October 31, 2000

Ms. Karen FitzGerald
Immigration and Naturalization Service
425 I Street, N.W.
Room 3040
Washington, DC 20536

Dear Ms. FitzGerald:

In light of the passage of the Violence Against Women Act's new immigration provisions, we are writing to you on behalf of the National Network on Behalf of Battered Immigrant Women. The Network is co-chaired by the NOW Legal Defense and Education Fund, the National Immigration Project of the National Lawyer's Guild and the Family Violence Prevention Fund. We are writing to highlight issues that we believe the Service should act swiftly to address so that the battered immigrant women and children and the immigrant crime victims who were to benefit from the protections provided in the new legislation can do so as soon as possible. Since issuance of full regulations to implement these new provisions can take quite some time, and many victims are in immediate need of access to protection, we urge the Service to swiftly provide information to the Vermont Service Center staff, INS trial attorneys, INS adjustment adjudicators and other INS officers who will need information about the new law so as to help and not harm battered immigrants and immigrant crime victims. In a separate letter we will discuss the regulations that we believe should be a priority for issuance before January, 2001.

The following memo outlines the most important issues we urge the Service to address in policy directives or by guidance to field officers as soon as possible.

Information to Provide Immediately to the Vermont Service Center

VAWA Amendments to Implement Immediately

The Violence Against Women Act of 2000 (VAWA II) made a number of straightforward eligibility criteria changes for self-petitions. These do not require regulatory interpretation, and are effective immediately (the President signed the bill on Saturday, October 28, 2000). We suggest that the VAWA staff in Vermont review these changes and apply them to all self-petitions pending as of October 28, 2000.

We suggest that Vermont view as "pending" any self-petition which the Administrative Appeals Unit (AAU) has not been denied, or for which no appeal or motion to reopen or reconsider has been taken. INS should allow applicant with cases pending before the AAU to request that their cases be transferred back to Vermont for reconsideration under the new law (perhaps providing a prima facie showing of how the new law affects the case). We urge Vermont to sua sponte apply the new rules in all other cases.

(1) "Extreme hardship" element should be eliminated from adjudications immediately.

VAWA II Sections 1503(b)(1), (2); 1503(c)(1), (2), revise the Immigration and Nationality Act's (INA) definitions of eligible self-petitioners to eliminate the former requirement that battered spouses and children demonstrate that their removal would result in extreme hardship.

(2) INS should immediately implement provisions that preserve VAWA eligibility after events such as divorce, loss of status, denaturalization or death.

VAWA II Sections 1507(a) and (b) preserve self-petitioning eligibility for certain spouses and children whose abusive spouse or parent has lost status or has died. Under VAWA II Section 1503(b)(1), individuals who were spouses of U.S. citizens within the preceding two years may self-petition if the abusive spouse, during that period: (1) died, or (2) lost or renounced citizenship for a reason relating to domestic violence. VAWA II Section 1503(c)(1) allows individuals who were spouses of lawful permanent residents during the preceding two years to self-petition if the abusive spouse lost permanent residence within the past two years due to an incident of domestic violence. Former spouses of abusive citizens or permanent residents also may self-petition if the marriage was legally terminated during the prior two years for a reason connected to the abuse. Sections 1503(b)(1) and 1503(c)(1).

Children who are or were children of a citizen or lawful permanent resident abusive parent may self-petition, even if the abusive parent lost or renounced citizenship status or lost permanent residence due to an incident of domestic violence. 1503(b) (2) and 1503(c)(2). Since spouses may be divorced within two years, it follows that step-children abused by their citizen of lawful permanent resident step-parents may self-petition within two years of their parents' divorce. This approach also reflects Board case law on the viability of step-relationships after the spousal relationship has dissolved. *See* Matter of Mowrer, 17 I&N 613, 615 (BIA 1981).

(3) INS should be prepared to immediately adjudicate VAWA applications for new categories of self-petitioners.

INS should discontinue its requirement that abusers' prior divorces be proven:

Sections 1503(b)(1) and (c)(1) of VAWA II allow persons who believed that they had married a U.S. citizen or lawful permanent resident to self-petition, provided they went through a marriage ceremony or otherwise meet the requirements for establishment of a bona fide marriage. The legislative history of the Violence Against Women Act of 2000 found in the Congressional Record for October 11, 2000 at pages S10191 through S10196 clarifies that this marriage could have been entered into either in the U.S. or abroad. (Congressional Record at S10192). The new statute focuses on the intent of the applicant when entering the marriage and exempts her from a finding that the marriage is not technically legal because the abuser has been married more than once. Proof of the abuser's prior divorces is no longer relevant, since the failure to obtain proof of the abuser's prior divorce can not render the self-petitioner ineligible.

