Annotated Statutes Related to Public Benefits Eligibility for Immigrant Survivors of Domestic Violence, Child Abuse and Human Trafficking

By Leslye E. Orloff

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Introduction

This document provides in footnotes that annotate the statute a detailed explanation of each of the groups of immigrants who have been subjected to battering or extreme cruelty by their U.S. citizen or lawful permanent resident spouse who is eligible as a qualified immigrant for federal and state public benefits. In addition to making many battered immigrants and immigrant child abuse victims qualified immigrants, Congress created special exceptions for federal and state public benefits deeming requirement for these immigrant victims of abuse. The second section of this document provides annotations explaining the deeming exceptions designed to protect immigrant victims of spouse abuse and child abuse.

In cases of abused immigrant spouses whose abusive citizen spouse filed a family based visa petition on the abused immigrant spouse's behalf in which the abused immigrant spouse has been granted two-year conditional residency, there are differences with regard to public benefits access that occur depending on how the abused immigrant spouse ultimately attains full lawful permanent residency. The last section of this paper explains those differences and the benefits of the Battered Spouse Waiver.

8 U.S. Code § 1641 Annotated – Qualified Immigrants Eligible to Access Federal and State Public Benefits

(a)IN GENERAL

Except as otherwise provided in this chapter, the terms used in this chapter have the same meaning given such terms in section 101(a) of the Immigration and Nationality Act [8 U.S.C. 1101(a)].

(b)QUALIFIED ALIEN For purposes of this chapter, the term "qualified alien" means an alien who, at the time the alien applies for, receives, or attempts to receive a Federal public benefit, is—

(1) An alien who is lawfully admitted for permanent residence[1] under the Immigration and Nationality Act [8 U.S.C. 1101 et seq.],

(2) An alien who is granted asylum under section 208 of such Act [8 U.S.C. 1158],

(3) A refugee who is admitted to the United States under section 207 of such Act [8 U.S.C. 1157],

(4) An alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C. 1182(d)(5)] for a period of at least 1 year,[2]

[1] **Lawful permanent residents**: This section covers lawful permanent residents including spouses and children of U.S. citizens who have been granted two-year conditional residency. U visa applicants and immigrant children who are granted Special Immigrant Juvenile Status become qualified immigrants when they are granted lawful permanent residency.

[2] This is known as **humanitarian parole**.

National Immigrant Women's Advocacy Project (NIWAP, pronounced *new-app*)
American University, Washington College of Law
4300 Nebraska Avenue, N.W., N100B, Washington, D.C. 20016
(o) 202.274.4457 · niwap@wcl.american.edu · wcl.american.edu/niwap ·http://library.niwap.org/

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(5) An alien whose deportation is being withheld under section 243(h) of such Act [8 U.S.C. 1253] (as in effect immediately before the effective date of section 307 of division C of Public Law 104–208) or section 241(b)(3) of such Act [8 U.S.C. 1231(b)(3)] (as amended by section 305(a) of division C of Public Law 104–208),[3]
(6) An alien who is granted conditional entry pursuant to section 203(a)(7) of such Act [8 U.S.C. 1153(a)(7)] as in effect prior to April 1, 1980,[4]
(7) An alien who is a Cuban and Haitian entrant (as defined in section 501(e) of the Refugee Education Assistance Act of 1980),[5] or
(8) an individual who lawfully resides in the United States in accordance with a Compact of Free Association referred to in section 1612(b)(2)(G) of this title, but only with respect to the designated Federal program defined in section 1612(b)(3)(C) of this title (relating to the Medicaid program).

(c)TREATMENT OF CERTAIN BATTERED ALIENS AS QUALIFIED ALIENS For purposes of this chapter, the term "qualified alien" includes—

(1) An alien who—

(A) has been battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a member of the spouse or parent's family residing in the same household as the alien and the spouse or parent consented to, or acquiesced in, such battery or cruelty, but only if (in the opinion of the agency providing such benefits) there

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[3] **Withholding of deportation** is the pre-1996 version of withholding of removal under INA Section 241(b)(3) which prohibits the removal of an immigrant to a country where their life or freedom would be threatened in that country because of the immigrant' s race, religion, nationality, membership in a particular social group or political opinion. For a discussion of withholding of removal and how it differs from asylum see, American Immigration Council, Fact Sheet: The Difference Between Asylum and Withholding of Removal (October 6, 2020) https://www.americanimmigrationcouncil.org/research/asylum-withholding-of-removal.

