

## APPLICATIONS FOR IMMIGRATION STATUS UNDER THE VIOLENCE AGAINST WOMEN ACT

by Gail Pendleton and Ann Block\*

### I. INTRODUCTION

At the end of 2000, Congress passed significant amendments to the immigration provisions of the Violence Against Women Act (VAWA) and created two new nonimmigrant visas for noncitizen crime victims. As of this writing, INS has not issued regulations or guidance on these new provisions, so this article will only attempt to sketch the contours of the new laws.<sup>1</sup> It also will describe existing law and practice under VAWA, and suggest winning strategies (“practice pointers”) garnered from years of experience providing technical assistance to practitioners and working with INS to administratively resolve individual and systemic problems. Although women file the vast majority of VAWA applications, reflecting the well-documented gender power differential underlying much domestic violence, a significant number of male self-petitioners have won their claims (perhaps because the power differential created by lack of immigration status creates conditions conducive to abuse). Where gender neutrality conflicts with stylistic simplicity, however, this document employs the generic female.

The recent law marks the fourth time Congress has expanded immigration relief for noncitizen domestic violence survivors, revealing its profound and ongoing commitment to helping this class of noncitizen. The Immigration and Naturalization Service (INS) personnel responsible for implementing the VAWA self-petitioning provisions honor this manifest intent. Convincing the rest of INS, trial attorneys and the EOIR to match this commitment remains a major task for immigration attorneys and service providers and advocates for noncitizen domestic violence survivors.

In the traditional family-based petition process noncitizens must rely on their U.S. citizen or lawful permanent resident relatives to file applications, rendering them particularly vulnerable to abusive sponsors. Congress first addressed this problem in 1990 with the battered spouse waiver to the joint petition requirement for conditional permanent residence. It soon became evident that this remedied only part of the problem; many spouses and parents failed to file petitions for their noncitizen relatives, using their control of the immigration process as a weapon of abuse. In VAWA of 1994, Congress added two new forms of immigration relief to help this latter population: “VAWA self-petitioning” and “VAWA suspension of deportation.” In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act reframed VAWA suspension of deportation as VAWA cancellation of removal and included several exemptions to new grounds of inadmissibility for noncitizen victims of domestic violence. Finally, in October, 2000, President Clinton signed the Victims of Trafficking and Violence Protection Act (hereinafter “Trafficking Act”), which removed many of the problems noncitizens encounter in pursuing VAWA status. It also included new nonimmigrant visas leading to adjustment of status for other victims of crimes, including domestic violence survivors who do not qualify for VAWA relief.

Procedural and practice issues change frequently in this area of the law. The National Immigration Project of the National Lawyers Guild (NIPNLG) works closely with INS VAWA personnel to swiftly fix problems and to develop new INS policies and practices in this area. Practitioners should contact NIPNLG for information on our extensive training materials and specialized e-mail lists on this issue.<sup>2</sup>

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<sup>1</sup> The National Network on Behalf of Battered Immigrant Women is submitting suggestions to INS on implementation of these new provisions. For copies of these suggestions and updates on the new laws, contact Gail Pendleton at the NIPNLG, 14 Beacon St., Ste. 602, Boston, MA; (617) 227-9727; fax: (617) 227-5495; e-mail: [nipgail@nlg.org](mailto:nipgail@nlg.org).

<sup>2</sup> Check the NIPNLG Web site at [www.nlg.org](http://www.nlg.org). Click on “immigration project” then on “domestic violence.”

## II. AUTHORITIES

### A. Statutes

The statutes assisting noncitizen domestic violence survivors appear below in the order in which Congress created them.

1. *INA §216(c)(4)(C), 8 USC §1186a(c)(4)(C)*<sup>3</sup>—IMMACT90<sup>4</sup> included a “battered spouse waiver” for the joint petition requirement for conditional residents. The waiver requires that a battered spouse demonstrate that she entered into the marriage in good faith, and that either she or her child has been the victim of battering or extreme cruelty by her spouse. Congress further modified this section of the INA in 1994 to require INS to accept “any credible evidence” for this waiver. Although INS has acknowledged that this changed the standard applied by INS,<sup>5</sup> as of the date of this article, it has not modified its regulations to conform to Congressional intent.

2. *INA §204(a)(1)(A)&(B), 8 USC §1154(a)(1)(A) & (B)*—VAWA<sup>6</sup> created a new “self-petitioning” process allowing the abused spouse or child of a lawful permanent resident or a U.S. citizen, or the parent of an abused child, to file a family preference visa petition on his or her own behalf without the participation of the abusive spouse or parent. Under these provisions, a self-petitioner had to show that he or she had “good moral character”; entered into the marriage in good faith (if the petitioner is the spouse of a citizen or lawful permanent resident); was the victim of abuse or the parent of a victim of abuse; and would suffer extreme hardship if deported. The Trafficking Act<sup>7</sup> eliminated the extreme hardship requirement for self-petitioners and expanded the class of those eligible (*see* self-petitioning discussion for detail).

3. *INA §240A(b)(2), 8 USC 1229b, and former INA §244(a)(3), 8 USC §1254(a)(3)*—VAWA also created a new three-year suspension provision for abused spouses and children of lawful permanent residents and U.S. citizens, and for parents of abused children of U.S. citizens or lawful permanent residents. IIRAIRA transformed this special suspension into three-year cancellation of removal.<sup>8</sup> He or she must show three years of continuous physical presence in the United States, good moral character and extreme hardship if deported. The Trafficking Act did not remove extreme hardship as it did for self-petitioning. It did expand the class of those eligible (*see* cancellation discussion for detail).

4. *IIRAIRA*<sup>9</sup>—IIRAIRA provided some exceptions for VAWA recipients to its new stringent provisions. The Trafficking Act further ameliorated problems created by IIRAIRA.

a. *Amendments to INA §212*—IIRAIRA exempted battered immigrants from part of the ground of inadmissibility based on unlawful presence in the United States<sup>10</sup> and from the requirement that family-based petitioners file enforceable affidavits of support to overcome the public charge ground of inadmissibility.<sup>11</sup> The Trafficking Act expanded these exceptions and created several new waivers to other grounds of inadmissibility (*see* discussion of admissibility issues for detail).

<sup>3</sup>Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §1110 *et seq.*) (hereinafter INA).

<sup>4</sup>Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (hereinafter IMMACT90).

<sup>5</sup>*See* (“This change in the statute prohibits the Service from requiring the recommendation of a mental health professional or any other specific form of evidence to support a Form I-751 waiver based on abuse or extreme cruelty.”).

<sup>6</sup>Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902–55, 8 USC §§1151, 1154, 1186a, 1186a note, 1254, 2245 (1994) (hereinafter VAWA).

<sup>7</sup>Victims of Trafficking and Violence Prevention Act of 2000, 114 Stat. 1464, Pub. L. No. 106–386 (Oct. 28, 2000).

<sup>8</sup>Those who received charging documents (Orders to Show Cause) before April 1, 1997, may pursue VAWA suspension of deportation; those who received charging documents (Notices to Appear) after that date may pursue VAWA cancellation of removal. *See* 8 CFR §240.40 (OSCs) and §240.30 (1-122s). This rule is important for clients now eligible to file the new VAWA motions to reopen.

<sup>9</sup>Illegal Immigration Reform and Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104–208, 110 Stat. 3009 (hereinafter IIRAIRA).

<sup>10</sup>INA §212(a)(6)(A)(ii) and (a)(9)(B), 8 USC §1182(a)(6)(A)(ii) and (a)(9)(B).

<sup>11</sup>INA §212(a)(4)(C)(i), 8 USC §1182(a)(4)(C)(i).

*b. Prohibition Against Using Information From Abusers*—In an extremely important provision, IIRAIRA prohibits any employee of the Department of Justice (which includes INS and EOIR) from making adverse determinations on admissibility or deportability using information furnished solely by the applicant’s abuser, an abusive member of the applicant’s household, or someone who has abused the applicant’s child.<sup>12</sup> It also prohibits the “use by or disclosure to anyone” except to other INS officers “for legitimate . . . agency purposes,” of information relating to self-petitioners, conditional residents requesting battered spouse waivers, and applicants for cancellation of removal.<sup>13</sup> Any INS officer, INS attorney or immigration judge who “willfully uses, publishes, or permits information to be disclosed in violation of this section shall be subject to appropriate disciplinary action *and subject to a civil money penalty of not more than \$5,000 for each such violation.*”<sup>14</sup> These prohibitions and penalties apply to any act by an INS officer or trial attorney that took place on or after September 30, 1996.<sup>15</sup>

**5. The Trafficking Act**<sup>16</sup>—Many noncitizens abused by U.S. citizen or lawful permanent resident spouses or parents found they were ineligible to file self-petitions or VAWA cancellation applications for a variety of reasons beyond their control. The Trafficking Act makes both forms of relief available to many of these noncitizens. It expands waivers and exceptions for good moral character problems, creates and expands waivers for inadmissibility and deportability grounds affecting VAWA applicants, and eliminates the extreme hardship requirement for self-petitioners. It allows all approved self-petitioners to adjust under §245(a) and exempts them from the bars at §245(c). It establishes liberal motions to reopen for VAWA suspension and cancellation applicants, exempts them from the “stop-time” provisions cutting off accrual of the required three-years’ continuous presence with the hearing notice, and mandates parole for their derivatives until they can adjust on their own. It excepts approved VAWA applicants from the “living in marital union” requirement for three-year naturalization and allows abused spouses and children of NACARA,<sup>17</sup> HRIFA<sup>18</sup> and Cuban Adjustment Act<sup>19</sup> beneficiaries to file independently under these acts. Last but not least, it creates the new “U” and “T” nonimmigrant visas for victims of crime and of trafficking, respectively. Both these visas may lead to lawful permanent residence.

## B. Regulations

INS issued interim regulations implementing the self-petitioning provisions of VAWA on March 26, 1996, effective immediately.<sup>20</sup> They amend 8 CFR §§103.1, 103.2, 204.1, 204.2, 205.1, 205.2, and 216.1. Significant portions of these regulations remain relevant despite the changes wrought by the Trafficking Act. The discussion below will note where and how they remain useful or are now obsolete.<sup>21</sup> In addition, the preamble to the regulations contains much information and direction that has proven extremely useful for advocating with INS and the EOIR on behalf of VAWA applicants.<sup>22</sup>

In May 1991, the Attorney General issued regulations defining factors for determining extreme hardship in suspension and cancellation cases, including VAWA cases.<sup>23</sup> These regulations explicitly adopt the special factors tailored to domestic violence that INS had been using for self-petitions.

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<sup>12</sup> IIRAIRA §384(a)(1).

<sup>13</sup> IIRAIRA §384(a)(2).

<sup>14</sup> IIRAIRA §384(c) (emphasis supplied).

<sup>15</sup> IIRAIRA §384(d)(2).

<sup>16</sup> Victims of Trafficking and Violence Prevention Act of 2000, 114 Stat. 1464, Pub. L. No. 106-386 (Oct. 28, 2000) (hereinafter VTTPA).

<sup>17</sup> Nicaraguan and Central American Relief Act, Pub. L. No. 105-139, 111 Stat. 2644.

<sup>18</sup> Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (div. A, title IX).

<sup>19</sup> Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161.

<sup>20</sup> 61 Fed. Reg. 13061-79 (Mar. 26, 1996).

<sup>21</sup> So far, no Department of State (DOS) regulations have addressed VAWA cases. Since the Trafficking Act creates new avenues to U.S. immigration status for those abroad, practitioners should anticipate a more active DOS role in fashioning regulations governing these cases.

<sup>22</sup> Preamble to Interim Regulations, 61 Fed. Reg. 13065 (Mar. 26, 1996) (hereinafter “Preamble”).

<sup>23</sup> 8 CFR §§240.58(c) & 240.20

### C. Instructions

Administrative advocacy has resulted in some of the most important procedural changes benefiting VAWA self-petitioners. Practitioners should not rely solely on the statute and regulations for guidance; these memoranda are essential tools.

Several of the INS memoranda contain procedural reforms that facilitate swift and ongoing access to work authorization and public benefits. Others address novel aspects of the VAWA eligibility requirements. For instance, a 1999 memo from the General Counsel's Office provides a very useful discussion of the "any credible evidence" standard, as well as guidance on the meaning of extreme hardship for VAWA purposes.<sup>24</sup>

Several of the memos contain mandates and suggestions for district offices, which often seem unsympathetic to VAWA cases. Although statutory and regulatory changes have overtaken some of its mandates, the 1996 "Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents"<sup>25</sup> includes guidance on derivatives and on adjustment that advocates use to educate district offices about proper treatment of VAWA cases. Another essential tool for educating district offices, trial attorneys and immigration judges is "Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA §384,"<sup>26</sup> which specifies how INS officers must treat evidence submitted by known abusers. In addition to establishing the novel VAWA employment authorization and public benefits' approval processes, "Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues"<sup>27</sup> includes useful exhortations to district offices to develop VAWA expertise and to place in proceedings those seeking VAWA suspension and cancellation.

