M E M O R A N D U M

February 7, 1992

TO: SANDRA J. SOBIERAJ, Legislative Assistant
Office of Congresswoman Louise Slaughter

FR: BILL TAMAYO, ASIAN LAW CAUCUS
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RE: SELF-PETITIONING RIGHTS FOR BATTERED ALIEN SPOUSES SEEKING LAWFUL RESIDENT STATUS

Thank you for your letter of October 28, 1991 requesting information and ideas on providing protections for battered spouses in the United States who are married to United States citizens or lawful permanent residents but who are not yet themselves either permanent lawful residents or conditional permanent residents.[1] We apologize for not sending this memorandum earlier but pending legal cases and Bill's parental leave in December caused the delay. An opportunity was also given to other practitioners to provide their comments on the drafts.

We certainly welcome the opportunity to illustrate problems and to suggest solutions not provided for by the 1990 amendments to the Immigration Marriage Fraud Amendments of 1986. We are definitely encouraged and enthused by Congresswoman Slaughter's interest in granting additional protections to victims of domestic violence.

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1. Your letter refers to providing protections to spouses who are not yet <u>conditional</u> permanent residents. It should be noted, however, that the conditional status only applies to those gain permanent resident status within two years of marriage. In cases where the victim has been married for over two years to the U.S. citizen or permanent resident petitioner she can be adjusted to full permanent resident status (if a visa petition has been filed and approved, and the visa is currently available at the time of adjustment. The victim would not be subject to the requirements of Sec. 216 of the INA, 8 USC 1186.

Our comments are based on direct experiences in handling dozens of cases of immigrant battered women referred by the battered women's shelters in the San Francisco Bay Area (including the Asian Women's Shelter), and in the Washington, D.C. area. While some of the women were already conditional residents and were eligible for a waiver of the joint petition requirement, many of the other battered women had not yet been granted any legal status for a variety of reasons including the abuser husband's refusal to file the petition, his actual withdrawal of a filed petition after she called the police or left him, or his threat to withdraw a petition if she complained about abuse.

We believe that allowing a battered woman to self-petition (without having to be a conditional resident as a prerequisite to full status) after she proves both the abuse and the validity of the marriage provides the safest solution for battered women and children. This approach prevents abusive U.S. citizen and lawful resident husbands from using immigration status as a mechanism to keep the battered alien spouse in an abusive relationship. Based on the approved petition, the alien spouse would then be able to adjust her status to that of a lawful resident.

I. BACKGROUND

A recent amendment under the Immigration Act of 1990 to the Immigration and Nationality Act amending the marriage fraud provisions (Sec. 216 of the INA, 8 USC 1186) provides for a "battered spouse waiver" to alien battered spouses who are conditional permanent residents. Sec. 216(c)(4), 8 USC 216(c)(4). However, this amendment does not address the situation wherein the battering spouse has withdrawn a previously filed (but not yet approved) visa petition.[2] Furthermore, this amendment does not address the situation when the husband simply refuses to file the petition as a means to control the victim.

Frequently, battered undocumented alien women will remain with their husbands and "choose" not to complain to authorities about abuse for fear that their husband will withdraw the petition. Similarly, these women are sometimes

2. If the husband threatens to withdraw the petition, but has not yet withdrawn it, the petition can still be approved, even if the spouses are separated as long as the marriage has not yet been terminated. See Bark v. INS, 511 F.2d 1200 (9th Cir. 1975); Dabaghian v. Civiletti, 607 F.2d 868 (9th Cir. 1979).

forced to remain or will not complain if the husbands threaten to not file the petition, threaten to have them deported, or threaten to divorce them and thereby eliminate a means to gain legal status under current law. Some women also remain with the abuser based on his promise to file the petition. For married, battered undocumented women, any of these occurrences makes them more vulnerable to deportation.

