

# 3.6

## ***Alternative Forms of Relief for Battered Immigrants and Immigrant Victims of Crime: U Visas and Gender-based Asylum<sup>1</sup>***

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Some immigrant victims of domestic violence, sexual assault, and other violent crimes may not qualify for relief under VAWA for several reasons. In cases of domestic violence, the victim may not be married to the abuser or the abuser may not be a U.S. Citizen or permanent resident. In some cases the perpetrator of a violent crime may be a complete stranger. Other victims may have been subjected to battery or sexual assault in their own country and then fled to the United States to escape this abuse. Immigrant victims who do not qualify for relief under VAWA may still qualify for other types of immigration relief such as a U visa for crime victims or asylum. This chapter contains an overview of these forms of relief and lists the requirements for eligibility. A battered immigrant who possibly qualifies for either a U visa or asylum should be referred to an immigration attorney or advocate with knowledge and experience with these types of cases.

### **Immigrant Crime Victim Visas - U Visas**

The Violence Against Women Act of 2000 (VAWA 2000)<sup>2</sup> created the U visa, a new visa for immigrant victims of crime. This new nonimmigrant visa offers temporary lawful status to victims of certain serious crimes if the victim has suffered substantial physical or mental abuse as a result of the crime.<sup>3</sup> The victim must have information about the crime and a law enforcement official or a judge must certify that the victim has been helpful, is being helpful, or is likely to be helpful in investigating or prosecuting the crime.<sup>4</sup> The purpose of this legislation was to:

create a new nonimmigrant visa classification that will strengthen the ability of law enforcement

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<sup>2</sup> Violence Against Women Act of 2000 (hereinafter "VAWA 2000"), enacted as div. B of the Victims of Trafficking and Violence Protection Act of 2000, Pub.L. No. 106-386, §§ 1501–1513, 114 Stat. 1464 (hereinafter VAWA 2000).

<sup>3</sup> INA § 101(a)(15)(U)(i); 8 U.S.C. § 1101(a)(15)(U)(i).

<sup>4</sup> INA § 101(a)(15)(U)(i); 8 U.S.C. § 1101(a)(15)(U)(i).

agencies to detect, investigate and prosecute cases of domestic violence, sexual assault, trafficking and other crimes ... committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States.<sup>5</sup>

This form of relief gives the applicant immediate temporary legal immigration status and the possibility of lawful permanent residence in the long-term.<sup>6</sup> The maximum number of U visas in any one year is 10,000 for the primary applicants. Spouses and children of U visas applicants, as well as parents of applicants who are under 16, may also qualify for a U visa under certain circumstances. There is no limit on the number of visas available for these qualifying relatives.

This chapter provides basic information on U visa eligibility and the requirements that must be met to apply and provides some suggestions of evidence that may be offered to meet each requirement. As of August 2004, no federal regulations exist to implement issuance of U visas. However, interim relief for those who qualify for a U visa is available while regulations are pending.<sup>7</sup> A memorandum on interim relief instructs the U.S. Citizenship and Immigration Services ("CIS", formerly INS) to use existing forms of immigration relief to prevent the removal of eligible U visa applicants while the regulations are pending.<sup>8</sup> The CIS is required to consider "any credible evidence" in its adjudication of an applicant's case.<sup>9</sup>

The purpose of this chapter is to assist advocates in identifying battered women who may be eligible for U nonimmigrant status and to direct them to resources that can help them prepare their cases. **If a potential U visa applicant is identified, she should be referred promptly to an immigration attorney or advocate who has experience in these types of cases.** The suggested evidentiary documents in this chapter are meant to be guidelines and not an exhaustive description of the types of evidence that may be offered to support an application for a U visa.

#### WHO IS ELIGIBLE TO APPLY FOR THE NONIMMIGRANT U VISA?

In order to be eligible for nonimmigrant U visa status, the immigrant victim must:

1. have suffered substantial physical or mental abuse as a result of having been a victim of the one or more of the criminal activities listed under INA § 101(a)(15)(U)(iii);<sup>10</sup>
2. possess information concerning the criminal activity;<sup>11</sup>
3. obtain a certification from a law enforcement official, prosecutor, judge, Immigration official, or other federal or state authority that he or she is being, has been, or is likely to be helpful to a federal, state, or local investigation or prosecution of a form of listed criminal activity;<sup>12</sup>

#### Crimes Covered:

The criminal activity must have violated the laws of the United States or occurred in the United States or the territories and possessions of the United States and involve one or more of the following:<sup>13</sup>

<sup>5</sup> The Violence Against Women Act of 2000 Section by Section Summary, Vol 146, No. 126, Congressional Record, 106<sup>th</sup> Congress Second Session, Wednesday October 11, 2000, S10196.

<sup>6</sup> As of August 2004, regulations have not been issued to implement the U visas provisions of VAWA 2000. Eligible immigrants may apply for "U Interim relief" and obtain work authorization and deferred action status pending the promulgation of implementing regulations.

