 18 Hastings Women's L. J. 31, 31-32 (2007) (describing higher conviction rates and longer sentences for domestic violence victims than all homicide defendants, including those with criminal records).

[87] *See* LESLYE ORLOFF & OLIVIA GARCIA, "DYNAMICS OF DOMESTIC VIOLENCE EXPERIENCED BY IMMIGRANT VICTIMS," BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS, The Nat'l Women's Advocacy Project and Legal Momentum 3, 6 (2013).

torture or extrajudicial killings) or INA 212(a)(2)(G) (relating to sever violations of religious freedom). (emphasis added); or

- Who has at any time on or after November 29, 1990 been convicted of an aggravated felony *for which a waiver is not available under INA Section 237(a)(7).*

Other bars, however, are not permanent in nature and are considered "conditional bars." Conditional bars are triggered by specific acts, offenses, activities, circumstances, or convictions under INA 101(f) that occurred in the 3-year period immediately preceding the filing of the self-petition. When a conditional bar is triggered, USCIS has discretion to make a finding of good moral character despite an act or conviction falling under the conditional bar.

These self-petitioners may still be considered persons of good moral character if:

- The act or conviction is waivable for purposes of determining inadmissibility or deportability; and
- The act or conviction was connected to the self-petitioner's having been battered or subjected to extreme cruelty*; or*
- *The self-petitioner who was convicted of an aggravated felony qualifies for a Domestic Violence Victim waiver under INA Section 237 (a)(7). Domestic Violence Victim waivers are available with respect to crimes of domestic violence or crimes of stalking to self-petitioners who prove that they:*
    - *Were battered or subjected to extreme cruelty;*
    - *Were not the primary perpetrator of abuse in the relationship; and*
    - *Were*
        - *Acting in self-defense;*
        - *Found to have violated a protection order that was issued to protect them; or*
        - *Arrested for or plead guilty to committing a crime that*
            - *Did not result in serious bodily injury; and*
            - *There was a connection between the crime and the noncitizen having been battered or subjected to extreme cruelty.*

MISINTERPRETATION OF VAWA 2000 REMARRIAGE PROTECTIONS

I. Self-Petitioner's Remarriage

One of the more significant areas of law where the policy manual is legally incorrect appears in Volume 3, Part D, Chapter 3 of the Policy Manual addresses the "Effect of Certain Life Events" on VAWA self-petitioners. Subpart (B)(2) currently read as follows:

> Self-petitioning spouses may remarry after the self-petition is approved without impacting the approved self-petition or their eligibility for an immigrant visa or adjustment of status. However, if the self-petitioner marries again before approval of the self-petition, the officer must deny the self-petition.

Throughout this Policy Manual USICS on at least 9 different occasions recognized that

> *"The VAWA regulations at 8 CFR 204.2 were promulgated in March 1996 and have not been updated to include superseding statutory provisions. Note that some of the regulatory provisions may no longer apply."*[88]

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[88] VOLUME 3: HUMANITARIAN PROTECTION AND PAROLE, PART D, VIOLENCE AGAINST WOMEN ACT [2 USCIS-PM D], (Feb. 10, 2022):

Chapter 1.C, Footnote 11 (The VAWA regulations at 8 CFR 204.2 were promulgated in March 1996 and have not been updated to include superseding statutory provisions. Note that some of the regulatory provisions may no longer apply.);

Chapter 2.A Footnote 5 and Chapter 4.B. Footnote 12 (See INA 204(a). See 8 CFR 204.1 (a)(3). See 8 CFR 204.2(c)(1). See 8 CFR 204.2(e)(1). Although & CFR 204.2(c)(1) and 8 CFR 204.2(e)(1) require self-petitioners to demonstrate extreme hardship to themselves or their children if deported; that they reside in the United States at the time of filing; and that their shared residence with the abuser takes place in the United States, the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386 (PDF), 114 Stat. 1464 (October 28, 2000) removed these as eligibility requirements and supersedes this part of the regulation.);

Chapter 2.B.2 Footnote 26 (See INA 204 (a) (1)(A) (u)(U) (aa)(CC). See INA 204 (a) (1)(B) li)U)(aa)(CC). For more information, see Chapter 3, Effect of Certain Life Events, Section A, Divorce Prior to Filing the Self-Petition (3 USCIS-PM D.3(A)] and Section D, Death of the U.S. Citizen, Lawful Permanent Resident, or Self-Petitioner [3 USCIS-PM D.3(D)]. Although & CFR204.2(c)(1)(i)(A) requires that the self-petitioner demonstrate an existing marriage to the abuser at the time of filing, the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. 106-386 (PDF), 114 Stat. 1464 (October 28, 2000) amended this requirement to allow abused spouses to remain eligible for VAWA benefits if the marriage was terminated due to divorce or death in certain circumstances. VTVPA supersedes this part of the regulation.);

Chapter 2.B.3 Footnote 68 (See 8 CFR 204.2(e)(2)(ii)(F). Although 8 CFR 204.2(e)(2)(ii)(F) requires that self-petitioners submit evidence that they have been residing with and in the legal custody of the abusive adoptive parent for at least 2 years, the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162 (PDF), 119 Stat. 2960 (January 5, 2006) removed this as an eligibility requirement and supersedes this part of the regulation.);

Chapter 2.F Footnote 120 (Although 8 CFR 204.2(c)(1)(v) states that "[a] self-petition will not be approved if the self-petitioner is not residing in the United States," this portion of the regulation has been superseded by the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386 (PDF), 114 Stat. 1464 (October 28, 2000), which removed the requirement for the self-petitioner to reside in the United States.);

Chapter 2.I, Footnote 156 (See INA 204(a)(1)(A)(iii)(I). See INA 204(a)(1)(A)(iv). See INA 204(a)(1)(B)(ii)(I). See INA 204(a)(1)(B)(iii). See 8 CFR 204.2(c)(4). 8 CFR 204.2(e)(4) has been superseded by the Victims of Trafficking and

This provision is one of the few, if not only places in the Policy Manual where USICS has ignored the will of Congress, clearly stated in the legislative history and statutory amendments made by VAWA 2000 that USCIS in this Policy Manual for some reason decided not to implement VAWA 2000 amendments. Between the passage of original VAWA 1994 and VAWA 2000, there were two interceding events that propelled Congress to act to revise law changes that undermined VAWA. In 1996 these two events occurred. VAWA self-petitioning regulations were issued as interim final rules on March 26, 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) was enacted on September 30, 1996. Both of these events profoundly impacted VAWA self-petitioning eligibility for immigrant spouses and children who were battered or subjected to extreme cruelty by their citizen or lawful permanent resident spouses.

A number of statutory changes in VAWA 2000 were designed to overrule the 1996 VAWA self-petitioning regulation's strict requirements regarding divorce and remarriage. The goal of these VAWA 2000 amendments was to ensure that neither divorce from an abuser nor remarriage to a new spouse would impede that ability of an abused spouse who had been batterer or subjected to extreme cruelty by their U.S. citizen or lawful permanent spouse to receive VAWA self-petitioning protections. VAWA 2000's immigration protections sought to address areas of the law and the VAWA self-petitioning process over which the battered immigrant self-petitioning spouses and children had no control so as to mitigate harm. A key goal was to remove immigration law impediments that would encourage victims to stay with their abusers, foster abusive citizen or lawful permanent spouse's power and control over their victims, and interfere with victim's ability to heal, move on, and rebuild their lives. At the time there was a confluence of these goals with a strong bi-partisan[89] interest in supporting battered immigrants who had begun new relationships and wanted to remarry.

By the time VAWA 2000 was being negotiated we already had experienced many significant delays in VAWA self-petitioning adjudications. Prior to the creation of the VAWA Unit at the Vermont Service Center in 1997 self-petitions languished for years not being adjudicated by District

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Violence Protection Act of 2000, Pub. L. 106-386 (PDF), 114 Stat. 1464 (October 28, 2000), which amended the INA to allow children of child self-petitioners to be classified as derivative beneficiaries under INA 204(a)(1)(A)(iv) and INA 204(a)(1)(B)(iii).);

Chapter 3.B.2 Footnote 13, in this footnote USCIS recognizes some of the amendments that overruled the 1996 regulations but fails to fully implement all of the VAWA 2000 amendments regarding remarriage. (See INA 204(a)(1)(A)(U)(aa). See INA 204 (a)(1) (B)(U)(aa). See 8 CFR 204.2 (c). (1) (li). See Delmas v. Gonzalez, 422 F.Supp.2d 1299 (S.D. Fla. 2005) (self-petitioner's remarriage prior to filing self-petition was disqualifying). Note that & CFR 204.2 (c)(1) (li) states: "The self- petitioning spouse must be legally married to the abuser when the petition is properly filed with the Service. A spousal self-petition must be denied if the marriage to the abuser legally ended through annulment, death, or divorce before that time." This portion of the regulation has been superseded by the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386 (PDF). (October 28, 2000), which removed the requirement for the self-petitioner to remain married to the abuser at the time the self-petition is filed. The remainder of & CFR 204.2(c)(1)(L) remains valid: "After the self- petition has been properly filed, the legal termination of the marriage will have no effect on the decision made on the self-petition. The self-petitioner's remarriage, however, will be a basis for denial of a pending self-petition.");

Chapter 3.G. Footnote 49 (See INA 101(b)(1). See 8 CFR 204.2(c)(4). See 8 CFR 204.2(e)(1) (Li). 8 CFR 204.2(e) (4) has been superseded by the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386 (PDF). (October 28, 2000), which allows children of child self-petitioners to be classified as derivative beneficiaries under INA 204(a)(1)(A)(iv), and INA 204(a)(1)(B)(iii).

[89] Senators Abraham, Kennedy, Hatch and Biden led this effort and negotiated these protections.

Offices across the country. By 2000 the VAWA Unit was beginning to experience problems that have persisted over time, specially trained adjudicators were being pulled from the VAWA unit to work on other case types and there were some efforts to undermine the unit but regularly rotate specially trained staff on and off the VAWA Unit. This was leading to delays of up to a year or more in some VAWA self-petitioning cases making it harder and harder to reach the target adjudication timeframes of approval or denial within 6 months of filing the VAWA self-petition. It is against this backdrop that the VAWA 2000 amendments about divorce and remarriage were written. VAWA self-petitioners were being forced to put off remarriage until their VAWA self-petition was adjudicated. There was no way to know or predict how long after filing the adjudication would occur – 8 months?, 12 months?, 18 months?

