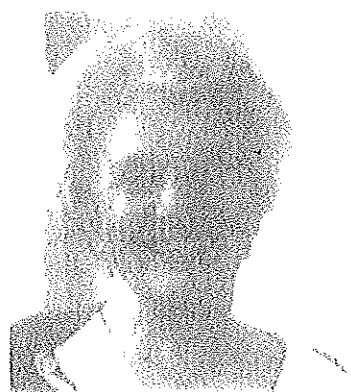


DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: Asserting the Rights of Battered Women



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Chapter VII

IMMIGRATION MARRIAGE FRAUD AMENDMENTS OF 1986 (Marriage Fraud Act) AND OTHER RELATED ISSUES

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A. Introduction

Immigrant battered women are often dependent on their abusive partners to obtain permanent residence status in the United States. In 1986, Congress passed the Immigration Marriage Fraud Amendments (IMFA)¹ which made major changes in how immigrants may obtain legal immigrant status through their spouses. The law's intent was to deter immigrants from entering into fraudulent marriages; it has, however, created great hardships for women who entered marriages "in good faith" (for purposes other than solely to obtain legal status), but whose marriages have become intolerable due to violence.²

¹ 8 U.S.C. 1186a. See Appendix 6 for Copy of Statute Governing Waivers in Marriage Fraud Cases

² Although the laws are not gender specific and apply to both husbands and wives, the questions and answers will refer to a noncitizen battered wife and a citizen or permanent resident battering husband. According to Department of Justice statistics, 95% of all assaults on spouses and ex-spouses are committed by men.

Immigrant women who have been married to United States citizens (USCs) or Lawful Permanent Residents (LPRs) for less than twenty-four months now only receive "conditional residency" for two years. Within ninety days before this two year waiting period ends, the husband and wife must file a joint application to have the "condition" removed and to obtain permanent residence status for the woman. They may have to return to INS for another interview and must show that their marriage is not a "sham" and has not been legally terminated. This additional waiting period and joint application requirement creates a dilemma for women who are victims of domestic violence. The Immigration Act of 1990 specifically amended IMFA to allow battered women to file for a waiver of these requirements. Although the changes should help battered women, they may prove difficult for many to use without legal counselling.

A battered woman may be aware that the law has changed but be uninformed or misinformed, perhaps by her battering husband. For instance, reporting the batterer to the authorities, filing for a restraining order, or filing for dissolution of the marriage will help, not hinder, her application for immigration status. She may relinquish her immigration rights, however, or suffer abuse by her husband because she fears being deported. Battered women must be reassured that, no matter what the batterer says, he does not have control over whether or not she is deported. There is hope for a battered woman who does not remain married to her batterer, but the complexities of the law make it imperative that battered women get legal advice early in the process of obtaining legal immigrant status. The following questions and answers provide basic information on relief for battered women.

B. Domestic Violence and Immigration Issues

This section outlines the process for obtaining lawful permanent residence through a marriage and answers some common questions about the immigration issues in a domestic violence situation. These answers should not be accepted as specific legal advice and one should always consult an immigration attorney about the particular facts of any case.

1. How does a noncitizen wife apply for lawful permanent residence through her marriage to a citizen or lawful permanent resident husband?

When a noncitizen wife marries a husband who is either a United States citizen or a lawful permanent resident of the United States, she is eligible to apply for lawful permanent residence (or obtain a "green card") through that marriage. The application involves a two-step process: the husband files an immigrant visa petition (Immigration and Naturalization Service (INS) Form I-130) for his wife; he is called the petitioner and she is called the beneficiary of this petition and the wife files either an application for permanent residence (INS Form I-485) in the United States or an application for an immigrant visa at a consulate abroad.

In most cases, both the husband and wife will be physically present in the United States. The wife may still have a valid non-immigrant status in the United States, such as an unexpired visitor's visa. In other cases, the wife may have originally entered the United States with a visa but the visa has since expired. However, if the wife originally entered the United States with a visa (if she was "inspected" by the INS at a border or airport and allowed to enter with her visa), and she has married a United States citizen husband, then she generally may file all the paperwork here in the United States and complete all her immigration processing here. Such processing will take place immediately (an interview will be scheduled in 2-12 months depending on where she applies).