### III. VAWA SELF-PETITIONING

The VAWA self-petitioning process parallels but is not equivalent to the regular family-based process. Not only must self-petitioners meet the eligibility requirements that apply to their family-based counterparts, they also must show they have suffered battery<sup>28</sup> or extreme cruelty and that they possess good moral character.<sup>29</sup> Fortunately, Congress eliminated the onerous extreme hardship requirement that it initially imposed on all VAWA applicants. Since this requirement was the primary barrier for many otherwise eligible VAWA self-petitioners, we now anticipate that many of those who experienced trouble in the past will easily win cases under the new law.

Similarly, Congress recently expanded the classes of people who qualify. No longer must a self-petitioner be married to her abuser at the time she files; she may have been divorced from him for up to two years, as long as there is a "connection" between the divorce and the abuse she suffered.<sup>30</sup> The abuser may have lost status within the past two years too, as long as this loss of status was "related to" an incident of domestic violence.<sup>31</sup> Even spouses of bigamists now qualify, even though their marriages are not legally valid.<sup>32</sup> Since many of your clients may prefer to qualify under the new law, this section begins with arguments concerning pending cases.

#### A. Pending Cases

If your client filed a self-petition before October 28, 2000, there are several ways you may convince INS to apply the new law to their cases. Motions to reopen probably are appropriate in all denied cases. You also may successfully argue

<sup>24</sup> Virtue, Office of the General Counsel, "Extreme Hardship" and Documentary Requirements Involving Battered Spouses and Children, Memorandum to Terrance O'Reilly, Director, Administrative Appeals Office, INS mem. HQ 90/15-P, HQ 70/8-P (Oct. 16, 1998), *reprinted in* 76(4) *Interpreter Releases* 162 (Jan. 25, 1999).

<sup>25</sup> Aleinikoff, Exec. Assoc. Comm'r, Office of Programs, INS Mem. HQ 204-P (Apr. 16, 1996) (available from the National Immigration Project).

<sup>26</sup> Virtue, INS Office of Programs, Mem. 96act.036 (May 5, 1997), *reprinted in* 74 *Interpreter Releases* 795 (May 12, 1997).

<sup>27</sup> Virtue, INS Office of Programs (no number) (May 6, 1997), *reprinted in* 74 *Interpreter Releases* 971 (June 16, 1997) (hereinafter "Virtue 1997 memo").

<sup>28</sup> *See, e.g.*, INA §204(a)(1)(A)(iii)(I)(bb), 8 USC §1154(a)(1)(A)(iii)(I)(bb), added by VTVPA §1503(b).

<sup>29</sup> *See, e.g.*, INA §204(a)(1)(A)(iii)(II)(bb), 8 USC §1154(a)(1)(A)(iii)(II)(bb), added by VTVPA §1503(b).

<sup>30</sup> *See, e.g.*, INA §204(a)(1)(A)(iii)(II)(aa)(CC)(ccc), 8 USC §1154(a)(1)(A)(iii)(aa)(CC)(ccc), added by VTVPA §1503(b).

<sup>31</sup> *See, e.g.*, INA §204(a)(1)(A)(iii)(II)(aa)(CC)(bbb), 8 USC §1154(a)(1)(A)(iii)(aa)(CC)(bbb), added by VTVPA §1503(b).

<sup>32</sup> *See, e.g.*, INA §204(a)(1)(A)(iii)(II)(aa)(BB), 8 USC §1154(a)(1)(A)(iii)(aa)(BB), added by VTVPA §1503(b).

that the new law should apply to all pending cases, since the statute was silent about the effective dates for the self-petition revisions. Do not rely on the Vermont Service Center's (VSC) sympathy (as noted below, a special VAWA unit at VSC adjudicates all VAWA self-petitions). You must articulate one or both of these arguments, at least until INS issues formal guidance on this issue.

**1. Move to Reopen**—As noted in the section on appeals, VSC liberally entertains motions to reopen or reconsider VAWA self-petition denials. The section of the regulations it looks to is 8 CFR §103.5(a)(1)(i), which imposes a 30-day filing deadline. Note, however, that

failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that *the delay was reasonable* and was *beyond the control* of the applicant or petitioner.<sup>33</sup>

If the new law fixes the reason your client was ineligible in the past, you probably can persuade the VAWA adjudicators that it was (a) not reasonable for your client to file a pointless motion to reopen while she was ineligible and (b) she had no control over when Congress would fix the law so she could apply.

**2. Argue the New Law Applies to Pending Cases**—If your client's case is pending but you have reason to believe that she could more easily win her case under the new law, you may wish to respond to requests for more evidence or denials by arguing that case law dictates that INS apply the new law to pending self-petitions. Under the BIA's decision in *Matter of Cervantes-Gonzalez*,<sup>34</sup> new laws that are effective on date of enactment apply to pending cases where there are no retroactive negative consequences for the applicant's settled expectations.<sup>35</sup> The new provisions impose no new disabilities on applicants; rather, it removes them. Section 1503 contains no specific effective date, therefore the provisions became effective on the date the President signed the bill: October 28, 2000. The new provisions should apply to all cases pending on that date.

**3. File a New Self-Petition**—One reason INS should acquiesce in applying the new law to pending cases, is that it acknowledges applicants may simply file new self-petitions under the new law. Rather than foster a flurry of new self-petitions, it makes sense that INS simply adjudicate pending cases under the new law. Nevertheless, one option for your client is to file a new self-petition.

## B. Any Credible Evidence Standard

Congress dictated that both INS<sup>36</sup> and the EOIR<sup>37</sup> apply a liberal "any credible evidence" standard to all VAWA applications, and to battered spouse waivers.<sup>38</sup> While you should strive to find traditional primary and secondary evidence, be creative if such efforts are fruitless. INS recognizes that evidence normally available to family-based petitioners may not be readily accessible because of the dynamics of domestic violence.<sup>39</sup> A particularly helpful memo by then General Counsel Paul Virtue explains this approach to the Administrative Appeals Unit (charged with handling self-petition appeals).<sup>40</sup>

The "any credible evidence" standard applies to all VAWA elements of proof. The self-petitioning requirements (which differ slightly from the cancellation requirements) are:

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<sup>33</sup> 8 CFR §103.5(a)(1)(i) (emphasis supplied).

<sup>34</sup> *Matter of Cervantes-Gonzalez*, Int. Dec. 3380, (BIA 1999), *aff'd*.

<sup>35</sup> *Id.* at 10. See Judge Rosenberg's dissent at 47–50 for a lengthy discussion of relevant federal case law and the inappropriate application of this principle to the amended §212(i) waiver that imposed new burdens on applicants.

<sup>36</sup> INA §204(a)(1)(H).

<sup>37</sup> INA §240A(b)(2).

<sup>38</sup> INA § 216(c)(4).

<sup>39</sup> See, e.g., 8 CFR §204.2(c)(3)(ii).

<sup>40</sup> Virtue, Office of the General Counsel, "Extreme Hardship" and Documentary Requirements Involving Battered Spouses and Children, Memorandum to Terrance O'Reilly, Director, Administrative Appeals Office, INS mem. HQ 90/15-P, HQ 70/8-P, at 7 (Oct. 16, 1998), *reprinted in* 76(4) *Interpreter Releases* 162 (Jan. 25, 1999).

### C. Battering or Extreme Cruelty

A self-petitioner must be “battered” or “the subject of extreme cruelty.”<sup>41</sup> These terms include but are not limited to “being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury.”<sup>42</sup> Acts of violence include “[p]sychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution,” as well as “other abusive actions . . . that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence.”<sup>43</sup> The Preamble to the interim regulations states that actions against some other person or thing may also qualify if these acts “were deliberately used to perpetrate extreme cruelty against the self-petitioner or the self-petitioning spouse’s child.”<sup>44</sup>

Evidence of battering or extreme cruelty may include “any credible evidence.”<sup>45</sup> Specifically, “[e]vidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel.”<sup>46</sup> Other evidence that the interim regulations specifically mention as relevant include: an order of protection against the abuser or other legal steps to end the abuse, evidence of seeking refuge in a battered women’s shelter or similar place, a photograph showing visible injuries, or documentation of “nonqualifying abuses” to show a pattern of abuse and violence.<sup>47</sup>

Thus, relevant evidence may include the following:

- temporary and final civil protection orders (CBOS)
- police records and reports;
- criminal court records, complaints, arrest records;
- medical records;
- school records;
- evidence of torn clothing, broken furniture;
- photographs of injuries;
- affidavit by the client detailing her relationship with the abuser and children, dates they began living together, beginning of domestic abuse, description of each incident, physical injuries and verbal threats, attempts to leave or seek help, difficulty in leaving, feelings about the abuse;
- affidavits or declarations from witnesses, friends or relatives corroborating the client’s statements;
- affidavits or declarations from shelter workers, counselors, social workers, clergy, experts on domestic violence, or other service providers.

**1. Extreme Cruelty**—Domestic violence is not confined to physical battery; it includes psychological and emotional harm. Examples of extreme cruelty include social isolation, threats, economic abuse, and other behaviors intended to control and exercise power over the applicant.<sup>48</sup>

<sup>41</sup> INA §§204(a)(1)(A)(iii)(I)(bb) & (iv), 204(a)(1)(B)(ii)(I)(bb) and (iii), and 204(a)(1)(A)(v)(I)(cc) (for self-petitioners living abroad whose abusers are U.S. citizens not employed by the U.S. government or military), as amended by VTVPA §1503(b).

<sup>42</sup> 8 CFR §§204.2(c)(1)(vi) and (e)(1)(vi).

<sup>43</sup> *Id.*

<sup>44</sup> Preamble at 13,065.

<sup>45</sup> INA §204(a)(1)(H).

<sup>46</sup> 8 CFR §§204.2(c)(2)(iv) & (e)(2)(iv).

<sup>47</sup> *Id.* Nonqualifying abuses would include those that took place at a time outside the requirements for VAWA self-petitioning, *e.g.*, when the parties were not married or, in the case of a self-petitioning child, when the child was not living with the abusive parent. They might also include incidents that, by themselves, might not qualify as “battery or extreme cruelty” but, when taken in conjunction with other incidents, form a qualifying pattern of abuse.

<sup>48</sup> Contact the National Immigration Project for a copy of an amicus brief to the BIA addressing the nature of extreme cruelty generally and witnessing abuse to a mother as extreme cruelty to a child specifically.

**2. Practice Pointers on Battering and Extreme Cruelty**—The applicant’s affidavit plus a final protection order or other corroborating evidence should prove this requirement, especially if they contain detail. If you have the state law on protection orders, and it demonstrates that the judge must consider evidence about domestic violence before issuing an order, include a copy of the law in the application.<sup>49</sup> Temporary restraining orders may be discounted if the applicant does not explain why she did not pursue a final order and does not bolster the explanation with documents about domestic violence or the inaccessibility of the system. For instance, if she did not pursue a final order because the abuser threatened her, because she didn’t understand the law as explained to her in English, or because she believed his promises to change, she should explain this in her affidavit.

A declaration by a counselor with experience in domestic violence is extremely helpful corroboration. Such counselors need not be “professionals” (shelter workers are appropriate) but they should include in their statements descriptions of your client’s experience with domestic violence, as related to them, in as much detail as possible. The declaration should confirm that these credibly comport with the counselor’s expertise in domestic violence. Both the applicant and the counselor should address extreme hardship factors in their declarations, especially the need for ongoing counseling for the applicant or her children.

**It is very important that immigration attorneys collaborate with domestic violence counselors on VAWA cases.** They are often in the best position to elicit information on proof sources and to help your client obtain the documentation she will need to win her self-petition.

**3. Children**—Battering or extreme cruelty to children may support both a self-petition by the child and a self-petition by the child’s parent. Often it is abuse to the child that ultimately leads the mother to seek help. Discovering and assisting abused children requires special care, however, for both psychological and legal reasons. Children who have lived in abusive households probably would benefit from counseling, regardless of whether it provides evidence for an immigration application. Some states’ departments of social services, however, will attempt to remove abused children from the mother’s care, even if the father is the perpetrator. This results not only in obvious harm to the child and mother, but may implicate good moral character issues for the mother’s self-petition.

Teachers are one good source of leads to the child’s experience. As noted above, if the child has not herself suffered physical abuse at the hands of her parent, one may persuasively argue that witnessing abuse to a parent constitutes extreme cruelty. Children who witness abuse often experience severe psychological trauma, behavioral disorders, age regression, loss of sense of safety, and violent behavior.

Children who do not have parents in the United States, who have been abandoned by their parents, or who are abused by both parents, may wish to consider applying for “special immigrant juvenile” status.<sup>50</sup>

#### D. Qualifying Abusers

The Trafficking Act significantly changed this VAWA eligibility requirement. Applicants in the following classes were eligible to apply as of October 28, 2000 (see above for arguments concerning old and pending cases).