Also, at this time social science evidence-based research was emerging about the heightened dangers for domestic violence victims following separation with their abusers. Research had begun to discredit the hypothesis in the 1996 VAWA self-petitioning regulations that remarriage end the danger to battered immigrants from their former citizen and lawful permanent resident spouses.

Research that had been conducted prior to and since 2000 consistently demonstrates that DHS's reasons for denying self-petitions when the victim has remarried reflects a faulty understanding of the dynamics of domestic violence that fails to recognize the dangers associated with separation from an abuser and forming new intimate partner relationships. In fact, women are often at the highest risk of severe abuse or death when they attempt to leave their abusers. There are also increased risks of violence when a victim separates from an abuser and moves on to another partner. Therefore, when DHS assumes that remarriage ends harm to the victim and therefore ends the need for a VAWA self-petition, it is acting contrary to and not based upon any understanding of the scientific evidence-based research on domestic violence that has been studies and emerging for decades.

Based on faulty assumptions about domestic violence the 1996 regulations presumed that remarried VAWA self-petitioners are no longer in need of protection of the law. This presumption is false. It was a myth that allowed the drafters of the 1996 VAWA regulations to justify imposing on VAWA self-petitioners what was and has remained in immigration law a darker history, a vestige of coverture that has been historically imbedded in U.S. immigration laws.

II. The Policy Manual's Decision to Impose a Remarriage Bar on Self-Petitions Continues a Legacy of Coverture in Immigration Law

The USCIS Policy Manual's imposition of the requirement that self-petitioners be mandated to not remarry until USCIS adjudicates the self-petition is the most recent illustration of legacy of coverture in U.S. immigration law. Currently VAWA self-petitioners are forced to wait for an unpredictably long period of time until USICS can work through the VAWA self-petitioning case load and reach the battered immigrant self-petitioners' case (currently there is a two year or more delay).

The notion of coverture is that a wife is subordinate to her husband and is under his control.[90] The idea of coverture was incorporated into early immigration laws and was strengthened by the 1986

[90] *See* JANET M. CALVO, SPOUSE-BASED IMMIGRATION LAWS: THE LEGACIES OF COVERTURE 28 San Diego L. Rev. 593, 595 (1991).

Immigration Marriage Fraud Amendments.[91] The common law doctrine of coverture made it so that the very being or legal existence of a woman was suspended during the marriage or incorporated into that of the husband.[92] The coverture doctrine, the idea of a husband's absolute rule over wife, became part of American law.[93]

The premises underlying the coverture doctrine were incorporated into the initial laws controlling immigration status of spouses.[94] Immigration laws incorporated and enforced the notion of spousal domination and gave the control and power to the male spouse.[95] Historically, in immigration law, both noncitizen and citizen women were disadvantaged. Before any immigration benefit could attach to an immigrant wife, her husband had to petition for her or she had to accompany him.[96] Citizen women did not have the same right as their male counterparts to petition for their male noncitizen spouses until 1952.[97] These restrictions perpetuated the assumption that a wife was under the control of her husband.[98]

The proposed regulation is a direct vestige of the coverture assumption that still permeates immigration laws. The policy that bar's a VAWA self-petitioner from remarriage presumes, as does coverture, that once remarried the VAWA self-petitioning spouse is the property of her new husband and any need for VAWA self-petitioning to protect the victim from her former abusive U.S. citizen or lawful permanent resident spouse ends. As will be discussed below, this presumption relies on the 1996 regulation overruled by Congress in 2000, is legally incorrect and imposes unnecessary dangers to the VAWA self-petitioner, any children in common with their abusive citizen or lawful permanent resident abusive husband, and to the new spouse as well.

III. The Statute Does Not Establish a Bar to Remarriage Statute Could have Said Bar Remarriage or Remain Unmarried but did not

DHS has been misinterpreting the VAWA protections that give self-petitioner's the right to remarry, thus discouraging applicants to move on from abusive relationships. The agency's interpretation is contrary to the plain language of the statute. The agency's interpretation of the VAWA statute – that a divorced self-petitioner must remain single until the self-petition is adjudicated in order to qualify for VAWA protection – is contrary to plain language of the statute.

Pursuant to INA § 204(a)(1)(A)(iii), a noncitizen may file a VAWA Petition if the following requirements are met:

(1) The noncitizen married a United States citizen in good faith;

(2) During the marriage, the noncitizen was subject to battery and extreme cruelty by the U.S. citizen spouse;

(3) The noncitizen is married to the U.S. citizen or obtained a divorce the U.S. citizen within the two years prior to filing the VAWA Petition, as long as the noncitizen demonstrates a connection between the divorce and the battery or extreme cruelty by the U.S. citizen spouse;

[91] *See id.*
[92] *See id.* at 596.
[93] *See id.* at 597.
[94] *See id.* at 600.
[95] *See id.*
[96] *See id.*
[97] *See id.*
[98] *See id.*

(4) Is a person of good moral character; and
Resided with the U.S. citizen spouse.

An agency decision must interpret the plain text of the statute.[99] When "Congress has directly spoken to the precise question at issue," courts must give "effect to the unambiguous expressed intent of Congress."[100] Unlike other parts of the Policy Manual where USCIS recognized statutes that overruled the 1996 regulations, the Policy Manual requires that self-petitioners must remain single to qualify for VAWA protection until their VAWA self-petition is finally adjudicated. Congress has directly spoken to this issue and said the contrary. A divorced self-petitioner is eligible for VAWA protection provided that the self-petitioner (1) demonstrates a connection between the divorce and the abuse, and (2) files the petition within two years of the divorce.[101] Congress placed no remarriage bar to the divorced self-petitioner's eligibility for VAWA protection. The agency may not add a remarriage bar to an unambiguous statute, especially when Congress chose to add a remarriage bar elsewhere in the statute.[102]

When Congress requires a noncitizen to remain single to be eligible for a family-based benefit, Congress explicitly sets forth the requirement in the law, such as for non-abused widows of United States citizens. The term "immediate relative" includes spouses of United States citizens and some windows of U.S. citizens.[103] In the case of a noncitizen who was the spouse of a United States citizen "and was not legally separated from the citizen at the time of the citizen's death, the [noncitizen] shall be considered … to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section 204(a)(1)(A)(ii) within 2 years after such date and only until the date the spouse remarries."[104] Congress included a remarriage bar for a self-petitioning widow of a United States citizen but did not include a remarriage bar for a VAWA self-petitioner. Had Congress intended for there to be a remarriage bar for VAWA self-petitioners, Congress would have written the remarriage bar into the statute.

Additionally, the allocation of immigrant visas in INA § 203(a) makes express distinctions between unmarried sons and daughters of U.S. citizens and married sons and daughters of U.S. citizens.[105] The statute provides for immigrant visas for unmarried sons and daughters of lawful permanent residents but not for married sons and daughters of lawful permanent residents.[106] The term "child" means "an unmarried person under twenty-one years of age" who establishes a parent-child relationship under the statute.[107] When Congress requires an applicant to be unmarried to qualify for a benefit, Congress so states in the statute. Since Congress did not require a VAWA self-petitioner to remain unmarried after divorce to qualify for VAWA protection, Congress intended to preserve eligibility for VAWA protection for remarried self-petitioners.

[99] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).
[100] *Id.*, 467 U.S. at 842-43.
[101] INA § 204 (a)(1)(A)(iii)(II)(aa) - (CC)(ccc).
[102] *See*, e.g., Hernandez v. Ashcroft, 345 F.3d 824, 841 (9th Cir. 2003).
[103] *See* INA § 201(b)(2)(A)(i).
[104] INA § 201(b)(2)(A)(i).
[105] *See* INA § 203(a)(1) and (3).
[106] *See* INA § 203(a)(2).
[107] INA § 101(b)(1).

The clear language of the VAWA shows that Congress did not intend to require that self-petitioners remain unmarried in order to qualify for VAWA protection. Thus, the agency's interpretation is contrary to the plain language of the statute.

IV. The 1997 Regulation Imposed Bars Not Established in the Statute

Following the enactment of VAWA 1994 creating VAWA self-petitions and the issuance of the VAWA self-petitioning regulations in 1997, problems arose in the field when immigrant victim's citizen spouses would rush to the court to seek a quick divorce that would cuts off victims from the ability to benefit from VAWA's self-petitioning protections. There were also many cases of divorced immigrant victims with pending VAWA self-petitions who began new relationships with men wanted to marry them and who were helping protect the victim and often her children from her prior abusive citizen or lawful permanent resident spouse. The VAWA self-petitioning laws needed to be amended to ensure that when battered immigrant former spouses of U.S. citizens and lawful permanent residents could both divorce and remarry without losing the important protections offered by VAWA self-petitioning.

While VAWA as enacted did not establish a bar to remarriage, DHS issued regulations after the original enactment of VAWA that did impose remarriage bars. Under these regulations, remarriage provided for denial of a pending VAWA self-petition and revocation of an approved VAWA self-petition. The superseded VAWA self-petitioning regulations stated as follows:

> Legal status of the marriage. The self-petitioning spouse must be legally married to the abuser when the petition is properly filed with the Service. A spousal self-petition must be denied if the marriage to the abuser legally ended through annulment, death, or divorce before that time. After the self-petition has been properly filed, the legal termination of the marriage will have no effect on the decision made on the self-petition. The self-petitioner's marriage, however, will be a basis for the denial of a pending self-petition.
>
> 8 C.F.R. § 204.2(c)(1)(ii).

The Immigration and Naturalization Service ("INS") in the preamble to the 1996 VAWA self-petitioning regulations provides an explanation for the INS decision to deny VAWA petitions if a divorced self-petitioner remarried that harks back to coverture:

> [A] pending spousal self-petition will be denied or an approved self-petition will be revoked if the self-petitioner chooses to remarry before becoming a lawful permanent resident. *By remarrying, the self-petitioner has established a new spousal relationship and has shown that he or she no longer needs the protections of section 40701 of the Crime Bill to equalize the balance of power in the relationship with the abuser*.
>
> 61 FR 13061 (Mar. 26, 1996). (emphasis added).