<sup>7</sup> See *generally* Memorandum from Michael D. Cronin, Acting Executive Associate Commissioner, Office of Programs, INS, to Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, INS (Aug. 30, 2001) (on file with Legal Momentum and the National Immigration Project of the National Lawyer's Guild) (hereinafter Interim Guidance).

<sup>8</sup> Forms of temporary status include deferred action, parole and stays of removal.

<sup>9</sup> INA § 214(p)(4); 8 U.S.C. § 1184(p)(4).

<sup>10</sup> INA § 101(a)(15)(U)(i)(I); 8 U.S.C. § 1101(a)(15)(U)(i)(I).

<sup>11</sup> INA § 101(a)(15)(U)(i)(II); 8 U.S.C. § 1101(a)(15)(U)(i)(II).

<sup>12</sup> The U visa is available to an individual crime victim who is "helpful, was helpful, or will be helpful" regardless of whether he or she serves as a witness, whether the investigation or prosecution results in a conviction.

Rape	Kidnapping
Torture	Abduction
Trafficking	Unlawful criminal restraint
Incest	False imprisonment
Domestic violence	Blackmail
Sexual assault	Extortion
Abusive sexual contact	Manslaughter
Prostitution	Murder
Sexual exploitation	Felonious assault
Female genital mutilation	Witness tampering
Being held hostage	Obstruction of justice
Peonage	Perjury
Involuntary servitude	Slave trade

#### Who May Certify:

A police officer, prosecutor, judge, or other state or federal government official must certify that the U visa applicant has been helpful, is being helpful or is likely to be helpful to an investigation or prosecution of criminal activity. Employees of the Equal Opportunity Employment Commission (EEOC), state child abuse workers, immigration officials, and state personnel administering the Victims of Crime Act (VOCA) program may also certify if they are responsible for investigating criminal activity.

The law targets “criminal activity” as opposed to “crimes” because prosecutors and other criminal investigators must be able to obtain witness help and cooperation at every and any stage of the criminal investigation.<sup>14</sup> The law is available to those who are “helpful” regardless of whether they serve as witnesses, regardless of whether the case is ultimately prosecuted or regardless of whether the investigation or prosecution results in a conviction.<sup>15</sup>

#### U VISAS FOR CERTAIN FAMILY MEMBERS OF THE CRIME VICTIM

Spouses and children of U visa applicants as well as parents of U visa applicants who are under the age of 16 can also receive U visas if: (1) they can demonstrate that receipt of the visa is necessary to avoid extreme hardship; or (2) a government official certifies that the investigation or prosecution would suffer without the assistance of the spouse, child, or parent. There is no cap on the number of U visas that can be issued to the spouses, children or parents of U visa recipients.

#### INTERIM PROCEDURES

As of February 2005, no regulations have been promulgated to implement issuance of U Visas, but interim relief is available to those who qualify for the U Visa. According to a CIS interim guidance in effect while the U visa regulations are pending, non-citizens identified as possible victims of any of the criminal activities listed must be given the opportunity to receive the protections of the U visa provisions.<sup>16</sup> CIS personnel are instructed to broadly interpret guidelines that would allow possible victims to temporarily remain in the

<sup>13</sup> INA § 101(a)(15)(U)(iii), 8 U.S.C. 1101(a)(15)(U)(iii) (2001). It is important to note that the statute provides relief for victims of “criminal activity.” This allows victims to participate in either an investigation, or prosecution, or both. The statute does not require a conviction, or that the case be ultimately prosecuted, or that this particular victim need called as a witness to testify, in order for the victim to qualify for U status.

<sup>14</sup> VAWA 2000 § 1513(a)(2)(B) (noting how the formulation of the new visa classification provides law enforcement with the tools to regularize immigrant cooperation in investigations of criminal activity)

<sup>15</sup> Leslye Orloff & Janice V. Kaguyutan, *Offering A Helping Hand: Legal Protections For Battered Immigrant Women: A History of Legislative Responses*, 10 Am. U. J. Soc. Pol’y L. 95, 164 (2002).

<sup>16</sup> Interim Guidance at 2.

country until there is a determination of whether they have been victims of one of the listed crimes.<sup>17</sup> CIS personnel have also been instructed to use mechanisms such as parole, deferred action, and stays of removal in order to prevent the removal of non-citizens who have been identified as possible victims of these crimes.<sup>18</sup> Under the procedure in effect as of August 2004, all applications for U interim relief are processed by the VAWA Unit of the CIS Vermont Service Center. If relief is granted, the applicant is placed in deferred action status, which protects the victim from being removed from the United States and allows her to obtain work authorization.<sup>19</sup>

## WORK AUTHORIZATION, CONFIDENTIALITY AND CREDIBLE EVIDENCE STANDARD

Work Authorization: Crime victims granted U visas or interim relief are eligible for work authorization from the CIS. U visa recipients do not qualify for public benefits. Those who are granted interim relief receive deferred action making them eligible to receive work authorization pursuant to 8 C.F.R. 274a.12(c)(14). If the alien is placed in deferred action, the Vermont Service Center will notify the applicant of their option to submit an I-765, Application for Employment Authorization<sup>20</sup>.