On the other hand, if a wife of a U.S. citizen husband entered the country "without inspection" (i.e., crossed the border illegally), she must return to her home country for an interview at the U.S. embassy or consulate there in order to complete her immigration processing. Finally, regardless of whether a wife entered with or without a visa, if her husband is only a lawful permanent resident, she also must return for the overseas consular processing in most cases.

The date of the overseas interview depends on the status of the petitioner husband and the countries of birth of both the husband and the wife. If the petitioner husband is a United States citizen, the overseas processing can take place immediately. However, if the petitioner husband is only a lawful permanent resident, the processing time depends on the countries of birth of the husband and wife. The current minimum waiting time for an interview is about two years. Moreover, if both spouses are from Mexico, there is a backlog that means a ten-year wait for the interview. If both are from the Philippines, the wait is seven years.³

Of course, in these situations, it would be much faster for the lawful permanent resident husband to apply to become a United States citizen (he is eligible five years after becoming a lawful permanent resident) so that the consular processing is immediate.

2. Is there any way to gain lawful permanent residence through a marriage if the husband refuses to cooperate? What can a battered woman do if her husband refuses to file a visa petition for her?

Unfortunately, the non-citizen wife is dependent on the petitioner husband to begin her application for permanent residence. If the husband has not yet filed the petition and refuses to file it, the wife cannot obtain lawful permanent residence through that marriage. Therefore, unless she has another way to remain in the United States lawfully, she may be deportable if she is discovered by the INS.

³ These waiting times may eventually become shorter with the increase in the total number of visas available under the changes under the Immigration Act of 1990.

3. What should a battered woman do in such situations?

A battered woman often faces much more serious danger than possible deportation. Because of the escalating nature of domestic violence, staying in the relationship simply for immigration reasons could be life threatening. Service providers should assist her in pursuing options that can help guarantee her safety in every way possible, including calling the police or seeking a restraining order.

Some women may fear that calling the police could also result in their deportation. Advocates should advise battered women that the local police do not have the authority to enforce the civil provisions of the immigration law, e.g. cannot arrest a person merely because she is in the country illegally, and that the police generally will not turn a woman reporting domestic violence in to the INS. Moreover, civil courts should not and generally do not ask about a woman's immigration status when she asks for a restraining order, a child custody order or dissolution. Most shelters and other social services agencies will help battered women without regard to immigration status. Thus, advocates should assure battered women that they can exercise their legal rights and seek other assistance.

Advocates should always advise an immigrant battered woman to consult an immigration attorney or legal services agency to determine her legal options. The advocate can then assist her in weighing the immigration risks involved in her particular situation.

An added problem to a husband's refusal to file a petition is his threat to have her deported if she complains to the police about the violence. Advocates should stress to the woman that her safety is of first concern, and that even if the husband calls the INS, deportation is not immediate. The woman will have an opportunity to present her case at a deportation hearing before a judge.⁴

4. Can a petitioner husband withdraw or revoke the petition for his noncitizen wife?

The petitioner husband can always withdraw the petition at any time prior to the time his wife acquires lawful permanent resident status. Just as the beneficiary wife cannot force the petitioner husband to file the petition, the beneficiary wife cannot force the petitioner husband to continue with the petition.⁵

However, if the husband tells the INS that the marriage was fraudulent or a sham, then both the husband and the wife would be equally liable for criminal penalties for engaging in marriage fraud. Thus, a woman who is in a domestic violence situation should not feel further victimized by such threats or extortion because if the husband

⁴ See section on deportation, Chapter VI.

⁵ Attorneys at Clinica Legal Latina/AYUDA [1736 Columbia Road, NW, Washington, D.C. 20008, (202) 387-0434] in Washington, D.C. have had success in getting judges in civil protection order cases to order batterers whose wives have approved applications for residency but are awaiting appointments for immigration visas not to contact INS, The State Department or The U.S. Consulate in the relevant countries. Violation of these orders could result in 180 day jail sentence.

goes to the INS, the husband will also be exposing himself to possible criminal prosecution.

