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Introduction to Immigration Relief for Battered Immigrants¹

By Cecilia Olavarria and Moira Fisher Preda

In order to properly assist battered immigrants with their immigration cases, attorneys and advocates should have a basic understanding of immigration law. This chapter outlines the basic potential legal immigration options for battered immigrants. Other chapters of this manual will discuss specific forms of immigration relief in detail. To understand immigration law, it is crucial for an attorney or advocate to understand the most commonly used terminology. The following brief descriptions of terms cover those areas that are relevant to assisting battered immigrants.

Basic Immigration Definitions²

Adjustment of Status – Without leaving the United States, an individual already present in the United States may file a Form I-485 to change her existing status to that of a lawful permanent resident. Before adjusting status, the individual must have already received an approved family or employment-based immigrant visa petition or an approved self-petition under VAWA. In all situations, the U.S. Citizenship and Immigration Services³ (“CIS”) has discretion whether or not to grant the adjustment of status. If the CIS approves the adjustment of status, the individual will then receive a Green Card, also referred to in this manual as “lawful permanent residence.”

Asylum – Immigration status given to individuals present in the United States who meet the requirements for “refugee” status. (*See “Refugee” definition below.*)

Battery or Extreme Cruelty – A form of abuse inflicted upon another person which includes, but is not limited to, any actions that cause or threaten to cause mental, psychological, or emotional harm, and any

¹ We gratefully acknowledge the contributions of Jan Tran of the George Washington University School of Law and Joan Robinson of Brooklyn Law School in the preparation of this chapter.

² The following is an adapted list of relevant immigration terms reprinted with the permission of the Immigrant Legal Resource Center.

³ On March 1, 2003, the agency formerly known as the Immigration and Naturalization Service was divided into 3 separate agencies and became part of the Department of Homeland Security. The U.S. Citizenship and Immigration Services (CIS) is the agency responsible for affirmative applications including VAWA self-petitions. The two other agencies are U.S. Immigration and Customs and Enforcement (ICE), the enforcement arm, and the Customs and Border Protection (CBP).

actions or inaction that is a part of an overall pattern of abuse, power, or control. These include acts that destroy the peace of mind and happiness of the injured party or cause distress and humiliation to the injured party. VAWA relief is available for persons who have been battered or subjected to extreme cruelty.⁴

Cancellation of Removal – Some non-citizens who have been placed in removal proceedings by the Immigration and Customs Enforcement (“ICE”) may request this form of immigration relief. Depending on the circumstances, an immigration court may use its discretion to grant this remedy. If granted, cancellation of removal allows the individual to remain in the United States. Under VAWA, certain abused spouses, children, and parents of abused children are eligible for a special form of cancellation of removal when the abuser is a U.S. citizen or a lawful permanent resident.

Conditional Resident – An individual who immigrates or adjusts his or her status through a spouse within the first two years of her marriage becomes a conditional resident for two years. Formerly, conditional residents could remove the condition and become lawful permanent residents by filing a joint petition together with the U.S. citizen spouse. A Battered Spouse Waiver was created so that certain conditional residents could request a waiver of the requirement to file a joint petition. To qualify for the waiver, the conditional resident must establish that he or she has been battered or subjected to extreme cruelty, and that the marriage was entered into in good faith. Waivers are also available in cases of divorce or extreme hardship.

Employment Authorization – Authorization from the CIS for a non-citizen to work in the U.S.. If an immigrant is eligible for employment authorization, she can file a Form I-765 with the CIS to obtain a work permit that is normally valid for one year. Employment authorization is not a “stand alone” benefit. It is only granted to a person who has demonstrated eligibility for some type of temporary or permanent immigration status. For example, an individual who has applied for permanent residence may obtain employment authorization while the application is pending.

Extreme Hardship – Hardship over and above the normal economic and social disruptions involved when an individual is forced to leave the United States. Proof of extreme hardship is needed before an immigration judge will grant cancellation of removal under VAWA. Although proof of extreme hardship is not needed for the VAWA self-petition and the Battered Spouse Waiver, an applicant may choose to produce relevant evidence to make the application stronger.

Family-Based Petition – A U.S. citizen or lawful permanent resident files this petition to start the process that would enable his or her family member to immigrate to the United States and become a lawful permanent resident.

Good Moral Character (GMC) – For many immigration remedies, it is necessary to show that a person has “good moral character” and has not committed certain crimes or engaged in other activities such as prostitution or illegal gambling. Good moral character is not precisely defined in the immigration laws, but Section 101(f) of the Immigration and Nationality Act lists certain acts that preclude someone from establishing good moral character.