Confidentiality: As with other types of cases under the Violence Against Women Act, the CIS and immigration and Customs Enforcement (“ICE”) are required to keep all information about U visa applications confidential.<sup>21</sup> They cannot release information about the existence of a case to any person who is not authorized to access that information for a legitimate law enforcement purpose. Furthermore, if the perpetrator of the crime or any of his or her family members provides information to the CIS or ICE about the crime victim, that agency cannot rely solely upon that information to make an adverse decision on the victim’s U visa case.

Credible Evidence Standard: As with petitions filed under VAWA, the CIS is required to consider “any credible evidence” when deciding U visa cases and applications for adjustment of status (permanent residence) based on the U visa provisions.<sup>22</sup> The CIS is prohibited from requiring one specific type of evidence in support of the application and must accept “any credible evidence” submitted to support each requirement. The credible evidence standard was first created by the Violence Against Women Act for self-petition and cancellation of removal cases and recognizes that victims of domestic violence and other violent crimes may have difficulty obtaining certain types of evidence.<sup>23</sup>

Waiver of grounds of inadmissibility: U visa applicants are eligible for a discretionary waiver of most grounds of inadmissibility (ineligibility).<sup>24</sup> A waiver may be granted for any ground except for participants in Nazi persecution and genocide if the CIS determines that it is in the national or public interest to do so.<sup>25</sup>

## DISCRETIONARY ADJUSTMENT OF STATUS

If a U visa holder has been physically present in the United States for three years after being granted U status, he or she may apply for adjustment of status to lawful permanent residence (a “green card”). The applicant must demonstrate that adjustment of status is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.<sup>26</sup> If the applicant falls under any of the grounds of inadmissibility that have arisen since obtaining the U visa, he or she can apply for a waiver under INA Section 212(d)(14). The CIS

<sup>17</sup> *Id.* at 3.

<sup>18</sup> *Id.* at 2.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> Memorandum for Regional Directors: Centralization of Interim Relief for U Nonimmigrant Status Applicants, U.S. Department of Homeland Security. October 8, 2003. Page. 5

<sup>21</sup> IIRAIRA of 1996 § 384, 8 U.S.C. § 1367 (2001).

<sup>22</sup> INA § 214(p)(4).

<sup>23</sup> See INA § 204(a)(1)(J); 8 U.S.C. § 1154(a)(1)(J).

<sup>24</sup> Section 212(a) of the Immigration and Nationality Act contains a list of grounds that render a person ineligible for admission to the U.S. Examples include health-related grounds such as HIV and tuberculosis, criminal convictions, security grounds, public charge, and immigration violations. The only grounds that cannot be waived are for persons who were former Nazi persecutors or those who have engaged in genocide.

<sup>25</sup> INA § 212(d)(14).

<sup>26</sup> INA § 245(m)(1), 8 U.S.C. § 1255(m)(1).

also has the discretion to adjust the status of a spouse, child, or parent<sup>27</sup> of a U visa holder whose status has been adjusted if it is necessary to avoid extreme hardship.<sup>28</sup> This applies to family members who were not originally granted U visa relief. If these family members are outside the United States, they may obtain an immigrant visa abroad at a U.S. Consulate.<sup>29</sup>

#### DOCUMENTARY EVIDENCE FOR U VISA APPLICATIONS

There is no official form to apply for the U Visa, nor is there a filing fee for requesting U Interim relief. Each application will potentially look different due to the facts of each individual case, but the following documents should be present in every application packet:

- q "A Cover Letter: *"The letter should explain how the applicant meets the requirements for the U Visa. It should also provide necessary identification information, including applicant's full name and date and place of birth. If the applicant's spouse, child, or, parent, will also be seeking interim relief, the cover letter should state this and should list information such as the family members' names, dates of birth, and relationship to the principal applicant. The letter must also explain how the derivative family members would be caused extreme hardship if they were not granted interim relief pending issuance of U Visas.*
- q The Applicant's Declaration: *A detailed declaration should describe the abuse and how the applicant meets each U Visa requirement*
- q The Applicant's Personal Identification Information
- q Law Enforcement Certification Form: The Certification, which may come in the form of a letter or other form created by the applicant's representative, must be signed by the law enforcement official within the past six months and include the following information:
  - o Identify the certifier by name, employer, position, job title, employer's address, and phone number;
  - o State that the immigrant was a victim of one or more crimes protected under U Visa;
  - o Identify the crime(s);
  - o Verify the victim is, has been, or is likely to be helpful to the prosecution or investigation of the criminal activity; and
  - o Affirm that the criminal activity occurred in the United States or its territories or possessions or is in violation of U.S. Law;
- q Other documentation regarding criminal activity, if available, and
- q Documentation of substantial physical and/or mental abuse"<sup>30</sup>

The following is a list of suggested documents that may be submitted to prove each element of a U visa case. This list is meant to serve as a guide, and additional types of evidence may also be submitted in support of the application. Furthermore, not all documents listed below will be available in every case. In addition to the evidence listed below, the applicant may also present affidavits of witnesses with knowledge of the crime or the harm the victim suffered. **Also included at the end of this chapter is a model certification form that can be used by the law enforcement officer, prosecutor or other government official investigating or prosecuting the crime.**

**An application for U non-immigrant status should include evidence of the following:**

#### **Evidence of Substantial Physical and Mental Abuse as a Result of the Crime:**

- .. Records from a health care provider documenting the diagnosis and treatment of physical injuries or a psychological condition resulting from the crime
- .. Affidavits from victim advocates, shelter workers, counselors, or mental health professionals, detailing any physical and mental abuse that the applicant has experienced and the effect that the abuse has had on the applicant and the applicant's family

<sup>27</sup> The U-visa holder must be a "child" under immigration law (unmarried and under 21 years old) for the parent to qualify.