5. Can the petitioner husband withdraw the petition after the INS has approved it or after his wife has acquired resident status?

The petitioner husband may withdraw the petition even after approved by the INS. If he notifies the INS or the consulate of his intention to withdraw the petition, the petition will be automatically revoked.

The petitioner husband cannot withdraw the petition after his wife has acquired permanent resident status. However, the husband can attempt to report to the INS that the marriage was fraudulent so that the INS would try to "rescind" the grant of permanent residence to the beneficiary wife or to deport her for holding a fraudulently obtained status. Of course, the petitioner husband is then also exposing himself to criminal liability for marriage fraud. //

While the INS may begin such "rescission" or deportation proceedings against beneficiary wives at any time., the INS generally only does so when the possibility of a fraudulent marriage is brought to its attention. This often occurs when the wife divorced, remarried and then tried filing a petition for her new husband. *

Under IMFA, the law now prohibits such a wife from petitioning for a new husband for five years unless she can affirmatively prove that the previous marriage was not a sham. If the wife had successfully had her conditional residency removed (see below), the INS will generally approve the petition for the new spouse and would not institute deportation proceedings unless there is new evidence which would indicate the previous marriage was fraudulent.

6. What are the immigration consequences if domestic violence or other marital problems arise after the petition is approved?

Under the immigration law, one cannot gain lawful permanent residence through a marriage in which the sole purpose is to obtain that immigration status. In other words, a marriage is a "sham" or fraudulent marriage only if the sole reason for the marriage is to obtain immigration status for the beneficiary spouse. Thus, a beneficiary wife is still eligible for lawful permanent residence as long as there were other reasons for the marriage, even if the marriage relationship is now in trouble.

The beneficiary wife will always have the opportunity to present evidence of the validity of the marriage. In fact, reporting and documenting domestic violence will actually help the battered wife because such evidence would demonstrate that there were intervening reasons, i.e. the husband became abusive, for the break-up of the marriage. //

7. Can a beneficiary wife still obtain permanent residence even if the marriage has broken up because of domestic violence?

Under the immigration law, a marriage is still valid unless it has legally ended, i.e., there has been a final divorce decree.⁶ The courts have long held that even if a couple is separated, that fact alone is insufficient to conclude that the marriage was a sham or otherwise entered into for fraudulent purposes.⁷ Many couples will be informally or legally separated or be living apart without formal divorce proceedings. Such persons are still married in the eyes of the immigration law and as long as the INS' suspicions about marriage fraud are refuted, the petition remains viable as long as it is not withdrawn. However, it will be up to the beneficiary wife to prove to the INS that the marriage was not fraudulent despite its current problems.⁸

8. What are the new procedures regarding "Conditional" permanent residence for beneficiary wives?

The Immigration Marriage Fraud Act of 1986 (IMFA) added another step in the immigration process for noncitizen wives. The IMFA requires that couples prove to the INS that their marriage is not a sham marriage and has not been terminated two years after the granting of lawful permanent residence through that marriage. IMFA only applies to marriages which are less than 24 months old when the immigrant visa petition is filed. These beneficiary wives will now only be granted a "conditional" permanent residence.

Their "green cards" will have an "expiration date" of two years. In order to remove the condition, both the petitioner husband and the beneficiary wife must file a joint petition (INS Form I-751) and may have to return to the INS for another interview. The joint petition must be filed during the ninety days before the second year anniversary of the grant of conditional permanent residence. The I-751 also requires a filing fee of \$65.

⁶ *Dabaghian v. Civiletti*, 607 F.2d 868 (9th Cir. 1979) (where alien's marriage to United States citizen was not a sham or fraudulent from its inception, it was valid for the purpose of determining eligibility for adjustment of status under the Immigration and Nationality Act until it was legally dissolved).