V. The VAWA 2000's Plain Language and Legislative History Confirm That Divorce and Remarriage Would Not Cut Off VAWA Self-Petitioners from VAWA's Protections

One of the groups Congress intended to protect with the 2000 Amendments to VAWA was divorced abused spouses of U.S. citizens of lawful permanent residents who demonstrate a connection between the abuse and the divorce and who file the Self Petition within two years of the divorce.[108] In no provision of the VAWA 2000 or any subsequent reauthorization did Congress require that a divorced self-petitioner remain unmarried in order to qualify for VAWA Self-Petitioning. Requiring a divorced, otherwise eligible self-petitioner to remain single eliminates protection for a large group of divorced remarried battered immigrants that Congress explicitly chose to protect through VAWA 2000's amendments.

Another key purposes of the VAWA 2000 Amendments was to allow self-petitioners to remarry while their petitions were pending and after their petitions were approved without the remarriage affecting the battered immigrant spouse's eligibility for VAWA self-petitioning protections. The VAWA 2000 amendments, together with their legislative history, make it clear that if a battered spouse remarries, prior to the approval of her self-petition, DHS cannot deny the petition solely due to the battered immigrant spouse's remarriage.

Where, as here, the statutory language is plain unambiguous and at odds with a regulation, the regulation is deemed arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Chen v. Board of Immigration Appeals*[109] Applying this ruling to the Policy Manual's continued imposition of a remarriage ban prior to the victim receiving a final adjudication of the VAWA self-petitioning mandates that the Policy Manual be amended to remove the remarriage bar..

No statutory provision in VAWA 1994 or VAWA 2000 required a divorced self-petitioner to remain unmarried to qualify for a VAWA self-petition. The Senate Congressional Record includes a "section by section analysis" of the VAWA and "a more detailed section by section analysis of the provisions contained in Title V[,]" the provisions for battered immigrant women.[110] Legislative history detailed below demonstrates that Congress intended for the VAWA 2000 to remove the impediment created by the VAWA 1997 regulation's to both allow for self-petitioning after divorce and ensure that remarriage will have no effect on the self-petitioner's eligibility to have their self-petition approved..

As the Senate Congressional Record explains:

> "VAWA 2000 addresses residual immigration law obstacles standing in the path of battered immigrant spouses … seeking to free themselves from abusive relationships that either had not come to the attention of the drafters of VAWA 1994 or have arisen since as a result of 1996 changes in immigration law."[111]

[108] *See* VTVPA 2000 § 1503(b) and (c).
[109] *See* Chen v. Board of Immigration Appeals, 164 F.Supp.3d 612 (S.D.N.Y. 2016).
[110] 146 CONG. REC. S10193 (daily ed. Oct. 11, 2000).
[111] 146 CONG. REC. S10195 (daily ed. Oct. 11, 2000).

VAWA 2000 included part of its legislative history in the statue itself. One of Congress's express goals articulated in Victims of Trafficking and Violence Protection Act of 2000 (VAWA 2000), Pub. L. 106-386, 114 Stat. 1464 (October 28, 2000) was to protect

> "[S]everal groups of battered immigrant women and children who do not have access to the immigration protections of the Violence Against Women Act of 1994 which means that their victims can be deported as a result of actions of their abusers and the Immigration and Naturalization Service cannot offer them protection no matter how compelling their case under existing law."
>
> VTVPA § 1502(a)(3).

VAWA 2000 sought to cut off as many of the means by which abusive citizen and lawful permanent resident spouses could continue to exert power and control over the battered immigrant spouse's life. Allowing divorce and remarriage were significant ways this goal was accomplished in VAWA 2000. Section 1507 of the Act included amendments designed to ensure that neither divorce nor remarriage would end an abused immigrant spouse's ability to win approval of a pending VAWA self-petition and would also not lead to an approved self-petition being revoked.

As to the issue of remarriage the legislative history highlights how lawmakers wanted to allow self-petitioners to remarry without threatening or impeding the battered immigrant spouse's ability to gain legal immigration status and lawful permanent residency as VAWA self-petitioners.

In the full Senate Judiciary Committee Report, former Senator Hatch –

"[c]larifie[d] that remarriage has no effect on a pending VAWA immigration petition."[112]

The Senate Judiciary Sub-Committee also made it clear that –

> "remarriage cannot serve as the basis for revocation of an approved self-petition or rescission of adjustment of status."[113]

VAWA self-petitioning VAWA 2000 amendments aimed to place abused immigrant spouses in the same position they would have been if their citizen or lawful permanent resident husband was not an abuser. It is important to remember that all VAWA self-petitioners are spouses or children of citizens and lawful permanent residents who, but for the actions of their abusive citizen or lawful permanent resident spouse, would have received lawful permanent residency during the marriage. Had their marriages ended in divorce they would have been lawful permanent residents and they would have the freedom to remarry with no immigration consequences of remarriage on their immigration status. VAWA self-petitioning was created rectify the fact that their abusive U.S. citizen and lawful permanent resident spouses refused to file a family-based visa petition on the battered immigrant spouse's behalf and to provide self-petitioners the protections and benefits that all non-abused spouses of citizens and lawful permanent residents receive.

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[112] 140 CONG. REC. S10196 (2000).
[113] 140 CONG. REC. S10192 (2000).

VI. Social Science Research

The social science research in the 1990s demonstrated that the danger to an abused spouse did not end upon separation, divorce, or remarriage. The most dangerous for battered women is when they try to separate from the batterer.[114] National Crime Survey Data show that in almost 75% of spouse-on-spouse assaults the victim was divorced or separated at the time of the assault.[115] In fact, research was demonstrating that intimate partner violence continues to escalate after separation or when women decide to leave the relationship. [116] Some women who left abusive partners were being stalked, followed, and harassed for months or even years.[117] Research published in 1988, found that women`s risk of abuse increases with separation[118] and that separation increases by 75% the risk of being killed by an abusive husband. [119] By the late 1990s, it was "well documented that the rate of violence in the relationship rises upon separation."[120]

The Justice Department has reported that 75% of all reported domestic abuse complaints involve women no longer living with their abusers.[121] Rather than easing the abuse, separation from a woman's abuser often results in more severe acts of violence.[122] One study reached a conclusion remarkably similar to that of the early Department of Justice report, finding that nearly three-quarters of women assaulted by their partners after leaving the relationship experienced severe physical abuse and approximately half of these women suffered some form of injury.[123] Other studies reaffirm that women are at greatest risk of homicide at the point of separation or after leaving a violent partner, and that violence against women who have attempted to leave a relationship can escalate over time.[124]

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[114] *See* MARTHA MAHONEY LEGAL IMAGES OF BATTERED WOMEN REDEFINING THE ISSUE OF SEPARATION 90 Mich. L. Rev. 1 (1991)

[115] KRISTINA ROSE AND JANET GOSS, DOMESTIC VIOLENCE STATISTICS, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, Bureau of Justice Statistics, 7 (1989).

[116] ANGELA BROWNE, WHEN BATTERED WOMEN KILL, New York, NY: The Free Press, 114 (1987).

[117] *Id.*

[118] STARK E., FLITCRAFT A., VIOLENCE AMONG INTIMATES, *in*, VAN HASSELT V.B., MORRISON R.L., BELLACK A.S., HERSEN M. (eds) Handbook of Family Violence, 308 (1988).

[119] BARBARA HART, NATIONAL ESTIMATES & FACTS ABOUT DOMESTIC VIOLENCE, NCADV Voice, 12 (1989).

[120] DUTTON, ORLOFF, AND HASS, "CHARACTERISTICS OF HELP-SEEKING BEHAVIORS, RESOURCES AND SERVICE NEEDS OF BATTERED IMMIGRANT LATINAS: LEGAL AND POLICY IMPLICATIONS" Georgetown Journal on Poverty Law & Policy, VII, No. 2, (2000).

[121] U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 4 (1995), http://www.bjs.gov/content/pub/pdf/FEMVIED.pdf; (reporting that the rates of domestic violence are higher for divorced or separated women than for married women); CAROLINE W. HARLOW, U.S.DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME 5 (1991), http://www.bjs.gov/content/pub/pdf/fvvc.pdf (stating that "[s]eparated or divorced women were 14 times more likely than married women to report having been a victim of violence by a spouse or exspouse"); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, REPORT TO THE NATION ON CRIME & JUSTICE 33 (2d ed. 1988), https://www.ncjrs.gov/pdffiles1/nij/105506.pdf; *see also* D. ELLIS, WOMAN ABUSE AMONG SEPARATED AND DIVORCED WOMEN: THE RELEVANCE OF SOCIAL SUPPORT, *in* Intimate Violence: Interdisciplinary Perspectives, 177, 178 (Emilio C. Viano ed. 1992) ("Findings from a variety of sources indicate that woman abuse among separated women is a more serious problem than is abuse experienced by married women who are living with their husbands.").

[122] RUTH E. FLEURY, ET AL., WHEN ENDING THE RELATIONSHIP DOESN'T END THE VIOLENCE: WOMEN'S EXPERIENCES OF VIOLENCE BY FORMER PARTNERS, 6 Violence Against Women 1363, 1364–65 (2000);

[123] *Id.* at 1371; *see also* JOHNS HOPKINS SCHOOL OF NURSING, THE DANGER ASSESSMENT (2009), https://www.dangerassessment.org/

[124] JENNIFER L. HARDESTY, SEPARATION ASSAULT IN THE CONTEXT OF POSTDIVORCE PARENTING: AN INTEGRATIVE REVIEW OF THE LITERATURE, 8 Violence Against Women 597, 601 (2002) (risk of intimate femicide increases six-fold when

Concluding, as the VAWA 1996 self-petitioning regulations did, that an abused spouse no longer needs protection of the law because when they have remarried has no basis in fact or law. Research has disproven the hypothesis that remarriage provides protection from an abuser. The United States Court of Appeals for the Ninth Circuit after reviewing this research in a VAWA suspension of deportation case concluded that, "Significantly, research … shows that women are often at the highest risk of severe abuse or death when they attempt to leave their abusers."[125]

Research conducted after VAWA 2000 became law has confirmed and expanded upon these findings. It is clear that domestic violence flows from the abuser's need to exercise control in his relationship with the victim.[126] This exercise of control necessarily prevents the victim from unilaterally ending the relationship.[127] It is therefore not surprising that violence, stalking, threats, and other kinds of coercive control that characterize abusive relationships often continue well after the partners no longer live together.[128] A substantial percentage of women who leave the home they share with their abusers are followed and either harassed or further attacked.[129]

Separation from the abuser has been shown to increase the risk for lethal violence. "[S]eparation has been identified as an important risk factor for lethal violence and injury."[130] Estrangement and separation have been shown to increase the risk of homicide:

> An association has … been found between intimate partner homicide involving husbands and wives and a history of estrangement. … From these studies and clinical experience with battered women, it has been theorized that male partners are threatened by loss of control over the relationship when women announce their decision to separate, and some men will stop at nothing to regain control, including femicide.[131]

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a woman leaves an abusive partner); JENNIFER L. HARDESTY & GRACE H. CHUNG, INTIMATE PARTNER VIOLENCE, PARENTAL DIVORCE, AND CHILD CUSTODY: DIRECTIONS FOR INTERVENTION AND FUTURE RESEARCH, 55 Family Relations 200, 201 (2006) ("[S]eparation is a time of heightened risk for abused women. Studies indicate that violence often continues after women leave and sometimes escalates.");

[125] Hernandez v. Ashcroft, 345 F.3d 824, 837 (9th Cir. 2003).