[4] All **conditional entrants** will be immigrants who were granted conditional entry into the U.S. because of fear of persecution in their home country due to race, religion, political opinion, or due to a natural catastrophe. This was an immigration status granted to refuges prior to enactment of the Refugee Act of 1980. All persons granted conditional entry will have entered the U.S. before April 1, 1980 when the U.S. government stopped granting this status. Most conditional entrants will have become lawful permanent residents but some never applied and retain conditional entry status. For more information on conditional entrants see, USCIS Policy Manual Vol. 7 Adjustment of Status, Chapter 2 Eligibility Requirements, E 1. Pre-April 1, 1980 Conditional Entrants. https://www.uscis.gov/policy-manual/volume-7-part-l-chapter-2.

[5] The **Cuban Haitian Entrant Program** (CHEP) was in effect from 1980 until its suspension in 2017 when Cubans and Haitians were required to seek humanitarian parole in the same manner as immigrant from other countries. *See,* U.S. Department of Homeland Security, Fact Sheet: Changes To Parole And Expedited Removal Policies Affecting Cuban Nationals (January 12, 2017) https://www.dhs.gov/sites/default/files/publications/DHS%20Fact%20Sheet%20FINAL.pdf. Although the CHEP program ended in 2017, Cubans and Haitians who had met the definition of Cuban or Haitian Entrant whose immigration case has not been finally adjudicated could still be considered CHEP for benefits eligibility purposes. A Cuban/Haitian Entrant was defined under Title V of the Refugee Education Assistance Act of 1980. A Cuban and Haitian entrant is defined as:

- Any individual granted parole status as a Cuban/Haitian entrant or granted any other special status subsequently established under the immigration laws for nationals of Cuba or Haiti, regardless of the status of the individual at the time assistance or services are provided; and
- Any other national of Cuba or Haiti who is not subject to a final, non-appealable and legally enforceable removal order and who meets the following criteria:
  - is in removal proceedings under the Immigration and Nationality Act; or
  - has an application for asylum pending with USCIS.

is a substantial connection between such battery or cruelty and the need for the benefits to be provided; and

(B) has been approved or has a petition pending which sets forth a prima facie case[6] for—**(i)** status as a spouse or a child of a United States citizen pursuant to clause (ii),[7] (iii),[8] or (iv)[9] of section 204(a)(1)(A) of the Immigration and Nationality Act [8 U.S.C. 1154(a)(1)(A)(ii), (iii), (iv)],

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[6] **VAWA Self-Petitioners**: In VAWA self-petitioning cases the U.S. Citizenship and Immigration Services (USCIS) makes prima facie determinations generally within three months of filing. *See* Memorandum from Jacquelyn A. Bednarz, Field Guidance Re: Prima Facie Review of Form 1-360 when Filed by a Self-Petitioning Battered Spouse/Child (Mar. 27, 1998), https://niwaplibrary.wcl.american.edu/pubs/form1360-filed-self-petitioning-spouse; Memorandum from William R. Yates, Extension of Validity Period for Notices of Prima Facie Case Issued in Connection with a Form 1-360 Filed by a Self-petitioning Battered Spouse/Child (Apr. 8, 2004), https://niwaplibrary.wcl.american.edu/pubs/extension-validity-period-primafacie.

VAWA Cancellation of Removal and VAWA Suspension of Deportation: In VAWA suspension of deportation and VAWA cancellation of removal cases, attorneys representing victims should file motions requesting that the immigration judge issue a prima facie determination so that victims are eligible to access public benefits. *See* Memorandum from The Office of the Chief Immigration Judge, EOIR: Motions for "Prima Facie" Determination and Verification Requests for Battered Spouses and Children (1997), https://niwaplibrary.wcl.american.edu/pubs/prima-facie-verification-requests. If a prima facie determination is not requested from the immigration judge, abused spouses and children of U.S. citizens and lawful permanent residents in must wait until their application for VAWA suspension of deportation or VAWA cancellation is granted by an immigration judge before they are able to access federal and state public benefits.