⁷ *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975) states that "Aliens cannot be required to have more conventional or more successful marriages than citizens... (Evidence) of separation, standing alone, cannot support a finding that a marriage was not bona fide when it was entered. The inference that the parties never intended a bona fide marriage from proof of separation is arbitrary unless we are reasonably assured that it is more probable not that the couples who separate after marriage never intended to live together... Couples separate, temporarily and permanently, for all kinds of reasons that have nothing to do with any preconceived intent not to share their lives, such as calls to military service, educational needs,...poverty, and domestic difficulties."

⁸ See Appendix 10 for letter requesting approval of petition and application during separation.

9. Is there any exception to this requirement for filing a joint petition to remove the condition?

The requirement for the filing of a joint petition after two years poses additional problems for beneficiary wives who are the victims of domestic violence. However, one clarification of the IMFA is the recognition that some marriages that are not fraudulent will break up within the two year conditional period and therefore it will not be possible to file a joint petition to remove the condition. The law allows these beneficiary wives to instead file a waiver of the requirement (INS Form I-752).⁹ and defines the standard for proving that the marriage was not originally fraudulent. The I-752 requires a filing fee of \$85.

10. How can a woman obtain a waiver of the requirement of filing a joint petition to remove the condition?

After the changes made by the Immigration Act of 1990, there are now three ways to obtain a waiver of the requirement of filing the joint petition to remove the condition. The INS may grant the waiver if the beneficiary wife can demonstrate that a) she entered her marriage in good faith but that it was terminated; b) the beneficiary wife or child was subject to battering or extreme cruelty by the petitioning husband during the marriage; or c) the deportation of the beneficiary wife would result in extreme hardship.

Under the original provisions of IMFA, it was required that the beneficiary wife initiate the termination of the marriage and that she show there was "good cause" for the termination to qualify for the first waiver. The Immigration Act of 1990 amended this section to remove the moving party and good cause requirements. This amendment applies retroactively and is a significant improvement in the law because the INS can no longer scrutinize the nature of the termination of the marriage. If the beneficiary wife was denied the waiver prior to the passage of the new law based on the fact that she could not demonstrate good cause or because the petitioning husband filed for the termination of the marriage, she should be able to go back to the INS and file a new I-752. *

To demonstrate that the marriage was entered in good faith, the interim regulations¹⁰ suggest that documentation such as joint ownership or a lease showing joint tenancy of property or other financial resources, birth certificates of children born of the marriage, affidavits from persons who know the couple or other documentation showing that a bonafide marriage relationship existed can be used. Any other documentation, such as invitations, pictures, etc. from a public marriage ceremony or evidence of other joint activities (vacations or other trips together, joint memberships in clubs, etc.) may also be used to show the bonafides of the marriage.

⁹ See Appendix 9 for sample I-752 and supporting documents.

¹⁰ See Appendix 6 for interim regulations for Conditional Basis of Lawful Permanent Residence for certain Alien Spouses and Sons and Daughters: Battered and Abused Conditional Residents.

11. What if the marriage has not been terminated? Can the woman still obtain a waiver?

The Immigration Act of 1990 also amended IMFA to provide an explicit exception to the filing of the joint petition for spouses and children subject to battering or extreme cruelty perpetrated by the U.S. citizen or permanent resident spouse or parent during the marriage. There is no requirement that the marriage be terminated to apply for this waiver. Evidence of domestic violence — and any actions the beneficiary wife might take to protect herself from it, such as calling the police, going to an emergency room, entering a shelter, getting counseling or seeking a restraining order — will help establish that the woman was battered or subject to extreme cruelty.¹¹ The Immigration Act of 1990 also directed that information regarding the battered spouse or child, including the address, be kept confidential.

A third waiver is also available if the beneficiary wife can demonstrate that her deportation would result in "extreme hardship." Again, she does not have to demonstrate that the marriage has been terminated. Thus, women who are still legally married but the victims of domestic violence also may be able to use this waiver standard. However, the "extreme hardship" standard is very difficult to establish. It means greater hardship than being forced to return to one's country and must be based on factors which arose after the woman was granted conditional permanent residence. In another immigration context, extreme hardship factors have included advanced or young age, separation from family members, medical conditions that may not be treatable in the country of origin, complete inability to find work in the home country, possible persecution in the home country or the loss of one's contributions to the community in the United States.