- Spouses and children of U.S. citizens<sup>51</sup> and lawful permanent residents<sup>52</sup>
- Spouses and children of lawful permanent residents who lost their status within the past two years “due to an incident of domestic violence”<sup>53</sup>
- Applicants who were spouses of U.S. citizens and lawful permanent residents within two years of filing, who demonstrate “a connection between the legal termination of the marriage . . . and battering or extreme cruelty” by the qualifying abuser<sup>54</sup>

<sup>49</sup> Suggestion from INS VAWA policy person after training new VAWA officers in Vermont, October 1998.

<sup>50</sup> INA §101(a)(27)(J). The Immigrant Legal Resource Center provides technical assistance and coordinates policy work on special immigrant juveniles. Immigrant Legal Resource Center, 1663 Mission St., San Francisco, CA 94103; phone: (415) 255-9499; fax: (415) 255-9792.

<sup>51</sup> INA §§204(a)(1)(A)(iii)(II)(aa)(AA) & (A)(iv), added by VTVPA §1503(b).

<sup>52</sup> INA §204(a)(1)(B)(ii)(II)(aa)(AA) & (B)(iii), added by VTVPA §1503(b).

<sup>53</sup> INA §204(a)(1)(B)(ii)(II)(aa)(CC)(aaa) and (B)(iii), added by VTVPA §1503(b).

<sup>54</sup> INA §204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) & (B)(ii)(II)(aa)(CC)(bbb), added by VTVPA §1503(b).

- Spouses of U.S. citizens who died within two years of filing<sup>55</sup>
- Spouses of U.S. citizen or lawful permanent resident bigamists who show they “believed” they had married a U.S. citizen or lawful permanent resident “with whom a marriage ceremony was actually performed.”<sup>56</sup>

To accommodate this last category, the Trafficking Act also added a definition of “intended spouse”<sup>57</sup> and qualified the good faith marriage requirement, as noted below.<sup>58</sup>

Spouses and children of undocumented abusers are not covered by the VAWA expansion, but may benefit from the new “U” visa, discussed below. They may not self-petition under INA §204.<sup>59</sup> Once a self-petitioner receives an approval notice from INS, it is no longer necessary that the abuser retain his qualifying status. This is particularly important for self-petitioners whose abusers have been successfully prosecuted and now face removal.

**1. Proof of Status**—A self-petitioner must submit proof of the abuser’s status as a U.S. citizen or lawful permanent resident.<sup>60</sup> (Presumably proof of former status will resemble existing proof requirements for current status.) If a self-petitioner “is unable to present primary or secondary evidence of the abuser’s status, the Service will attempt to electronically verify the abuser’s citizenship or immigration status from information contained in Service computerized records” and may review “[o]ther Service records” in its discretion.<sup>61</sup> If the INS does not locate any record, the INS will rule on the petition based on the information sent by the self-petitioner.<sup>62</sup> Thus, the burden of proving the abuser’s status remains on the self-petitioner.<sup>63</sup>

*Practice Pointers on Proving the Abuser’s Status*—Even with INS assistance, this requirement may pose particular difficulties. If, for example, the abusive spouse was born in the United States and never filed a petition for his spouse or child, INS would have no record of his status. In addition, INS’s databases are notoriously unreliable and inadequate. If you seek their help, provide as much detail as possible about where the abuser likely filed applications and any aliases or name variations he may have used.

Remember the “any credible evidence” standard: Be creative. While perhaps unrealistic for some, an abused spouse should try to acquire whatever documentation she can from her husband, such as copies of his Permanent Resident Card, record of naturalization, or birth certificate before she moves out. It may also be possible to document his status with “secondary evidence,” such as affidavits of family members, friends, former employers, or even the military if he registered or served with them. A family law court may make findings about the abuser’s legal status or require the abuser to produce evidence about his status (and prior divorces; see section on “good faith” marriage proof, below). NIPNLG has updated training materials for (nonimmigration) judges to accompany a chapter on assisting noncitizens in *Cultural Considerations in Domestic Violence Cases: A National Judges Benchbook*.<sup>64</sup>

**2. Change of Abuser’s Status**—The Trafficking Act also fixed several significant problems in this area. The abuser’s loss of citizenship or permanent residence no longer affects an approved self-petition if it took place within two years

<sup>55</sup> INA §204(a)(1)(A)(iii)(II)(aa)(CC)(aaa), added by VTVPA §1503(b).

<sup>56</sup> INA §204(a)(1)(A)(iii)(II)(aa)(BB), added by VTVPA §1503(b).

<sup>57</sup> INA §101(a)(50), added by VTVPA §1503(b).

<sup>58</sup> See, e.g., INA §204(a)(1)(A)(iii)(I), added by VTVPA §1503(b).

<sup>59</sup> Clients in these circumstances also may wish to consider applying for asylum based on domestic violence as gender-based persecution now that Attorney General Reno has vacated the BIA’s decision in *Matter of R-A*, Int. Dec. 3403 (BIA 1999), vacated January 19, 2001. INS has issued proposed regulations concerning issues relevant to such cases. Contact Gail Pendleton at NIPNLG for practice pointers, comments on the regulations and updates on asylum claims based on domestic violence.

<sup>60</sup> 8 CFR §§204.2(c)(2)(ii) and (e)(2)(ii).

<sup>61</sup> 8 CFR §§103.2(b)(17) & 204.1(g)(3).

<sup>62</sup> 8 CFR §103.2(b)(17).

<sup>63</sup> Practitioners may argue that INS should have the burden of presenting information about a lawful permanent resident or naturalized citizen abuser once a self-petitioner has made credible assertions of his legal status since this information is within INS’ particular knowledge. See *Matter of Vivas*, 16 I&N Dec. 68 (BIA 1977). If the U visas prove helpful, this strategy may not be necessary.

<sup>64</sup> Ramos & Runner, *Cultural Considerations in Domestic Violence Cases: A National Judges Benchbook* (Family Violence Prevention Fund, 1999). Check the Fund’s Web site, [www.fvpf.org](http://www.fvpf.org), for ordering information, or call them at (415) 252-8900.

of filing and was “due to an incident” of domestic violence.<sup>65</sup> Most of the problems have occurred where abusers were deported before their victims could file for status. Relating criminal activity to domestic violence has helped overcome good moral character problems in existing VAWA cases, and creative arguments have proven persuasive. Do not assume that only deportations based on domestic violence crimes will suffice. Did the call to the police that led to an arrest arise out of a domestic violence incident? Was domestic violence related in any way to the initiation, prosecution or commission of the crimes resulting in removal?

Clients who still can’t self-petition because their abusers lost status many years ago or were deported for completely unrelated reasons are eligible to apply for VAWA cancellation. There are no limiting requirements; applicants merely must show that their abusers are or were U.S. citizens or lawful permanent residents.<sup>66</sup>

Self-petitioners now automatically upgrade to immediate relatives if the lawful permanent resident abusers naturalize.<sup>67</sup>

## E. When and Where the Abuse Took Place

For a spouse to self-petition, the battering or extreme cruelty against herself or her child must have occurred “during the marriage or relationship intended by the alien to be legally a marriage.”<sup>68</sup> It does not need to have occurred in the United States, however, and now self-petitioners may apply from outside the United States.<sup>69</sup> In another change from prior law, abuse to children no longer must take place while the child resided with the abuser, although children must show they reside or have resided with the abuser at some point.<sup>70</sup>

One problem with the existing VAWA provisions is that otherwise qualified noncitizens living abroad had no way to file a self-petition. Sometimes abusers would purposefully take their undocumented spouses and children abroad and then strand them there. The Trafficking Act fixes this by providing access to self-petitioning for the following relatives of abusers living abroad:

- Spouses and children of U.S. citizens and lawful permanent resident employees of the U.S. government abroad;
- Spouses and children of U.S. citizens and lawful permanent residents who are members of the “uniformed services;”<sup>71</sup>
- Spouses and children of any U.S. citizen or lawful permanent resident living abroad who subjected the applicant or the applicant’s child to battery or extreme cruelty in the United States.<sup>72</sup>

These include spouses of bigamists. All those eligible under these new provisions “shall file . . . under the procedures that apply to self-petitioners.”<sup>73</sup> This means they send their applications to the Vermont Service Center.

## F. Good Faith Marriage to the Abuser

The marriage<sup>74</sup> (or intent to marry for those abused by bigamists) must have been in “good faith.”<sup>75</sup> It is the self-petitioner’s good faith that is important. INS will deny a self-petition if “the self-petitioner entered into the marriage to the

<sup>65</sup> In addition to §204 definitions cited above, *see* INA §§204(a)(1)(A)(vi) & (B)(v)(I), added by VTVPA §1507(a).

<sup>66</sup> INA §§240A(b)(2)(A)(i)(I) & (II), added by VTVPA §1504(a).

<sup>67</sup> INA §204(a)(1)(B)(v)(II), added by VTVPA §1507(a).

<sup>68</sup> INA §§204(a)(1)(A)(iii)(I)(bb) & (B)(ii)(I)(bb), added by VTVPA §1503. Note that “intent” language only works for those whose marriages are invalid because of the abuser’s bigamy: “but whose marriage is not legitimate solely because of the bigamy of” the abuser, *Id.* at (A)(iii)(II)(BB) & (B)(ii)(II)(BB).

<sup>69</sup> INA §§204(a)(1)(A)(1)(A)(v) & (B)(iv).

<sup>70</sup> INA §§204(a)(1)(A)(iv) & (B)(iii).

<sup>71</sup> Defined under 10 USC §101(a).

<sup>72</sup> INA §§204(a)(1)(A)(v) & (B)(iv).

<sup>73</sup> *Id.*

<sup>74</sup> If your client is in a common law marriage, the law of the state or country where she was “married” determines whether it is a marriage under the immigration laws. If your client is not married to her abuser, check to see if there are any children who also are abused. She may file for cancellation of removal if she can prove the abuser is the parent of the battered child.

<sup>75</sup> INA §§204(a)(1)(A)(iii)(I)(aa) & (B)(ii)(I)(aa).

abuser for the primary purpose of circumventing the immigration laws.”<sup>76</sup> Children legitimated by the subsequent marriage of their parents and stepchildren of abusers also must show the termination of all prior marriages of their abusive parents.<sup>77</sup>

Evidence of “good faith” may include proof that both spouses are listed on insurance policies, property leases, income tax forms or bank accounts and “testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences.”<sup>78</sup> Other evidence “might include” birth certificates of children; police, medical or court documents with information about the relationship; and affidavits of persons with personal knowledge of the relationship.<sup>79</sup>

A self-petitioning spouse must submit evidence of the marriage (such as a marriage certificate) and proof that all prior marriages of both the self-petitioner and the abuser have legally terminated.<sup>80</sup> Obviously, the final regulations should exempt self-petitioners from showing their abusers’ prior divorces if the abusers were bigamists. The INS inquiry in such cases must focus on the applicant’s good faith.<sup>81</sup> If the self-petition is based on abuse to a child, the self-petitioner must include a copy of the child’s birth certificate or other evidence of the relationship to the abuser.<sup>82</sup>

*Practice Pointers on Good Faith Marriage*—Very brief marriages, those of only a few months, or marriages entered into soon after the noncitizen entered the United States, swiftly followed by a self-petition, will raise marriage fraud concerns.<sup>83</sup> The applicant should explain in her affidavit why the marriage was so short, and supporting documents, articles, or expert affidavits should frame this explanation within the context of domestic violence, if relevant. For example, many battered women believe their abusers’ promises to reform and accept offers of marriage only to discover the promises were illusory, which convinces them it is time to leave.

**1. Divorce and Remarriage**—As noted above, self-petitioners no longer must rush to file before divorces become final. In addition, the Trafficking Act explicitly states that remarriage by self-petitioners “shall not be the basis for revocation of a petition approval.”<sup>84</sup> This section provides the same protection against revocation for child self-petitioners who marry, although it is not clear how married child self-petitioners whose abusers were lawful permanent residents can gain adjust status.

*Practice Pointers on Proving the Abuser’s Prior Divorces*—A spouse must submit proof that all of the abuser’s prior marriages have legally ended. This may be extremely difficult. She may not know whether her spouse was married before or may not have access to proof that his prior marriages have terminated. If you can get jurisdiction over the abuser in family court, ask the judge to force the abuser to provide that information or to make rulings on this issue. Explain to the court that the abuser’s refusal to provide the information is part of the pattern of abuse and coercion the court may sanction.<sup>85</sup> Check the relevant state statute on marriage licenses and requirements: Does it require an attestation that the parties are free to marry? Similarly, obtain affidavits from people to whom the abuser represented himself as divorced from prior spouses. Although none of this necessarily proves he was free to marry, it may be the only credible evidence available in the absence of the actual divorce decrees.