Battered spouse waiver applicants have had their family based immigraiton petition approved and have received green cards that are valid for two years. *See Conditional Permanent Residence*, USCIS (Oct. 23, 2020), https://www.uscis.gov/green-card/after-we-grant-your-green-card/conditional-permanent-residence. As green card holders conditional residents are eligible for public benefits to the same extent as lawful permanent residents.

Abused spouses and children whose I-130 family based visa petition has been approved are also qualified immigrants for public benefits purposes. However, although the statute authorizes access to public benefits when a spouse, child or stepchild has been subjected to battering or extreme cruelty, as of the time when this article was written, no process has been implemented by USCIS to obtain prima facie determinations for benefits eligibility purposes for abused spouses of citizens or lawful permanent residents. As a result, abused immigrant spouses and children must await approval of their family based visa petition case to gain access to federal or state public benefits as a qualified immigrant.

[7] **Widowers and widows of U.S. citizens:** are abused immigrants who filed self-petitions as widows or widowers of U.S. citizens within two years of date of the citizen spouse's death. Widows and widowers may include any of their children or stepchildren in their application.

INA Section 204(a)(1)(A)(ii); 8 U.S.C. Section 1154(a)(1)(A)(ii) reads "(ii) An alien spouse described in the second sentence of section 1151(b)(2)(A)(i) of this title also may file a petition with the Attorney General under this subparagraph for classification of the alien (and the alien's children) under such section."

The second sentence of INA Section 201(b)(2)(A)(i); 8 U.S.C. Section 1151(b)(2)(A)(i) reads "In the case of an alien who was the spouse of a citizen of the United States and was not legally separated from the citizen at the time of the citizen's death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section 1154(a)(1)(A)(ii) of this title within 2 years after such date and only until the date the spouse remarries."

[8] **VAWA self-petitioner spouses whose citizen spouses are abusers:** INA Section 204(a)(1)(A)(iii); 8 U.S.C. Section 1154(a)(1)(A)(iii) are abused immigrant spouses of U.S. citizens who filed VAWA self-petitions and any of the immigrant spouse's children or stepchildren included in their VAWA self-petition.

[9] **VAWA self-petitioner children and stepchildren whose abusive parents or stepparents are U.S. citizens:** INA Section 204(a)(1)(A)(iv); 8 U.S.C. Section 1154(a)(1)(A)(iv) are abused immigrant children or stepchildren of U.S. citizens who filed VAWA self-petitions and any of the immigrant child's own children or stepchildren included in their VAWA self-petition. Divorce does not terminate the stepchild/stepparent relationships for purposes of eligibility of an abused stepchild or stepparent to file a VAWA self-petition *Arguijo v. USCIS*, 991 F.3d 736 (7th Cir. 2021). *See*, 3 USCICS Policy Manual D.2(B)(3)(Stepchild) (May 22, 2024).

(ii) Classification pursuant to clause (ii)[10] or (iii)[11] of section 204(a)(1)(B) of the Act [8 U.S.C. 1154(a)(1)(B)(ii), (iii)],

(iii) Suspension of deportation under section 244(a)(3)[12] of the Immigration and Nationality Act [8 U.S.C. 1254(a)(3)] (as in effect before the title III–A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996),

(iv) status as a spouse or child of a United States citizen pursuant to clause (i)[13] of section 204(a)(1)(A) of such Act [8 U.S.C. 1154(a)(1)(A)(i)], or classification pursuant to clause (i)[14] of section 204(a)(1)(B) of such Act [8 U.S.C. 1154(a)(1)(B)(i)]; or

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[10] **Immigrant spouses of lawful permanent resident abusers:** INA Section 204(a)(1)(B)(ii); 8 U.S.C. Section 1154(a)(1)(B)(ii) are:

1) **VAWA self-petitioner abused immigrant spouses of lawful permanent residents:** Abused immigrant spouses of lawful permanent residents who filed VAWA self-petitions and any of the immigrant spouse's children or stepchildren included in their VAWA self-petition; or
2) **Abused immigrant spouses of lawful permanent residents with pending or approved family based visa petitions I-130:** Abused immigrant spouses of lawful permanent residents whose abusive spouse filed a family based visa petition (I-130) on the victim's behalf and any of the immigrant spouse's children or step-children included in their application;

[11] **VAWA self-petitioner children or stepchildren whose abusive parents or stepparents are lawful permanent residents:** INA Section 204(a)(1)(B)(iii); 8 U.S.C. Section 1154(a)(1)(B)(iii) are abused immigrant children or stepchildren of lawful permanent residents who filed VAWA self-petitions and any of the immigrant child's own children or step-children included in their VAWA self-petition. Divorce does not terminate the stepchild/stepparent relationships for purposes of eligibility of an abused stepchild or stepparent to file a VAWA self-petition Arguijo v. USCIS, 991 F.3d 736 (7th Cir. 2021). See, 3 USCICS Policy Manual D.2(B)(3)(Stepchild) (May 22, 2024).

[12] **VAWA suspension of deportation applicants and recipients**: INA Section 244(a)(3) as in effect on March 31, 1997. VAWA suspension of deportation applicants are abused spouses, former spouses, children, and stepchildren of U.S. citizens and lawful permanent residents who had deportation proceedings initiated against them prior to March 31, 1997. It is important to note that VAWA suspension of deportation was removed from the Immigration and Nationality Act in 1996 and replaced with Temporary Protected Status which is the current section 244 if the INA. However, VAWA suspension of deportation continues to be an immigration remedy available to abused immigrant spouses. It is a remedy that Congress has continued to amend although the section of the statute was removed from the INA. The current legislative text is available at: https://niwaplibrary.wcl.american.edu/pubs/vawa-suspension-of-deportation-interliniated-statute. VAWA suspension of deportation applicants will need to file a motion with the immigration judge to obtain a prima facie determination. *See* Memorandum from The Office of the Chief Immigration Judge, Motions for "Prima Facie" Determination and Verification Requests for Battered Spouses and Children (1997), https://niwaplibrary.wcl.american.edu/pubs/prima-facie-verification-requests.

[13] **Abused spouses and children of U.S. citizens whose abusers filed family based visa petitions on their behalf:** INA Section 204(a)(1)(A)(ii); 8 U.S.C. Section 1154(a)(1)(A)(ii) are

1) **Abused immigrant spouses of citizens with pending or approved family based visa petitions I-130:** Abused immigrant spouses of U.S. citizens whose abusive spouse filed a family based visa petition (I-130) on the victim's behalf and any of the immigrant spouse's children or stepchildren included in their application;
2) **Battered Spouse Waiver Applicants:** Abused immigrant spouses of U.S. citizens who received conditional residency based upon a family based visa petition filed by their abusive citizen spouse. INA Section 216(c)(4)(C) and (D); 8 U.S. C. Section 1186a(c)(4)(C) and (D).

[14] **Abused spouses and children of lawful permanent residents whose abusers filed family based visa petitions on their behalf:** INA Section 204(a)(1)(B)(i); 8 U.S.C. Section 1154(a)(1)(B)(i) are:

3) **Abused immigrant spouses of lawful permanent residents with pending or approved family based visa petitions I-130:** Abused immigrant spouses of lawful permanent residents whose abusive spouse filed a family based visa petition (I-130) on the victim's behalf and any of the immigrant spouse's children or stepchildren included in their application;
4) **Battered Spouse Waiver Applicants:** Abused immigrant spouses of lawful permanent residents who received conditional residency based upon a family based visa petition filed by their abusive citizen spouse. Although

(v) Cancellation of removal pursuant to section 240A (b)(2)[15] of such Act [8 U.S.C. 1229b(b)(2)];