Green Card (Lawful Permanent Resident Card) – Popular term for the I-551, the card that shows a person is a lawful permanent resident.

Immediate Relative – For the purposes of a family-based petition and a self-petition under VAWA, this term means the children and spouse of a U.S. citizen, or the parents of an adult U.S. citizen.

Immigration and Nationality Act (INA) – The primary federal statute that governs the process of immigration and the treatment of immigrants in the United States.

Lawful Permanent Resident (LPR) – A lawful permanent resident is an individual, other than a U.S. citizen, who has the right under U.S. immigration law to live and work permanently in the United States. An individual who has a green card is either a lawful permanent resident or a conditional resident.

⁴ See 8 CFR § 204.2(c)(vi) for CIS regulations defining “battery and extreme cruelty.”

Refugee – An individual who is unwilling or unable to return to her country because of persecution or a well-founded fear of persecution on account of her race, religion, nationality, membership in a particular social group, or political opinion. An individual who is outside the U.S. and meets this definition can be admitted to the U.S. as a refugee. An individual already in the U.S. must apply for and be granted asylum to receive protection as refugee.

Removal – Removal, also known as deportation, is the process through which a non-citizen who is determined to be unlawfully in the U.S. is ordered to leave the United States and is returned to his or her country of origin by U.S. ICE (or in some cases to a third country that agrees to accept that person).

Second Preference – The immigrant visa category for family-based petitions of spouses and children of lawful permanent residents.

Section 245(i) – Congress enacted Section 245(i) of the INA in 1994 to allow non-citizens otherwise eligible for permanent residence (through a family or employment-based petition, for example) to apply for adjustment of status in the United States even if they were present without lawful immigration status. The Section imposed a penalty fee in addition to the normal fees for processing the application. After expiring in January 1998, the Section was re-extended in 2000 and again expired on April 30, 2001. VAWA self-petitioners do not need to rely on Section 245(i) and may adjust their status in the U.S. even if they are out of status. For other non-citizens who are out of status, adjustment of status under 245(i) is only available if an immigrant visa petition or labor certification petition was filed by the expiration date of the law.

Self-Petition – Under the Violence Against Women Act, certain abused spouses, children, or parents of abused children can file their own petitions to obtain lawful permanent resident status without the cooperation of an abusive spouse, parent, or step-parent if that spouse or parent is a U.S. citizen or lawful permanent resident.

U.S. Citizen (USC) – An individual may become a U.S. citizen through several means. An individual born in the United States or in certain U.S. territories such as Guam and Puerto Rico is automatically a citizen at birth. Additionally, an individual born abroad may acquire U.S. citizenship through a U.S. citizen parent or parents. Finally, a lawful permanent resident may apply through the naturalization process to become a U.S. citizen.

Vermont Service Center – This regional CIS center processes immigration applications from residents of certain eastern states as well as all VAWA self-petitions and T-visa and U-visa interim relief applications regardless of geographic area. The service center has a “VAWA Unit” whose staff is specially trained to adjudicate these cases.

Visa – The official document issued by the U.S. Department of State at an Embassy or Consulate abroad which grants an individual the legal permission to enter the United States for a particular purpose. Two types of visas, immigrant and non-immigrant, exist. An individual who wishes to enter the United States temporarily as a student or a tourist, for example, will be issued a non-immigrant visa. An individual who qualifies for permanent resident status will be issued an immigrant visa.

Violence Against Women Act (VAWA) – In 1994, Congress enacted the Violence Against Women Act, legislation that brought about far-reaching criminal and civil reforms, including several provisions addressing immigration relief for battered immigrants such as the self-petition and special rule cancellation of removal. In 2000, VAWA was reauthorized and expanded to create broader protections for battered immigrants as well as trafficking victims and victims of certain violent crimes.

Overview of Family-based Immigration

The most common form of obtaining lawful permanent residence in the U.S. is through certain citizen and permanent resident family members. The citizen or permanent resident relative, also known as the petitioner,

files a family-based petition on behalf of the relative (also known as the beneficiary) who wants to immigrate to the U.S.

After the family-based petition is filed and approved, the beneficiary then applies for lawful permanent resident status. Beneficiaries who are immediate relatives of U.S. Citizens (parents, spouses and children under 21, including step-children) may apply for lawful permanent resident status immediately.⁵ Relatives of lawful permanent residents and adult sons and daughters and siblings of U.S. Citizens must wait until an immigrant visa becomes available in order to apply for permanent residence, which can take five years and for some categories much longer.⁶

Under normally circumstances, a citizen or lawful permanent resident petitioner will generally file family-based petitions on behalf of their beneficiaries without delay so that the family members obtain can reside and work in the U.S. as soon as possible. However, some abusive petitioners delay, revoke, or never file these family-based petitions. Because of the petitioner's total control over the family-based petitioning process many beneficiaries in this situation remained trapped and isolated in violent homes, afraid to turn to anyone for help.