As with other evidence, show your good faith effort to find the primary evidence and supply whatever you were able to find that goes to the missing element of proof. Often this effort will persuade Vermont to grant. While attempt-

<sup>76</sup> 8 CFR §204.2(c)(1)(ix).

<sup>77</sup> See 8 CFR §204.2(e)(2)(ii).

<sup>78</sup> 8 CFR §204(c)(2)(vii).

<sup>79</sup> *Id.*

<sup>80</sup> 8 CFR §204.2(c)(2)(ii).

<sup>81</sup> INA §§204(a)(1)(A)(iii)(I)(aa) & (B)(ii)(I)(aa) (“intent to marry . . . in good faith.”); §204(a)(1)(A)(iii)(I)(bb) & (B)(ii)(I)(bb) (“relationship intended by the alien to be legally a marriage”); §204(a)(1)(A)(iii)(II)(aa)(BB) & (B)(ii)(II)(aa)(BB) (“who believes that he or she had married” a U.S. citizen or lawful permanent resident); §204(a)(1)(A)(iii)(II)(cc) & (B)(ii)(II)(cc) (who would have been classified as an immediate relative or second preference category but for bigamy of the U.S. citizen of lawful permanent resident that applicant “intended to marry”); §204(a)(1)(A)(iii)(II)(dd) & (B)(ii)(II)(dd) (resided with “intended spouse”).

<sup>82</sup> 8 CFR §204.2(c)(2)(ii).

<sup>83</sup> Discussion with INS VAWA adjudicators.

<sup>84</sup> INA §204(h), added by VTPVA S 1507(b).

<sup>85</sup> Use Ramos & Runner, *supra*, and NIPNLG updates to educate family court judges.

ing to prove the abuser’s prior divorces, you may encounter evidence that he is a bigamist. Fortunately, now you may submit this evidence and request that INS focus solely on the applicant’s good faith, since the abuser’s prior divorces and intent are now irrelevant.

**2. Marriage Fraud Bar if Abuser Obtained Status Through Marriage**—Self-petitioners must comply with three sections of the INA relating to marriage fraud.<sup>86</sup> INS may not approve a self-petition filed by someone who previously committed marriage fraud,<sup>87</sup> or whose eligibility is based on marriage to a lawful permanent resident, if that lawful permanent resident gained his status through marriage within the last five years.<sup>88</sup> The only way a self-petitioner can overcome this latter bar is by showing that her abuser’s prior marriage was a good faith marriage.<sup>89</sup> Those who married while in immigration proceedings must meet a higher good faith marriage standard of proof.<sup>90</sup>

The Trafficking Act did not fix any of these problems. Advocates should stress its emphasis on the applicant’s intent where evidence of prior marriages is out of their control, as well as emphasize the “any credible evidence” standard. Use the family court, if possible, to uncover or acquire such evidence (*e.g.*, ask the judge to make a finding).

## G. Residence With the Abuser and Residence in the United States

Self-petitioners no longer must reside or have resided in the United States. They must show, however, that they have resided with the abuser, although this may have occurred in another country.<sup>91</sup> Child self-petitioners also must reside or have resided in the past with their abusive parents, but this also may have been outside the United States.<sup>92</sup> They do not have to be residing with the abuser when they file self-petitions nor must they have lived with their abusers for any particular period of time.

The Preamble to the interim regulations states:

The rule also does not limit the time that may have elapsed since the self-petitioner last resided with the abuser ... A self-petitioner cannot meet the residency requirements by merely visiting the United States or visiting the abusers’ home in the United States while continuing to maintain a general place of abode or principal dwelling place elsewhere. This rule, however, does not require the self-petitioner to have lived in the United States or with the abuser in the United States for any specific length of time ... A qualified self-petitioner may have moved to the United States only recently, made any number of trips abroad, or resided with the abuser . . . for only a short time.<sup>93</sup>

Moving out will not hurt the self-petitioner’s immigration application, but it may increase the personal risk to the client. Before suggesting that a client move out, make sure she has developed a safety plan (work with a shelter worker or other domestic violence expert). Similarly, if she decides to remain with the abuser throughout the process, make sure YOU ARE LISTED as the person to receive all communication from INS and ensure she has a plan for protecting herself and her children.

A self-petitioner may submit “[o]ne or more documents” showing residence with the abuser.<sup>94</sup> She may use employment records, utility receipts, school records, medical records, birth certificates of children born in the United States, rental records, mortgages, affidavits and other credible evidence to show residence.<sup>95</sup>

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<sup>86</sup> INA §§204(a)(2)(A), (c) and (g); 8 CFR §204.2(c)(1)(iv).

<sup>87</sup> INA §204(c).

<sup>88</sup> INA §204(a)(2)(A)(i).

<sup>89</sup> INA §204(a)(2)(A)(ii).

<sup>90</sup> INA §204(g); INA §245(e)(3).

<sup>91</sup> INA §§204(a)(1)(A)(iii)(II)(dd) & (B)(ii)(II)(dd).

<sup>92</sup> INA §§204(a)(1)(A)(iv) & (B)(iii).

<sup>93</sup> Preamble at 13,065 (March 26, 1996).

<sup>94</sup> 8 CFR §§204.2(c)(2)(iii) and (e)(2)(iii). Presumably INS will eliminate the reference to residence in the United States in the final regulations.

<sup>95</sup> *Id.*

## H. Good Moral Character

The self-petitioner must prove good moral character.<sup>96</sup> The inquiry focuses on the past three years, although INS may examine prior history.<sup>97</sup> The new law allows INS to forgive acts or convictions that would otherwise pose good moral character bars<sup>98</sup> if an admissibility or deportability waiver would be available for such conduct and if it was “connected to . . . having been battered or subjected to extreme cruelty.”<sup>99</sup>

Primary evidence of good moral character is the self-petitioner’s affidavit.<sup>100</sup> Under the interim regulations, however, it must be accompanied by a local police clearance or state criminal check from each place the self-petitioner resided for six months or more during the three-year period prior to filing the self-petition.<sup>101</sup> If the self-petitioner was living outside the United States during those three years, she should submit the same type of criminal report from each foreign country in which she lived during that period. If these reports are not available, she should explain her efforts to obtain them and why they were unsuccessful. If possible, she should submit other evidence, “such as affidavits from responsible persons who can knowledgeably attest to the self-petitioner’s good moral character.”<sup>102</sup> Fortunately, the final regulations will probably allow applicants to provide either fingerprints or police clearances to satisfy the criminal check requirement.

## I. Extreme Hardship

The Trafficking Act eliminated the extreme hardship requirement for self-petitioners. The analyses, strategies and guidance developed in the self-petitioning context are equally valuable in the suspension and cancellation context, however. (See discussion below.)

## J. Children As Self-Petitioners

**1. Children Seeking Status**—A self-petitioning child must have a parent-child relationship with the abuser and must be unmarried, under 21 and otherwise qualified as a “child” under immigration law.<sup>103</sup> The parent/child relationship must exist when the self-petition is filed.<sup>104</sup> Although the interim regulations require that it exist until the self-petition is approved,<sup>105</sup> we expect the final regulations to eliminate this ongoing relationship requirement, as the interim regulations did for divorce. Note that step-children may maintain their relationship with their abusive parents even when their parents have separated.<sup>106</sup>

The Trafficking Act allows child self-petitioners to include their own children in their self-petitions.<sup>107</sup> Since children lose their status as “children” when they turn 21, by the time they become eligible to adjust, they may have been automatically reclassified into the relevant self-petitioning visa categories for sons and daughters.<sup>108</sup> Self-petitions by children of lawful permanent residents will no longer be automatically revoked if they marry,<sup>109</sup> but it is unclear how they may obtain lawful permanent residence, since no visa preference category exists for them.

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<sup>96</sup> INA §§204(a)(1)(A)(iii)(II)(bb) & (iv), (B)(ii)(II)(bb) & (iii).

<sup>97</sup> Preamble at 13,066.

<sup>98</sup> Under INA §101(f).

<sup>99</sup> INA §204(a)(1)(C), added by VTVTA §1503(d).

<sup>100</sup> 8 CFR §§204.2(c)(2)(v) and (e)(2)(v).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> INA §101(b)(1) contains various definitions of children, including legitimate children, children born out of wedlock, adopted children and stepchildren.

<sup>104</sup> 8 CFR §204.2(e)(1)(ii).

<sup>105</sup> *Id.*

<sup>106</sup> See, e.g., *Matter of Mowrer*, 17 I&N 613 (BIA 1981); *Matter of Mourillon*, 18 I&N 122 (BIA 1981), both cases cited in NIPNLG, *Immigration Law and the Family* 6-11-12 (West, 2000).

<sup>107</sup> INA §§204(a)(1)(A)(iv) & (B)(iii).

<sup>108</sup> 8 CFR §205.1(a)(3)(i).

<sup>109</sup> INA §204(h), added by VTPVA §1507(b).

**2. Derivatives vs. Child Self-Petitioning**—Attorneys and clients often include the children as derivatives in the parent’s application to avoid the extra fees. Unlike normal family-based petitions, immediate relative children may be included as derivatives.<sup>110</sup> Under Trafficking Act revisions, aging out derivatives now automatically transform into approved self-petitioners in the relevant son or daughter preference category.<sup>111</sup> They retain the primary self-petitioner’s priority date and, now that they are approved self-petitioners, they benefit from the VAWA adjustment provisions (described below).

#### IV. PREPARING THE APPLICATION

Winning self-petitions is not as easy as winning family-based petitions. Practitioners must spend more thought and energy on them.

- Flesh out the story and its accuracy through a series of interviews with your client, employing open-ended questions;
- Collect affidavits and documents corroborating the elements of proof, especially domestic violence and good faith;
- Index and summarize supporting documents by element of proof so adjudicators may easily understand which documents support what elements of proof and how;
- Include a cover letter providing a road map through the case, using bullets or a similar technique that maximizes reader friendliness.

The self-petitioner’s affidavit is the most important evidence; it is the first document most VAWA adjudicators review and establishes (or fails to establish) the applicant’s credibility.<sup>112</sup> It should provide as much detail as possible *in the applicant’s own words*. It may be organized according to element of proof, but legal jargon implies the attorney wrote the affidavit, undermining its value to the adjudicators and triggering fraud concerns in some cases.

##### A. Where, What, and When to File

As of May 7, 1997, all VAWA self-petitioners, including spouses and children of U.S. citizens, must file Form I-360 at the Vermont Service Center (VSC).<sup>113</sup> All old cases should have been transferred to Vermont by now.<sup>114</sup> Approved self-petitioners whose abusers were lawful permanent residents are subject to the visa allocation system, and must wait for their “priority date” to become “current” before they can apply for lawful permanent residence. They may, however, transfer priority dates from previously filed family-based petitions to their self-petitions “without regard to the current validity” of the previous petition,<sup>115</sup> decreasing the waiting period in many cases. A copy of the previous I-130 petition or other identifying information should be included in the I-360 application and the request for the priority date transfer should be noted in red large letters on the cover sheet. If the application includes the old I-130, enclose it in a manila envelope and mark it “evidence.” This should avoid unnecessary kickbacks from the Vermont Service Center mailroom.

*Practice Pointers on What to File*—VSC will accept adjustment (I-485) and work authorization (I-765) applications filed along with the I-360, but lacks jurisdiction to adjudicate adjustment. On the one hand, filing the I-485 with the I-360 may delay adjudication of the self-petition, since the mail room may send the packet to the wrong unit. On the other hand, filing the work authorization application along with the I-360 may accelerate receiving the EAD (Employment Authorization Document). Such EAD applications MUST comply with the requirements noted below, which depend on the basis for

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<sup>110</sup> 8 CFR §204.2(c)(4); *see also* Preamble at 13068, 13069 (“A qualified derivative child of a self-petitioning spouse of an abusive citizen of the United States is also considered to be an immediate relative. . .”).

<sup>111</sup> INA §204(a)(1)(D).

<sup>112</sup> These practice pointers are gleaned from discussions with VAWA adjudicating staff at Vermont Service Center during training sessions, St. Albans, Vermont, July 16, 1997, December 3, 1997 and September, 2000.

<sup>113</sup> *See* Virtue, Office of Programs, Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues 2 (May 6, 1977), *reprinted in* 74 *Interpreter Releases* 971 (June 16, 1997).

<sup>114</sup> Cronin, Acting Associate Commissioner, Office of Programs, INS Mem. HQ204-P at 3 (Dec. 22, 1998) (available from the National Immigration Project).