[126] MARY ANN DUTTON & LISA A. GOODMAN, COERCION IN INTIMATE PARTNER VIOLENCE: TOWARDS A NEW CONCEPTUALIZATION, 52 Sex Roles 743, 743 (2005).

[127] PETER G. JAFFEE, ET AL., COMMON MISCONCEPTIONS IN ADDRESSING DOMESTIC VIOLENCE IN CHILD CUSTODY DISPUTES, Juvenile & Family Ct. J. 57, 59–60 (2003) ("[S]eparation may be a signal to the perpetrator to escalate his behavior in an attempt to continue to control or punish his partner for leaving.").

[128] CATHY HUMPHREYS & RAVI K. THIARA, NEITHER JUSTICE NOR PROTECTION: WOMEN'S EXPERIENCES OF POST-SEPARATION VIOLENCE, 25 J. of Social Welfare & Family L. 195, 199–201 (2003); JANE K. STOEVER, ENJOINING ABUSE: THE CASE FOR INDEFINITE DOMESTIC VIOLENCE PROTECTION ORDERS, 67 Vand. L. Rev. 1015, 1025–26 (2014) (finding that an increased risk of violence continues for years after separation).

[129] TINA HOTTON, SPOUSAL VIOLENCE AFTER MARITAL SEPARATION, Statistics Canada, Catalogue no. 85-002, 1 (2001); MICHELLE L. TOEWS & AUTUMN M. BERMEA, "I WAS NAÏVE IN THINKING, 'I DIVORCED THIS MAN, HE IS OUT OF MY LIFE'": A QUALITATIVE EXPLORATION OF POST-SEPARATION POWER & CONTROL TACTICS EXPERIENCED BY WOMEN, J. of Interpersonal Violence 3 (2015); (the term "separation assault" was coined "to describe the violence men use to prevent women from leaving the relationship, to force them to return, or to retaliate after they had left.").

[130] TK LOGAN, "SEPARATION AS RISK FACTOR FOR VICTIMS OF INTIMATE PARTNER VIOLENCE: BEYOND LETHALITY AND INJURY" J. of Interpersonal Violence, Vol. 29 No. 23, 1478-1486 (2004)

[131] ROEHL, JANICE, ET AL., "INTIMATE PARTNER VIOLENCE RISK ASSESSMENT VALIDATION STUDY," 26 (Mar. 28, 2005), (complete report found at https://www.ncjrs.gov/pdffiles1/nij/grants/209731.pdf (last visited Mar. 8, 2022).

Separation from an abuser, combined with having a highly controlling abuser, increases the risk of femicide. The risk is even greater "[w]hen the worst incident of abuse was triggered by the victim's having left the abuser for another partner or by the abuser's jealousy."[132] Campbell, et al. found:

> Women who separated from their abusive partners after cohabitation experienced increased risk of femicide, particularly when the abuser was highly controlling. Other studies have revealed the same risks posed by estrangement, but ours further explicates the findings by identifying highly controlling male partners as presenting the most danger in this situation. At the incident level, we found that batterers were significantly more likely to perpetuate homicide if their partner was leaving them for a different partner.[133]

The research cited here demonstrates that an abusive relationship does not end when the victim moves out. Indeed, when a victim attempts to leave a shared residence and move on with her life, the abuse can become even more violent and disempowering as the abuser strives to maintain control of the relationship. Further, the victim's exit from the shared residence may cause the abuser to sharpen his threats and violence toward third parties -including the victim's children or family members, or even a new romantic partner – as a way to maintain control in the relationship. When battered women share a child in common with their abuser's visitation exchange and contact related to children is a point of vulnerability for on-going post-separation violence and abuse.[134]

This social science research has demonstrated that the danger to an abused spouse did not end after separation and divorce. Congress convinced by the research already available by 2000, amended VAWA self-petitioning statutes to remove the prohibition on remarriage imposed by the 1997 VAWA self-petitioning regulations. The 1997 regulations did three things:

- They kept remarried self-petitioners from having their self-petitions approved;
- They required revocation of an approved VAWA self-petition; and
- They required VAWA self-petitioners to wait until they had received their lawful permanent residency based on the VAWA self-petition to remarry.

Congress statutorily superseded the regulations to removal all three of these barriers. A key purpose in the bipartisan negotiations leading to the VAWA 2000 VAWA self-petitioning amendments was to allow the VAWA self-petitioner to re-marry without the remarriage having any effect on the victim's pending VAWA self-petition or approved self-petition. This allowed remarried battered immigrant spouses to have their self-petitions approved and to access to lawful permanent residency based on the approved VAWA self-petition. Lawmakers from both parties wanted to promote marriage by allowing self-petitioners to remarry without jeopardizing their VAWA self-petitions.

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[132] CAMPBELL, JACQUELYN, ET AL., "RISK FACTORS FOR FEMICIDE IN ABUSIVE RELATIONSHIPS: RESULTS FROM A MULTISITE CASE CONTROL STUDY" 93 No. Am. J. Of Public Health, 7 (2003)

[133] *Id*. at 41.

[134] DARRELL PAYNE & LINDA WERMELING, DOMESTIC VIOLENCE AND THE FEMALE VICTIM: THE REAL REASON WOMEN STAY!, J. Multicultural Gender & Minority Studies 4 (2009); DANIEL G. SAUNDERS, CHILD CUSTODY AND VISITATION DECISIONS *in* Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns (2007), http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=1134 ("Separation is a time of increased risk of homicide for battered women, and these homicides sometimes occur in relation to custody hearings and visitation exchanges.").

VII. Conclusion

The Congressional intent is clear in the plain language of the statute and in the legislative history. Congress intended for remarriage to have no effect on a pending VAWA petition. The Policy Manual approach that returns to and relies upon the 1997 regulations is contrary to Congress's intent. The data has proven that battered immigrant spouses need VAWA self-petitioning protections after separation and divorce. The need for the protections VAWA self-petitioning provide from the increased violence and abuse that come when victims separate and divorce and the need for protection from abuse does not end with remarriage.

Considering this research, Congressional intent, and the plain language of VAWA, DHS should amend the policy to state that remarriage has no impact on a victim's ability to file, be granted, and receive lawful permanent residency based on an approved VAWA self-petition. DHS should correctly implement the VAWA 2000 amendments allowing VAWA self-petitioners to remarry without impeding the victim's eligibility for all VAWA self-petitioning protections. Volume 3, Part D, Chapter 3 of the Policy Manual addresses the "Effect of Certain Life Events" on VAWA self-petitioners. Subpart 3.B.2 should be amended to read as follows:

> Since VAWA self-petitioning statutes authorize the filing of a self-petition within 2 years of divorce, self-petitioners remain eligible to self-petition whether or not the self-petitioner remarries. If a self-petitioner remarries after having filed a self-petition, remarriage post-filing will have no effect on the ability of USCIS to adjudicate and approve the VAWA self-petition. Self-petitioning spouses may also remarry after the self-petition is approved without impacting the approved self-petition or their eligibility for an immigrant visa or adjustment of status.

Improving Access to Naturalization for Spouses of U.S. Citizens Who Are Battered or Subjected to Extreme Cruelty

VAWA 2000 made a series of amendments that were designed to remove barriers in immigration law that contributed to trapping battered immigrant spouses in abusive marriages and that created perverse incentives to stay with their abusers. One of the provisions in immigration law that posed this barrier for abused immigrant spouses of U.S. citizens was the fact that immigrant spouses of citizens could naturalize in 3 years if they had been living in marital union with their abusive citizen spouse. During this three year wait, the immigrant must not be divorced or separated from the citizen. If separation or divorce occurs, the immigrant must wait five years before they are eligible to naturalize. Many battered immigrants either are divorced by their abusive husbands or obtain divorces or separate from their abusers. As a result, the wait for them would become five years before being eligible for naturalization.

The goal of VAWA 2000's naturalization amendments was to provide access to naturalization in 3 years for any spouses of U.S. citizens who had been battered or subjected to extreme cruelty. Many abused spouses immigrate through family-based petitions filed by the abusive spouse, and not through VAWA self-petitions. Those abused spouses who did not obtain VAWA relief can currently file for naturalization three years after receiving permanent residence status, only if they remain married and are living in a union with the abusive spouse. If they are separated or divorced from the abusive spouse, they must wait five years to apply for U.S. citizenship.

The VAWA 2000 amendments were to provide naturalization in three years for each of the following groups of battered immigrant spouses of U.S. citizens gained lawful permanent residency in any of the following ways:

- Battered immigrant spouses whose gained lawful permanent residency through their abusive U.S. citizen spouse
- VAWA self-petitioners
- VAWA cancellation of removal applicants
- VAWA suspension of deportation applicants
- Battered spouse waiver
- Any other mean of attaining lawful permanent residency who has been living in marital union with an abusive citizen spouse for three years before applying for naturalization.

All these groups were intended to be covered because they are all similarly situated. First, it made no sense to disadvantage battered spouses of citizens in terms of their access to naturalization because their abusive citizen spouse filed immigration papers on the immigrant spouse's behalf and the battered immigrant spouse obtained lawful permanent residency through the family-based visa petition I-130 or I-485 as opposed to a VAWA self-petition. Second, since the goal was to help battered immigrant spouses leave abusive relationships, Congress decided to focus on the abuse, the battering or extreme cruelty rather than the path to lawful permanent residency by allowing any abused spouse of a U.S. citizen to escape the relationship without a 5 year as opposed to 3-year naturalization penalty.