More often than not, many alien women find themselves in this extremely vulnerable sitaution in which they are subject to deportation[3], despite the fact that they have the requisite relationship to accord them legal residency. This fear of deportation becomes a central tool used by the abusive spouse to maintain power and control in the battering relationship and to continue the battering without fear of retaliation by his spouse or of arrest. Unfortunately, the current structure of our immigration laws places battered spouses who are eligible to apply for and to receive legal permanent residency at the mercy of the abusive spouses. Essentially, existing law vests the power in the batterer to determine whether the victim can gain legal status or not by requiring that a petition be first filed by the batterer, and allows the batterer to withdraw the visa petition at any time prior to the issuance of the visa or the adjustment of status of the victim. The woman is powerless to revoke her husband's action.

This memo addresses possible legislative amendments that can be enacted in order to protect the battered alien spouses found in these vulnerable situations. This memo presents arguments for allowing an eligible battered spouse to file a visa petition on her behalf, and secondly, offers an alternative, those less preferred, approach of amending legislation so as to prevent the revocation of a relative visa petition (I-130) when the battering spouse has withdrawn the petition before conditional resident status is actually granted.

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3. Some of the women who are married to U.S. citizens or lawful permanent residents might have violated their nonimmigrant status (e.g. visitors, students) by either overstaying or by having worked without authorization. or persons who entered without inspection (EWI). Therefore, they are technically deportable.

II. CURRENT LAW

A. Revocation of the Petition

Under current law, a person seeking legal permanent resident status by way of a marriage generally can obtain such a benefit if the U.S. citizen or lawful permanent resident spouse initiates the process by filing a relative visa petition (Form I-130) with the INS. (One exception is the "self-petition" process provided for surviving spouses of U.S. citizens. See discussion in Footnote 4.) However, a pending or approved relative visa petition is automatically revoked

> (1) upon written notice of withdrawal filed by the petitioner with any officer of the INS who is authorized to grant or deny petitions
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> (2) upon the death of the petitioner or beneficiary
>
> (3) upon the death of the petitioner unless the Attorney General (INS) in his discretion determines that for humanitarian reasons revocation would be inappropriate.

8 CFR Sec. 205.1(a). (emphasis added)

Thus, mere written notice to the INS is sufficient to automatically revoke the petition, and leaves no discretion to the Attorney General (INS).

B. Reinstatement of a Petition

Normally, a petition would also automatically revoke if the petitioner dies. Sec. 205.1(a)(3), however, provides the Attorney General with the discretion to reinstate the petition if the petitioner dies and humanitarian considerations warrant reinstatement. That is, the law recognizes reinstatement of petitions even after the requisite relationship ends by death. This regulation was essentially enacted in order to avoid hardships to a beneficiary who has waited for years for a visa, and expresses a recognition that the death of the petitioner cannot normally be foreseen when a petition is filed and furthermore, that the death is not within the control of the parties.

Discretion under Sec. 205.1(a)(3) has been favorably but narrowly exercised when the petitioner dies after the petition has already been approved, but before the date when the beneficiary would have been granted permanent resident status or would have entered the U.S. on an an immigrant visa. Moreover, under Sec. 205.1(a)(3) the INS has the authority to

approve a pending visa petition even if the petitioner has already died. Estate of Wing Hing Tow v. INS ____ F. Supp. ____ (1990) No. C90-1644 SC (N.D. Cal.) (Petition approved three days after petitioner died.) See also Sanchez-Trujillo v. INS, 620 F. Supp. 1361 (D.C.N.C. 1985) (petition can still be approved and adjustment application adjudicated after petitioner dies).

Thus, there is precedence allowing for the approval and/or reinstatement of a petition even after a relationship has ended.

C. Self-Petitioning for Surviving Spouses of U.S. Citizens

Additionally, Congress recognized the need to approve petitions after a relationship has technically ended and when no petition has been filed, when it provided that spouses of U.S. citizens can "self-petition" after the U.S. citizen dies if a marriage existed for two years. Sec. 201(b)(2)(A)(i) of the INA, 8 USC 1151(b)(2)(A)(i).[4] In creating this unique remedy Congress acknowledged the desire of a widowed beneficiary to immigrate regardless of whether the U.S. citizen spouse has taken any previous action to file a petition.