If the woman may be eligible for more than one of the above grounds for a waiver, she can apply for more than one waiver on the same application.

12. How is the waiver filed?

The waiver is due at the same time the I-751 would have been due, or in the ninety-day period prior to the second anniversary of the grant of conditional permanent residence. If neither a joint petition or a waiver is filed before the deadline, the beneficiary wife loses her permanent residence and the INS may begin deportation proceedings against her. However, late filings may be excused for reasons of good cause beyond the beneficiary wife's control.

¹¹ Unfortunately, the INS interim regulations require an evaluation by a "licensed professional" in order to substantiate any claim to extreme cruelty. Such an unreasonable burden of proof may be changed by the INS in its final regulations, or if not changed, challenged in court. See Section 3 of this Chapter.

13. What can a beneficiary wife do if the marriage is in fact fraudulent?

Again, it is important to remember that the immigration law defines a fraudulent or sham marriage as one entered into solely for the purpose of obtaining immigration status for the beneficiary spouse. If the INS discovers a fraudulent marriage, then the beneficiary spouse is deportable and permanently prohibited from ever becoming the beneficiary of any other immigrant petition. Both spouses also face criminal liability. Unfortunately, the INS and U.S. attorney often decline to prosecute the petitioner if he will testify against the beneficiary in deportation proceedings. Accordingly, women who have participated in a fraudulent marriage should immediately consult with an immigration attorney.

C. Preparing a "Battered Spouse" Waiver Under the Immigration Marriage Fraud Amendments.¹²

The following is a general guide for the preparation of a "battered spouse" waiver.¹³ Naturally, each woman's case must be evaluated and treated differently and this "model" may not work neatly in each situation. The purpose is to assist immigration and non-immigration lawyers in preparing a waiver and to encourage non-lawyers to prepare waivers in consultation with or supervision of a lawyer. Generally, preparing the form is not difficult, but documentation of the abuse is the basis of the waiver and this can entail much information and document gathering. This sample model is one that includes much information and documents; some may require less. Some women may not have all of the sample information requested available to them. The general idea is to work creatively with what is available for the particular situation.

1. Working with the Battered Immigrant Woman

As stated in previous chapters, the nature of domestic violence and its effect on a battered immigrant woman often results in the woman having a low self-esteem. She may seem non-communicative, depressed, and/or unsure of herself. She may have difficulty remembering details. She may have difficulty trusting others and may be reluctant to talk about her family situation. She may not be used to anyone asking her for her opinion or thinking that her opinion has any value. Consequently, it may be difficult and frustrating to obtain information from her.

¹² The final INS regulations on the battered spouse waiver have not been issued as of the date of publication. Few decisions have been issued on the applications filed under the interim regulations. See Appendix 6 for interim regulations.

¹³ See Appendix 9 for sample waiver and supporting documents.

It is important, therefore, to initially work to gain the confidence and trust of the battered woman and to understand the dynamics of domestic violence and what she has had to endure. Many times, a battered immigrant woman is referred to an immigration attorney or agency for assistance in preparing a waiver by a domestic violence counselor or shelter advocate. It is helpful for the attorney and advocate to work together to assure the battered woman that she can have confidence in the attorney and that she is an integral part of her case. Together they can advise her that she has the option of leaving her batterer if she chooses and that this does not jeopardize her legal immigration status as long as she files the proper papers. Assure her that there is support for her decisions and agencies that can help her in finding shelter and other service.

It is also important to let her know that the attorney is not an agent of the government and all information that she gives her is confidential. The attorney should also explain the process of changing from a conditional resident to one of being an unconditional permanent resident.¹⁴ The conditional resident should know that she can file the waiver whether she is living with the batterer, is separated, or is divorced. She may not be sure of her immigration status, therefore, her status should be explained thoroughly.