The legislative history of the VAWA 2000 Naturalization amendments confirms this Congressional approach:

Senate Legislative History Section 1503:

> "Allows a battered spouse to naturalize after three years residency as other spouses may do, but without requiring the battered spouse to live in marital union with the abusive spouse during that period." [135]

House Subcommittee on Immigration and Claims' Hearing on VAWA 2000's immigration provisions memo from Chief Counsel described the naturalization provisions as follows:

> "The bill permits divorced battered aliens to naturalize in 3 years, as if no divorce occurred, instead of 5 years."[136]

Additionally, the Section-by-Section descriptions of VAWA 2000's immigration provisions published concurrently with the Conference Report on the final VAWA 2000 bill described the naturalization protections included in the final VAWA 2000 as follows

"Sec. 1503(e). Access to Naturalization for Divorced Victims of Abuse – INA § 310(a)"

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[135] 146:126 CONG. REC. S10169, S10195 (daily ed. Oct. 11, 2000), https://niwaplibrary.wcl.american.edu/pubs/vawa-ii-leg-history-senate

[136] HEARING ON H.R. 3083, THE "BATTERED IMMIGRANT WOMEN'S PROTECTION ACT OF 1999." MEMORANDUM FROM GEORGE FISHMAN, CHIEF COUNSEL AND LORA RIES, COUNSEL, to MEMBERS, SUBCOMMITTEE ON IMMIGRATION AND CLAIMS 4 (July 19, 2000), https://niwaplibrary.wcl.american.edu/pubs/vawa-imm-house-hearing-july-2000

"Expands the provision which permits naturalization after three years of permanent residence for the spouse of a citizen to include a divorced person and a person no longer living with her spouse in marital union, who became a permanent resident by reason of his or her status as the spouse or child of a citizen, and who was subjected to battery or extreme cruelty by that citizen abuser."[137]

When INS and later USCIS implemented policies governing naturalization for battered immigrant spouses of U.S. citizens following VAWA 2000 amendments USCIS misinterpreted these protections and limited access to these protections to only three groups of the victims Congress intended to protect:[138]

- VAWA self-petitioners
- VAWA cancellation of removal applicants
- Battered spouse waiver

Section 319 of the INA does not mandate this narrow reading and such an approach is not consistent with the evidence-based research that was available at the time of the creation of the VAWA 2000 immigration protections about the danger of domestic violence rising upon separation. Research published in 1988, found that women`s risk of abuse increases with separation[139] and that separation increases by 75% the risk of being killed by an abusive husband. [140] By the late 1990s, it was "well documented that the rate of violence in the relationship rises upon separation."[141]

The Justice Department has reported that 75% of all reported domestic abuse complaints involve women no longer living with their abusers.[142] Rather than easing the abuse, separation from a woman's

[137] NOW LEGAL DEFENSE AND EDUCATION FUND, IMMIGRANT WOMEN PROGRAM, CONFERENCE REPORT ON VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000, DIVISION B VIOLENCE AGAINST WOMEN ACT OF 2000, TITLE V BATTERED IMMIGRANT WOMEN 4 (October 2000), https://niwaplibrary.wcl.american.edu/pubs/nowldef-section-by-section-summary-vawa-2000-immigration; NOW LEGAL DEFENSE AND EDUCATION FUND, FINAL IMMIGRATION PROTECTIONS INCLUDED IN THE VIOLENCE AGAINST WOMEN ACT OF 2000 (Jan. 19, 2001), https://niwaplibrary.wcl.american.edu/pubs/final-immigration-protections-vawa-2000

[138] INSTRUCTIONS REGARDING THE EXPANDED MEANING OF SECTION 319(A) MEMORANDUM FROM WILLIAM R. YATES, DEPUTY EXECUTIVE ASSOC. COMM'R, TO REG'L DIR., DISTRICT DIR., OFFICERS-IN-CHARGE SERV. CTR. DIR., (Oct. 15, 2002), https://niwaplibrary.wcl.american.edu/pubs/yates-2002-naturalization-319a (limiting VAWA 2000's naturalization protections only to VAWA self-petitioners and VAWA cancellation of removal applicants); CLARIFICATION OF CLASSES OF APPLICANTS ELIGIBLE FOR NATURALIZATION UNDER SECTION 319(A) OF THE IMMIGRATION AND NATIONALITY ACT, MEMORANDUM FROM WILLIAM R. YATES, ASSOC. DIR. OF OPERATIONS, TO REG'L DIR., DISTRICT DIR., OFFICERS-IN-CHARGE SERV. CTR. DIR., (Jan. 27, 2005), https://niwaplibrary.wcl.american.edu/pubs/clarification-eligible-applications (adding Battered Spouse Waiver applicants).

[139] STARK E., FLITCRAFT A., VIOLENCE AMONG INTIMATES. IN: VAN HASSELT V.B., MORRISON R.L., BELLACK A.S., HERSEN M. (eds) Handbook of Family Violence, 308 (1988).

[140] BARBARA HART, NATIONAL ESTIMATES & FACTS ABOUT DOMESTIC VIOLENCE, NCADV Voice, Winter 12 (1989).

[141] DUTTON, ORLOFF, AND HASS, "CHARACTERISTICS OF HELP-SEEKING BEHAVIORS, RESOURCES AND SERVICE NEEDS OF BATTERED IMMIGRANT LATINAS: LEGAL AND POLICY IMPLICATIONS" VII No. 2 Georgetown J. on Poverty Law & Policy, (2000).

[142] U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 4 (1995), http://www.bjs.gov/content/pub/pdf/FEMVIED.pdf (reporting that the rates of domestic violence are higher for divorced or separated women than for married women); CAROLINE W. HARLOW, U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME 5 (1991), http://www.bjs.gov/content/pub/pdf/fvvc.pdf (stating that "[s]eparated or divorced women were 14 times more likely than married women to report having been a victim of violence by

abuser often results in more severe acts of violence.[143] One study reached a conclusion remarkably similar to that of the early Department of Justice report, finding that nearly three-quarters of women assaulted by their partners after leaving the relationship experienced severe physical abuse and approximately half of these women suffered some form of injury.[144] Other studies reaffirm that women are at greatest risk of homicide at the point of separation or after leaving a violent partner, and that violence against women who have attempted to leave a relationship can escalate over time.[145] Research since 2000 has continued to confirm these dangers.

A correct reading of the statute that is consistent with the realities of the dangers battered immigrant spouses of U.S. citizens face would be that Section 319(a) in the first sentence identifies two groups of eligible spouses of U.S. citizens:

- Any person whose spouse is a U.S. citizen; or
- Any person who obtained stats as a lawful permanent resident by reason of his or her status as a spouse or child or a United States citizen who battered him or her or subjected him or her to extreme cruelty

Then later on in the sentence when discussing the living in marital union requirement the statute creates an exception for battered immigrants ("except in the case of a person who has been battered or subject to extreme cruelty by a United States citizen or parent)". In wording this exception Congress chose a broader description and did not limit this exception only to persons who gained status as lawful permanent residents through VAWA.

Reading the statute this way as it was intended to be read, any spouse who can prove battering or extreme cruelty is able under the statute to naturalize within 3 years. If battering or extreme cruelty is proven the lawful permanent resident abused spouse will be eligible for 3 years naturalization even if they separated from or were divorced from the abusive citizen spouse. VAWA's any credible evidence rules would apply to the adjudication of these naturalization applications and the adjudications should be conducted by the specialized VAWA Unit. The USCIS Policy Manual should be amended to confirm

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a spouse or exspouse"); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, REPORT TO THE NATION ON CRIME & JUSTICE 33 (2d ed. 1988), https://www.ncjrs.gov/pdffiles1/nij/105506.pdf; *see also* D. ELLIS, WOMAN ABUSE AMONG SEPARATED AND DIVORCED WOMEN: THE RELEVANCE OF SOCIAL SUPPORT, *in* Intimate Violence: Interdisciplinary Perspectives, 177, 178 (Emilio C. Viano ed. 1992) ("Findings from a variety of sources indicate that woman abuse among separated women is a more serious problem than is abuse experienced by married women who are living with their husbands.").

[143] RUTH E. FLEURY, ET AL., WHEN ENDING THE RELATIONSHIP DOESN'T END THE VIOLENCE: WOMEN'S EXPERIENCES OF VIOLENCE BY FORMER PARTNERS, 6 Violence Against Women 1363, 1364–65 (2000);

[144] *Id.* at 1371; *see also* JOHNS HOPKINS SCHOOL OF NURSING, THE DANGER ASSESSMENT (2009), https://www.dangerassessment.org/.

[145] JENNIFER L. HARDESTY, SEPARATION ASSAULT IN THE CONTEXT OF POSTDIVORCE PARENTING: AN INTEGRATIVE REVIEW OF THE LITERATURE, 8 Violence Against Women 597, 601 (2002) (risk of intimate femicide increases six-fold when a woman leaves an abusive partner); JENNIFER L. HARDESTY & GRACE H. CHUNG, INTIMATE PARTNER VIOLENCE, PARENTAL DIVORCE, AND CHILD CUSTODY: DIRECTIONS FOR INTERVENTION AND FUTURE RESEARCH, 55 Family Relations 200, 201 (2006) ("[S]eparation is a time of heightened risk for abused women. Studies indicate that violence often continues after women leave and sometimes escalates.").

that any spouse of a U.S. citizen who is battered or subjected to extreme cruelty. Amendments would be needed to the following sections in Part G Spouses of U.S. Citizens:

Chapter 1 – Purpose and Background 1.A
Chapter 3 – Spouses of U.S. Citizens Residing in the United States Sections 3.B, 3.F.1, and 3.F.2

Attachments

Please see attached:

1. Attachment A: Brief of Amicus Curiae National Immigrant Women's Advocacy Project, Inc. in Support of Plaintiff-Appellant and Reversal, Arguijo v. United States Citizenship & Immigr. Servs., 991 F.3d 736, 3 (7th Cir. 2021) (No. 20-1471).
2. Attachment B: Arguijo v. United States Citizenship & Immigr. Servs., 991 F.3d 736, 3-4 (7th Cir. 2021).

No. 20-1471

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JENNIFER ARGUIJO

Plaintiff-Appellant,

v

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; CHAD WOLF, Acting Secretary of the Department of Homeland Security; KENNETH CUCCINELLI, Sr. Official Performing the Duties of the Director of the United States Citizenship and Immigration Services; SUSAN DIBBINS, Acting Chief, Administrative Appeals Office; MICHAEL PAUL, Director, Vermont Service Center

Defendants-Appellees.

On Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division
No. 1:13-cv-05751
The Honorable Judge Andrea R. Wood

BRIEF OF *AMICUS CURIAE* NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT, INC. IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

George C. Summerfield
**Counsel of Record*
Daniel-Charles V. Wolf
Trevor J. Martin
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Counsel for Amicus Curiae,
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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-1471

Short Caption: Jennifer Arguijo v. USCIS, et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

National Immigrant Women's Advocacy Project, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

K&L Gates LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ George C. Summerfield Date: 07/24/2020

Attorney's Printed Name: George C. Summerfield

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ Daniel-Charles V. Wolf Date: 07/24/2020

Attorney's Printed Name: Daniel-Charles V. Wolf

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

Attorney's Signature: s/ Trevor J. Martin Date: 07/24/2020

Attorney's Printed Name: Trevor J. Martin

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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N/A

Attorney's Signature: s/ Meghan K. Tierney Date: 07/24/2020

Attorney's Printed Name: Meghan K. Tierney

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the undersigned counsel certifies that the *amicus curiae* is not a publicly held corporation, does not have a parent corporation, and that no publicly held corporation owns ten percent or more of its stock.

Dated: July 24, 2020

s/ George C. Summerfield
George C. Summerfield

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae National Immigrant Women's Advocacy Project, Inc. ("NIWAP") is a non-profit training, technical assistance, and public policy advocacy organization that develops, reforms, and promotes the implementation and use of laws and policies that improve legal rights, services, and assistance to immigrant women and children who are victims of domestic violence, sexual assault, stalking, child abuse, human trafficking, and other crimes. As a national resource center, NIWAP offers technical assistance and training at the federal, state, and local levels to assist a wide range of professionals who work with immigrant crime victims. NIWAP's Director worked closely with Congress in the drafting of the immigration protections included in the Violence Against Women Acts ("VAWA"), both the original Act and each amendment, and the Trafficking Victims Protection Acts ("TVPA"), the original Act and the 2008 amendment. NIWAP provides direct technical assistance and training for attorneys, advocates, immigration judges, Board judges and staff, state court judges, police, sheriffs, prosecutors, Department of Homeland Security adjudication and enforcement staff, and other professionals.

This case involves interpreting provisions of VAWA, the provisions of which allow children, including stepchildren, who have suffered extreme cruelty to self-petition for legal immigration status without the normally required sponsorship of a U.S. citizen or lawful permanent resident parent. Self-petitioning helps immigrant stepchildren escape an abusive stepparent's grasp. Important protections such as these are at the core of NIWAP's mission to promote access to legal mechanisms aimed at helping immigrant abuse victims. NIWAP attorneys and staff were actively involved in drafting VAWA's protections for immigrant abuse victims. As such, NIWAP has a unique interest in ensuring that VAWA is interpreted and applied correctly to immigrant survivors of domestic and child abuse. NIWAP, *as amicus curiae*, thus believes that this brief "will

assist the judges by presenting ideas, arguments, . . . [and] insights" that are not present in the parties' briefs. *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003).

NIWAP files this brief under Fed. R. App. P. 29(a). All parties to the appeal have consented to the filing. Appellant's counsel neither authored the brief in whole or in part, nor contributed financial support to the preparation or submission of this brief. No other individual(s) or organization(s) contributed financial support intended to fund the preparation or submission of this brief.

II. INTRODUCTION

A stepparent's abuse involves the same perversion of authority, trust, control, and innocence as does that of a blood relative; indelibly marking the victim's life long after the marriage affording the abusive stepparent the opportunity to commit these acts, has ended. Allowing stepchildren to self-petition for legal immigration status is intended to help alleviate these deleterious effects. The U.S. Citizenship and Immigration Service ("USCIS" or the "Agency") ignored this. It determined that Appellant, whose U.S. citizen stepfather abused her, is not entitled to self-petition for legal immigrant status under VAWA. The Agency's position underlying this determination is that stepchild status terminates along with the marriage that created it, unless the child maintains a "continuing relationship" with the abusive former stepparent. *See Arguijo v. U.S. Citizenship & Immigration Servs.*, No. 13-CV-05751, 2020 WL 231075, at *3 (N.D. Ill. Jan. 15, 2020).

But that is not what the statute says. Under the Immigration and Nationality Act ("INA"), a "child" who can self-petition under VAWA is defined, in relevant part, to include:

> an unmarried person under twenty-one years of age who is . . . a ***stepchild***, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred.

8 U.S.C. § 1101(b)(1)(B) (emphasis added). Thus, while the statute plainly specifies that a marriage between an immigrant's biological parent and a stepparent "creat[es] the status of stepchild," it plainly does ***not*** say that terminating the marriage also terminates the status.

In affirming USCIS's determination, the district court cited dictionary definitions of "stepchild" that purportedly require a valid ***current*** marriage. District Court Decision at 7 (emphasis added). The district court ignored clear Congressional intent reflected in both the statute's omission of any reference to the ***termination*** of stepchild status, and in the legislative context of the statute. Further, as explained herein, the cited dictionary definitions are entirely consistent with that intent. Thus, the statutory construction propounded by the USCIS and the district court, allowing for the termination of stepchild status, did not give effect to the unambiguously expressed intent of Congress, and was therefore erroneous.

The trauma a stepchild endures under a stepparent's abuse does not end with divorce. It does not end when a stepchild flees to escape abuse or ends all contact with her tormentor. Rather, it can continue regardless of any changes due to divorce, death, or distance. The plain text of the INA recognizes this by expressly omitting any provision that termination of a marriage ends stepchild status once that status was created. The district court was wrong to so hold.

III. ARGUMENT

A. Standard of review.

When a court reviews an agency's construction of the statute which it administers, it considers two questions: 1) whether Congress has directly spoken to the precise question at issue, which must be given effect; and 2) if not, whether the agency has adopted a permissible construction of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Here, Congress expressed its clear intent that stepchildren are entitled to self-petition for legal immigration status, and it spoke directly to whether stepchild status

terminates by making no provision for such termination, as it has done in other statutes under which an enumerated event cuts off such status. The issue on appeal, then, is whether the Agency's decision, affirmed by the District Court, gave effect to this intent. The answer, as explained herein, is no.

The District Court, for its part, reviewed the Agency's decision under an "arbitrary and capricious" standard pursuant to 5 U.S.C. § 706(2). *Arguijo v. United States Citizenship and Immigration Services*, No. 13-cv-05751, 2020 WL 231075, at *3 (N.D. Ill. Jan. 15, 2020). While subsection (A) of that statute does reference an "arbitrary and capricious" standard of review, subsection (C) separately provides for judicial review of agency decisions that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). The test set forth in *Chevron*, *supra*, provides the framework for such review when statutory construction is at issue. In other words, the District Court applied the wrong standard of review. And, as the District Court implicitly skipped over the first part of the *Chevron* inquiry entirely, proceeding directly to the reasonableness of the Agency's statutory construction, it erred in its review. *See Arangure v. Whitaker*, 911 F.3d 333, 338 (6th Cir. 2018) (citations omitted) ("*Chevron's* first step is not a free pass").

B. The district court's and USCIS's interpretation of the term "stepchild" as requiring an existing marriage ignores the plain text of 8 U.S.C. § 1101(b)(1)(B).

1. Read as a whole, 8 U.S.C. § 1154(a)(1)(A)(iv) and § 1101(b)(1)(B) unambiguously provide that stepchild status starts with, but does not end, with marriage.

The Agency's statutory construction, which denies access to self-petitioning to those that purportedly lose stepchild status, was contrary to clear Congressional intent expressed in the plain text of the governing statute. In affirming the Agency's decision, the district court relied on dictionary definitions that define a stepchild as a "child of one's" spouse. District Court Opinion

at 7. These definitions do not further specify whether or when a stepchild ceases to be such, *e.g.*, in the event of death or divorce. And the applicable statute itself only qualifies the term "stepchild" by requiring that the child "had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred." 8 U.S.C. § 1101(b)(1)(B). Put simply, the statute says only that stepchild status results from a marriage that happened before the child turned eighteen. It says nothing about how (if at all) that status ends. Holding, as the district court did, that termination of the marriage terminates this status amounts to re-writing the statute, and ignoring Congressional intent as expressed in the unambiguous statutory text.

Other aspects of the statutory scheme, when read as a whole, support that stepchild status does not terminate under VAWA. First, VAWA's provision that a stepchild "who has resided in the past" with an abusive citizen parent, 8 U.S.C. § 1154(a)(1)(A)(iv), supports that such status does not terminate. By adding "who has resided in the past," Congress sought to promote access to relief through VAWA, allowing self-petitioning for immigrant victims of abuse so they could leave abusive homes, sever dependence on the perpetrator, and rebuild their lives. 146 Cong. Rec. S10170 (daily ed. Oct. 11, 2000).[1]

Second, the definition of "child" includes a stepchild under twenty-one if "the child ***had*** not reached the age of eighteen . . . at the time the marriage creating the status of stepchild

[1] The legislative history, also an indicator of Congressional intent, specifies with regard to spouses that "***recently divorced*** battered immigrants will be able to file self-petitions. Current law allows only battered immigrant women ***currently married*** to their abusive spouses to qualify for relief. As a result, many abusers have successfully ***rushed to the court house to obtain divorces, in order to deny relief to their immigrant spouse***. This provision will prevent this unfair result and ensure that victims are not wrongly deprived of the legal protection they need." 146 Cong. Rec. S10170 (daily ed. Oct. 11, 2000) (emphasis added). The same policy consideration applies at least equally to children.

occurred" (emphasis added). 8 U.S.C. § 1101(b)(1)(B). Use of the past perfect "had" refers to an event that began and finished in the past, *see* GRAMMARLY BLOG, https://www.grammarly.com/blog/past-perfect/; whereas Congress could have used the present perfect "has," *see* GRAMMARLY BLOG, https://www.grammarly.com/blog/present-perfect-continuous-tense/, to describe an event that began in the past and continues to the present. The past-perfect tense "had not" includes a situation in which the marriage creating stepchild status has ended.

Third, the word "is" in § 1101(b)(1)(B) does not in and of itself suggest that stepchild status requires a present marriage. The present tense "is" would indicate that a continuing marriage is required only if that requirement were inherent in the word "stepchild," which it is not.