(2) An alien—

(A) whose child has been battered or subjected to extreme cruelty in the United States by a spouse or a parent of the alien[16] (without the active participation of the alien in the battery or cruelty), or by a member of the spouse or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, and the alien did not actively participate in such battery or cruelty, but only if (in the opinion of the agency providing such benefits) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided; and

(B) Who meets the requirement of subparagraph (B) of paragraph (1);

(3) An alien child who—[17]

(A) resides in the same household as a parent who has been battered or subjected to extreme cruelty in the United States by that parent's spouse or by a member of the spouse's family residing in the same household as the parent and the spouse consented or acquiesced to such battery or cruelty, but only if (in the opinion of the agency providing such benefits) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided; and

(B) Who meets the requirement of subparagraph (B) of paragraph (1); or

(4) An alien who has been granted nonimmigrant status under section 101(a)(15)(T)[18] of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(T)) or who has a pending application that sets forth a prima facie case for eligibility for such nonimmigrant status.

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under the statue spouses of lawful permanent residence could technically be granted two-year conditional residence, due to immigration case processing adjudication backlogs historically and currently, virtually all spouses of lawful permanent residents will be married for more than two years by the time their family based visa petition is adjudicated. As a result they will be granted full lawful permanent residency and will not have to go through the two-year conditional residency process. *See* INA § 216(c)(4)(C) and (D); 8 U.S. C. § 1186a(c)(4)(C) and (D).

[15] **VAWA Cancellation of Removal** applicants and recipients are abused spouses, former spouses, children, and step-children of U.S. citizens and lawful permanent residents who had removal proceedings initiated against them after March 31, 1997. VAWA cancellation of removal applicants will need to file a motion with the immigration judge to obtain a prima facie determination. *See* Memorandum from The Office of the Chief Immigration Judge, EOIR: Motions for "Prima Facie" Determination and Verification Requests for Battered Spouses and Children (1997), https://niwaplibrary.wcl.american.edu/pubs/prima-facie-verification-requests; INA § 240A(b)(2); 8 U.S.C. § 1229b(b)(2).

[16] **Immigrants whose children or stepchildren are victims of child abuse:** The immigrant must an a spouse, child, stepchild, widow, or widower of a U.S. citizen or lawful permanent resident with a pending or approved VAWA self-petition, family based visa petition, widow or widower petition, VAWA suspension of deportation, or VAWA cancellation of removal application and the immigrant's child or stepchild has been abused by the immigrant's spouse, parent, or a member of the spouse or parent's family residing in the same household as the citizen or lawful permanent resident spouse or parent. The abused child or stepchild may be a citizen or a noncitizen.

[17] **Immigrant children or stepchildren who are victims of child abuse are:** abused immigrant children residing with their non-abusive parent. The immigrant child was abused by their non-abusive parent's spouse or a member of the spouse's family residing in the household. The immigrant child has filed, received approval of, or was included as a family member in a pending or approved VAWA self-petition, family based visa petition, widow or widower petition, VAWA suspension of deportation, or VAWA cancellation of removal application.

[18] **Victims of human trafficking who are T visa applicants or recipients:** INA Section 101(a)(15)(T); 8 U.S.C. 1101(a)(15)(T). Victim of severe forms of human trafficking (sex or labor trafficking) who have been granted T visas or who have received bona fide determinations in pending T visa cases. The T visa bona fide determination includes a prima facie determinations.

This subsection shall not apply to an alien during any period in which the individual responsible for such battery or cruelty resides in the same household or family eligibility unit as the individual subjected to such battery or cruelty.