We note, however, that the statute did not cover the minor, unmarried children (including step-children) of the U.S. citizen. Consequently, we recommend that the statute be amended to include the unmarried children (as defined by the INA) of deceased U.S. citizens. Without such an amendment, the spouse who gains permanent residency would have to file second preference visa petitions and the children would have to wait several months, if not years, to immigrate. (See discussion below on spouses of permanent residents.) In the alternative, the law can be amended to grant "derivative status" to a child whose parent will self-petition.

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4. This amendment expands the definition of "immediate relatives" to include

> "the spouse of a citizen of the United States for at least two years at the time of the citizen's death and was not legally separated from the citizen at the time of the citizen's death. . . if the spouse files a petition under section 204(a)((1)(A) within two years after such date and only until the date the spouse remarries".

III. AMENDING THE IMMIGRATION AND NATIONALITY ACT TO ALLOW FOR SELF-PETITIONING FOR BATTERED ALIEN SPOUSES AND CHILDREN AND ADJUSTMENT OF STATUS.

In allowing self-petitioning following a spouse's death Congress recognized the validity of offering a humanitarian solution to a stringent reading of immigration laws in cases where the petitioner dies. This compassionate approach should be expanded to offer battered spouses and children similar relief. Such an approach would add the humanitarian goal of removing a major factor that keeps battered women in abusive relationships.

Under Sec. 216(c)(4) of the INA, 8 U.S.C. Sec. 1186(c)(4) Congress has expressed its belief that a battered woman should not be forced to remain in a battering relationship in order to retain her permanent residence.[5] Similarly, a battered woman should not be forced to remain in a battering relationship in order to gain permanent residence when the marriage was entered into in good faith. (Sec. 701 also allows a waiver if the marriage was terminated for good cause by either party.)

Just as an alien spouse cannot control the unexpected death of a U.S. citizen spouse, a battered spouse similarly cannot control the abusive relationship or the batterer, and thus should not be denied the immigration benefits that she would normally be entitled to receive. While it could be argued that the relationship upon which the petition would be granted no longer exists - or at least the petitioner has not evinced an intent to "reunite"[6] in the United States with the beneficiary - a relationship nevertheless exists under the INA unless it is legally terminated. Bark v. INS, 511 F. 2d 1200 (9th Cir. 1975) (separation during marriage does not invalidate a petition).[7] See also Dabaghian v. Civiletti, 607

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5. This section was added through Sec. 701 of the Immigration Act of 1990.

6. "Reunite" in this context refers to the concept of family reunification under the immigraiton laws not marital reconciliation.

7.

> Aliens cannot be required to have more conventional or more successful marriages than citizens....(E)vidence 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

F.2d 868 (9th Cir. 1979) (where alien's marriage to U.S. citizen was not a sham or fraudulent from its inception, it was valid for the purpose of determining eligiblity for adjustment of status until it was legally dissolved.)

Divorced Aliens

Our proposal for self-petitioning, however, would also extend self-petitioning rights to battered spouses when a divorce has already occurred providing it can be proven that the marriage was valid and entered into in good faith. In cases where abuse occurs, oftentime the petitioner/abuser will threaten to divorce the alien spouse and thereby terminate the basis for a relative visa petition. As stated earlier, this is another major tactic for control. Thus, by allowing the abused spouse (or former spouse) to self-petition, one the batterer's major weapons for control - the threat of divorce and the alien spouses' consequent deportation - is removed from his arsenal.

On the other hand, the abused spouse may want to leave the petitioner and obtain a divorce in order to sever ties to him and end the abuse. Her goal of ending the abuse, however, should not come at the price of forsaking the opportunity to gain legal status through a marriage. Consequently, even if there is a divorce (initiated by either party)[8], the alien spouse should still be able to self-petition providing she can prove that the marriage was entered into in good faith and that abuse occurred in the relationship. Granting self-petitioning rights after a divorce (when abuse has occurred) is consistent with the grant of self-petitioning rights to a

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> from proof of separation is arbitrary unless we are reasonably assured that it is more probable than not that couples who separate after marriage never intended to live together...Common experience is directly to the contrary. 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, employment opportunities, illness, poverty, and domestic difficulties.