2. In other statutory contexts, Congress has been explicit with its intent that divorce terminates stepchild status, suggesting that no such termination occurs in the instant context.

In drafting 8 U.S.C. § 1101(b)(1)(B), Congress chose to omit from the definition of "stepchild" language it included in another statutory provision that expressly states that one ceases being a stepchild "after the divorce of the member from the stepchild's parent by blood." 37 U.S.C. § 401(b)(1)(A) (defining various types of dependents of service members). Congress's decision to insert this language in the service member dependency statute implicitly recognizes that stepchild status persists after termination of the marriage. Said differently, if the ordinary meaning of "stepchild" necessarily means that stepchild status ends along with the marriage that created it, there would be no need to include a further explicit statement to that effect, as Congress did in the service member dependency statute. Under the canons of statutory construction, courts construe language in a statute to avoid rendering any term superfluous. *Maslenjak v. United States*, 137 S. Ct. 1918, 1925 n.2 (2017).

In any event, the district court itself recognized that the dissolution of a marriage does not necessarily terminate stepchild status. Rather, according to the court, that status endures at least when there is a "continuing relationship" between the stepchild and stepparent. District Court Opinion at 10-11. But the notion that such a relationship is ***required*** has no basis in the statutory text. As mentioned, the unqualified reference to "stepchild" in § 1101(b)(1)(B) suggests a continuing status, in contrast to the qualified reference in the service member dependency statute or in a statutory provision requiring that a dependent stepchild "lived with the individual in a regular parent-child relationship" to establish family member status for purposes of receiving certain benefits. *See, e.g.,* 5 U.S.C. § 8701(d)(1)(B) (stating this requirement for both stepchildren and foster children). This latter statutory provision belies the notion that "stepchild" status inherently requires an ongoing relationship because it explicitly notes additional requirements limiting when stepchild status applies.

It was wrong to read such a continuing relationship requirement into § 1101(b)(1)(B). No such additional protection is needed, because the continued status of being a "stepchild" is inherent in that word, especially when viewed in the statutory framework under consideration in this Appeal. *See, e.g.*, *Palmer v. Reddy*, 622 F.2d 463, 464 (9th Cir. 1980) (the definition of "stepchild" under section 1101(b)(1)(B) is "without further qualification"); *Si Min Cen v. Attorney General*, 825 F.3d 177, 185 (3rd Cir. 2016) (no need to demonstrate a parent-child relationship with U.S. stepparents under section 1101(b)(1)(B)).

C. The definition of stepchild in 8 U.S.C. § 1101(b)(1)(B) is clear when read within the overall context of VAWA's underlying purpose and relationship to the INA.

The definition of child (and stepchild) under § 1101(b)(1)(B) is clear because it expressly omits any circumstances under which the stepchild relationship ends. The correctness of that definition is clearer still in the context of VAWA and its underlying purpose and history.

The broad goal of VAWA within the INA is to "remove immigration laws as a barrier that [keep] battered immigrant women and children locked in abusive relationships." Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1502, 114 Stat. 1518 (2000). VAWA's legislative history recounts the plights of many immigrant women "caught between their desperate desire to flee their abusers and their desperate desire to remain in the United States." 146 Cong. Rec. S10205 (daily ed. Oct. 11, 2000). Amendments to VAWA aimed to address "targeted improvements that our experience with the original Act has shown to be necessary, such as . . . strengthening and refining the protections for battered and immigrant women." 146 Cong. Rec. S10192 (daily ed. Oct. 11, 2000).

Senator Leahy discussed one such "targeted improvement" when he said that "VAWA [] will ensure that the immigration status of battered women will not be affected by ***changes in the status*** of their abusers." 146 Cong. Rec. S10185 (daily ed. Oct. 11, 2000) (emphasis added). Such improvements include the ability for an immigrant spouse to self-petition in the event that a marriage was not valid, and the provision allowing self-petitioners to remarry in order to protect themselves from ongoing domestic violence. *Id.*

Similarly, in renewing VAWA, Congress explicitly addressed the impact of divorce in other contexts, but did not do so with regard to the stepchild relationship—again suggesting that inherent to that relationship is its persisting status, unless limited by an express termination provision. The renewal of VAWA carefully provided safeguards for battered immigrant spouses to obtain legal relief and protection from their abusers in the event of a change in marital status. VAWA's 2000 amendment added a provision that allows for battered spouses to self-petition within two years of divorce if the divorce was related to domestic violence. Battered Immigrant Women Protection Act of 2000, § 1503. The legislative history of this amendment particularly

pointed out the expansion of those eligible to file self-petitions would "ensure that victims are not wrongly deprived of the legal protection they need." 146 Cong. Rec. S10170 (daily ed. Oct. 11, 2000).

This amendment to the protections of divorced immigrants under VAWA is further evidence that Congress expressly considered the impact of divorce in the context of self-petitioning. If Congress intended divorce to have an impact on the stepchild relationship, it was more than capable of so stating. Divorce thus does not impact the definition of "stepchild." Put simply, Congress had to make post-divorce rights explicit for former spouses, because inherent in the term "spouse" is a current marriage; but it did not have to do this for stepchildren, because there is no corresponding inherency for that term.

When viewed within the overall purpose of VAWA to offer protection for abused immigrant children and stepchildren, and sever any need for the child victim to remain dependent upon or in a relationship with the abuser, the plain language interpretation of the term "stepchild" from the broader landscape of the INA is consistent with what Congress sought to achieve when it adopted the INA's definition of child (and stepchild) for purposes of self-petitioning under VAWA—ensuring that a change of status in an abusive marriage will not affect immigration status.

D. Even if 8 U.S.C. § 1101(b)(1)(B) is susceptible to USCIS's urged interpretation, this Court should not adopt that reading since it leads to absurd results and overlooks the impact of the very abuse VAWA seeks to mitigate.

1. USCIS's reading of the statute is meaninglessly formal and would yield absurd results.

Running a proposed legal rule or interpretation through a series of hypothetical scenarios is a valuable tool for testing the rule to assess its viability and detect errors. *Cf.* Eugene Volokh, *Test Suites: A Tool for Improving Student Articles*, 52 J. LEGAL EDUC. 440 (2002) ("A test suite is a set of cases that programmers enter into their [software] programs to see whether the results look right . . . The test suite is the . . . tool for proving . . . that [a] claim is sound."). In this instance,

applying USCIS's interpretation of "stepchild" to at least the following hypotheticals confirms that adopting an interpretation requiring a continuing stepparent/stepchild relationship would lead to absurd results.

Hypothetical #1: An abuser terminates a marriage by killing a stepchild's mother. Under USCIS's interpretation of "stepchild," there would need to be a continuing relationship between the stepchild and her mother's murderer.

Hypothetical #2: A stepchild secures a no contact civil protection order against her stepfather as a result of abuse. That order would terminate stepchild status under the USCIS definition.

These hypotheticals expose USCIS's construction of "stepchild" for what it is: arbitrary and contrary to what Congress enacted VAWA to do.

2. The proper meaning of the statute recognizes what science confirms: In the context of abuse, a stepparent abuser creates enduring and psychological trauma for the victim.

As the district court recognized, the cases from which USCIS drew its "continuing relationship" test are an "uneasy fit" in the context of an abused self-petitioner. *Arguijo v. United States Citizenship & Immigration Servs.*, No. 13-CV-05751, 2020 WL 231075, at *5 (N.D. Ill. Jan. 15, 2020). "[T]he continuing relationship requirement arose in cases that did not deal with abuse and provides an accommodation for circumstances where a strict, plain language interpretation of the statutory text leads to a harsh result." *Id.* The district court's statement recognizes that in the context of abuse, a "continuing relationship" could perversely "incentiviz[e] a victim to maintain a relationship with her abuser" at grave risk to the victim. *Id.* at *7. Making this result all the more "uneasy" is that neither the district court nor USCIS considers what science has continued to confirm: in the context of abuse, a stepparent abuser creates enduring and psychological trauma for the victim.

There are many ways in which a stepparent abuser creates enduring psychological trauma for the victim. Suffering such abuse, or even witnessing it, as a minor affects the child's health and wellbeing. Diana J. English, David B. Marshall & Angela J. Stewart, *Effects of Family Violence on Child Behavior and Health During Early Childhood*, 18 J. FAM. VIOLENCE 43 (2003); Alissa C. Huth-Bocks, Alytia A. Levendosky & Michael A. Semel, *The Direct and Indirect Effects of Domestic Violence on Young Children's Intellectual Functioning*, 16 J. FAM. VIOLENCE 269 (2001); Joy D. Osofsky, *Prevalence of Children's Exposure to Domestic Violence and Child Maltreatment: Implications for Prevention and Intervention*, 6 CLINICAL CHILD & FAM. PSYCH. REV. 161 (2003). Even the physical development of a human brain is negatively affected.[2] When trauma alters a child's brain, the emotional, behavioral, cognitive, social, and physical problems are enduring. Decl. of David B. Thronson at 11, *O.M.G. v. Wolf*, D.D.C. No. 1:20-cv00786-JEB, Dkt. No. 25 (March 30, 2020) (citing J. Scott, et al., *A Quantitative Meta-Analysis of Neurocognitive Functioning in Posttraumatic Stress Disorder*, 141 PSYCH. BULLETIN 105 (2015)).

The proper, and plain and ordinary meaning of "stepchild," urged herein, which does not terminate upon divorce, and which does not require a continuing relationship with an abusive stepparent, assists in the avoidance of these adverse effects of abuse. Limiting "stepchild" in the manner proposed by USCIS leads to the absurd result wherein abuse is allowed to continue, and such a result is to be avoided in construing the statute at issue. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989).

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[2] Brief for Amicus Invitation No. 16-06-09 as Proposed Brief of National Immigrant Women's Advocacy Project, Lutheran Immigration and Refugee Service, Dr. Giselle Hass, Tahirih Justice Center, and National Center on Domestic Violence, Trauma & Mental Health, U.S. Dep't of Justice Exec. Office for Immigration Review Bd. of Immigration Appeals, Amicus Invitation No. 16-06-09 (2016), http://niwaplibrary.wcl.american.edu/pubs/final-amicus-brief-niwap-et-al-stamped/ (amicus brief submitted to the Department of Justice discussing effects of trauma in minors, particularly in immigrant minors).