<sup>115</sup> 8 CFR §204.2(h)(2); INS Mem. HQ 204-P from T. Alexander Aleinikoff, Exec. Assoc. Comm’r, Office of Programs at 2-3 (Apr. 16, 1996) (hereinafter “Aleinikoff Memo”) (available from the National Immigration Project).

the work authorization (immediately eligible to adjust v. deferred action). Note that, if the applicant loses the self-petition, she also will lose the work authorization fee. In any case, **MARK THE APPLICATION IN BIG RED LETTERS: “VAWA SELF-PETITION AND WORK AUTHORIZATION REQUEST.”**

### **B. Notices of Action (NOAs)**

Vermont often requests additional information from self-petitioners in the form of Notices of Action (NOA). The regulations specifically require that it allow self-petitioners to present additional evidence and challenge derogatory information at least once before Vermont may deny an application.<sup>116</sup>

The Vermont Service Center has proven amenable to granting requests for extensions of time to respond to the NOA. If you do not receive notice of an extension grant before the deadline for responding to the NOA, *you must respond to the content of the NOA before the deadline*. Failure to do so will result in denial of the self-petition for “failure to prosecute.” It is much more difficult to reopen cases denied for this reason than to submit whatever extra evidence you can muster before the deadline, and thereby trigger another NOA or a Notice of Intent to Deny, to which you can then also respond with additional documentation. You may receive a grant based on the additional evidence you submitted and your legal arguments concerning the NOA’s deficiencies.

*Practice Pointers on NOAs*—For practitioners experienced in other areas of immigration law, the attitude of the INS personnel specifically assigned to VAWA is remarkable and refreshing. The Vermont VAWA supervisors are extremely sympathetic to those applying and spend significant energy ensuring they do not wrongfully deny petitions. Thus, NOAs usually contain specific requests, describing how the application is deficient. Some NOAs may request evidence you believe you provided the first time. Others may, in your view, misapply the evidentiary standard or misinterpret the statute and regulations. Contact NIPNLG in such cases to discuss your legal arguments and a strategy for convincing Vermont you are right.

A prudent approach to problematic NOAs is to (a) politely explain why the decision is wrong and (b) provide the requested information if it is readily available. Since many requests represent an individual adjudicator’s idiosyncratic interpretation, not the policy of the unit as a whole, don’t worry about establishing a bad “precedent.” The VAWA supervisors are adept at teaching adjudicators the errors of their ways, and appreciate hearing about problems occurring in the field.

VSC has established a special VAWA phone line,<sup>117</sup> which practitioners may use to resolve concerns with NOAs. To ensure safety and confidentiality, VSC may require the following information you: who you are; your organization or firm; whether there is a G-28 or cover letter from you in the file; the client’s name (and any possible variations in the file); client’s A# or EAC# given by INS; the ID number and date of last notice received from VSC; your phone, fax and email.

### **C. Prima Facie Notices**

Vermont issues prima facie approval notices to allow self-petitioners to obtain public benefits as “qualified aliens.”<sup>118</sup> *These are not self-petition approvals*, and failure to respond to an accompanying Notice of Action requesting further information will result in denial of the self-petition for failure to prosecute. Prima facie notices should, however, allow self-petitioners to obtain all public benefits except SSI and Food Stamps.

*Practice Pointer on Swiftly Obtaining Public Benefits*—If your client’s immediate goal is to obtain public benefits, she should file a very skeletal application. The standard for a prima facie showing is: a statement of facts that, if substantiated, would lead to approval of the self-petition.<sup>119</sup> Too much information may raise questions about eligibility and lead to a request for more information. Those seeking prima facie approval should, however, provide a few sentences describing the battery or extreme cruelty.

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<sup>116</sup> 8 CFR §204.2(c)(3)(ii); *see also* Preamble at 13069.

<sup>117</sup> (802) 527-4888

<sup>118</sup> *See* “Prima Facie Review of Form I-360 When Filed by Self-Petitioning Battered Spouse/Child,” 62 Fed. Reg. 60769-72 (Nov. 13, 1997), *reprinted in* 74 *Interpreter Releases* 1754 (Nov. 17, 1997).

<sup>119</sup> Discussions with INS adjudicators and subsequent communications between Pendleton and supervisor or VAWA adjudicators.

Unfortunately, even with a prima facie approval in hand, public benefits administrators may wrongfully deny your client the benefits for which she is eligible. For more information on the requirements and procedures for obtaining public benefits for VAWA applicants, and rectifying wrongful denials, contact the Immigrant Women's Project of NOW Legal Defense and Education Fund.<sup>120</sup>

#### D. Employment Authorization

All approved VAWA petitioners are eligible for work authorization, either because they are immediately eligible to adjust<sup>121</sup> (immediate relatives and those with current priority dates), because they are eligible for Deferred Action with attendant eligibility for work authorization,<sup>122</sup> or because they are suspension or cancellation applicants.<sup>123</sup>

**1. Procedure for Those Who Must Wait**—Approved self-petitioners subject to the visa quota system should receive grants of Deferred Action and notice of the right to apply for work authorization in their self-petition approval notices. As required under the regulations for work authorization pursuant to Deferred Action, proof of economic necessity must accompany applications for work authorization in these cases.<sup>124</sup> A cover letter listing assets/income and expenses should suffice.<sup>125</sup>

##### *Checklist for Work Authorization Applications under Deferred Action*

The mail room in Vermont will probably kick back your work authorization request if it doesn't conform with the following requirements;

- include a copy of the I-360 approval notice on top of the packet;
- cite in big red letters on the cover letter the relevant section of the regulations for deferred action, 8 CFR §274a.12(c)(14); and
- include in the cover letter a simple list of assets/income and expenses to meet the economic necessity requirement in the regulation.

Vermont should process all work authorization requests and send the EAD documents directly to the self-petitioner. They should not send the paperwork to the local office for processing. Vermont initially grants deferred action for 15 months with extensions in increments of 12 months.<sup>126</sup> It also now has authority to extend these benefits as long as the applicant needs them.<sup>127</sup>

Self-petitioners who need to renew their work authorization and deferred action should file a request for extending both at the same time with Vermont. It is not necessary to obtain the deferred action extension before filing for work authorization renewal, and doing so may confuse the mail room. When Vermont extends deferred action and work authorization, it does so retroactively to the expiration of the previous period.

**2. Work Authorization for Derivative Children**—Children included in their parents' self-petitions may apply for deferred action and work authorization from the Vermont Service Center by sending proof of the parent/child relationship, e.g., birth certificate, and writing in big letters on the I-765, "VAWA self-petitioner or self-petitioner's child."

**3. Options for Those Eligible to File Immediately**—Although self-petitioners may confuse the mail room by attaching their adjustment applications to the self-petitions they file with Vermont, those who need work authorization more

<sup>120</sup> NOW Legal Defense and Education Fund, Immigrant Women's Project, 1522 K Street, N.W., Suite 550, Washington, DC 20005; (202) 326-0040; (202) 589-0511 (fax); e-mail: [jkaguyutan@nowldef.org](mailto:jkaguyutan@nowldef.org); Web site: [www.nowldef.org](http://www.nowldef.org).

<sup>121</sup> 8 CFR §274a.12(c)(9).

<sup>122</sup> 8 CFR §274a.12(c)(14).

<sup>123</sup> 8 CFR §274a.12(c)(10).

<sup>124</sup> 8 CFR §274a.12(c)(14).

<sup>125</sup> Advice of VAWA supervisors at National Network on Behalf of Battered Immigrant Women meeting, August, 2000.

<sup>126</sup> Cronin, Acting Associate Commissioner, Office of Programs, INS Mem. HQ204-P at 4 (Dec. 22, 1998) (available from the National Immigration Project).

<sup>127</sup> Cronin, Acting Executive Associate Commissioner, Office of Programs, INS Mem. HQ/ADN/70/6.1P (Sept. 8, 2000), *reprinted in 77 Interpreter Releases* 1432–33 (Oct. 2, 2000).

than they need a swift self-petition adjudication, may choose to file all the forms at once. In these cases, Vermont will grant work authorization based on immediate eligibility to adjust<sup>128</sup> (as opposed to a grant of deferred action status). If the VAWA unit grants the self-petition, Vermont will forward the entire file to the applicant's local office for the adjustment interview.

## V. SELF-PETITION DENIALS AND APPEALS

If INS ultimately denies the self-petition, it will notify the self-petitioner in writing of the reasons and of the right to appeal. Appeals of denials of self-petitions lie with the Administrative Appeals Unit (AAU) (and, arguably, with the BIA), but a motion to reopen or reconsider<sup>129</sup> filed with the Vermont Service Center may achieve swifter and better results. If you think the denial was wrong, you also may request a fee waiver for a motion to reconsider.<sup>130</sup> If a denial is based on old law, articulate the arguments noted at the beginning of this article. If you think the decision was wrong, follow your written communication with a call to the special VAWA number (*see* section on NOAs). Ask for a supervisor to pull the case and review your motion.

Unlike the VSC, the Administrative Appeals Unit (AAU) is not regularly trained in VAWA, does not have a special VAWA unit, and does not devote special resources to swiftly resolving VAWA problems, and does not communicate regularly with VAWA advocates. You are much more likely to prevail swiftly with the VAWA supervisors at VSC than with the AAU.

## VI. PROHIBITION AGAINST INS USE OF INFORMATION PROVIDED BY AN ABUSER

IIRAIRA § 384 prohibits INS officers from making adverse determinations on admissibility or deportability “using information furnished solely by” the applicant’s abuser, an abusive member of the applicant’s household, or someone who has abused the applicant’s child.<sup>131</sup> It also prohibits the “use by or disclosure to anyone” except to other INS officers “for legitimate . . . agency purposes,” of information relating to self-petitioners, conditional residents requesting battered spouse waivers, and applicants for cancellation of removal.<sup>132</sup> Anyone who “willfully uses, publishes, or permits information to be disclosed in violation of this section shall be subject to appropriate disciplinary action *and subject to a civil money penalty of not more than \$5,000 for each such violation.*”<sup>133</sup> These prohibitions and penalties apply to any act by an INS officer or trial attorney that took place on or after September 30, 1996.<sup>134</sup>

INS has issued a helpful memo to the field implementing section 384.<sup>135</sup> Use it to educate local INS officers who may be inclined to take information from abusers. Challenge alleged fraud problems arising at the adjustment phase and notices to appear issued at the behest of the abuser. If your client is in proceedings because an abuser called INS, move to terminate the case because INS issued the hearing notice (Notice to Appear) in violation of section 384. Move to suppress any information provided by the abuser or that flowed directly from the abuser’s information (“fruit of the poisonous tree”). Demand that INS prove it obtained “independent corroborative information from an unrelated person before taking any action based on that information.”<sup>136</sup> NIPNLG has sample briefs and motions on section 394. We also are working to identify problem districts for more concerted action; we need your information to do this effectively.

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<sup>128</sup> Pursuant to 8 CFR §274a.12(a)(9).

<sup>129</sup> 8 CFR §§103.5(a)(1) and (2) authorize and describe the requirements for such motions.

<sup>130</sup> An INS memo on standards for fee waivers refers INS officers back to the Aleinikoff and Virtue VAWA memos for waivers in VAWA cases “[d]ue to the sensitive nature of applications and petitions associated with this category. . .” Pearson, Interim Field Guidance on granting fee waivers pursuant to 8 CFR 103.7(c), HQ 70/5.5 (Oct. 9, 1998), *reprinted in* 75(41) Int. Rel. 1497, 1499 (Oct. 26, 1998).

<sup>131</sup> IIRAIRA §384(a)(1).

<sup>132</sup> IIRAIRA §384(a)(2).

<sup>133</sup> IIRAIRA §384(c) (emphasis supplied).

<sup>134</sup> IIRAIRA §384(d)(2).

<sup>135</sup> Virtue, Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRAIRA §384, 96 act.036 (May 5, 1997), *reprinted in* 74 Int. Rel. 795 (May 12, 1997).

<sup>136</sup> *Id.* at 797.

## VII. VAWA ADJUSTMENT

The Trafficking Act amended the INA's adjustment provisions so that all approved self-petitioners are now eligible to adjust regardless of manner of entry. These amendments are sufficiently profound that they bear quotation here.

INA §245(a) now provides that the Attorney General may adjust the status of anyone

who was inspected and admitted *or paroled into the United States or the status of any other alien having an approved petition for classification under [the VAWA self-petition provisions]*. . .<sup>137</sup>

INA §245(c) now begins:

*Other than an alien having an approved petition for classification under [the VAWA self-petitioning provisions], subsection (a) shall not be applicable to . . .*<sup>138</sup>

These amendments apply “to applications for adjustment of status pending on or made on or after January 14, 1998.”<sup>139</sup>

The only self-petitioners who cannot adjust are those whose adjustment applications already have been denied. Presumably, they may now file again. Note that derivatives do not, themselves, have “approved petitions” and must, therefore either file self-petitions or show independent eligibility for adjustment.

