

PROTECTING THE BATTERED IMMIGRANT WOMAN

by Deborah Weissman

Despite the increasing awareness of the ravaging consequences of domestic violence, there continues to be a group of victims of domestic violence which remains largely invisible and out of reach. They are immigrant women, who without command of the language, culture, legal or social systems, are unable to obtain any protection against the violence they suffer.¹

The Immigration Marriage Fraud Act (IMFA) of 1986 provides that an immigrant married to a U.S. citizen or lawful permanent resident for less than two years receives only conditional residency for two years.² Before the expiration of two years, she and her spouse must file a joint petition demonstrating that the marriage was in good faith, in order to avoid her deportation.³ This two-year waiting period, as well as the requirement of a joint filing, creates a

dilemma for victims of domestic violence. A woman whose marriage has become intolerable due to violence can be placed at the mercy of her husband as she waits for the two-year period to end.

Prior to 1990, the ability of many battered immigrant women to achieve lawful immigration status rested not with the Immigration and Naturalization Service, but with a brutal and abusive spouse. That year Congress amended the IMFA to allow spouses to petition for a waiver of the requirement of filing a joint petition.⁴ Although the IMFA applies to both male and female immigrant spouses, it has a disproportionately negative impact on women, because women comprise the majority of spouse-based immigrants to the United States, and are significantly more likely to be victimized by domestic violence.⁵

This article addresses the specific

problems faced by battered immigrant women, examines the legal remedies available to them in the context of their immigration status, and reviews current efforts to expand their legal protection. With the exception of those special remedies available to immigrant women subjected to domestic abuse, this article will not cover other equally critical immigration issues which otherwise affect the immigrant woman. Although it may not be necessary to become an expert in immigration law to assist the battered immigrant woman, it is necessary to consult with immigration advocates to assure that all immigration consequences and other areas of relief are explored.

Barriers Facing Immigrant Women

An immigrant woman may be completely unfamiliar with ways to access the legal system or community re-

sources, or to apply for any type of assistance. She may not even realize that domestic violence is against the law in this country. She may have difficulty finding a bilingual attorney, and the judicial process is even more difficult for her if she cannot speak English well. Shelters may be reluctant to help her because she is less likely to have an income and may not be eligible for public benefits. If she does not speak English, she even may be considered ill-suited for shelter support services.

A battered immigrant woman is often afraid to call the police. If she is from a country where the police are repressive, it is difficult for her to have anything but terror of the police. She may fear that if the batterer is arrested he will refuse to cooperate with the immigration process on her behalf, resulting in her deportation. Often, she will be economically dependent on her partner. She is likely to be isolated due to intimidation by her husband's threats to call INS and her own fear of deportation. Like most survivors of domestic violence, she may hide the problem because of fear, shame, and denial, or because she does not know what to do.

The consequences of domestic violence for an immigrant woman are extremely harsh. If she tries to break loose from the pattern of abuse and domination, she may jeopardize her ability to obtain permanent residence in this country, which hinges on her ability to file a joint petition with her spouse. She faces deportation to her country of origin. For some women who have fled persecution in their home country, deportation means torture, jail, or death. For others, it means a return to a life of extreme poverty, disease, and few or no opportunities because of gender discrimination. Perhaps the worst threat is that she may have to leave her U.S.-born children. Deportation is something she cannot risk. If she is not aware that she may have other legal avenues to obtain lawful permanent residence, she will be reluctant to leave a dangerous and violent relationship.

Remedies Available to Immigrant Women

There are four categories for which a waiver of the joint petition requirement for permanent residency may be

obtained: 1) the marriage was entered in good faith, but the spouse died; 2) the marriage was entered in good faith, but was terminated due to divorce or annulment; 3) the marriage was entered in good faith, but the beneficiary wife (or child) was the subject of battering or extreme cruelty by the husband; or 4) deportation of the wife would result in extreme hardship.⁶ The waiver request is filed at the same time as the joint petition would have been due, within 90 days prior to the end of the two-year period of conditional residency.⁷ If neither joint petition nor waiver is filed before the deadline, INS may begin deportation proceedings although late filings may be excused for showing of good cause.⁸