Bark v. INS, supra, 1201-1202.

8. The 1990 act removed the "race to the courthouse" provisions which previously limited waivers of the joint petition requirement in judicially terminated relationships when the moving party was the alien. Sec. 216(c)(4)(B), 8 USC 1186(c)(4)(B), as amended, November 29,1990.

surviving spouse of a U.S. citizen since the relationships in both situations have terminated.

While 8 CFR Sec. 205.1 could simply be amended to give the Attorney General (in actuality the INS District Director) the discretion to reinstate a withdrawn petition when battering or extreme cruelty has occurred, this remedy would only be limited to situations wherein the petitioner has actually filed a petition, and thus leaves other victims unprotected. **A better approach would create a legislative solution so that the battered spouse is not dependent on an affirmative act by the batterer, i.e. filing and retention of an immigrant visa petition. In essence, affording the battered spouse a remedy within which she can gain legal status independent of the batterer's conduct provides the most practical solution.**

While there is a two-year marriage requirement for surviving spouses of U.S. citizens to self-petition, such a requirement should not be applied in this situation. In amending the marriage fraud amendments through the Immigration Act of 1990, Congress realized that a battered spouse need not stay married to her batterer for two years in order for the INS to remove her conditional resident status and grant her full resident status.[9] Thus, requiring her to stay married for two years before she can file her own relative visa petition violates the spirit of and contravenes the public policy behind the battered spouse waiver. Once a spouse establishes that she entered the marriage in good faith, and would otherwise have been eligible for an immigrant visa or adjustment of status but for the batterer's refusal to file a petition, she should be allowed to obtain "immediate relative" status.

Public policy argues against forcing a battered spouse to stay in a relationship in order to obtain immigration benefits that she would normally have obtained but for the batterer's desire to have control over the victim. Furthermore, it can be argued that the batterer's refusal to file the petition is in and of itself extreme cruelty since the batterer is forcing the woman to choose between deportation as the price of complaining about the battering or suffering further bodily harm.

Note: Granting self-petitioning rights to battered spouses obviates the need to grant them conditional resident

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9. Sec. 701 of Immigration Act of 1990 (Battered spouse or child waiver of the conditional residence requirement.) amending Sec. 216(c)(4) of the INA, 8 U.S.C. 1186a(c)(4)

status. Once the INS accepts the petition from the battered spouse on the grounds that she was battered (i.e. self-petition), there should be no need for further inquiry into the bona fides of the marriage two years later. Her post-battery and post-approval conduct should have no bearing on the petition she has filed.

B. Amending the Immigration & Nationality Act

An amendment to the Immigration and Nationality Act would basically redefine "immediate relatives" under Sec. 201(b) of the INA to include "spouses (and the children) of U.S. citizens who entered into marriage in good faith but were the subjects of battering or extreme cruelty perpetrated by the U.S. citizen spouse or parent, providing that the spouse files a petition under section 204(a)(1)(A)".

We also recommend, however that Sec. 245(c) of the INA, 8 USC 1255(c) (which bars adjustment of status to those who have worked without authorization or fallen out of status unless they are immediate relatives of U.S. citizens, and to those who entered without inspection) be amended to allow adjustment of status when the beneficiary or her child is a victim of battery or extreme cruelty by the spouse regardless if she or child entered without inspection.

The safety of the victim and her child(ren) depends on the beneficiary's ability to adjust her status without leaving the U.S. Present law in 50 U.S. jurisdictions offers battered spouses orders of protection that prohibit future abuse by the batterer. These orders are difficult to enforce interstate. If the battered spouse is forced to travel abroad to obtain an immigrant visa for permanent residency she must as a practical matter forego the protection offered by the civil protection order while she is outside the U.S. There are no cases to date in which another country has been willing to enforce a U.S. protective order.

