July 3, 2015

Ms. Maureen Dunn
Division Chief
U.S. Citizenship and Immigration Services
Family Immigration & Victim Protection Division
Office of Policy & Strategy

20 Massachusetts Avenue, N.W. Washington, DC 20529–2140

Submitted via email: ope.feedback@uscis.dhs.gov

Re: PM-602-0110: VAWA amendments to the Cuban Adjustment Act: Continued Eligibility for Abused Spouses and Children

Dear Ms. Dunn:

I am writing to strongly support the comments on VAWA Cuban Adjustment Act (VAWA CAA) Eligibility submitted by ASISTA, Americans for Immigrant Justice and other organizations working with immigrant survivors of domestic violence. I worked with Congressional staffers to draft the VAWA Cuban Adjustment Protections that were contained in the Violence Against Women Act of 2000 and the Violence Against Women Act of 2005 assisting in the drafting of the statute and the legislative history of the VAWA CAA protections for battered immigrant spouses and children of Cuban immigrants. We are submitting these comments in response to U.S. Citizenship and Immigration Services' (USCIS) request for comment on the new guidance related to VAWA amendments to the Cuban Adjustment Act: Continued Eligibility for Abused Spouses and Children (hereinafter referred to as "Guidance").

First, we commend you for issuing this important guidance and providing vital instruction for USCIS employees regarding abused spouses and children of those eligible for relief under the Cuban Adjustment Act ("hereinafter referred to as "eligible derivatives"). We respectfully submit our comments in order to provide further clarification and instruction regarding the adjudication of these applications.

I. VAWA's Cuban Adjustment Act Protections Legislative History and Congressional Intent.

Attached to these comments and incorporated herein by reference are two attachments:

- Interlineated text of the Cuban Adjustment Act reflecting the amendments made by VAWA 2000 and VAWA 2005;[1] and
- The full legislative history of VAWA 1994, VAWA 2000 and VAWA 2005 containing discussions of VAWA CAA provisions at pages 15, 30, 35, 44, 51, 52 and 53.[2]

[1] Attachment A CUBAN ADJUSTMENT ACT WITH VIOLENCE AGAINST WOMEN ACT 2000 AND 2005 AMENDMENTS (2010) available at http://niwaplibrary.wcl.american.edu/immigration/vawa-self-petition-and-cancellation/statutes/VAWA_VAWA-2000-and-2005-Cuban.pdf/view

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One of Congress' key goals in VAWA 2000 and VAWA 2005 was to sever dependence on the abusive spouse by treating spouses and children subjected to battering or extreme cruelty by Cuban principals in a manner identical to abused spouses and children of citizens and lawful permanent residence. Under VAWA CAA, spouses and children of Cuban principal immigrants would be able to self-petition for VAWA CAA when the Cuban spouse was eligible to file for adjustment had filed for adjustment and the case is pending, or had already adjusted their status to lawful permanent residency. The goal was to ensure that spouses and children subjected to battering or extreme cruelty would maintain access to VAWA CAA adjustment of status under a range of circumstances:

- When the perpetrator had not filed for adjustment
    - The goal was to allow abused spouses and children to flee the abusive home and no longer be forced to stay until the abuser filed for adjustment and included the spouse and children in the applications;
- When the perpetrator had filed for adjustment
    - The goal was to allow the abused spouse and/or child to not have to stay with the abuser because there was a pending case awaiting adjudication. This approach also offered protection by addressing the problem of cases in which the abuser filed for adjustment and refused to include their abused spouse or child in the application as part of the immigration related abuse coercive control dynamics in the relationship.
- When the perpetrator filed an application for adjustment and adjusted status under CAA and did not include their immigrant spouse or child whom the Cuban perpetrator battered or subjected to extreme cruelty in the adjustment application.

The VAWA CAA provisions were designed to provide protections to spouses of CAA eligible Cuban immigrants virtually identical to the protections available to self-petitioning abused spouses and children of citizens and lawful permanent residents. VAWA CAA was designed to be available to:

- Undocumented immigrant spouses and children of CAA applicants who have been subjected to battering or extreme cruelty
    - VAWA CAA was primarily designed to help undocumented abused immigrants. VAWA 2005 included VAWA CAA applicants on the list of domestic violence victims who were defined in INA 101(a) (51) as VAWA self-petitioners. VAWA CAA applicants like all every other category of self-petitioner described in INA 101(a) (51) include undocumented immigrant applicants. Even battered spouse waiver applicants who have conditional residency without the battered spouse waiver itself become undocumented if they fail to file the joint petition or if their battered spouse waiver is denied.

[2] Attachment B Katrina Castillo, Alexandra Spratt, Catherine Longville and Leslye E. Orloff, Legislative History of VAWA (94, 00, 05), T and U-Visas, Battered Spouse Waiver, and VAWA Confidentiality (June 17, 2015) available at http://niwaplibrary.wcl.american.edu/reference/additional-materials/vawa-legislative-history/VAWA_Leg%20History_Final%2011%2023%2014%20leo.pdf/view?

- Abused immigrant spouses and children of Cuban principals who were admitted or paroled
- Abused immigrant spouses and children of Cuban principals without regard to the abused immigrant spouse or child's citizenship, nationality or country of origin.