For purposes of determining a good faith marriage, INS will consider evidence showing sharing of financial assets and liabilities, the length of time of cohabitation, birth certificates of children born of the marriage, and any other pertinent evidence such as affidavits from persons who know the couple, or documentation of other joint activities.⁹

To obtain a waiver on the basis of death of the spouse, documentation establishing death, as well as that the marriage was entered in good faith, is required.¹⁰ To obtain a waiver based on the termination of marriage, a certified copy of final judgment of divorce is required.¹¹ A waiver can be requested if one of the parties has filed for divorce but the divorce is not final. Proof must be submitted that the case is on file with the court. INS will delay adjudication until the final decree is obtained. Again, evidence must be produced demonstrating that the marriage was entered into in good faith.¹²

To obtain a waiver based upon a showing of extreme hardship, the applicant must demonstrate that the factors giving rise to such hardship arose *after* the person's entry as a conditional resident.¹³ This is a very difficult standard to meet. Factors have included advanced or young age, separation from family members, medical conditions (but not pre-existing) that may not be treatable in the country of origin, inability to find work in the home country, possible persecution in the home country, and loss of one's contributions to the community in the United States.

Immigration specialists who are familiar with the waiver provisions un-

der the 1990 IMFA amendments may be unfamiliar with the dynamics of domestic violence. Many attorneys, whether family law or immigration specialists, may be unfamiliar with cultural and religious values of immigrant women. Such a lack of familiarity may cause these attorneys to expect battered women to use divorce proceedings as the basis for their waiver request, because the evidentiary burden is much easier to meet. Counsel may become frustrated when a woman refuses to seek divorce, but instead wishes to seek a waiver on the grounds of domestic violence. In such cases, counsel must be sensitive to the myriad of religious and cultural factors which lead some women to avoid divorce. However, where the husband is uncooperative and refuses to file a joint petition, and where there are no other grounds for a waiver, the client should be advised to file for divorce.

Preparing a Battered Spouse Waiver

It is important to keep in mind the nature of domestic violence and its effects on a battered immigrant woman. Like her nonimmigrant sister, she may be likely to suffer from low self-esteem and depression, and may seem non-communicative. She may have difficulty trusting others and may be reluctant to talk about her family situation. In addition, she may not be familiar with laws or customs of the legal system, or the role of an attorney.

Preparing a waiver based upon domestic violence includes providing a chronology of the history of abuse. Evidence can include police reports; photos of injuries; photos of broken household furnishings; criminal court records; medical records; statements of witnesses, shelter personnel and counselors; protective orders, and an affidavit of the battered woman.¹⁴ Such an affidavit should include how the couple first met, the nature of the relationship, a description of living arrangements, whether there are children, the first act of domestic violence, factors which make it difficult for her to leave, a description of each incident, her attempts to seek help, physical injuries, verbal abuse, threats, and her inability to get help. Counsel should also include a list of addresses where the couple resided, and any pressure exerted on her not to report the abuse.

The "extreme mental cruelty" waiver requires a showing of nonphysical cruelty and must be supported by the evaluation of a professional recognized by the INS.¹⁵ The narrow application and documentation guidelines for this type of waiver make it difficult to sustain. Many immigrant women will simply never get to a psychologist or psychiatrist because of costs or unavailability of such professionals. The pool of bilingual and bicultural professionals is limited.

Advocates should investigate what resources exist in this area and learn what may be available on a pro bono or sliding scale fee basis. In addition to the affidavit of a professional recognized by INS regulations, documents that show physical abuse can also confirm the behavior which constitutes extreme cruelty. These documents should be obtained and submitted on behalf of an "extreme cruelty" waiver as well as a battered woman waiver.