After consultation with the Secretaries of Health and Human Services, Agriculture, and Housing and Urban Development, the Commissioner of Social Security, and with the heads of such Federal agencies administering benefits as the Attorney General considers appropriate, the Attorney General shall issue guidance (in the Attorney General's sole and unreviewable discretion) for purposes of this subsection and section 1631(f) of this title, concerning the meaning of the terms "battery" and "extreme cruelty", and the standards and methods to be used for determining whether a substantial connection exists between battery or cruelty suffered and an individual's need for benefits under a specific Federal, State, or local program.[19]

8 U.S. Code § 1631 - Federal attribution of sponsor's income and resources to alien

(a)IN GENERAL Notwithstanding any other provision of law, in determining the eligibility and the amount of benefits of an alien for any Federal means-tested public benefits program (as provided under section 1613 of this title), the income and resources of the alien shall be deemed to include the following:

> **(1)** The income and resources of any person who executed an affidavit of support pursuant to section 213A of the Immigration and Nationality Act [8 U.S.C. 1183a] (as added by section 423 and as amended by section 551(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) on behalf of such alien.[20]
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> **(2)** The income and resources of the spouse (if any) of the person.

(b)DURATION OF ATTRIBUTION PERIOD Subsection (a) shall apply with respect to an alien until such time as the alien—

> **(1)** Achieves United States citizenship through naturalization pursuant to chapter 2 of title III of the Immigration and Nationality Act [8 U.S.C. 1421 et seq.]; or
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> **(2)** has worked 40 qualifying quarters of coverage as defined under title II of the Social Security Act [42 U.S.C. 401 et seq.] or can be credited with such qualifying quarters as provided under section 1645 of this title, and (B) in the case of any such qualifying quarter creditable for

[19] *See* Interim Guidance on Verification of Citizenship, Qualified Alien Status, and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 62 Fed. Reg. 61344-416 (Nov. 17, 1997), *available at* https://niwaplibrary.wcl.american.edu/pubs/interim-guidance-verification. (This interim guidance continues in full force and effect, no final rule on benefits verification has been issued).

[20] Battered immigrant spouses who receive two year conditional residency through their U.S. citizen spouses' visa application will be subject to deeming in their benefits application process. This includes cases in which the parties remained married for the full two-year conditional residency period and cases where battered immigrant spouses sought removal of conditions on their residency based on divorce or extreme hardship. The same will be true for battered immigrant spouses of citizens and lawful permanent residents who obtain full lawful permanent residency based upon their abusive spouse's application. Since in each of these cases the victim's immigration applications were based solely on the validity of the marriage and did not involve any adjudication regarding the battering or extreme cruelty perpetrated, in order for the abused immigrant spouse to qualify for exemptions to sponsor deeming, they will have to provide proof of abuse to the benefits granting agency.

any period beginning after December 31, 1996, did not receive any Federal means-tested public benefit (as provided under section 1613 of this title) during any such period.

(c)REVIEW OF INCOME AND RESOURCES OF ALIEN UPON REAPPLICATION

Whenever an alien is required to reapply for benefits under any Federal means-tested public benefits program, the applicable agency shall review the income and resources attributed to the alien under subsection (a).

(d)APPLICATION

(1) If on August 22, 1996, a Federal means-tested public benefits program attributes a sponsor's income and resources to an alien in determining the alien's eligibility and the amount of benefits for an alien, this section shall apply to any such determination beginning on the day after August 22, 1996.

(2) If on August 22, 1996, a Federal means-tested public benefits program does not attribute a sponsor's income and resources to an alien in determining the alien's eligibility and the amount of benefits for an alien, this section shall apply to any such determination beginning 180 days after August 22, 1996.

(3) This section shall not apply to assistance or benefits under the Food Stamp Act of 1977 (7 U.S.C. 2011 et seq.) to the extent that a qualified alien is eligible under section 1612(a)(2)(J) of this title.

(e)INDIGENCE EXCEPTION

(1)IN GENERAL

For an alien for whom an affidavit of support under section 213A of the Immigration and Nationality Act [8 U.S.C. 1183a] has been executed, if a determination described in paragraph (2) is made, the amount of income and resources of the sponsor or the sponsor's spouse which shall be attributed to the sponsored alien shall not exceed the amount actually provided for a period beginning on the date of such determination and ending 12 months after such date.

(2)DETERMINATION DESCRIBED

A determination described in this paragraph is a determination by an agency that a sponsored alien would, in the absence of the assistance provided by the agency, be unable to obtain food and shelter, taking into account the alien's own income, plus any cash, food, housing, or other assistance provided by other individuals, including the sponsor. The agency shall notify the Attorney General of each such determination, including the names of the sponsor and the sponsored alien involved.