Few countries have become signatories to the Hague Convention which requires international enforcement of custody orders. Furthermore, child custody law has not yet evolved to this level of enforcement. Thus, requiring that battered spouses travel outside the U.S. or away from the jurisdiction where the custody order is enforceable poses grave danger. Consequently, Sec. 245(c) of the INA, 8 U.S.C. 1255(c), which bars adjustment of status to aliens who entered without inspection, should be amended to exempt battered spouses and children from its prohibitions to adjustment.

C. Spouses of Lawful Permanent Residents

Spouses of lawful permanent residents face particular problems since they are not "immediate relatives" and are precluded from adjusting their status to permanent resident in the United States if their nonimmigrant status has expired, they have worked without authorization, or if a visa is not currently available. Sec. 245(c) of the INA.[10] Generally, however, the visas under second preference are not currently available[11], and thus the beneficiaries cannot adjust their status. Given the nature of battering relationships and the danger of increasing violence over time, beneficiaries must be able to lawfully remain in the United States pending the availability of the visa. In some situations, the permanent resident husband threatens to withdraw the petition when the victim proceeds abroad to the consulate.

There are two approaches to resolving this dilemma. The first is to redefine "immediate relatives" under Sec. 201(b) of the INA to include the spouses and minor children of lawful permanent residents. Former Congressman Morrison attempted to include this revision in H.R. 4300 (1989-1990), but it was not accepted in the final package. The compromise provision grants additional visas to the second preference and to the backlogged countries. Sec. 203(a)(2)(B) of the INA, 8 USC 1153(a)(2)(B). (However, as noted in Footnote 11, the additional visas did not "cure the backlog", and thus there is still a substantial waiting period.) This waiting period, as

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10. The bar also applies to the alien children of permanent residents. It should be noted that many undocumented alien wives are parents of U.S. citizen children. Forcing these mothers to leave the United States pending the granting of theirs visas abroad is contradicts the compelling need to not separate the mother from the children, particularly children who have suffered and/or witnesses violence and other abuse. Under the law, immediate relatives (spouses, parents, and unmarried minor children) of United States citizens can adjust their status to that of permanent resident provided that they entered with inspection.

11. The February 1992 State Department's Visa Bulletin indicates that the second preference (Family Preference 2A) has a cutoff date of November 1, 1989, and a cutoff date of September 1, 1989 for countries exempt from the per-country limit, i.e. Dominican Republic, Indian, Mexico, Philippines. Thus on a worldwide basis, only those beneficiaries who had second preference (2A) petitions filed on their behalf are waiting approximately two years and three months for an immigrant visa.

a practical matter, if not removed locks battered women into the battering relationship for the entire two year and three month waiting period. Additionally, the 1990 Act grants 55,000 visas annually for three years (FY 1992, 1993, and 1994) for spouses and minor children of legalized aliens above the normal second preference allocation in order preserve the second preference visas. Sec. 112 of the Immigration Act of 1990.

Amending the legal definition of "immediate relatives" to include spouses and minor children of lawful permanent residents and to allow a battered spouse or child to file a petition is the most convenient way to remedy the problem of battered spouses married to lawful permanent residents. While Congress rejected the idea in 1990 and tried to address it by providing an additional (but still inadequate) number of visas for these beneficiaries, a documented record of the potential abuses resulting from this dilemma would support an argument to expand the definition of immediate relatives to cover spouses and minor children of lawful permanent residents.

The second alternative, if immediate relative status is not redefined as proposed above, would be to grant some type of "temporary stay" analogous to the "family unity" provisions of the Immigration Act of 1990. Undocumented second preference beneficiaries theoretically do not have legal status in the United States and are not immediately eligible for such status. Congress, however, realized the dificult situation that legalized aliens families would be in and thus provided for a stay of deportation for the spouses and minor children of legalized aliens until a 2nd preference visa is available. See Sec. 241(a) of the INA, 8 USC 1251(a); see also Sec. 301 of the Immigration Act of 1990 (Family Unity provisions)

The humanitarian public policy behind the battered spouse waiver would also support providing a stay of deportation for battered spouses and children while self-petitions of the battered spouses and children are pending. It can be argued that once the beneficiaries establish that they had bona fide marriages and are victims of domestic violence, a stay of deportation should be provided.