The goal with to provide direct self-petitioning access to VAWA CAA protection that would not be under the power and control of the abusive Cuban principal spouse or parent. Congress understood that Cuban CAA applicants would become lawful permanent resident and eventually if the marriage was not terminated prior to the Cuban perpetrator becoming a lawful permanent resident undocumented battered immigrant spouse and children who did not attain lawful permanent residency along with the abusive Cuban adjustment applicant principal might be able to self-petition.

However, there was a concern that making abused immigrant spouses and children of CAA Cuban principals wait until after the Cuban abusive immigrant spouse attained lawful permanent residency would lock that battered immigrant spouse and child in the relationship where they would be subject to ongoing abuse.[3] To address this concern the VAWA CAA provisions were written to allow a victim to file whether or not the victim continued to reside with the abuser. This provision allowed the victim to flee the abusive home without losing the path to lawful permanent residency the abused spouse or child had though the CAA or when the abusive Cuban principal spouse adjusted status. VAWA 2005 amendments expanded these protections to give spouses and children subjected to battering or extreme cruelty by Cuban spouse the same two years post-divorce to file their VAWA CAA application that VAWA 2000 gave all VAWA self-petitioners.

II. Clarification of Filing Procedures & Eligibility

We commend USCIS for clarifying and confirming that abused spouses and children of qualifying Cuban principals need not file an I-360 VAWA self-petition in order to avail themselves of the protections of the VAWA protections of the Cuban Adjustment Act ("CAA"). Given the varied policies and procedures of USCIS District Offices, this clarification of procedures is very welcome. Furthermore, we also appreciate that the Vermont Service Center's VAWA Unit will adjudicate adjustment of status applications for eligible derivatives, given its specialized training and expertise. Moving VAWA CAA adjudications to the VSC is consistent with the legislative history of VAWA 2005 and congressional expectations for having these and all cases classified as VAWA self-petitions under (NA Section 101(a)(51) adjudicated at the specially trained VAWA unit of the Vermont Service Center. See Legislative History Attachment B page 30.

[3] It is important to note that many battered immigrant VAWA self-petitioners and U visa applicants continue to reside with their abusive spouses until the VAWA self-petition or U visa application is adjudicated and the victim receives work authorization. The research findings provide a clear picture of the frequency with which abused spouses continue to be subjected to abuse. It is this ongoing abuse that the VAWA CAA amendments to VAWA 2000 and VAWA 2005 were designed to avoid. See generally, Attachment C: Krisztina E. Szabo, David Stauffer, Benish Anver & Leslye E. Orloff, *Early Access to Work Authorization For VAWA Self-Petitioners and U Visa Applicants*, NIWAP (Feb. 12, 2014), *available at* http://niwap.org/reports/Early-Access-to-Work-Authorization.pdf.

We also appreciate the clarification that eligible derivatives may apply if the abusive qualified Cuban principal is eligible for adjustment or those who **have adjusted** to legal permanent resident status, whether under the CAA or another adjustment provision.[4] We believe this statement is necessary to clear up the practice and policy among USCIS District Offices.

III. Training to VSC Adjudicators

Secondly, we wish to confirm that VSC VAWA Unit adjudicators will be trained in the unique adjustment procedures for eligible derivatives under the VAWA provisions of the CAA, specifically, that they are aware of the "roll back" provision, which back dates permanent residency approval. Specifically, the CAA states:

> "[u]pon approval of such an application for adjustment of status, the Attorney General shall create a record of the alien's admission for permanent residence as of a date ***thirty months prior*** to the filing of such an application or the date of his last arrival into the United States, whichever date is later."[5]

In the case *Silva Hernandez v. Bureau of Citizenship and Immigration Services* (11th Cir. November 13, 2012), the Eleventh Circuit Court held that the thirty month roll back provisions apply to non-Cuban spouses and children. As such, we recommend that VAWA Unit adjudicators receive adequate guidance and training related to these specific provisions.

IV. Immigration Status of Abused Spouses or Children

We are very concerned that the Guidance implies that abused spouses and children of qualified Cuban principals must themselves be "admitted or paroled" to apply for the VAWA protections of the CAA. We firmly believe, based upon existing law and USCIS guidance that abused spouses and children who are eligible derivatives may apply for these protections regardless of their manner of entry. As discussed in Section I, this is not what is contemplated by VAWA 2000 or VAWA 2005 and this approach will trap battered immigrant spouses and children of Cuban Adjustment Principals into abusive marriages. It will force them to stay in the marriage and endure the abuse until the Cuban Adjustment Act Principal becomes a lawful permanent resident and the abused spouse and the abused child become eligible to self-petition. This result could not be more contrary to the legislative history, purpose, and intent of Congress in the Violence Against Women Act. See full legislative history Attachment B.