### A. Practice Pointer on Using Existing Interview Dates to Adjust

Is there an outstanding I-130-based adjustment application? If so, then self-petitioners should be able to substitute their self-petition for the I-130 and retain the original I-485 for adjustment purposes. How much information to convey to the local office is a strategy question, since you probably wish to avoid creating another long wait for an adjustment interview. On the other hand, if you fear the abuser will contact INS to ensure it denies the I-130 and I-485, you should notify the local office that your client is substituting the I-360 and invoke IIRAIRA §384 as protection against using information from the abuser to deny the adjustment or to issue a Notice to Appear.

### B. Difficult District Offices

Some district offices seem particularly uneducated or antagonistic to VAWA applicants. They should not routinely review the I-360 merits, nor require that applicants reprove their cases. They should understand that approved self-petitioners and their derivatives may adjust regardless of whether they remained in the qualifying relationships with their abusers. They should have transferred any outstanding I-360s to Vermont long ago. If you are experiencing problems with your local office, please contact NIPNLG.

### C. Special Problems for Former Fiancées

Fiancée visas are the typical way women ensnared in abusive international relationships are brought into the United States. Unfortunately, the immigration law places special restrictions on fiancée access to status. One significant barrier is the prohibition against adjusting fiancées based on a relationship other than that with the U.S. citizen sponsor.<sup>140</sup> As long as the self-petition is based on an abusive relationship with the fiancée visa sponsor and she married her sponsor within the statutorily required three months after entry,<sup>141</sup> the fiancées should be able to adjust (assuming they are otherwise eligible).

As the preamble to the VAWA regulations notes,

[a] self-petitioner who last entered in K-1 or K-2 nonimmigrant status would be subject to [the §245(d) restriction on adjustment], as would his or her derivative children who last entered in K-2 nonimmigrant status, *unless the abuser is also the citizen who had filed the fiancé(e) petition.*<sup>142</sup>

<sup>137</sup> INA §245(a), amended by VTVPA §1506(a)(1)(A) (emphasis supplied).

<sup>138</sup> INA §245(c), amended by VTVPA §1506(a)(1)(B) (emphasis supplied).

<sup>139</sup> VTVPA §1506(a)(2).

<sup>140</sup> INA §245(d).

<sup>141</sup> INA §214(d).

<sup>142</sup> 61 Fed. Reg. 13061–79, at 13070 (Mar. 26, 1996) (emphasis supplied).

Moreover, the limitation on adjusting fiancées only to conditional residence<sup>143</sup> should not apply.<sup>144</sup> Unfortunately, however, fiancées whose abusers refuse to marry them or who wish to gain status through a subsequent relationship must process their immigrant visas abroad.

#### D. The Dangers of Travel

Many approved self-petitioners assume they are authorized to travel. This is inaccurate. If they leave the United States without advance parole, they may be unable to return. They may have triggered unlawful presence bars that they must overcome at adjustment, even if they return on advance parole. If they reenter without permission, they may do so by committing acts that will preclude them from adjusting, such as claiming to be U.S. citizens.<sup>145</sup> Practitioners should thoroughly brief their clients about the risks of traveling. Explaining the expedited removal process should instill a healthy fear of the risks of leaving the United States.

**I. Expedited Removal**—IIRAIRA gave low-level INS officers at the border and at international airports the power to expel noncitizens because they lack entry documents or use fraudulent documents.<sup>146</sup> This new form of deportation, called summary (or expedited) removal, has the same extremely serious consequences for a noncitizen as being deported after a full-fledged immigration hearing.<sup>147</sup> As expected, the new power is proving a serious problem and, unfortunately, so far the federal courts have not stepped in to fix it. Consequently, legitimate asylum seekers are being turned away and INS officers are summarily removing noncitizens simply because they suspect their documents are fraudulent. Unless approved VAWA self-petitioners obtain “advance parole” before they leave the United States (which is very unlikely) or obtain an immigrant visa from a consular office abroad, they will not have documents that allow them to leave and re-enter the United States.

### VIII. ADMISSIBILITY AND DEPORTABILITY

Although all approved self-petitioners are now eligible to adjust status, they still must overcome the grounds of inadmissibility and, in case of those in proceedings, the grounds of deportability. Do not refrain from filing a self-petition because of inadmissibility problems. Even when Vermont denies a self-petition, it does not issue NTAs or report those denied to deportation (except, perhaps, for cases involving fraud).<sup>148</sup>

The Trafficking Act added new waivers and substantial expansions of existing waivers of inadmissibility and deportability benefiting VAWA applicants. The unlawful presence “permanent bar”;<sup>149</sup> domestic violence, stalking or protection order violations;<sup>150</sup> misrepresentations or “visa fraud”;<sup>151</sup> communicable diseases;<sup>152</sup> and criminal offenses<sup>153</sup> were all affected. An exception to the public charge ground was also added.<sup>154</sup>

#### A. Unlawful Presence

IIRAIRA created three- and ten-year bars to gaining status if someone has stayed in the United States for certain periods of time in an unauthorized immigration status (unlawful presence) and then leaves the country.<sup>155</sup> Leaving to pick up

<sup>143</sup> INA §245(d).

<sup>144</sup> See 8 CFR §216.1.

<sup>145</sup> See INA §212(a)(6)(C)(ii).

<sup>146</sup> INA §235(b)(1)(a)(i).

<sup>147</sup> See, e.g., INA §212(a)(9)(A).

<sup>148</sup> Although INS takes the position that it may deport denied self-petitioners, the Vermont Service Center has repeatedly assured the author that it is neither issuing immigration hearing notices, nor forwarding files to any other part of the agency.

<sup>149</sup> INA §212(a)(9)(C)(ii), as amended by VTVPA §1505(a).

<sup>150</sup> INA §237(a)(7), as enacted by VTVPA §1505(b).

<sup>151</sup> INA §212(i)(1); INA §237(a)(1)(H), as amended by VTVPA §1505(c).

<sup>152</sup> INA §212(g)(1), as amended by VTVPA §1505(d).

<sup>153</sup> INA §212(h)(1), as amended by VTVPA §1505(e).

<sup>154</sup> INA §212(p), as amended by VTVPA §1505(f).

<sup>155</sup> INA §212(a)(9)(B).

an immigrant visa will trigger these bars. So far, INS has said that Deferred Action, the status VAWA self-petitioners receive when Vermont approves their petitions, is not a “stay authorized by the Attorney General” and therefore counts as unlawful presence.<sup>156</sup> Thus, approved VAWA self-petitioners with Deferred Action may trigger the bars when they leave the United States.

Many approved VAWA self-petitioners are statutorily exempt from the bars but Department of State instructions for consular officers don’t explain what someone must show to be exempt. The essence of the problem is that, when it created the exemption, Congress distinguished between VAWA self-petitioners who had “first arrived” in the United States before April 1, 1997, and those who arrived after that date.<sup>157</sup> Many copies of the statute used by practitioners lack this significant footnote.

Under IIRAIRA §301(c)(2), people who first arrived in the United States before 4/1/97 need only show they are approved self-petitioners; people who first arrived after that date also demonstrate a “substantial connection” between the reason they were in unlawful status and the domestic violence they suffered. It is very likely that consular officers will require all VAWA self-petitioners to show this connection in all cases, which may be very hard to prove. It may take them many months to reach a decision. In the mean time, the self-petitioner must stay abroad, unless she has “advance parole.” Those who leave and return on advance parole, however, may be subject to the unlawful presence bars because they triggered them by leaving the United States.

Although the Trafficking Act does not remedy these problems, it did create a new waiver for the unlawful presence “permanent bar” based on accruing one year of unlawful presence in the United States, followed by a departure and an attempted or successful illegal re-entry.<sup>158</sup> The new waiver also requires a “connection” between the domestic violence suffered and the applicant’s removal, departure, reentry or attempted reentry.<sup>159</sup> Notably, this differs from the prior unlawful presence VAWA provisions in that (1) the permanent bar provision requires an application for a *waiver*, instead of providing an *exemption* for VAWA applicants as does the three and ten year bars provision<sup>160</sup>; and (2) the waiver only requires a “connection”<sup>161</sup> versus the exemption’s “*substantial connection*”<sup>162</sup> to the domestic violence suffered, (3) the “permanent bar” waiver allows the “connection” to be made between any one of four possibilities: the applicant’s removal, departure, reentry or attempted reentry<sup>163</sup> and (4) the three-and ten-year bar exemption applies to persons *qualified*<sup>164</sup> for VAWA status whereas the “permanent bar” waiver applies to those already *granted*<sup>165</sup> VAWA status.

## B. Criminal Conduct

The Trafficking Act expanded the criminal waiver pursuant to §212(h) to allow VAWA qualifiers eligibility for the waiver without proof of hardship or the existence of “qualifying relatives.”<sup>166</sup> The domestic violence deportation ground, including convictions for domestic violence stalking, child abuse, neglect, or abandonment and violations of protection orders are also all waivable under the new VAWA provisions.<sup>167</sup> The VAWA applicant must not be or have been “the

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<sup>156</sup> Virtue, Office of Programs, Additional Guidance for Implementing Sections 212(a)(6) and (a)(9) (June 17, 1997), *reprinted in* 74 Int. Rel. 1046 (July 7, 1997).

<sup>157</sup> IIRAIRA §301(c)(2).

<sup>158</sup> INA §212(a)(9)(C).

<sup>159</sup> INA §212(a)(9)(C)(ii), as amended by VTVPA §1505(a).

<sup>160</sup> INA §212(a)(9)(B)(iii)(IV); INA §212(a)(6)(A)(ii)(III).

<sup>161</sup> INA §212(a)(9)(C)(ii), as amended by VTVPA, Sec. 1505(a).

<sup>162</sup> INA §212(a)(9)(B)(iii)(IV); INA §212(a)(6)(A)(ii)(III).

<sup>163</sup> INA §212(a)(9)(C)(ii)(2)(A)-(D), as amended by VTVPA, Sec. 1505(a).

<sup>164</sup> INA §212(a)(9)(B)(iii)(IV); INA §212(a)(6)(A)(ii)(I). The difference between “qualified” and “granted” is meaningful and should be interpreted to mean that an alien should only have to demonstrate eligibility for VAWA status without necessarily applying for that status; *e.g.*, if a client is adjusting on another application, she or he should be able to offer up proof that would satisfy a self-petition and obtain the waiver on that basis. While the distinctions have been present in the statute since IIRAIRA was enacted, as of yet, INS has not addressed this issue in regulations or policy memoranda.

<sup>165</sup> INA §212(a)(9)(C)(ii), as amended by VTVPA, §1505(a).

<sup>166</sup> INA §212(h)(1)(C), as amended by VTVPA, §1505(e).

<sup>167</sup> INA §237(a)(7)(A), as enacted by VTVPA, §1505(b).

primary perpetrator of violence in the relationship.”<sup>168</sup> There must be a showing of one of three alternatives: either that (1) the applicant was acting in self-defense, or (2) the protection order violated was one intended to protect the VAWA applicant, or (3) the crime did not result in serious bodily injury and there was “a connection” between the crime and the domestic violence suffered.<sup>169</sup> No VAWA status is required.

### C. Fraud

The “visa fraud” or misrepresentation waiver of inadmissibility pursuant to §212(i) was expanded to allow those with approved VAWA status to qualify for a waiver by demonstrating extreme hardship to *self* or to a USC, LPR or “qualified alien” *parent* or *child*.<sup>170</sup> The term “qualified alien,” as defined by Section 501 of IIRAIRA and the recent Welfare Act, includes prima facie eligible or approved VAWA self-petitioners.<sup>171</sup> The waiver of the analogous deportation ground, INA §237(a)(1)(H), was expanded to allow those qualifying for VAWA status to apply for the waiver notably *without* the existence of any “qualifying relatives.”<sup>172</sup> Practitioners should advocate for the application of VAWA “extreme hardship” standards, particularly since in certain INS Districts, standards for obtaining general “extreme hardship” waivers are quite stringent and many such non-VAWA waivers have been denied.

### D. HIV and Public Charge

VAWA “qualifiers” with communicable diseases, including HIV, may also receive the expanded 212(g) waiver by demonstrating eligibility for VAWA status without proving the existence of “qualifying relatives,” without bond, and without consultation with Health and Human Services or the Centers for Disease Control.<sup>173</sup>

Finally, a further exemption to the public charge ground of inadmissibility was added, prohibiting the consideration of any benefits VAWA applicants were authorized to accept under section 501 of IIRAIRA in determining public charge.<sup>174</sup>

### E. Remaining Problems

While there is still no waiver available for false claims to citizenship, drug abuse or addiction and a number of criminal offenses, the waivers and exemptions described above represent a substantial and significant expansion of potential for adjustment or immigrant visa eligibility for many previously ineligible VAWA applicants. In addition, those VAWA applicants for whom no waiver is available might benefit from the new “U” visa category with its subsequent adjustment to permanent residency provisions.<sup>175</sup> See U visa section for a discussion of admissibility waivers available to those applicants.