<sup>28</sup> INA § 245(m)(3); 8 U.S.C. § 1255(m)(3).

<sup>29</sup> *Id.*

<sup>30</sup> Sally Kinoshita, *How To Obtain U Interim Relief: A Brief Manual for Advocates Assisting Immigrant Victims of Crime*, Immigrant Legal Resource Center, San Francisco (2005).

- .. Affidavit of the applicant detailing the substantial physical and mental abuse suffered as a result of the crime
- .. Copies of any police/ incident reports on domestic violence or sexual assault or listed criminal activity
- .. Copies of any protection orders/ restraining orders against the perpetrator
- .. Affidavits from neighbors, landlords, friends, or family who witnessed the criminal activity or harm or injuries that resulted
- .. Affidavits from police officers or prosecutors describing the violence that the applicant has experienced
- .. Photographs showing injuries, damage from the crime (e.g. torn clothing, broken door, etc.)
- .. Records of any 911 calls

**Evidence that the Victim Possesses Information Concerning the Criminal Activity:**

- .. Affidavit of the applicant detailing the applicant's knowledge of the criminal activity (*one affidavit should be used by the crime victim to address all of the eligibility requirements*)
- .. Affidavits from police officers and prosecutors detailing the applicant's knowledge of the criminal activity
- .. Copies of any police reports or statements that the applicant has made to a law enforcement agency
- .. Copies of claims for VOCA assistance filed as a result of the criminal activity
- .. Copies of reports filed with state child abuse investigators
- .. Transcripts of testimony that the applicant has given to a law enforcement agency
- .. Affidavits from witnesses that may place the applicant at the scene of the criminal activity or attest to the applicant's knowledge of the criminal activity
- .. Copies of reports made to SANE team health professionals and law enforcement with regard to evidence collection in rape cases.

**Evidence That The Crime Victim Has Been Helpful, Is Helpful, or Is Likely to Be Helpful to a Federal, State, or Local Investigation or Prosecution:**

- .. Certification from a law enforcement official, prosecutor, judge, CIS/ ICE official, or other federal or state authorities that the applicant has been helpful, is helpful, or is likely to be helpful to the investigation or prosecution
- .. Affidavit of the applicant detailing the applicant's helpfulness with the investigation or prosecution of the criminal activity
- .. Copies of any police reports or complaint reports made to law enforcement officials.

**Evidence That Criminal Activity Violated the Laws of the United States or Occurred in the United States or its Territories:**

- .. Certificate or affidavit from a law enforcement official, prosecutor, judge, INS official, or other federal or state authority that the criminal activity violated the laws of the United States or occurred in the United States or its territories

.. Copies of any arrest warrants, police reports, or domestic violence incident report

## CONCLUSION

It is important to note that the U visa can help several groups of battered immigrants who were not covered by the original VAWA self-petition or cancellation of removal provisions. These include immigrants who are abused by a boyfriend or another person who is not a spouse or parent or by a spouse or parent who is not a U.S. citizen or permanent resident. The U visa will also help non-citizen victims of other crimes, including victims of rape or sexual assault who may not know or be related to the perpetrator and domestic workers who are abused or held hostage in the home by their employers.

The standard for being granted a U visa is in some ways more difficult than for self-petitioning under VAWA. To qualify, the battered immigrant must suffer substantial physical or emotional abuse and must cooperate with law enforcement. If an immigrant victim has never called the police and reported the abuse and is afraid or unwilling to do so, it will not be possible to apply for a U visa.

No one should apply for a U visa without the assistance of an immigration advocate or attorney who has experience with this type of case.<sup>31</sup> Since denial of a U Visa case not adequately prepared could lead to an immigrant victim being placed in removal proceedings, advocates need to inform and educate their clients about the U Visa and work with an immigration advocate or attorney with experience serving immigrant victims in all U Visa cases. This chapter serves only as a basic introduction and should not be relied upon to apply for U relief without first consulting an attorney. Because the U visa is relatively new and regulations have not yet been issued (as of the date of publication of this manual), few immigration practitioners or advocates will be familiar with U visa relief.

## Gender-Based Asylum

In addition to investigating whether an immigrant victim is eligible for relief under VAWA or for a U visa, an advocate should be aware of the potential for an asylum application. Asylum is an important benefit, as it generally leads to lawful permanent residence. Immigrant women who are victims of domestic violence may be eligible for asylum in the United States under limited circumstances which are described in this chapter.