IV. CONCLUSION

For the foregoing reasons, the Court should reverse the district court's ruling and remand for entry of judgment in the Appellant's favor granting the Appellant's VAWA self-petition.

Dated: July 24, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), I certify that the attached brief conforms to the type volume limitations of Fed. R. App. P. 32(a)(7)(B) and Cir. R. 32(c). This brief contains 3,753 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I hereby certify, in accordance with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), as amended by Cir. R. 32(b), that this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman 12-point font.

Dated: July 24, 2020

s/ George C. Summerfield
George C. Summerfield

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ George C. Summerfield
George C. Summerfield

In the

United States Court of Appeals

For the Seventh Circuit

No. 20-1471

JENNIFER ARGUIJO,

Plaintiff-Appellant,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 13-cv-05751 — **Andrea R. Wood**, *Judge*.

ARGUED DECEMBER 8, 2020 — DECIDED MARCH 12, 2021

Before EASTERBROOK, KANNE, and HAMILTON, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. The Violence Against Women Act added to the Immigration and Nationality Act a provision giving "immigrant status" (i.e., permanent residence) to an alien "child" who has suffered domestic violence at the hands of a U.S. citizen:

> An alien who is the child of a citizen of the United States, or who was a child of a United States citizen parent who within the past

> 2 years lost or renounced citizenship status related to an incident of domestic violence, and who is a person of good moral character, who is eligible to be classified as an immediate relative under section 1151(b)(2)(A)(i) of this title, and who resides, or has resided in the past, with the citizen parent may file a petition with the Attorney General under this subparagraph for classification of the alien (and any child of the alien) under such section if the alien demonstrates to the Attorney General that the alien has been battered by or has been the subject of extreme cruelty perpetrated by the alien's citizen parent. For purposes of this clause, residence includes any period of visitation.

8 U.S.C. §1154(a)(1)(A)(iv). Arguijo was born in 1987. Her mother, like her a citizen of Honduras, married a U.S. citizen in 1999 and divorced in 2004 because of his violent behavior. Arguijo had run away the year before, when she was 15, to escape the abuse. The litigation presents a single issue: whether, after the divorce, Arguijo remained a "child" of her mother's ex-husband.

The normal way in which an abused alien child receives immigrant status under the Violence Against Women Act is on petition by the non-abusive parent. Arguijo's mother could have filed such a petition within two years after her divorce from the abusive man. 8 U.S.C. §1154(a)(1)(A)(iii)(I), (a)(1)(A)(iii)(II)(aa)(CC). But that two-year window is open only to the divorced spouse and does not help Arguijo because her mother died shortly after the divorce. She therefore had to petition on her own behalf, and the agency rejected her application because a self-petition may be filed only by someone who "is the child" of an abusive U.S. citizen. The statute defines the word "child" to include a stepchild who is under 21 and was under 18 when the marriage occurred. 8 U.S.C. §1101(b)(1)(B). Arguijo meets those timing rules (she was 11 when her mother married the U.S. citizen

and filed on her own behalf before her 21st birthday), but the agency believes that a stepchild loses that status on the natural parent's divorce from the stepparent. Because, in the agency's view, Arguijo lost stepchild status in 2004, and only a person who "is" a child of an abusive parent may seek relief, the agency denied her application. On review under the Administrative Procedure Act, the district court agreed with the agency. 2020 U.S. Dist. LEXIS 6568 (N.D. Ill. Jan. 15, 2020).

The agency's brief pitches its argument on the word "is". That word could be conclusive if divorce or death necessarily ends a stepparent / stepchild relation, but that's the real issue. The agency assumes an affirmative answer rather than demonstrating that only an ongoing marriage permits someone to call herself a "stepchild." The district court did not make this mistake. Instead the court looked to dictionary definitions. Here is one: a stepchild is the "child of one's spouse by a previous partner." *Black's Law Dictionary* (11th ed. 2019). No spouse, no stepchild, the district court concluded. But we read this definition (and others like it) to record how one *becomes* a stepchild; none of the dictionaries records common usage about how that relation ends. Cf. *Medina-Morales v. Ashcroft*, 371 F.3d 520, 531–32 (9th Cir. 2004) (discussing how a stepchild relation is created while leaving open the question how it ends, if it ever does). Dictionaries do not resolve this litigation.

Both the agency and the district judge saw that their view, coupled with a mother's death, may cut off relief to an abused youngster. Both the agency and the district judge wrote that things are not as bad as they seem, because even after divorce a person remains a stepchild as long as "a family relationship has continued to exist as a matter of fact be-

tween the stepparent and stepchild." This language comes from *Matter of Mowrer*, 17 I&N Dec. 613, 615 (1981). Our reaction is: Huh? If divorce ends a stepparent / stepchild relation, how can a family relationship continue "between the stepparent and stepchild"? That's possible only if divorce does *not* end the stepparent / stepchild relation. And if divorce does not un-make a stepchild relation that arose from a marriage, why should it matter whether a "family relationship" exists?

Mowrer created this standard out of whole cloth. It did not cite any provenance for this rule (other than one of the Board's earlier unreasoned decisions) and did not discuss any judicial decision that interpreted the word "stepchild." The Board of Immigration Appeals issued *Mowrer* long before Congress enacted the Violence Against Women Act, and neither the agency nor the district court tried to explain what sense it can make to condition immigration benefits on a stepchild's continuing familial relation *with the abuser*. The point of the option created by §1154(a)(1)(A)(iv) is to allow the abused child to remain in this country without subjecting herself to continued physical or sexual abuse.

By relying on *Mowrer*, however, the agency showed its unease with a rule under which divorce or death automatically ends a victim's status as a stepchild. And there is a better, more textual, reason to be skeptical of the bright line that the agency wants to draw on the date of divorce. Look back to §1154(a)(1)(A)(iv): a child "who resides, *or has resided in the past*, with the citizen parent" (emphasis added) may seek immigrant status. This tells us that the child need not be living with the abusive parent at the time of the application. Maybe it also implies that divorce, which is among the prin-

cipal reasons why a stepchild would stop living with an abuser, does not un-make the stepchild relation.

Mowrer treated the meaning of "stepchild" as something that the Board of Immigration Appeals could define in any way it wanted. Immigration officials have considerable leeway when acting under delegated interpretive authority, see *Scialabba v. Cuellar de Osorio*, 573 U.S. 41 (2014) (one of many immigration cases applying *Chevron* deference), but the part of *Mowrer* that we have discussed is utterly a-textual. It also does not rest on, or implement, any policy unique to immigration law and, as we have observed, predates the Violence Against Women Act. It is not dispositive.

At oral argument the agency told us that a no-contact order issued by a state court might serve the same role as the "family relationship" mentioned in *Mowrer*. If both an ongoing family relationship and a legal prohibition of such a relationship add up to stepchild status, language has lost its meaning. The agency added that an immigration judge in a removal proceeding might treat Arguijo as a stepchild, despite the divorce, but that only an immigration judge can do so. At this point the agency was in full flight from both statutory text and common understanding. If an immigration judge can treat Arguijo as a stepchild, why *not* United States Citizen and Immigration Services? One statute should have the one meaning in all of immigration law.

"Stepchild" is hardly a new word, without legal roots. Nor is it new to common usage. Does anyone think that Cinderella stopped being the wicked stepmother's stepchild once Cinderella's natural father died, ending the marriage? She was still a stepchild even after she married Prince Charming and moved to the palace.

So let us ask what "stepchild" means elsewhere in law. For example, a parent must support minor children. That support obligation extends after divorce. Does it extend to stepchildren after divorce? The answer generally is no—not because the meaning of the word "stepchild" precludes it, but because the support obligation usually runs in favor of natural children, and after divorce the stepchild still has a natural parent (two, if both parents from the first marriage are still alive). How about inheritance under a will that provides bequests to children? The common answer is that stepchildren count as children after divorce, unless the will says otherwise.

These and many other examples can be found in Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 Cornell L. Rev. 38 (1984). Mahoney concludes that, "[a]s a general rule … courts and legislatures have not extended stepparent support obligations beyond marriage termination" (*id*. at 52), while "[c]ourts have generally been more willing to regard the stepparent-child relationship as independent of the marriage creating it, and thus capable of surviving marriage termination, in the context of legal issues other than support." *Id.* at 57 (citing state inheritance-tax cases). The difference, Mahoney writes, reflects different reasons why a particular person might receive or be required to pay money, not on some fixed meaning of the word "stepchild."

Consider the Social Security Act. Children are entitled to certain payments based on a parent's earnings. *Florio v. Richardson*, 469 F.2d 803 (7th Cir. 1972), rejects an argument by the Social Security Administration that a stepchild loses "child" status after his or her parent's divorce from the

wage-earner. The court observed that the statute (as in force in 1972) provided benefits to children (including stepchildren) and provided for termination on one of four particular events. That list of four did not include a divorce between the child's natural parent and a stepparent. *Florio* concluded that the word "stepchild" by itself does not do the work of establishing a benefits-termination event.

Much the same can be said about the Violence Against Women Act. An alien child initially qualifies by becoming a stepchild of an abusive U.S. citizen, if that relation is established before the child turns 18 and the application is made before age 21. The statute does not create any "out" clauses except for the age limits—and by referring to a child who "has resided in the past" with an abusive U.S. parent the statute implies that losing a familial relation with the abuser does not cut off the option for an immigration benefit.

Law often uses a word that sounds like it has a temporal extent but doesn't. For example, Title VII of the Civil Rights Act of 1964 provides rights to employees and applicants for employment. Suppose an employee is fired and sues under the statute. By the time of suit, this person is an ex-employee. But in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), the Court held that a former employee remains an "employee" under Title VII. Otherwise the function of the statute would be defeated, because if ex-employees are not treated as "employees" an employer could fire someone for an expressly forbidden reason, such as race. By similar reasoning, someone who is a stepchild during a marriage remains one after divorce, when termination of "stepchild" status would defeat application of the substantive rule that abused stepchildren are entitled to an immigration benefit.

The word "stepchild" does not have a single legal meaning, free of the context in which it appears. When legal language has some plasticity, the agency retains interpretive discretion—but, we repeat, *Mowrer* does not interpret the Violence Against Women Act, and the bureau that rejected Arguijo's application did not offer an independent understanding of the word. This leaves us to interpret the word on our own, and we hold that in the context of the Violence Against Women Act "stepchild" status survives divorce.

REVERSED AND REMANDED