The Guidance states, in relevant part, "Section 1 of the CAA also permits the spouse or child of a *qualifying Cuban principal* to adjust status if the spouse or child:

- **Was inspected and admitted or paroled into the United States after January 1, 1959;**

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[4] Guidance at 4.
[5] Pub.L. No. 89–732, § 1, 80 Stat. 1161, 1161 (as amended)

- Has been physically present in the United States for at least one year; and
- Resides with the *qualifying Cuban principal*."[6]

The Guidance goes on to establish that VAWA 2005 "amended the CAA to make it easier for battered or abused spouses or children of qualifying Cuban principals to adjust status under section 1 of the CAA" by removing the residency requirements for abused spouses and children and creating death and divorce exceptions. However, it does not address the application of INA 212(a)(6)(A)(ii) to the VAWA 2005 Amendments to the CAA.

In its amendment to the Adjudicator's Field Manual 23.11(h) (proof of eligibility), the Guidance goes on to state:

> The VAWA amendments to the CAA do not alter other existing evidentiary standards or requirements applicable to adjustment of status applications. (e.g., evidence demonstrating that the spouse or child is the spouse or child of the qualifying Cuban principal, **was inspected and admitted or paroled**, physically present in the United States for 1 year). [7][emphasis added]

We strongly disagree with this interpretation of the law. Congress created the Cuban Adjustment Act in order to grant Cuban nationals in the United States, and their family members, certain protections and benefits. Subsequent legislation, namely the 2000 and 2005 Violence Against Women Acts, extended those benefits to spouses and children who have been abused by a qualified Cuban principal.

According to INA 212(a)(6)(A)(ii) "the admission or parole" requirement does not apply to those who are applying for adjustment of status as VAWA self-petitioners. In 2006, Congress expanded the definition of "VAWA self-petitioner,"[8] to include an individual or child of an individual who qualifies for relief under--

> (A) clause (iii), (iv), or (vii) of section 204(a)(1)(A);
> (B) clause (ii) or (iii) of section 204(a)(1)(B);
> (C) section 216(c)(4)(C);
> **(D) the first section of Public Law 89-732 (8 U.S.C. 1255 note) (commonly known as the Cuban Adjustment Act) as a child or spouse who has been battered or subjected to extreme cruelty;**
> (E) section 902(d)(1)(B) of the Haitian Refugee Immigration Fairness Act of 1998 (8 U.S.C. 1255 note);
> (F) section 202(d)(1) of the Nicaraguan Adjustment and Central American Relief Act; or
> (G) section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (division C of Public Law 104-208).

[6] Guidance at page 2.
[7] Guidance at page 6.
[8] See INA § 101(a)(51); See § 811 of Public Law 109-162, dated January 5, 2006, amended section 101(a) of the Immigration and Nationality Act by adding paragraph (51). [Emphasis added]

Furthermore, in 2008, USCIS issued guidance entitled, "Adjustment of status for VAWA self-petitioner who is present without inspection." In this Memo, then Associate Director of Domestic Operations, Michael Aytes instructed:

> "Effective immediately, USCIS interprets the introductory text in Section 245(a) of the Act as effectively waiving inadmissibility under section 212(a)(6)(A)(i) of the Act for any alien who is the beneficiary of an approved VAWA self-petition. All USCIS adjudicators will follow this interpretation in adjudicating a **VAWA self-petitioner's** adjustment of status application."[9] [emphasis added]

The memo further makes changes to the Adjudicator's Field Manual, emphasizing:

> "Under section 245(a) of the Act, the alien beneficiary of a VAWA self-petition may apply for adjustment of status even if the alien is present without inspection and admission or parole. USCIS has determined that this special provision in section 245(a) of the Act, in effect, waives the VAWA self-petitioner's inadmissibility under section 212(a)(6)(A)(i) for purposes of adjustment eligibility. Thus, a **USCIS adjudicator will not find, based solely on the VAWA self-petitioner's inadmissibility under section 212(a)(6)(A)(i), that the VAWA self-petitioner cannot satisfy the admissibility requirement in section 245(a)(2) of the Act. The VAWA self-petitioner is not required to show a "substantial connection" between the qualifying battery or extreme cruelty and the VAWA self-petitioner's unlawful entry."** [Emphasis added]

To hold abused spouses and children of qualified Cuban principals to a higher standard is unjust and contrary to the intent of the law, which was to protect ***all*** abused spouses and children of qualified Cuban principals. Given that the Cuban Adjustment Act is reproduced as a historical note to INA §245,[10] it follows that the provisions for VAWA self-petitioners apply thusly to VAWA-based provisions of the CAA, and that eligible derivatives for VAWA-based protections of the CAA, regardless of their manner of entry, should be eligible for protection.

We urge USCIS to amend the proposed Guidance to bring it into line with both the VAWA statutes and legislative history and intent. Thank you in advance for your consideration of these comments. For more information please contact Leslye E. Orloff at (202) 210-8886 orloff@wcl.american.edu and Benish Anver at banver@niwap.org.

Respectfully submitted:

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[9] Michael Aytes. HQDOMO 70/23.1 "Adjustment of status for VAWA self-petitioner who is present without inspection" (April 11, 2008)

[10] Cuban Adjustment Act of 1966 ("CAA"), Pub. L. No. 89-732, 80 Stat. 1161 (reproduced as a historical note to Immigration and Nationality Act ("INA") 245, 8 U.S.C.§ 1255)