Great consideration should be given to the fact that many battered women are totally unfamiliar with customs and laws in the United States and may have difficulty understanding the legal process. Many might also believe that the "attorney will do it all" without involving the battered woman or any other witnesses. It is important that the battered woman be informed that she will be the principal source of information from which suggestions for other sources of information flow. Consequently, she should also be told that there will be a series of meetings with her in order to prepare the proper documentation and that her full cooperation is necessary. In addition, it should be reiterated and emphasized that the battered woman must inform the attorney of her current address and telephone number if she moves.

2. Documenting a History of Violence

The interim regulations covering the documentation for a waiver defines the battered woman or the subject of extreme cruelty as one who is (but is not limited to) the victim of "any act of threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury." They add that "Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the battered woman is a minor) or forced prostitution shall be considered acts of violence." What is considered evidence of physical abuse¹⁵ may include, but is not limited to, expert testimony in the form of reports and affidavits from police, judges, medical personnel, school officials and social service agency personnel. The INS must be satisfied with the credibility of the sources of documentation submitted in support of the application.¹⁶

¹⁴ See Appendix 7 for a Fact Sheet on Joint Petitions and Waivers for Conditional Residents.

¹⁵ Evidence of extreme cruelty is discussed later in this chapter.

¹⁶ Vol. 56 Fed. Reg. No. 95, at 22637, (interim regulations amending 8 CFR Sec.216.5). See Appendix 6c for copy of interim regulations.

a. Chronological History and the Most Recent Events

The easiest way to document a case is generally by placing information in a chronological history. However, because of the sensitive nature of the issue and because some battered women may engage in "self-denial" of the history of abuse as a way to cope with the abuse, it is essential that the attorney probe extensively into the history and extent of the abuse and what actions she has taken.¹⁷ It is easiest to start with the most recent acts of abuse first since they are freshest in her mind. Once these acts are probed and discussed, the groundwork is laid to trace the chronological history of events. There are numerous questions and documents which should be obtained for each incident suffered by the battered woman.

b. Police Records

Always ask if the battered woman has called the police for help at any time and if so, whether a report was taken. It is also important to know if a neighbor, friend or relative contacted the police. These people can be interviewed and declarations taken for documenting the abuse. If there was contact with the police there may possibly be one or both of the following:

- ☐ a police report, and/or
- ☐ a record in the police dispatch logs that a call was answered at the battered woman's address.

The latter document is extremely crucial. In some jurisdictions, police are poorly trained in handling domestic violence situations. Some officers may merely tell the husband to stop abusing the battered woman and will not file a police report. In many jurisdictions, the police do not file a formal report unless the battered woman is willing to file criminal charges or requests that a report be made. Thus, it is important to obtain a printout of any records indicating that the officer reported to the battered woman's address or that a "911" emergency call was received from the battered woman's phone or from a friend or neighbor at or about the time of the abuse. The presumption here is that most battered women (of any crime) do not call the police unless it is a serious matter. In some jurisdictions, the police keep a computer printout of all 911 calls and responses.

If the battered woman or a neighbor, friend, etc. did call the police and an officer answered the call ask her (or the person making the phone call), if they remember the police officer's name or badge number. The officer should be interviewed and a declaration taken if no report was made. If the officer did prepare a report, her/his declaration can be used to authenticate the report made.

The battered woman should be advised that if she needs to call the police again, she should ask for the responding officer's name and badge number for future use, and for the police report number (which may encourage the officer to make a report).

Always ask the police department and the district attorney's office how emergency calls are documented and what written records might be available.