(f)SPECIAL RULE FOR BATTERED SPOUSE AND CHILD

(1)IN GENERAL Subject to paragraph (2) and notwithstanding any other provision of this section, subsection (a) shall not apply to benefits—

(A) During a 12 month period if the alien demonstrates that

(i) the alien has been battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a member of the spouse or parent's family residing

in the same household as the alien and the spouse or parent consented to or acquiesced to such battery or cruelty,[21]

(ii) the alien's child has been battered or subjected to extreme cruelty in the United States by the spouse or parent of the alien (without the active participation of the alien in the battery or cruelty), or by a member of the spouse's or parent's family residing in the same household as the alien when the spouse or parent consented or acquiesced to and the alien did not actively participate in such battery or cruelty,[22] or

(iii) the alien is a child whose parent (who resides in the same household as the alien child) has been battered or subjected to extreme cruelty in the United States by that parent's spouse, or by a member of the spouse's family residing in the same household as the parent and the spouse consented to, or acquiesced in, such battery or cruelty,[23] and

the battery or cruelty described in clause (i), (ii), or (iii) (in the opinion of the agency providing such public benefits, which opinion is not subject to review by any court) has a substantial connection to the need for the public benefits applied for; and

(B) after a 12 month period (regarding the batterer's income and resources only)[24] if the alien demonstrates that such battery or cruelty under subparagraph (A) has been recognized in an order of a judge or administrative law judge or a prior determination of the Immigration and Naturalization Service,[25] and that such battery or cruelty (in the

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[21] This exception applies to VAWA self-petitioners, family based visa applicants, and VAWA cancellation of removal and VAWA suspension of deportation applicants. In the case of abused spouses who are widows or widowers, no deeming can apply from the spouse because of the death of the spouse.

[22] This exception applies to parents of abused children and abused stepchildren whether or not the applicant parent is also a victim of battering or extreme cruelty and applies to parents who are applicants or have received approvals of their VAWA self-petitions, family based visa applications, and VAWA cancellation of removal or VAWA suspension of deportation applications.

[23] This exception helps abused immigrant children residing with their non-abusive parent. The immigrant child was abused by their non-abusive parent's spouse or a member of the spouse's family residing in the household. The immigrant child has filed, received approval of, or was included as a family member in a pending or approved VAWA self-petition, family based visa petition, widow or widower petition, VAWA suspension of deportation, or VAWA cancellation of removal application.

[24] In some cases when the abusive U.S. citizen or lawful permanent resident spouse filed a visa application for their immigrant spouse and/or immigrant child when the sponsoring citizen or lawful permanent resident spouse did not have sufficient income to sponsor immigrant family members on their own, there will have been affidavits of support filed by additional sponsors. Under this provision the abused immigrant will receive this additional year deeming exception only with regard to income from their abusive citizen or lawful permanent resident spouse.

[25] Deeming exemptions for immigrant spouses and children subjected to battering or extreme cruelty can become permanent under this section if the abused immigrant spouse or child receives an affirmative adjudication, court order, or finding from a state court that they have been abused. This can occur in a number of contexts: The victim could have obtained a civil protection order, the abuser could have been criminally convicted, a state court made a finding about the abuse in a divorce, child support, spousal support, child welfare, juvenile, guardianship, adoption, tort or other state family or civil court proceeding. A finding regarding the battered spouse or child's abuse could have been made by an administrative law judge in a fair housing, landlord tenant, public benefits, human rights or other administrative law proceeding. In cases of immigrant spouse or child abuse victims, findings regarding battering or extreme cruelty will have been made as part of their VAWA self-petition, VAWA cancellation of removal, VAWA suspension of deportation, or battered spouse waiver application by adjudicators at USCIS or by an immigration judge.

opinion of the agency providing such public benefits, which opinion is not subject to review by any court) has a substantial connection to the need for the benefits.

(2)LIMITATION

The exception under paragraph (1) shall not apply to benefits for an alien during any period in which the individual responsible for such battery or cruelty resides in the same household or family eligibility unit as the individual who was subjected to such battery or cruelty.