In enacting this provision, Congress specifically stated that this was its intended result: "evidence of such a battered immigrant's legal marriage to the abuser through a marriage certificate or marriage license would ordinarily suffice as proof that the immigrant is eligible to

petition for classification as a spouse without the submission of divorce decrees from each of the abusive citizen's or lawful permanent resident's former marriages." (Congressional Record at p. S10192). Thus, evidence of a marriage certificate or license for a marriage performed in the United States or abroad should suffice. No further evidence of prior divorces is required. Self-petitioners need no longer engage in the dangerous and difficult task of exploring the abuser's past.

The INS would, however, still need to examine other evidence of bona fide marriage or intended marriage . No investigation of bigamy is required, provided that the self-petitioner could meet her burden of proving that she believed that she had entered into a marriage with her citizen or lawful permanent resident spouse.

INS should plan for receipt and adjudication of applications for self-petitioners residing abroad: VAWA II Sections 1503(b)(3) and (c)(3) expand VAWA self-petition eligibility to certain additional categories of persons. These are aliens who:

1) are living abroad;
2) are spouses, intended spouses, or children of U.S. citizens or lawful permanent residents, and
(3) (a) were abused by the spouse or parent in the United States, or
(b) were abused either inside or outside the United States, if the abusive spouse or parent is a member of the uniformed services, or an employee of the U.S. government.

In the VAWA II legislative history Congress stated that: "We would expect that INS will take advantage of the expertise the Vermont Service Center has (been) developing in deciding self-petitions and assign it responsibility for adjudicating these petitions even through they may be filed at U.S. embassies abroad." We urge INS to accept applications from qualified battered immigrants living abroad which may either be file with the Vermont Service Center directly or with a U.S. embassy abroad and forwarded to INS Vermont for adjudication. (Congressional Record at p. S10192).

(4) Adjudicators should be informed of revisions to "good moral character" provisions and immediately apply them to pending self-petitions.

Section 1503(d) of VAWA II makes an amendment to INA § 204(a)(1) regarding good moral character. It provides that INS may still find that a self-petitioner has good moral character despite an act or conviction that would be a disqualifying act under INA § 101(f), if (1) the act or conviction is waivable for purposes of determining inadmissibility or deportability, and (2) the act or conviction was connected to the domestic violence suffered by the self-petitioner. The legislative history of these provisions emphasizes that the INS must consider evidence of the connection between the history of abuse and the otherwise potentially disqualifying conduct. In doing this, the Service should "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." Congress urges the Attorney General to take this evidence into account when making good moral character determinations including "whether otherwise disqualifying conduct should not operate as a bar to that finding because it is connected to the domestic

violence, including the need to escape an abusive relationship." (Congressional Record p. S10192).

Section 1505 of VAWA II creates several new waivers of inadmissibility and deportability for battered immigrants. INS adjudicators should be made aware of each of these waivers so that they can immediately begin making good moral character determinations in pending VAWA self-petitioning cases that reflect these changes in the law. We include here a list of the new waivers and discuss them in our separate letter on regulations.

-- 1505(a) creates a waiver of the 212(a)(9)(C)(i) inadmissibility bar for persons unlawfully present after prior immigration violation where there was a connection between the battering or extreme cruelty and the alien's removal, departure from the U.S., or reentry, reentries or attempted reentry into the United States.

-- 1505(b) creates a domestic violence victim waiver for the 237(a)(2)(E) domestic violence removal ground when the abuse victim acted in self-defense, was found to have violated her own protection order, or where the crime was connected to her having been battered or subjected to extreme cruelty and resulted in no serous bodily injury. The waiver is only available in cases where the self-petitioner can prove that she is not the primary perpetrator of abuse in the relationship. *See* legislative history discussion, Congressional Record p. S10192.