## IX. VAWA SUSPENSION/CANCELLATION

VAWA cancellation and self-petitioning are very similar, but there are some differences which may affect a client’s decision about which route to choose. On the one hand, spouses and children of lawful permanent resident abusers may be eligible to adjust immediately if an immigration judge grants VAWA cancellation, rather than waiting for a current priority date. An inadmissible adjustment applicant may qualify instead for cancellation. On the other hand, Congress has attempted to severely restrict access to suspension and cancellation by limiting the number of cancellation applicants who may gain lawful permanent residence each year<sup>176</sup> and by applying a narrow construction of the “continuous physical presence” requirement. While the Trafficking Act has added certain exceptions for VAWA cancellation applicants, there are additional proof requirements as well.

<sup>168</sup> *Id.*

<sup>169</sup> INA §237(a)(7)(A)(i)(I)-(III), as enacted by VTVPA, §1505(c).

<sup>170</sup> INA §212(i)(1), as amended by VTVPA, §1505(c).

<sup>171</sup> 8 USC 1641.

<sup>172</sup> INA §237(a)(1)(H)(ii), as amended by VTVPA, §1505(c).

<sup>173</sup> INA §212(g)(1)(C), as amended by VTVPA, §1505(d).

<sup>174</sup> INA §212(p), as amended by VTVPA, §1505(f).

<sup>175</sup> 8 USC 1101(a)(15)(U); INA §101(a)(15)(U), as amended by VTVPA, §1513.

<sup>176</sup> INA §240A(b)(3). Congress amended INA §240A(e) to exempt VAWA suspension applicants from the 4,000 “cap.” Nicaraguan and Central American Relief Act, §204(a), Pub. L. No. 105—139, 111 Stat. 2644 (hereinafter NACARA).

The Trafficking Act's new suspension/cancellation provisions track the self-petitioning provisions in allowing VAWA applicants to qualify for suspension/cancellation despite a loss of status by the abuser and by deleting the past requirement of the abuse occurring in the United States. The extreme hardship requirement has been expanded to include hardship to a parent of an adult VAWA applicant and the applicable bars to good moral character have been significantly reduced. Very significantly for many potential applicants, the Trafficking Act significantly amended the accrual of residency "cut-off" rule for VAWA cancellation/suspension. Instead of the issuance of the NTA or OSC, the date of the actual cancellation/suspension application filing with the immigration judge is now the relevant "cut-off" date.

Motions to reopen for VAWA cancellation have a new, expanded deadline and the deadline has been completely removed for VAWA suspension of deportation motions. Children and parents of VAWA cancellation/suspension grantees automatically receive parole beginning on the date of the grant by the immigration judge and INS district offices are encouraged by new reporting requirements to accept and act upon requests for NTAs by eligible VAWA applicants.

Although many more applicants will now qualify for VAWA cancellation/suspension after the Trafficking Act amendments, and the entire EOIR should now be more "VAWA friendly" after receiving special training last year, all applicants in proceedings who are eligible to file self-petitions should still do so with Vermont. The applicant might then be eligible to immediately adjust in proceedings, and an approved self-petition may go far in convincing a judge that the client merits VAWA suspension/cancellation.<sup>177</sup>

## A. Suspension/Cancellation Proof Requirements

**1. Qualifying Abusers**—Under the Trafficking Act, current abuser USC or LPR status is no longer required—consistent with the similar amendments made to the self-petitioning provisions. It should not now disqualify an applicant if the abuser has already been deported. A legally invalid marriage due to the abuser's bigamy is also sufficient to qualify the applicant for suspension/cancellation, again consistent with the self-petitioning provisions.<sup>178</sup>

Note that a VAWA suspension/cancellation applicant may be a "parent of a child of a United States citizen or lawful permanent resident" if the "child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent."<sup>179</sup> At least one immigration judge has granted VAWA suspension to a woman who was never married to her abuser but whose child in common with the abuser suffered extreme cruelty from witnessing the abuse.<sup>180</sup>

**2. When and Where the Abuse Took Place**—As in self-petitioning, there is no longer any requirement with regard to where the abuse took place. Thus, VAWA suspension/cancellation applicants may have suffered abuse outside the United States "by a spouse or parent" or their children were abused outside the United States by [a qualifying] parent" and still qualify for suspension/cancellation.<sup>181</sup> The statutory language still appears to indicate, however, that the abuser must have been a spouse or parent at the time he committed the acts of domestic violence against his family members.<sup>182</sup>

**3. Good Faith Marriage**—Like the new self-petitioning provisions, the law does not require that a VAWA suspension/cancellation applicant currently be a spouse or child of an abuser. INS appears to agree with this view.<sup>183</sup> Advocates should argue, therefore, that the abuser only had to be a spouse or parent at the time the acts of domestic violence

<sup>177</sup> Note also that approved VAWA self-petitioners in proceedings are exempt from the ground of inadmissibility for entering without admission or parole at INA §212(a)(6)(A). Thus, one may argue that, if this is the only ground of inadmissibility charged, the immigration court must terminate proceedings.

<sup>178</sup> INA §240A(b)(2)(A), as amended by VTVPA, §1504(a)(2)(A).

<sup>179</sup> *Id.*

<sup>180</sup> Contact the National Immigration Project for a brief to the BIA challenging INS's appeal of one such grant.

<sup>181</sup> INA §240A(b)(2)(A), as amended by VTVPA, §1504(a)(2)(A).

<sup>182</sup> *Id.* It is not clear whether the abuser is required to have been a U.S. citizen or LPR at the time the abuse occurred. The amendments only require that the abuser "is or was" an LPR or USC.

<sup>183</sup> Virtue, INS Office of Programs (no number) (May 6, 1997), reprinted in 74 *Interpreter Releases* 971 (June 16, 1997) ("It is important to note, however, that some individuals who are ineligible for status pursuant to the self-petitioning provisions will be eligible for cancellation (e.g., where the marriage has been terminated).").

occurred and need no longer be in this legal relationship with the petitioner at the time of the immigration court hearing.

The suspension/cancellation statute also lacks the “good faith marriage” requirement contained in VAWA self-petitioning. Although the applicant must still show she was married to the abuser at one time (unless she bases her request on abuse suffered by her child), she should not be held to the onerous requirements contained in the VAWA regulations. Immigration judges may explore marriage fraud as it relates to good moral character, however,<sup>184</sup> so it will behoove applicants to submit as much proof of good faith marriage as possible.

**4. Extreme Hardship**—Last year the Attorney General explicitly applied the special VAWA extreme hardship factors to the EOIR.<sup>185</sup> Practitioners must focus on these factors, and not rely on traditional extreme hardship factors. **The Trafficking Act removed the requirement that hardship to an alien’s parent would only be considered if the alien applicant herself is a child.** Thus proof of extreme hardship to either the alien, her child or her parent will suffice.<sup>186</sup>

Evidence relating to abuse that self-petitioners may submit to show extreme hardship includes:

- a. the nature and extent of physical abuse and the psychological consequences of battering or extreme cruelty;
- b. the need for access to U.S. courts, to the U.S. criminal justice system (including but not limited to the ability to obtain and enforce protection orders, criminal investigations and prosecutions), and to family law proceedings for child support, maintenance and custody;
- c. the need for social, medical, and mental health or other services for both self-petitioners and their children that are available here but are not “reasonably accessible” in self-petitioners’ homelands;
- d. laws, social mores and customs in the home country that would ostracize or penalize the self-petitioner or her child for being the victim of abuse, for leaving the abusive situation, or for taking actions to stop the abuse, including divorce;
- e. the abuser’s ability and inclination to follow his victims to the homeland and that country’s inability or unwillingness to protect victims of abuse; and
- f. the likelihood that the abuser’s family, friends or others would physically or psychologically harm the self-petitioner or her child.<sup>187</sup>

Juxtaposing of the applicant’s experience here with what will happen to her in her homeland is the key to these factors. For instance, needing and seeking counseling here for the domestic violence suffered can be a very strong extreme hardship factor, but it must be contrasted with lack of similar services, or their availability, in the homeland. This requires documentation.<sup>188</sup>

A child custody dispute is a compelling reason for needing ongoing access to the courts here. A grant of custody will be meaningless if the mother is deported; the abusive parent will then be free to reopen the custody decision without challenge. Many abusers travel back and forth to the victim’s homeland, especially if the couple came together to the United States. This likelihood, combined with lack of protection against his abuse in the homeland, is a powerful extreme hardship factor. A protection order acquired in the United States has no force abroad. Once again, however, you must document that either the home country lacks laws that protect victims of domestic violence or that it fails to implement any that exist.

One factor not explicitly mentioned on the official list, but which experience teaches is extremely important, is the effect on children of domestic violence in the household. Since extreme hardship to an applicant’s children may qualify her for status, explore this question in every case. Practitioners suggest that any information on how witnessing

<sup>184</sup> INA §240A(b)(2)(C), as amended by VTPA, §1504(a)(2)(C).

<sup>185</sup> 8 CFR §§240.58(c) & 240.20.

<sup>186</sup> INA §240A(b)(2)(B) as amended by VTPA, §1504(a)(2)(A)(v).

<sup>187</sup> 8 CFR §240.58(c).

<sup>188</sup> Contact NIPNLG for suggestions on places that might have the documentation you need.

domestic violence harms children greatly enhances the likelihood of the mother's case being approved. If a child would be too traumatized to meet with a domestic violence counselor, talk to teachers and others who may be able to describe behavioral manifestations of that trauma. If testifying is too difficult for a children, perhaps they have drawn pictures that show they feel the violence in their surroundings or would be willing to write a letter to the judge explaining why they don't want their mother deported and why they need to stay here with her.

Under this scheme, traditional extreme hardship factors are much less important than the special VAWA factors. Do not rely on traditional factors alone. If you use traditional factors, frame them in terms of the VAWA factors. For instance, most traditional extreme hardship to children may be described in the context of why their experience of violence in the home requires ongoing access to the support systems with which they are familiar here.

Extreme hardship decisions are discretionary, so denials on this basis are difficult to challenge. It is incumbent on advocates to devote significant thought and time to developing and articulating this proof. Develop a legal theory or theories that reflect the VAWA factors. Marshall supporting documentation as well as expert testimony, and present your extreme hardship evidence with the same care and specificity as you would for an asylum application. The petitioner should explain in testimony why she believes she and her children will suffer if she is deported and how the theory and supporting documents apply to her in particular.

**5. Three Years' Continuous Physical Presence**—Applicants for VAWA suspension/cancellation need not show they have lived with the abuser. They must, however, show three years of continuous physical presence in the United States.<sup>189</sup> This is significantly less time than that required for seven-year suspension, or for ten-year cancellation of removal. The Trafficking Act eliminated the “cut-off” rule relating to the issuance of an NTA or OSC for accrual of residency by VAWA suspension and cancellation applicants, and instead appears to have substituted a return to the pre-IIRAIRA suspension requirement that the three years be accrued prior to the date of application for cancellation or suspension.<sup>190</sup> Arguably the “date of such application” could be either the date of filing or the date of the regular hearing when the application is formally “submitted” to the immigration judge and signed by the applicant. Also, under the pre-IIRAIRA standard, the subsequent accrual of physical presence time counts up until a final order of deportation (at the BIA), if an appeal is non-frivolous.<sup>191</sup> Advocates should argue the latter if necessary, though it is likely that INS will argue the former.

**6. Effect of Absences on the Physical Presence Requirement**—The potentially harsh effect of past temporary absences from the U.S. on cancellation/suspension applicants has been ameliorated for VAWA applicants by the Trafficking Act. The VTVPA provides an exception for such absences if there is a “connection” between the absence and the domestic violence suffered. Such an absence will not “count” toward the 90/180 day limits. If a period of absence is excluded from the 180 day limit, the VAWA applicant may not then use that period of time she was absent from the U.S. in achieving the required three years continuous presence in the United States.<sup>191</sup>

**7. Good Moral Character**—The Trafficking Act significantly reduced the good moral character “bars” to eligibility applicable to VAWA cancellation/suspension applicants. Now, only those good moral character bars that correspond to the existing bars to eligibility for VAWA cancellation or suspension applicants may result in a denial of relief based upon a failure to prove good moral character. (See discussion of eligibility bars below.) Other “bars” to good moral character generally under INA §101(f) may be waived if the act or conviction was “connected” to the domestic violence suffered and a waiver is “otherwise warranted.”<sup>192</sup> An immigration judge may still consider additional factors on a discretionary basis, however.

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<sup>189</sup> INA §240A(b)(2)(B).

<sup>190</sup> INA §240A(b)(2)(A)(ii), as amended by VTVPA, §1506(b).

<sup>191</sup> *Watkins v. INS*, 63 F.3d 844 (9th Cir. 1995); *Cipriano v. INS*, 24 F.3d 763 (5th Cir. 1994); but see *INS v. Rios-Pineda*, 471 U.S. 444 (1985) (time accrued through frivolous appeals will not count toward the physical presence requirement).