¹⁷ See Chapter II for more guidance on interviewing the battered woman.

c. Torn or Burned Clothes

In some domestic violence incidents, clothes are ripped, torn or burned. Ask the client if she has kept the clothes she was wearing at the time of abuse. If not, advise her to keep her clothes if she were to be abused again in the future since they will be useful evidence.

d. When No Complaint is Filed

The battered woman may be reluctant to file a complaint or cooperate with the pressing of criminal charges. If she is aware that her husband might be placed in jail, she at times balks, fearing that the incarceration will make her husband even more angry and thus lead to more abuse, or she simply does not want him to be "handled like a criminal". The attorney should advise the battered woman, that for her own safety (and the safety of any children) she should seriously consider pressing charges. Any charges filed will help in the documentation of her waiver case.

e. Criminal Court Records

If the batterer was arrested or convicted for any acts of domestic violence, certified copies of these records should be obtained immediately if possible. The battered woman should sign a release authorizing the attorney to receive such copies. The documents should include the criminal complaint, arrest records, record of conviction, sentencing report, and any other related records. Those records should contain the names and addresses of other witnesses to the violence. If possible these witnesses should also be contacted in order to obtain their declarations. Many times, witnesses, especially neighbors or relatives, are reluctant to "get involved" with what they may consider a "family dispute". It is important to impress upon the seriousness of the situation and how they can be helpful to the battered woman and that their assistance is important to her safety.

f. Medical Records

Always obtain any medical records which document that the battered woman was injured. Sometimes, however, the battered woman does not tell the medical staff that her injuries were a result of domestic violence. Nevertheless, the fact that she went to the doctor on or about the date of the incident is critical to confirm her story. If the client has not gone to the doctor, advise her that she should see a physician for two simple reasons: 1) she might need medical attention because of possible injury or damage, and 2) medical confirmation of her injuries strengthens her waiver case. An authorization waiver should be signed by the battered woman and obtained before requesting medical records.

g. Photos

Photos of the woman's injuries are helpful in the corroboration of her case. They may be taken by the service provider, by the police or even by herself. If taken by the police, obtain copies of these photos and attach a declaration by a police official attesting to the authenticity of the photos. These photos should include photos of the battered woman and any bruises or cuts, photos of the home or apartment in disarray, photos of weapons if any, etc.

h. Statements of Witnesses

Always obtain the names, address, and telephone numbers of witnesses to the violence. These can include a neighbor who called the police, a landlord or tenant who heard a fight going on, a friend or relative who was told by the battered woman about the abuse, someone who helped the battered woman flee the batterer or helped get assistance, an ambulance medic, etc. Information obtained from these witnesses include:

1. their relationship to the battered woman;
2. a description of the incident, any observation of physical abuse or resulting injuries, any observation of the battered woman's emotional state;
3. their familiarity with the battered woman and the batterer ;
4. knowledge of any other witnesses.

Witnesses can also include those who might have seen the battered woman's bruises, cuts, black-eye, etc., either at school, work, church, etc., on or about the date of the beating(s).

All of this information should be prepared in affidavit form or declaration form if an affidavit cannot be obtained.¹⁸

i. Statements from a Shelter

Confirmation that a battered woman had to seek assistance from a battered women's shelter is extremely helpful. The shelter's letter should be issued by the director or other authorized personnel which confirms the experience of the shelter (years of service), that the battered woman sought the shelter's assistance, the date of contact, if the battered woman resided in the shelter, any injuries observed, etc. The attorney should prepare a waiver authorizing the shelter to release information to the attorney for purposes of documenting the case. The letter should be specifically addressed to the Immigration and Naturalization Service and marked "confidential".

¹⁸ The interim regulations do not specifically require that the statement be in affidavit form. A declaration is a signed statement under penalty of perjury; an affidavit requires an oath and witness by a notary public.

j. Protective Orders

A copy of a protective order (or at least evidence of an attempt to obtain one) is also extremely helpful. The protective order will generally be accompanied by the battered woman's declaration describing the violence. If a protective order has not yet been obtained, the battered woman should be encouraged to obtain one for her own safety. In most jurisdictions, the filing of a protective order is a public record and can be easily found by contacting or going to the local civil courthouse. Many times, it will be easy to obtain a certified copy (at nominal or no cost).

k. Counselors

Statements from counselors confirming that the battered woman is undergoing counseling because of a history of domestic violence is also helpful although this situation is rare. An authorization for release of information from the battered woman must be prepared in order to obtain such information. This authorization should state for what purpose the information will be used.

1. Affidavit of Immigrant Battered Woman

Perhaps the most critical document is the affidavit of the immigrant battered woman. Because of limited language skills and unfamiliarity with the legal system, her attorney should describe purpose of affidavit. Again, please refer to Chapter II for key questions to be asked in preparing her declaration. In essence, this is the last document which should be prepared. It is essentially the battered woman's own testimony about her relationship and the incidences of violence. The other documentation can be used to refresh the battered woman's memory about each incident and thus gives greater accuracy to the affidavit. The affidavit should be written with sufficient detail. Remember, the battered woman's credibility is always at issue in a waiver case, since the burden is on her to convince the INS that the waiver is warranted. Key information on the affidavit includes:

- (1) How the battered woman and batterer first met; nature of their relationship; dating history; living arrangements; if they have children.
- (2) When they began living together.
- (3) The first act of domestic violence; what factors made it difficult for her to leave.
- (4) A description of each incident; her protests and attempts to seek help; her feelings and observations; her reactions; physical injuries; her inability to obtain help and why; verbal abuse; threats.
- (5) List of all addresses where they resided.
- (6) Relationship with parents and siblings of batterer.

- (7) Role-if any-of the parents and siblings in the battering, including pressure on her not to report the incident to the authorities.
- (8) Her own feelings of fear for her safety.

m. Documenting the "Extreme Cruelty" Waiver

Aside from seeking a waiver on the basis that the woman is a victim of battering, she can also seek a waiver if she is the victim of "extreme cruelty".¹⁹ The interim regulation use the same definition to describe a waiver applicant as a person who "was battered by or was the subject of extreme cruelty" (See Sec. 2 above). The interim regulations, however, create the term "extreme mental-cruelty" (a phrase nowhere in the statute or legislative history governing these waivers) as an attempt to distinguish between physical harm (battering) and nonphysical cruelty. This distinction has been criticized in comments to the interim regulations.²⁰

The interim regulations provide that:

"All waiver applications based upon claims of extreme mental cruelty must be supported by the evaluation of a professional recognized by the Service [INS] as an expert in the field..."

"The evaluation must contain the professional's full name, professional address and license number. It must also identify the licensing, certifying, or registering authority. The Service [INS] retains the right to verify the professional's license."²¹

According to the regulations, the INS will base its decision on the evaluations of professionals. Professionals recognized must be licensed clinical social workers, psychologists, and psychiatrists.

Obviously, the narrow application and the documentation guidelines of the regulations may make it difficult to document these cases. Many immigrant women will simply never get to a psychologist or psychiatrist because of costs or unavailability. Moreover, the pool of bilingual and bicultural professionals is limited, thereby making it even harder to obtain the documentation. However, if there is time, the battered woman should be referred to a professional for assistance and documentation.

In addition to the professional's evaluation, the documents used to verify the existence of physical abuse can also confirm the behavior which also creates the extreme cruelty. The preparer of the extreme cruelty waiver should not hesitate to submit and obtain documents similar to those used in documenting physical abuse.

¹⁹ INA Sec. 216(c)(4)(C).

²⁰ See Davis, M. and Calvo, J. "INS Interim Rule Diminishes Protection for Abused Spouses and Children", *Interpreter Releases* 665, (June 3, 1991). 68.

²¹ Vol. 56 Fed. Reg. No. 95, at 22637 (interim regulations amending 8 CFR Sec. 216.5), see Appendix 6 for copy of interim regulations.

3. Conclusion

Every case will have its own particularities and may require additional approaches. However, the above documents will prove extremely helpful. Because documentation of these cases for immigration purposes is still a new process, attorneys will have to refine the process and develop more creative ways. At all times, the attorney must be aware that s/he plays a critical role in helping the battered woman feel empowered to "turn the tables" and make a change in her life. Even if the sources of information exist, they are useless unless the battered woman can provide leads to them. This occurs, however, only if the battered woman understands her role in preparing the case. The attorney should thus be patient yet firm and understand the experiences that the battered woman has had to endure. Always remember that her seeking help in order to flee the violence is a courageous act, and perhaps is one the most difficult things she has ever done.