-- Section 1505(c) extends 237(a)(1)(H) misrepresentation waivers to self-petitioners and allows approved self-petitioners to obtain waivers under 212(i) if they show extreme hardship to themselves or their US citizen or lawful permanent resident parents or children. This analysis must include the VAWA extreme hardship factors as stated at 8 CFR § 240.58(c).

-- Section 1505(d) extends the 212(g) health related grounds waiver to self-petitioners.

-- Section 1505(e) extends the 212(h) waiver for crimes of moral turpitude, multiple criminal convictions, prostitution, persons with immunity, and simple possession of marijuana to battered immigrant self-petitioners.

-- Section 1505(f) directs the Service and consular officials to disregard under 212(a)(4) the use of public benefits, including cash benefits, that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 granted battered immigrants.

(5) <u>"Age-out" provisions for child self-petitioners and derivative children should be implemented immediately</u>.

Section 1503(d) of VAWA provides that children who have filed self-petitions on their own behalf, or children who are included as derivative beneficiaries in self-petitions filed by their parents before the child turned 21, do not "age-out" of VAWA eligibility. Instead, their self-petitions automatically convert to the "adult sons or daughters" self-petitioners, similar to how the Service currently treats cases of self-petitioning children who turn 21 before receiving lawful permanent residency. Children in this situation do not need to file a new petition, and

their original petition retains its priority date when moved to a new preference category. Information about this provision must be immediately distributed both to adjudicators in Vermont and to adjustment adjudicators in all of the district offices.

(6) Automatic upgrade to immediate relative status should be implemented.

Section 1503(a)(2) of VAWA II provides that the self-petition of a spouse or child of a lawful permanent resident is deemed reclassified as an immediate relative petition if, after filing, the abusive spouse or parent establishes U.S. citizenship through any means (including, but not limited to, naturalization). Self-petitioners are eligible for this immediate upgrade even if they are divorced from the abuser, or, in the case of a child, the abusive spouse's parental rights have been terminated.

(7) Adjudicators should be informed that marriage of a battered immigrant should not adversely affect approved self-petitions.

Section 1507(b) provides that remarriage of an individual with a self-petition approved on the basis of marriage to an abusive citizen or lawful permanent resident spouse, or marriage of a child self-petitioner or derivative child, cannot serve as the basis for revocation of the self-petition.

A policy directive should be issued as soon as possible setting out interim measures for handling "T" and "U" visas pending issuance of final regulations

We urge immediate guidance to the field for both the new "U" and "T" visas. Trafficking victims, battered immigrants and crime victims may need immediate access to the protections of these visas. We propose that INS issue guidance that offers these needy trafficking, crime and domestic violence victims some relief until regulations are forthcoming. We recommend that INS do the following things:

* Designate the Vermont Service Center as the place for filing all such visa applications. They have the most experience dealing with domestic violence issues, have excellent staff, and are amenable to training on any issues with which they are unfamiliar (e.g., peonage). We realize Vermont would need more resources to accomplish this. (Both T and U visas)

* Allow those who meet a "prima facie" standard for eligibility to gain work authorization, based on deferred action. This system would parallel that used for self-petitioners otherwise ineligible for work authorization (e.g., those not immediately eligible to adjust). (Both T and U visas)

* Vermont should adjudicate the prima facie applications, grant deferred action and work authorization to those who meet the prima facie standard. Fee waivers for work authorization should be readily available, based on a showing of economic necessity. (Both T and U visas).

* The prima facie standard should be parallel to that used for VAWA assessments which we understand is: "A statement of facts which, if substantiated, would lead to approval."

* The elements for a prima facie showing for a "U" visa would include:

    * Allege they are victims of the crimes listed in subsection (iii)or of "any similar activity;"

    * Allege they have suffered "substantial physical or mental abuse" as the result of this criminal activity;

    * Allege they have (or if the child is the victim, the child's representative has) information that will be or is helpful to enforcement;

    * Provide a certification from a State or Federal law enforcement officer, judge, or prosecutor; a federal or state agency official (e.g. EEOC) or an INS officer stating that the self-petitioner for the U-visa is being, has been or is likely to be helpful to the investigation or prosecution of unlawful activity listed in the Act with regard to U-visas. A signed statement should suffice and include contact information for the official completing the certification. No separate affidavit from the official should be required.

    * List any derivatives and whether they need work authorization;

    * Show economic necessity for work authorization under deferred action (a simple list of assets v. expenses would suffice).