Congress recognized the problems that could result when an abusive spouse has complete control over a victim's immigration status. Since 1990, Congress has passed a series of reforms to immigration, public benefits, criminal, and legal services laws that reflect an evolving understanding of the dangers that domestic violence poses to society as a whole and to all individual victims, citizens, and non-citizens alike. This emerging understanding has led to the passage of critical legal immigration protections, including welfare access for a broad array of battered immigrant women and their children who have been or are being abused in the United States.⁷

Potential Immigration Options for Battered Immigrants

The following is an introduction to potential immigration options for battered immigrants. These brief descriptions are not meant to provide an exhaustive list of all possible immigration options, but rather to serve as an issue-spotting guide for advocates working with battered immigrants.

Battered Spouse Waiver

Congress enacted the Immigration Marriage Fraud Amendments of 1986 (IMFA)⁸ to deter marriage-related immigration fraud. . In an effort to ensure that lawful permanent resident status was granted only to immigrant spouses in valid marriages to U.S. citizens, IMFA required that immigrant spouses who obtained permanent residence based on a marriage to a U.S. citizen or lawful permanent resident of less than two years' duration fulfill a two year conditional residence requirement before being granted full lawful permanent residence.⁹ The law required a joint petition to be filed ninety days before the expiration of the two-year conditional resident status, possibly followed by a joint interview with an CIS official.¹⁰

For immigrant victims of domestic violence, the joint filing requirement proved problematic. Immigrant victims felt compelled to stay in dangerous and abusive relationships in order to fulfill the joint filing requirement. In 1990, Congress enacted the "battered spouse waiver."¹¹ The waiver allowed the battered immigrant to file an application for the purpose of removing the conditions on her permanent residence without the assistance of her abusive spouse.

⁵ See INA § 201(b)(2)(A)(i); 8 U.S.C. § 1151(b)(2)(A)(i).

⁶ INA § 203(a); 8 U.S.C. § 1153(a).

⁷ Leslye E. Orloff and Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 99 (2002).

⁸ The Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (Nov. 10, 1986).

⁹ Immigration and Nationality Act (INA) § 216(a), 8 U.S.C. § 1186a(a).

¹⁰ Immigration and Nationality Act (INA) § 216(c), 8 U.S.C. § 1186a(c).

¹¹ Pub. Law 99-639, 101 Stat. 3537 § 701 (a) (4) (c). See 56 Fed. Reg. 22,635 (May 16, 1991) (to be codified at 8 C.F.R. pt. 216).

VAWA IMMIGRATION RELIEF

Many different legal remedies now exist to aid battered immigrants. The Violence Against Women Act of 1994 (VAWA), which was amended and expanded through VAWA II in 2000, contained several provisions to prevent abusers from using immigration as a tool to control their victims. VAWA self-petitions and VAWA cancellation of removal are two forms of relief that are very important for attorneys and advocates to understand.¹² The VAWA self-petition enables a battered immigrant to obtain lawful permanent resident status without the cooperation of his or her abusive spouse or parent. The filing of this self-petition can occur at any time and, due to the changes in 2000, can even occur after a divorce if the petition is filed within two years and if the divorce was related to the abuse. VAWA cancellation of removal is a remedy to prevent removal that a battered immigrant may request after being placed in removal proceedings before an immigration judge. The end result of a VAWA self-petition or VAWA cancellation of removal is lawful permanent status for the survivor.

T AND U VISAS

Changes to VAWA in 2000 created additional remedies for survivors of violence. Congress created two new nonimmigrant visas for battered victims. The first nonimmigrant visa is the U-visa, also known as the Crime Victims Visa. An applicant must prove that she has been a victim of a certain type of serious crime, has suffered substantial physical or mental abuse as a result of the crime, has information about the crime, and can provide a certification from a law enforcement official or judge that the victim has been, is or is likely to be helpful in investigating or prosecuting the crime.¹³ The other type of nonimmigrant visa is the T-visa. An applicant must prove that he or she has been a victim of a severe form of trafficking and has either complied with any reasonable request for assistance in the investigation or prosecution of trafficking or has not yet turned fifteen years old.¹⁴ If either the U-visa or the T-visa is approved, the applicant may be eligible to apply for lawful permanent resident status under certain circumstances.