When filing a waiver request, any applicable basis may be submitted. Thus, it is possible for a woman to submit her waiver request on the basis of domestic violence, extreme cruelty, and extreme hardship, as well as termination of marriage, if applicable.¹⁶

Inadequacies in Current Law

Although the 1990 amendments to the IMFA alleviated some of the problems for battered immigrant women, they did not begin to address the grim reality for battered women whose husbands have not yet submitted the initial petition to grant their conditional residency. Currently, the proposed "Violence Against Women Act"¹⁷ contains a provision which would allow certain categories of immigrant spouses to "self-petition" the INS in order to obtain conditional residency: battered spouses, parents of abused children, and spouses who have lived in the United States with their spouses for more than three years.¹⁸ Thus, there is the possibility that self-petitioning will be allowed in certain circumstances, which would further improve the situation for battered immigrant women. Additionally, the proposed legislation would eliminate the limitations on the need for or type of professional needed to support a claim of extreme cruelty.¹⁹ If passed, the new law would require INS to accept any type of credible evidence. Because the

new provisions, if passed, will have no retroactive effect, and only women married on the date the legislation is passed will benefit, it is important *not* to let clients divorce before the effective date.

Conclusion

Historically, immigration laws have not reflected the needs or circumstances of women. Women were originally prevented from entering this country as individuals, due to the doctrine of coverture which held that the husband is the head of the household, and that a married woman's nationality and residence followed that of her husband.²⁰ As a result, the immigration of women to this country is often referred to as "chain immigration," or the arrival of married women and their children joining their husbands already in the United States. Studies show that while some women come to the United States seeking a better quality of life for themselves and their families, many flee from political repression, rape by military police, or severe poverty. Others seek reunification with family members here in the United States.

Because of the high numbers of immigrants coming to Florida, and because the incidence of domestic violence is so shockingly high, it is imperative that the legal profession assume responsibility for protecting battered immigrant women. We can best accomplish this task by educating ourselves and working together with domestic violence service providers and immigrant/refugee programs. □

REV. 908, 909 (1984); Donato & Tyree, *Family Reunification, Health Professionals and the Sex Composition of Immigrants to the United States*, 70 Soc. & Soc. Res. 226 (1986).

¹⁶ INA, 8 U.S.C. §1186a(c)(4) (1994).

¹⁷ INA, 8 U.S.C. §1186a(d)(2)(A) (1994).

¹⁸ INA, 8 U.S.C. §1186a(d)(2)(B) (1994).

¹⁹ Aliens and Nationality, 8 C.F.R. §216.4(a)(5) (1993).

²⁰ INS Form I-751 Instructions.

¹¹ *Id.*

¹² There is no formal authority or source for the INS accepting the waiver when action is filed, but no formal judgment has been entered. The authority for this is based on practical experience of practitioners in this area and informal information from INS, e.g., phone call requests for information.

¹³ INA, 8 U.S.C. §1186a(c)(4) (1994).

¹⁴ 8 C.F.R. §216.5(e)(3)(iii). But information in this sentence goes beyond what is enumerated specifically in this regulation. Regulation includes "other pertinent information" type language, and examples are given.

¹⁵ Aliens and Nationality, 8 C.F.R. §216.5(e)(3)(iv)-(vii) (1993).

¹⁶ 8 C.F.R. §216(a)(1); (2); or (3).

¹⁷ H.R. 1133.

¹⁸ House Violence Against Women Act, H.R. 1133.

¹⁹ *Id.*

²⁰ J. Calvo, *Legacies of Coverture*, 28 SAN DIEGO L. REV. 593 (1991).

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¹ For a comprehensive review of the obstacles facing battered immigrant women, see FAMILY VIOLENCE PREVENTION FUND, ET AL., DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN, THE MANUAL, (available from Family Violence Prevention Fund, Bldg. One, Suite 200, 1001 Potero Ave., S.F., CA 94110).

² Immigration and Nationality Act, 8 U.S.C. §§1154(g), 1186a, and 1255(e) (1994) (hereinafter INA).

³ INA, 8 U.S.C. §§1186a(c), (2)(A), (d)(2)(A) (1994).

⁴ INA, 8 U.S.C. §1186a(c)(4) (1994).

⁵ J. Calvo, *Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 614 (1991), citing Houston, Kramer & Barrett, *Female Predominance of Immigration to the United States Since 1930: A First Look*, 18 INT'L MIGRATION