Public Benefits Implications for Abused Immigrant Spouses of U.S. Citizens Who Did Not File Battered Spouse Waivers

Battered spouse waiver applicants are qualified immigrants for state and federal public benefits purposes as two-year lawful permanent residents under 8 U.S.C. section 1641(b)(1) and as battered spouse waiver applicants under 8 U.S.C. section 1641(c)(1)(B)(iv). In contrast, when an abused immigrant spouse of an abusive U.S. citizen or lawful permanent residence through the abusive spouse's family based visa petition without raising issues of abuse the immigrant spouse receives their full lawful permanent residence:

1) In marriages of longer duration the immigrant spouse obtains full lawful permanent residence without having to go through two-year conditional residence because they had already been married for over two years at the time their family based visa petition was adjudicated;
2) By fulfilling the joint filing requirement together with their spouse near the end of the two-year conditional residence period; or
3) By obtaining a waiver of the joint filing requirement due to divorce or extreme hardship.

Battered spouse waiver applicants and approved recipients receive the same public benefits access as VAWA self-petitioners, and VAWA cancellation of removal and VAWA suspension of deportation applicants. They are considered qualified immigrants directly eligible for federal public benefits but can face a five (5) year bar to access to federal means-tested public benefits including TANF, TANF funded child care, subsidized health care through Medicaid and SCHIP, Food Stamps (SNAP), and Supplemental Security Income.[26]

Several states provide state funded benefits to qualified immigrants during the federal 5-year bar waiting time. However, some of these states only extend state funded benefits during this waiting period to battered immigrants. Six states only offer state funded TANF to qualified abused immigrants (NV, NJ, RI, TN, OR, IA).[27] Two states (IL and NM) limit state funded health care subsidies to qualified immigrants with a 5 year bar to Medicaid eligibility. In states that offer battered qualified immigrants greater access to state funded public benefits that other qualified immigrants, battered spouse waiver applicants will have more benefits access than battered spouses who attained lawful permanent residence through a joint filing with their spouse, through the divorce hardship exception or through the extreme hardship exception. For battered immigrant spouses who gained lawful permanent residency through means that were not the battered spouse waiver it may be possible advocate with state agencies for battered qualified immigrant benefits despite the lack of a DHS adjudication of battering or extreme cruelty.

[26] It is important to note that battered qualified immigrant access to SSI is extremely limited. To identify which immigrants may be eligible for SSI, *see* NIWAP, All State Public Benefit Charts and Map, *available at* https://niwaplibrary.wcl.american.edu/all-state-public-benefits-charts.

[27] *See* Leslye E. Orloff, State Funded Benefits Comparison Chart (Jul. 22, 2021), *available at* https://niwaplibrary.wcl.american.edu/pubs/state-benefits-comparison-chart.

Similarly with regard to deeming, attaining exemptions from deeming as a battered qualified immigrant will be easier for battered spouse waiver recipients than for battered immigrant spouses who attained lawful permanent residence through paths that did not require revealing or adjudicating the existence of battering or extreme cruelty. VAWA self-petitioners, VAWA cancellation of removal and suspension of deportation and battered waiver recipients all directly qualify for the exemptions from deeming contained in 8 U.S.C. section 1631(f)(1)(A). In contrast, abused immigrant spouses who attained lawful permanent residence through the divorce and extreme hardship waivers, like abused spouses who attained lawful permanent residency based on their spouse's full cooperation, will not have access to the domestic violence related deeming exception without proving to the benefits agency that they suffered battering or extreme cruelty.

Since state and federal benefits agency staff often have little or no training on domestic violence, the success of this application can vary from state to state and at different benefits offices within a state. These adjudications are made more complex because the immigration law definition for domestic violence is battering or extreme cruelty, which covers forms of extreme cruelty that are not considered domestic violence crimes under state domestic violence and protection order laws. This makes it more likely that untrained benefits workers will apply state domestic violence definitions and will wrongly deny benefits applications filed by abused immigrant spouses who under the federal public benefits laws should qualify for benefits.