GENDER-BASED ASYLUM AND CAT CLAIMS

Several possible immigration options are available to domestic violence survivors in addition to the VAWA related remedies discussed above. One option is for the a victim who has suffered domestic violence or other gender-based violence to apply for asylum. Asylum is an immigration remedy that can be granted when the applicant shows a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.¹⁵ If successful, the applicant may remain in the U.S. and would later be eligible to apply for lawful permanent resident status. **Asylum law is complex, and a claim should not be filed without enlisting the help of an experienced attorney or advocate. Some courts have granted asylum in cases involving domestic violence and other forms of violence against women, but others have rejected such asylum claims.**

The second option is a claim under the Convention Against Torture (CAT). The treaty prohibits a person's return to a country where there are substantial grounds to believe that person would be in danger of being subjected to torture.¹⁶ A victim can make a CAT claim along with her asylum claim, but the consequences are different. While an approved asylum claim gives the applicant the opportunity to later apply for lawful permanent resident status, an approved CAT claim only ensures that the applicant is not returned to the specified country.¹⁷ Approved CAT claims do not result in an opportunity to become a lawful permanent

¹² For an overview on VAWA immigration relief, see Gail Pendleton and Ann Block, "Applications for Immigration Status Under the Violence Against Women Act," in *Immigration and Nationality Handbook* (2001-02 ed.), Vol. 1, American Immigration Lawyers Association, 2001.

¹³ INA § 101(a)(15)(U); 8 U.S.C. § 1101(a)(15)(U).

¹⁴ INA § 101(a)(15)(T); 8 U.S.C. § 1101(a)(15)(T).

¹⁵ See INA § 208(b)(1), 8 U.S.C. § 1158(b)(1); INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

¹⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, *adopted* December 10, 1984, 1465 U.N.T.S. 85, *reprinted in* 23 I.L.M. 1027 (1984), *modified in* 24 I.L.M. 535 (1985) (entered into force June 26, 1987).

¹⁷ See *generally* 64 Fed. Reg. 8478 (Feb. 19, 1999).

resident. CAT relief may, however, be available to persons who cannot qualify for asylum for various reasons, including the commission of certain crimes or failure to apply within the one-year filing deadline.

An attorney should weigh all of the above-mentioned remedies with their client's specific situation to determine the best strategy in the individual case. Importantly, most of these remedies may be used alone or in combination with one another.

Determining a Client's Immigration Status

Before deciding on which immigration option to pursue, an attorney or advocate should attempt to determine the individual's immigration status. Sometimes the individual will have a green card or other document that clearly established her status. In other cases the battered immigrant will not be certain of her status and the advocate or attorney must ask a series of detailed questions and review all available immigration papers, such as CIS filing receipts or copies of applications filed. An important thing to remember is that anyone who is not a U.S. citizen or U.S. national may be subject to possible removal from the United States.

The following questions can be asked to try to ascertain an individual's immigration status and eligibility for relief such as VAWA self-petitioning. An advocate or attorney, though, should always reassure the abused immigrant that the following questions are merely being asked to better understand the situation. Many abused immigrants may fear disclosing their immigration status, so an advocate or attorney should make every effort to calm those fears.

*Questions to Ask to Determine Immigration Status:*¹⁸

- Where were you born?
- What is your full birth name?
- Have you ever used a different name?
- Why did you leave your country?
- Where did you enter the United States?
- When did you enter the United States?
- When you entered the United States, did you speak or see an immigration official?
- Did you come over on a tourist, student, H1-B, etc... visa?
- If yes, did you receive a white card (I-94) when you entered the United States?
- Do you still have the I-94 card?
- Do you have a Social Security number?
- If no, have you ever used a false Social Security card?
- Do you know if you or someone else has filed papers for you with the CIS?
- Where were your parents born?
- Was either of your parents a U.S. citizen at the time of your birth abroad?
- Did either or both of your parents become U.S. citizens through naturalization prior to your 18th birthday?
- Do you work in the United States?
- If you do have a job, do you have a card that you presented when you began your job?
- Have you ever worked under another name or Social Security #?
- Are you married?
- If yes, when did you get married?
- Did you come to the United States with your husband?
- What's your husband's immigration status?
- Do you have children?
- If yes, were the children born in the United States?

¹⁸ Adapted from: Ann Benson, *Getting Technical Assistance on Immigration Issues* (unpublished manuscript, on file with the Washington Defenders Immigration Project).