Asylum may be granted if the applicant can show that she has been persecuted in the past or has a well-founded fear of future persecution in her country on account of one of five grounds: 1) membership in a particular social group, 2) religion, 3) race, 4) nationality or 5) political opinion.<sup>32</sup> Asylum law is slowly acknowledging that women often suffer unique persecution such as forced abortion and female genital mutilation and are more likely to experience certain forms of persecution such as rape and domestic violence. These types of cases are often referred to as “gender-based asylum” claims because the persecution is inflicted for reasons related, at least in part, to the victim’s gender.

A gender-based asylum claim for a victim of domestic violence should only be considered if the victim is not eligible for VAWA or any other relief, such as a T or U nonimmigrant visa. **Furthermore, such a claim must only be undertaken after consultation with an immigration attorney who has experience with this type of claim.** This is not a claim that a battered immigrant woman, even with the help of an advocate, should attempt to file on her own. Asylum is never a simple matter, and a gender-based asylum claim can be especially difficult because it is a relatively new concept and there is a lack of consistent judicial and regulatory interpretation. It can be very difficult to establish the motivation behind the persecution and to prove that it was at least in part on account of one of the five protected grounds listed above. Because filing

<sup>31</sup> The following organizations can provide information and technical assistance on U visa cases: Immigrant Women Program, Legal Momentum -- telephone: (202) 326-0040, fax: (202) 589-0511, E mail: iwp@legalmomentum.org; Address: 1522 K Street, N.W., Suite 550, Washington, D.C. 20005. National Immigration Project, National Lawyers Guild – telephone: (617) 227-9727, fax: (617) 227-5495, E mail: gail@nationalimmigrationproject.org; Address: 14 Beacon Street, Suite 602, Boston, MA 02108.

<sup>32</sup> See INA § 101(a)(42); 8 U.S.C. § 1101(a)(42)(defining the term “refugee”);

an asylum claim can be risky and can potentially lead to deportation, an immigrant victim should consult with an attorney who can assess the claim and fully explain the risks involved.

The purpose of this chapter is to help advocates identify battered women who may have a potential gender-based asylum claim and to direct attorneys to resources to help develop and obtain documentation to support an asylum claim. **After identifying a potential case, it is imperative to make a prompt referral to an attorney to ensure that the filing deadline (one year after entering the United States) can be met.**

### WHAT IS ASYLUM?<sup>33</sup>

Asylum is based on international law on the protection of refugees, which prohibits countries from returning refugees to countries where they face persecution.<sup>34</sup> Under U.S. law, a refugee is someone who is unable or unwilling to return to his or her country because of past persecution or a well-founded fear<sup>35</sup> of future persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.<sup>36</sup>

The requirement that the persecution suffered must have been inflicted on account of one of the five stated reasons is particularly important. It is not enough to prove that the persecution occurred and that the government could not protect the applicant. There must be proof of a link between the harm suffered or feared and at least one of the protected grounds.

Even if an applicant proves these factors, she may be denied asylum. U.S. law imposes many statutory bars to asylum, such as conviction of a “particularly serious crime” such as an aggravated felony, commission of a serious non-political crime outside the U.S., persecution of others, danger to the security of the United States, or participation in a terrorist activity.<sup>37</sup> Additional bars to asylum include a previous denial of asylum or having been firmly resettled in another country prior to coming to the United States.<sup>38</sup>

### FILING DEADLINE

All persons seeking asylum who arrived in the U.S. on or after April 1, 1997 are required to prove, with clear and convincing evidence, that their applications were filed within one year of their arrival in the United States.<sup>39</sup> Failure to demonstrate this results in automatic denial of the claim. There are two exceptions to this one-year filing requirement. The first is for “extraordinary circumstances related to the delay in filing” the application. These extraordinary circumstances must be factors beyond the applicant’s control.<sup>40</sup> In addition, the application must have been filed within a reasonable time period given those circumstances. The circumstances may include:

- Serious illness or disability. Such disability may include effects of past persecution or abuse;
- Legal disability, for example if the applicant was an unaccompanied minor or suffered from a mental impairment;
- The applicant maintained Temporary Protected Status until a reasonable period before the filing of the asylum application;

<sup>33</sup> There are many helpful general asylum practice guides available from various immigration organizations such as: American Immigration Lawyers Association, AILA’s Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure (2d ed., 2000).

<sup>34</sup> 1951 United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 150; 1967 United Nations Protocol relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (1967).

<sup>35</sup> For a definition of the “well-founded fear” standard, see *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

<sup>36</sup> See INA § 101(a)(42), 8 U.S.C.A. § 1101(a)(42) (2000); 8 C.F.R. § 208.1 *et seq.*

<sup>37</sup> See generally INA § 208(b)(2)(A), 8 U.S.C. § 1158(b)(2)(A).

<sup>38</sup> *Id.*

<sup>39</sup> INA § 208(a)(2)(B); 8 U.S.C. § 1158(a)(2)(B).

<sup>40</sup> INA § 208(a)(2)(D); 8 U.S.C. § 1158(a)(2)(D).