* The elements for a prima facie showing for a "T" visa would include:

    * Allege they are victims of a severe form of trafficking as defined in Section 103 of the Trafficking Victims Protection Act of 2000;

    * Allege they are physically present in the United States, American Samoa or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto on account of trafficking;

    * Allege that they have complied with any reasonable request for assistance in an investigation or prosecution of acts of trafficking or that they have not attained the age of 15;

    * Allege that they would suffer extreme hardship involving unusual or severe harm if they were removed from the United States. VAWA extreme hardship factors, see 8 CFR § 240.58(c), should apply where relevant.

    * Allege that they have not committed an act of a severe form of trafficking in persons;

    * List any derivatives and whether they need work authorization;

    * Show economic necessity for work authorization under deferred action (a simple list of assets v. expenses would suffice).

Action should be taken to implement and preserve adjustment eligibility under VAWA II.

While we realize that the adjustment changes may require regulations, we urge INS to issue immediate guidance to district offices on the new provisions allowing approved self-petitioners to adjust under the provisions of Section 245(a) and (c) rather than 245(i). As a practical matter many of the cases that district offices will see will be persons who qualify under section 245(i). District offices must be informed that they should notify adjustment applicants with approved self-petitions that they qualify under 245(a) and (c) and are no longer required to pay the $1,000 penalty under section 245(i). In addition, district offices should return the $1,000 penalty to battered immigrants with pending adjustment applications as of October 28, 2000. In our view. These adjustment provisions must be immediately available to battered immigrants. See separate letter on regulations for specifics of VAWA adjustment changes.

New 212 Waivers for Battered Immigrants

INS adjudicators in Vermont, adjustment adjudicators in the district offices and INS trial attorneys need to be made immediately aware of the new waivers to INA Section 212 inadmissibility provisions that have been created for battered immigrants. These waivers are immediately available to all pending VAWA cases, including both self-petitions and VAWA cancellation/suspension cases. INS officers must be informed about these waivers and instructed that they can immediately grant them. If INS does not feel that they can immediately adjudicate some of these waivers, a mechanism must be set up at the district office level for non-denial and preservation of applications of battered immigrant self-petitioners who may qualify for waivers until regulations are issued.

INS should accept naturalization applications filed by battered immigrants who have been lawful permanent residents for 3 years

The new law allows battered immigrants who obtained their lawful permanent residency through their relationship with a citizen spouse to apply for naturalization within 3 years even when they are no longer residing with their abusive spouse or when they have been divorced from their abuser. Since this is now law, INS should be prepared to accept applications from battered immigrants filing under these new provisions.

INS should immediately inform trial attorneys about amendments relating to VAWA motions to reopen.

We urge the Office of General Counsel to immediately inform INS trial attorneys about the new motion to reopen provisions included in Section 1506. Trial attorneys must be immediately informed about the following:

* Numerical limits that apply to other motions to reopen DO NOT apply to VAWA motions to reopen for either VAWA suspension or VAWA cancellation;

* Time frames for filing other motions to reopen (or motions to rescind in absentia orders) DO NOT apply either

* There is NO deadline for filing a motion to reopen for VAWA suspension under the old law. These applicants are, in general, persons who received Order to Show Cause and were in proceedings before 4/1/97; who are eligible to file for VAWA suspension of deportation.

* One-year deadline from final removal order. These are people who received a Notice to Appear and were placed in proceedings after 4/1/97-- VAWA cancellation applicants.

* VAWA II allows the Attorney General to waive the one-year deadline on the basis of extraordinary circumstances or hardship to the applicant or the applicant's child. Congress clarified that:

> "Such extraordinary circumstances may include but would not be limited to an atmosphere of deception, violence, and fear that make it difficult for a victim of domestic violence to learn of or take steps to defend against or reopen an order of removal in the first instance. They also include failure to defend against removal or file a motion to reopen within the deadline on account of a child's lack of capacity due to age. Extraordinary circumstances may also include violence or cruelty of such a nature that, when the circumstances surrounding the domestic violence and the consequences of the abuse are considered**,** not allowing the battered immigrant to reopen the deportation or removal proceeding would thwart justice or be contrary to the humanitarian purpose of this legislation. Finally, they include the battered immigrant's being made eligible by this legislation for relief from removal not available before that time." (Congressional Record p. S10192).