<sup>191</sup> INA §240A(b)(2)(B), as amended by VTVPA, §1504(a)(2)(B).

<sup>192</sup> INA §§240A(b)(2)(A)(iii), and (C) as amended by VTVPA, §§1504(a)(2)(A), (C).

8. **Credible Evidence**—Consideration of “any credible evidence” is now the statutory mandate for VAWA cancellation/suspension applications, consistent with the self-petitioning provisions.<sup>193</sup>

### B. Inadmissibility and Deportability Bars to Cancellation Eligibility

VAWA cancellation applicants are subject to certain bars to eligibility that are more onerous than nonpermanent resident cancellation. Specifically, the criminal and security grounds of both inadmissibility and deportability (INA §§212(a)(2) & (3); 237(a)(2) & (4)), and the marriage fraud, registration, document fraud and false claim to citizenship provisions of INA §§237(a)(1)(G) and (a)(3) all apply to VAWA cancellation.<sup>194</sup> A VAWA applicant is also barred by conviction of any aggravated felony.<sup>195</sup> Significantly, an applicant for non-VAWA nonpermanent resident cancellation of removal is only barred from eligibility by a conviction of an offense found in INA §§212(a)(2), 237(a)(2) or 237(a)(3).<sup>196</sup>

As a result, admissions to drug crimes or crimes of moral turpitude (without conviction); prostitution; drug trafficking; security grounds of inadmissibility; marriage fraud; drug abuse or addiction; violations of protection orders; being the subject of a final order for document fraud; and false claims of citizenship all result in a bar to VAWA cancellation under §240A(b)(2), but *not* to “regular” non-permanent resident cancellation pursuant to §240A(b)(1). For example, the use of a U.S. birth certificate or the application for a U.S. passport by a VAWA applicant, not an uncommon occurrence for aliens desperate for employment to support themselves and their families, would arguably result in a loss of eligibility for VAWA cancellation as a false claim to citizenship prohibited under INA §237(a)(3)(D), but would not necessarily result in the loss of eligibility for “regular” nonpermanent resident §240A(b)(1) cancellation, particularly if there was no conviction of that specific offense. The VAWA applicant, if otherwise eligible, should then be able to apply for regular cancellation, although the additional requirements relating to continuous physical presence, hardship and the cut-off for accrual of residency are much more onerous.<sup>197</sup>

The Trafficking Act allows a waiver of the applicable grounds of inadmissibility and deportability only for the domestic violence provisions of §237(a)(2)(E).<sup>198</sup> One positive note for VAWA applicants, is that the additional grounds of ineligibility cited in the statute under subsection (c), do not apply to VAWA cancellation applicants. For example, INA 240A(c) bars from eligibility for cancellation those persons whom have previously been granted cancellation of removal, suspension of deportation or 212(c) relief. Those admitted with “J” visas, and as crewmen, are similarly generally ineligible under 240A(c) as are those defined as “persecutors.”<sup>199</sup> However, the 240A(c) bars do not apply to VAWA cancellation applicants.<sup>200</sup>

### C. Motion to Reopen For Newly Eligible Applicants & Effective Dates

The Trafficking Act created a special motion to reopen for those victims of domestic violence eligible for VAWA suspension or cancellation. The general motion to reopen deadline does not apply. A VAWA motion to reopen for cancellation must be filed within one year of the entry of the final order of removal. This one-year deadline may be waived upon a showing of “extraordinary circumstances” or “extreme hardship to the [VAWA applicant’s] child.”<sup>201</sup> For those in deportation proceedings, there is *no* time limit for a motion to reopen to apply for VAWA suspension of deportation.

In the case of either a motion to reopen removal or deportation proceedings, the motion must be accompanied by a cancellation or suspension application, whichever is appropriate, or by a copy of a VAWA self-petition, to be filed with the INS upon the granting of the motion to reopen. The effective dates of the Trafficking Act changes to VAWA cancella-

<sup>193</sup> INA §240A(b)(2)(D), as enacted by VTVPA, §1504(a)(2)(D).

<sup>194</sup> INA §240A(b)(2)(D).

<sup>195</sup> *Id.*

<sup>196</sup> INA §240A(b)(1)(C).

<sup>197</sup> INA §§240A(b)(1)(A), (D); §240A(d)(1).

<sup>198</sup> INA §240A(b)(2)(A)(iv); INA§237(a)(7), as amended by VTVPA, §1504(a)(2)(A)(iv); 1505(b).

<sup>199</sup> INA §241(b)(3)(B)(i).

<sup>200</sup> INA §240A(c).

<sup>201</sup> INA §240(c)(6)(C)(iv), as amended by VTVPA, §1504(c); 1506(c)

tion and suspension relate back to the effective dates of the corresponding sections of IIRAIRA<sup>202</sup> and the 1994 VAWA statute.<sup>203</sup>

#### D. Requests for NTAs for VAWA Cancellation

A 1996 INS Central Office memo states that “INS district offices shall promptly issue a Notice to Appear (NTA) to any alien who makes a credible request to be placed in proceedings in order to raise a claim for cancellation of removal” under VAWA.<sup>204</sup> Nevertheless, many districts have refused to issue NTAs in such cases. To make INS more accountable, Congress included a reporting requirement in the Trafficking Act, requiring INS to report the number of such requests filed and granted in each District and the average length of time between the request and the date of the first appearance before an immigration judge.<sup>205</sup>

#### E. Children, Sons and Daughters, and Parents

Unlike self-petitioning, VAWA suspension/cancellation does not allow parents to include their children in their applications. Abused children must file their own applications, although they may do so at the same time their abused parents file and request consolidation of the cases. Note that those who do not meet the limited INA definition of child can be eligible: The statute says only that the applicant must be abused “by a parent.”<sup>206</sup>

Children of successful VAWA cancellation/suspension grantees and parents of children granted cancellation or suspension are now mandated a grant of parole.<sup>207</sup> The parole extends from the initial grant of cancellation or suspension until the adjudication of an adjustment of status application; such parolees may adjust under the special VAWA exemptions.<sup>208</sup> There is no apparent time deadline for adjustment. However, parole may be revoked if the parent or child granted VAWA cancellation/suspension does not exercise “due diligence” in filing a visa petition on behalf of the paroled relative.<sup>209</sup>

### X. NEW U & T VISAS

The Trafficking Act created two new nonimmigrant visas for noncitizen victims of crimes. Both visas are designed to provide immigration status for noncitizens who are assisting or willing to assist authorities investigating crimes. After three years, both U and T visa holders may apply for lawful permanent residence. INS has not yet issued regulations governing these visas, but will grant other temporary status to those who are eligible until there is a process for applying. In the mean time, those who qualify should start collecting the documentation they will need and should obtain the suggestions for implementing these provisions submitted to the INS by the National Network on Behalf of Battered Immigrant Women.<sup>210</sup>

#### A. U Visa Eligibility

The U visa is designed for noncitizen crime victims who have suffered substantial physical or mental abuse flowing from criminal activity and who have mustered the courage to cooperate with government officials investigating or prosecuting such criminal activity. Victims of a broad range of criminal activity listed in the legislation may qualify for U visas. Many of these victims will be women and children and include, but are not limited to, victims of domestic violence, nannies subjected to abuse from their employers, trafficking victims, and victims of rape in the workplace.

To qualify for a U visa, a noncitizen must:

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<sup>202</sup> Section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104–208; 110 Stat. 587).

<sup>203</sup> Title IV, Subtitle G, Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103–322; 108 Stat. 1953 *et seq.*).

<sup>204</sup> Virtue 1997 memo at 6.

<sup>205</sup> VTVPA, § 1505(g).

<sup>206</sup> INA § 240A(b)(2)(A).

<sup>207</sup> INA § 240A(b)(4), added by VTVPA § 1504(b).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Contact Gail Pendleton for copies of these memoranda.

- show that she has suffered “substantial physical or mental abuse”<sup>211</sup> as the result of one of the following forms of criminal activity (or “similar” activity):
  - rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes;<sup>212</sup>
- show that she possesses information concerning the criminal activity;<sup>213</sup>
  - and*
- provide a certification from a federal, state, or local law enforcement official, prosecutor, judge, or authority investigating criminal activity designated in the statute that states that the U visa applicant is being, has been or is likely to be helpful to the investigation or prosecution of designated criminal activity.<sup>214</sup>

**1. Children of Principal Applicants**—Spouses, children, and parents, if the applicant is a child, of principal applicants mentioned in §101(a)(15)(U)(ii) are not derivatives as that term is generally used. They are, instead, individual self-petitioners facing a slightly higher standard for approval. A designated government official must certify that an investigation or prosecution would be harmed without the assistance of the qualifying relative, and INS must determine that the qualifying relative would suffer extreme hardship if he or she does not receive a U visa.<sup>215</sup>

**2. Adjustment of Status to Lawful Permanent Residence**—The U visa provision creates a special avenue of adjustment for those approved, INA §245(l).<sup>216</sup> Applicants for adjustment under the U visa provision must show that

- they were admitted “or otherwise [were] provided nonimmigrant status” under §101(a)(15)(U);
- they are not “described in” §212(a)(3)(E), *i.e.*, they neither participated in Nazi persecution nor engaged in genocide;
- they have been physically present in the United States for at least three years since receiving their U visas; and
- humanitarian grounds, family unity, or the public interest justify their continued presence in the United States.<sup>217</sup>

Absences greater than 90 days or an aggregate of 180 days will not terminate continuous presence if (a) “the absence is in order to assist in the investigation or prosecution” or (b) an official involved in the investigation or prosecution certifies that it is “otherwise justified.”<sup>218</sup> Other than failure to meet the criteria above, the only ground for denying adjustment to a U visa holder is that the applicant “unreasonably refused to provide assistance” to a criminal investigation or prosecution.<sup>219</sup>

**3. Inadmissibility**—The Trafficking Act provides a generous waiver for all grounds of inadmissibility, with the sole exception of the nazi and genocide grounds pursuant to §212(a)(3)(E).<sup>220</sup> Inadmissibility for all other grounds may be

<sup>211</sup> INA §101(a)(15)(U)(i)(I), added by VTPVA §1513(b).

<sup>212</sup> INA §101(a)(15)(U)(iii), added by VTPVA §1513(b).

<sup>213</sup> INA §101(a)(15)(U)(i)(II), added by VTPVA §1513(b).

<sup>214</sup> INA §101(a)(15)(U)(i)(III) & INA §214(o)(1), added by VTPVA §1513(b) & (c).

<sup>215</sup> INA §101(a)(15)(U)(ii), added by VTPVA §1513(b).

<sup>216</sup> VTPVA §1513(f).

<sup>217</sup> INA §245(l)(1), added by VPVPA §1513(f).

<sup>218</sup> INA §245(l)(2), added by VPVPA §1513(f).

<sup>219</sup> INA §245(l)(1), added by VPVPA §1513(f).

<sup>220</sup> INA §212(d)(13), added by VTPVA §1513(e).

waived in the “public or national interest.” It appears that no other grounds of inadmissibility should apply to “U” visa holders upon application for adjustment of status.<sup>221</sup>

### **B. T Visa Eligibility**

The T visa is similar to the U visa, but designed specifically for those who have been subjected to sex trafficking or other severe forms of trafficking.<sup>222</sup> The statute defines sex trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”<sup>223</sup> It defines “severe” trafficking as:

sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.<sup>224</sup>

T visa applicants must

- be or have been victims of severe trafficking;
- be physically present in the United States or at a U.S. port of entry on account of such trafficking;
- have “complied with any reasonable request for assistance in the investigation or prosecution of” trafficking act OR be under 15; and
- show he or she would “suffer extreme hardship involving unusual and severe harm” if removed.<sup>225</sup>

The procedure and requirements for the T visa appear more restrictive than for the U. Practitioners who wish to explore this option, however, should contact Gail Pendleton for an update.

## **XI. CONCLUSION**

Congress and the INS have demonstrated strong commitment to helping battered immigrants flee abusive citizens and lawful permanent residents. Practitioners should not, however, expect the statute and regulations to provide adequate guidance. Internal INS memoranda and practice pointers gleaned from working closely with both INS and numerous advocates for battered immigrants are essential sources of information on how to win VAWA cases. Working with a local advocate for victims of domestic violence will greatly enhance case preparation and presentation. For further training materials, information on organizing a training in your area, and for technical assistance in individual cases, please contact NIPNLG.

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<sup>221</sup> INA §245(l) as amended by VTVPA, § 1513(f).

<sup>222</sup> INA §101(a)(15)(T), added by VTVPA §107(e).

<sup>223</sup> VTVPA §§103 (9).

<sup>224</sup> VTVPA §§103(8).

<sup>225</sup> INA §101(a)(15)(T), added by VTVPA §107(e).