- The applicant submitted an asylum application prior to the expiration of the 1-year deadline, but that application was rejected by the INS as not properly filed, was returned to the applicant for corrections, and was re-filed within a reasonable period;
- Ineffective assistance of counsel.<sup>41</sup>

The second exception to the deadline is for “changed circumstances” that materially affect the application for asylum.<sup>42</sup> For example, the country conditions may have changed so that a group to which the applicant belongs that was not persecuted at the time she entered the U.S. may have since become subject to violence. Further, the applicant may have become a member of a group subject to persecution after entering the U.S. In these situations, the applicant must still file within a reasonable time period following the change in circumstances.<sup>43</sup>

## PROCESSING OF THE APPLICATION

After an application for asylum is filed, an applicant may be able to obtain work authorization while the application is pending, but only if the asylum application has not been decided by the U.S. Citizenship and Immigration Services (“CIS”, formerly INS) within 150 days of filing.<sup>44</sup> An applicant for asylum must appear for a detailed interview before a CIS asylum officer and must supply her own interpreter for the interview. Family members who are in the United States, including a spouse and unmarried children under 21 may be included in the application and must also attend the interview. If the applicant is already in removal proceedings before the immigration court, the case will be heard by an immigration judge rather than an asylum officer.

At the interview, the asylum officer will review the application and evidence and ask the asylum applicant questions about the claim. It is important that the facts stated in the written application be correct and consistent with the applicant’s oral testimony at the asylum interview. If there are inconsistencies, the applicant may be found not to be credible and the application denied.<sup>45</sup> If the application is not approved by the CIS asylum office, the case will be referred to the immigration court for a hearing. If the judge denies the case, the applicant will be ordered removed (deported) to her country or ordered to depart from the United States.

If the application is granted, the individual and dependent family members are conferred the status of “asylee”. Asylees are authorized to remain and work in the United States and may obtain an unrestricted social security card permitting employment. They also qualify for certain public benefits. If the asylee has a spouse or children outside the United States, she may file a petition to classify them as asylees and allow them to enter the U.S. After one year an asylee is eligible to apply for lawful permanent resident status (a green card), though it can take several years to be granted permanent residence due to yearly quotas and a resulting backlog.<sup>46</sup>

## GENDER AS A BASIS FOR ASYLUM

Gender-based asylum claims began to gain acceptance and recognition internationally in the 1990s. In 1991, the U.N High Commissioner for Refugees (“UNHCR”) released *Guidelines on the Protection of Refugee Women*,<sup>47</sup> which addressed gender-related persecution.<sup>48</sup> As a result of the growing international attention on

<sup>41</sup> See 8 C.F.R. § 208.4.

<sup>42</sup> INA § 208(a)(2)(D); 8 U.S.C. § 1158(a)(2)(D).

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

<sup>44</sup> 8 C.F.R. § 208.7(a). The applicant must wait 150 days before filing the application for work authorization. If it is filed earlier, the application will be rejected.

<sup>45</sup> See INS Supplemental Refugee/ Asylum Adjudication Guidelines, *reprinted in* 67 Interpreter Rele INA § 208(a)(2)(D); 8 U.S.C. § 1158(a)(2)(D).ases 101-03 (Jan. 22, 1990); *Matter of A-S-*, 21 I & N Dec. 1106 (BIA 1998).

<sup>46</sup> INA § 209(b); 8 U.S.C. § 1158(b).

<sup>47</sup> United Nations High Commissioner for Refugees, *Guidelines on the Protection of Refugee Women* (Geneva: July 1991) EC/SCP/67.

<sup>48</sup> Some examples of gender-related claims include sexual abuse, rape, infanticide, female genital mutilation, forced marriage, slavery, domestic violence, forced abortion, and honor killings.

gender-based persecution as well as an increasing number of gender-related asylum cases being filed in the U.S., the CIS (then INS) issued guidelines on gender-based asylum claims in May 1995.<sup>49</sup> The INS-issued guidelines direct asylum officers to consider the following while adjudicating gender-based asylum cases:

- laws and customs of home countries may contain provisions that discriminate based on gender;
- rape, sexual abuse, domestic violence, infanticide and genital mutilation are all examples of harm that may constitute persecution;
- these forms of violence may bring shame, discrimination, or additional violence upon women;
- some societies require women to live under the protection of male family members, and without this protection, women may be vulnerable to abuse;
- women may be more likely to discuss gender-based violence to a woman interviewer;
- women may also be more likely to discuss the violence when other family members are not present.<sup>50</sup>

One year later, the Board of Immigration Appeals issued a landmark decision in *Matter of Kasinga*.<sup>51</sup> Fauziya Kasinga, a Togolese woman, was granted asylum based on the fact that she had resisted and fled from female genital mutilation, a practice engrained in the tribal society in her country from which the state does not provide protection.

### DOMESTIC VIOLENCE AS A GENDER-BASED ASYLUM CLAIM<sup>52</sup>

Immigrant victims of domestic violence *may* be eligible to file gender-based asylum claims. Those battered women usually fall into one of two categories: (1) women who come to the U.S. fleeing domestic violence in a home country where the state will not or cannot protect her from her abuser, or (2) women who are abused in the U.S. by an abuser who is from the same country.