Employment authorization Applicants should be able to apply through the Vermont Service Center until adjustment of status is granted

A policy directive should be issued allowing Vermont to grant work authorization to those immediately eligible to adjust after they have filed their 485s at local offices. Currently, district offices often delay and improperly deny such work authorization applications. We anticipate even more confusion and delay with the new adjustment bar exemptions for battered immigrants under 245(a) and (c). Those awaiting adjustment should be able to choose to extend their work authorization through Vermont, rather than the local office.

Vermont should be able to adjudicate adjustment fee waiver requests

Vermont should be able to adjudicate 485 filing fee waiver requests when self-petitioners file 485s concurrently with their self-petitions. Where a district office is not well trained, antagonistic or slow in processing these applications, battered immigrants should be able to file the I-485 adjustment packet with Vermont. If a fee waiver is included, Vermont should generously consider and swiftly process it, using the same standards as those applied to work authorization. Vermont would then transfer the whole packet to the appropriate district office. A single sheet showing expenses and income and assets should suffice. This guidance should reiterate that a fee waiver for a VAWA-based applicant should not be considered a public charge problem. Regulations or guidance to the field must clarify these standards for the adjudication of fee waivers.

INS should issue a directive prohibiting INS raids on, and subpoenas of records maintained by, battered women's shelters.

Another issue that we have been concerned about for some time for which issuance of a policy directive would be extremely important is the problem of INS officers contacting shelters looking for undocumented individuals or subpoenaing shelters for information about battered women who may be staying at the shelter. It is clear that every domestic violence shelter in this country is required to offer shelter and related domestic violence services to any battered woman without regard to her immigration status. If a shelter turns away a battered woman because of her undocumented status, national origin, or inability to speak English, such discrimination will be in violation of the Attorney General's Order regarding services necessary to protect life and safety and could be prosecuted by the Office of Civil Rights of the Departments of Justice, HHS or HUD depending on the shelter's funding. AG Order Number 2049-96 specifies programs necessary to protect life and safety that under the Personal Responsibility and Work Opportunity Act of 1996 are to be open to all persons what ever their immigration status.

Secondly, and equally importantly, policy guidance on this issue is needed to protect INS officers and officials from violating VAWA confidentiality provisions. Section 384 of IIRAIRA bars INS officers from relying on information provided by abusers to make adverse determinations on admissibility or deportability of battered immigrants. VAWA II adds U-visa applicants to the list of persons covered by these VAWA confidentiality protections. In most circumstances, INS or border patrol officers will have received information that an undocumented person is at a shelter from a person or the agent of a person who was the perpetrator of battering or extreme cruelty. INS officers who act on such information regarding the whereabouts of a person who may currently be undocumented, who has been accepted for residence at a battered women's shelter, may be subject to fine under Section 384 of IIRAIRA.

Further, battered women's shelters in this country are well known to have limited shelter beds and limited resources. Shelter staff are domestic violence experts who carefully screen applicants for shelter space to be sure that only persons who are victims of domestic violence are offered refuge at the shelter. Shelters are confidential safe havens for battered women and their children. INS should issue policy directives that clarify that INS officers are to respect that confidentiality. Such a policy would respect state confidentiality statutes that apply to battered women's shelters, shelter workers, and domestic violence program records.

Finally, the vast majority of battered immigrants residing at battered women's shelters will now either be eligible to file a VAWA self-petition or a U-visa application, depending on the level of abuse they have suffered. It is a waste of INS resources to have INS investigators or border patrol officers searching for undocumented battered immigrants who are very likely to have immigration benefits available to them, but who may not have been informed that they may qualify for such relief.

Conclusion

We strongly urge INS to inform its officers, adjudicators and trial attorneys about the new immigration protections for battered immigrants and crime victims that were included in

VAWA II. It is also of the utmost importance that policy and field guidance be issued, as soon as possible, on interim procedures for T and U visas, work authorization, fee waivers and not subpoenaing or searching for battered immigrants at domestic violence shelters. The issues discussed above must be addressed as soon as possible. Deferring action on these issues until the more cumbersome process of issuing full regulations can be completed, will potentially endanger the lives of the very battered immigrant women and children VAWA II sought to protect.
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Thank you in advance for you attention to these matters that will enhance protection for battered immigrant women and children.

Sincerely,

For the National Network on Behalf of Battered Immigrant Women
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