We recommend that the prohibitions of Sec. 245(c) which bar adjustment of status when a person has fallen out of status or entered without inspection be inapplicable to battered spouses who had been or who are married to lawful permanent residents. There is precedence for lifting this bar for humanitarian reasons. For example, under President Bush's Executive Order 12711 of April 11, 1990 providing certain protections for nationals of the People's Republic of China

following the massacre of students in China on June 4, 1989, PRC nationals who are out of status remain in legal status for purposes of adjustment to permanent resident or change to nonimmigrant status. Vol. 55 Fed. Regs. No. 72, p. 13897[12]

IV. A LIMITED ALTERNATIVE

An alternative to granting self-petitioning rights would be to minimally protect spouses are beneficiaries of petitions currently pending but which the petitioner intends to withdraw. The INA could be amended to supercede 8 CFR Sec. 205.1(a)(1) (automatic revocation of petition by written notice of withdrawal filed by petitioner) to bar the revocation of the petition when the beneficiary child or spouse has been a victim of battery or extreme cruelty either directly or indirectly by the petitioner. If the petitioner submits a written notice of withdrawal, the Attorney General would be required[13] to notify the beneficiary of the petitioner's intent. The beneficiary would then be allowed 90 days to respond. If the beneficiary establishes that the marriage was bona fide and she is a victim of battery or extreme cruelty, the petition cannot be revoked by the Attorney General unless upon the written request of the beneficiary.

12.

> ...(I)t is unclear how an executive order can override the statutory prohibition in INA Sec. 245(c) against allowing aliens to adust status inthis country if they have worked without authorizationorfailed to maintain continuous lawful status here. Assuming the executive order goes unchallenged, the net effect is that PRC nationals in lawful nonimmigrant status at anytime before April 11, 1990 cannot fall out of status for Secs. 245 or 248 purposes until 1994, no matter what they do.

Vol. 67, Interpreter Releases, 434 (April 16, 1990). It should be noted that the INS has honored the executive order. We are not aware of any legal challenge to this provision of the order.

13. Under current law, if the husband does not withdraw the petition but refuses to attend the spousal interview at the INS, the petition can still be approved and battered spouse should still be able to obtain legal residence as long as she establishes that the marriage was bona fide. See Bark v. INS, supra; see also Dabaghian v. INS, supra.

Thus, the only inquiry by the Attorney General would be on the bona fides of the marriage as presented in the visa petition and on the existence of battery or extreme cruelty as it would an I-752 waiver. Since the visa petition would be retained, the victim spouse can adjust her status to permanent resident or proceed abroad to pick-up her visa abroad should she choose.

Obviously, this alternative is much more limited since it only provides protections wherein the batterer has actually filed the petition. However, as noted above, many abusers do not file the petition so that they can maintain control over their wives. In view of its significant limits, this alternative is not the preferred remedy to the problem. Consequently, we believe that the "self-petitioning" process provides the only real solution that provides an adequate immigration remedy to victims of violence.

CONCLUSION

In order to decrease the vulnerablity of abused immigrant women it is essential to provide them the opportunity to gain legal resident status without depending on any affirmative action by the abusive spouse to initiate the immigration process. The best approach is to amend the law to allow abused spouses to "self-petition" and eliminate the existing bars to adjustment of status if a record of abuse is presented.

We are prepared to discuss and propose specific language to amend existing law once there is an agreement on the intended amendment. We are also in the process through the Immigrant Women's Task Force of CIRRS and other groups to provide documentation illustrating the problems discussed above.[14]

Thank you for soliciting our comments and suggestions.

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14. The case referred to in Appendix X of the manual, Domestic Violence in Immigrant and Refugee Communities, provides a clear illustration of the problem. (A copy was sent to you earlier from the Family Violence Prevention Fund.)