*Matter of R-A-* was the first domestic violence asylum claim decided by the Board of Immigration Appeals.<sup>53</sup> Rodi Alvarado was a Guatemalan woman who suffered years of abuse by her husband and tried to no avail to flee the abuse and divorce her husband. The Board ruled that she had not proven that the abuse was on account of membership in a particular social group or political opinion as she had argued and denied her claim. In December 2000, the CIS (then INS) published proposed regulations governing gender-based asylum claims and in January 2001 Attorney General Janet Reno vacated the Board's decision and ordered that the case be reconsidered when the proposed regulation is finalized.<sup>54</sup>

The proposed regulations elaborate upon the definitions of persecution, past persecution, the "on account of" factor, and the protected ground of "membership in a particular social group."<sup>55</sup> Furthermore, the regulations suggest how to demonstrate that a government is unwilling to protect someone persecuted not by the government, but by a private actor, which is typically a difficult hurdle to overcome in asylum cases. Specifically, the regulations suggest that evidence be provided regarding:

- government complicity with respect to the infliction of harm or suffering at issue;
- attempts by the applicant, if any, to obtain protection from government officials and the government's response to these attempts;

<sup>49</sup> Memorandum: Considerations for Asylum Officers Adjudicating Asylum Claims from Women: To All INS Asylum Office/rs HQASM Coordinators From: Phyllis Coven, Office of International Affairs 13(May 26, 1995) [hereinafter Memorandum].

<sup>50</sup> See *generally id.* at 4-10.

<sup>51</sup> Interim Dec. 3278 (BIA 1996).

<sup>52</sup> Domestic violence is listed as one example of gender-based violence that could serve as the basis of an asylum claim. Memorandum, at 4.

<sup>53</sup> Interim Dec. 3403 (BIA 1999); Karen Musalo, *Matter of R-A-: An Analysis of the Decision and its Implications*, 76 Interpreter Releases 1177 (Aug. 9, 1999).

<sup>54</sup> 65 Fed. Reg. 76588-98 (Dec. 7, 2000). As of the date of publication, the final regulations have not been published. Attorney General John Ashcroft has *certified Matter of R.A.* for decision and accepted briefs from the parties, but has not issued a final decision as of the date of publication of this manual. See the Department of Justice website, [www.ins.usdoj.gov/graphics/publicaffairs/questsans/RARule.htm](http://www.ins.usdoj.gov/graphics/publicaffairs/questsans/RARule.htm) for a discussion of the proposed rule in a helpful question and answer format.

<sup>55</sup> 65 Fed. Reg. 76588, 76597-98

- official action that is perfunctory;
- a pattern of government unresponsiveness;
- general country conditions, and the government's denial of services;
- the nature of the government's policies with respect to the harm or suffering at issue; and
- any steps the government has taken to prevent infliction of such harm or suffering."<sup>56</sup>

Since the final regulations have yet to be promulgated and there is a lack of consistent interpretation from the courts on domestic violence-related asylum claims, it is critical that advocates promptly refer these cases to an experienced immigration attorney. Immigration attorneys who do not have experience working with battered immigrants or with gender-based asylum claims are encouraged to contact the asylum experts listed at the end of this chapter for advice and assistance on formulating case strategies in gender-based asylum cases.

## IDENTIFYING A POTENTIAL CASE FOR REFERRAL

An advocate may identify a potential gender-based asylum case if some of the following factors are discovered during an interview:

- The applicant suffered particularly severe abuse;
- she suffered abuse over a sustained period of time;
- she suffered sexual abuse, rape, infanticide, female genital mutilation, forced marriage, slavery, domestic violence or forced abortion;
- her husband, or other abuser, is affiliated in any capacity with the government (i.e. he is a police officer, serves in the military, works for a government ministry or department);
- she attempted to seek help from any government authority but received no assistance;
- there are no laws in her country that provide protection for victims of domestic violence or the particular abuse she suffered from;
- there are laws that punish a woman for seeking outside help in a family, spousal, or domestic violence matter;
- there is a social stigma attached with a woman rebelling against her husband by seeking outside help;
- divorcing or separating often leads to further abuse, violence or discrimination;
- domestic violence or the particular abuse suffered is not addressed within society or is even condoned on some level;
- she is unable to relocate within the country to avoid abuse;
- the culture views women as subordinate to men;
- she openly expressed her opposition to such treatment in the community at large;
- the violence will continue if she is returned to her home country.<sup>57</sup>

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<sup>56</sup> *Id.* at 76597.

<sup>57</sup> See Leslye E. Orloff & Nancy Kelly, A Look at the Violence Against Women Act and Gender-Related Political Asylum, 1 Violence Against Women 380, 393, 398 (1995).

Additionally, advocates and attorneys working with immigrant victims of domestic violence and sexual assault should be aware that some potential gender-based asylum applicants will have been abused, assaulted, raped, or otherwise persecuted in the U.S. by someone who comes from their home country. In such cases the abuser/perpetrator could be deported back to the home country as a result of a criminal prosecution for crimes he committed against the applicant. In such cases, if the victim is removed from the U.S. and returned to the home country, she may be in danger of persecution there, either by her abuser or by family members residing in that country.

### Resources Available to Advocates and Attorneys

- **The Center for Gender and Refugee Studies** at the University of California, Hastings College of Law, monitors domestic violence asylum cases; summarizes current domestic and international case law, regulations, and standards particular to gender asylum; lists contact information for gender asylum experts; and provides individual case support. Phone 415-656-4791  
<http://www.uchastings.edu/cgrs>
- **The Refugee Law Center**, in conjunction with the Harvard Immigration and Refugee Clinic Program, provides document support, attorney referrals and general advice on gender-based asylum claims. Phone 617-524-8400 <http://www.refugeelawcenter.org/>
- Mentoring and materials on domestic violence claims are available from Gail Pendleton, **The National Immigration Law Project** of the National Lawyers Guild at 617-227-5495 or [gail@nationalimmigrationproject.org](mailto:gail@nationalimmigrationproject.org), and Anna Gallagher of the **American Immigration Law Foundation** at 202-742-5600 or [agallagher@aifl.org](mailto:agallagher@aifl.org)
- <http://www.asylumlaw.com/> - provides contact information for pro bono and low fee attorneys
- Request a free **UNHCR Handbook on Procedures and Criteria for Determining Refugee Status** from UNHCR, 1775 K Street, N.W. Suite 300, Washington, DC 20006, email [usawa@unhcr.ch](mailto:usawa@unhcr.ch) or access the *Handbook* on the Internet at <http://www.unhcr.ch>
- Contact a **university law clinic** where law students supervised by licensed attorneys represent asylum clients pro bono. Typically students have more time to prepare for cases and take on cutting-edge issues. Following is contact information for some law school clinics around the country:
  - § American University International Human Rights Law Clinic  
Washington College of Law  
Washington, DC  
Phone 202-274-4147
  - § Harvard Immigration and Refugee Law Clinic at  
Greater Boston Legal Services  
Boston, MA  
Phone 800-323-3205, 617-371-1234
  - § Immigration Clinic  
St. Thomas University School of Law  
Miami, FL  
Phone 305-623-2309
  - § Immigration Law Clinic  
University of California Davis School of Law  
Davis, CA  
Phone 530-752-6942

- § Immigration Law Clinic  
University of Southern California Law School  
Los Angeles, CA  
Phone 213-821-5987
  
- § International Human Rights Law Clinic  
University of California Berkeley Boalt Hall School of Law  
Berkeley, CA  
Phone 510-643-4800

## Sample Certification Form

<b>U VISA CERTIFICATION FORM</b>
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I, (NAME \_\_\_\_\_), hereby affirm the following:

1. **I am a:** (check one)

Federal official

State official

Local official (municipal, district, county)

INS officer\* (see 2B below)

**Specifically, I am a:** (check one)

Law Enforcement Officer

Prosecutor

Judge

EEOC officer

Other Investigating Authority (Describe \_\_\_\_\_).

Please provide the following information:

- Job Title
- Name of Employer
- Street Address / Location
- City, State & Zip Code
- Telephone

2A. I am responsible for, or the agency for which I work is responsible for, investigating (or overseeing the investigation of) criminal activity involving or similar to violations of (some or all of) the following types of offenses under Federal, State or local criminal laws: 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 these crimes OR

\*2B. I am an INS officer with information not limited to civil immigration violations, but related to criminal activity described above, or similar criminal activity.

3. The criminal activity at issue in this case may involve (but is not limited to) possible violations of the following criminal laws:

(PROVIDE STATUTE OR CODE CITATION(S) AND OFFENSE NAME(S)) and, based upon my expertise and understanding of these laws, I have determined that these laws fall within the list of offenses set forth in Question # 2 or constitute similar activity violating Federal, State or local criminal law.

4. It is suspected that this criminal activity occurred on or about:  
(Specify as much as possible date(S) and location(s) of criminal activity)

5. I affirm that (Name Of U Visa Applicant \_\_\_\_\_)\*\*: (Check All That Apply)

\_\_\_ has been helpful; \_\_\_ is being helpful; \_\_\_ is likely to be helpful in an / the investigation and / or prosecution of this criminal activity.

6. I affirm that (NAME OF U VISA APPLICANT \_\_\_\_\_)\*\* possesses relevant information relating to this criminal activity. This information includes (but is not limited to) the following: (PROVIDE BRIEF DESCRIPTION OF INFORMATION)

\*\* If the U visa applicant is under the age of 16, please certify that the applicant's parent, guardian or "next friend" meets these requirements.

7. I affirm that this criminal activity occurred: (CHECK ALL THAT APPLY)

\_\_\_ in the United States (including Indian country and military installations);  
\_\_\_ in territories and possessions of the United States; OR  
\_\_\_ outside the United States, but violated United States laws.

#### **Certification for applicant's spouse, child or parent**

8. This investigation and/or prosecution would be harmed without the assistance of (Name of Applicant's Spouse, Child or Parent) who is the:

\_\_\_ spouse

\_\_\_ child

\_\_\_ parent of the applicant listed above.

SIGNATURE:

DATE: