

To: Domestic Violence Advocates, Family and Immigration Attorneys,
Immigrant Rights Advocates and Interested Persons
From: Janice Kaguyutan and Leslye Orloff
Legal Momentum
Date: January 2001
Re: The Violence Against Women Act of 1994 and 2000
Battered Immigrant Provisions

This memorandum will provide an introduction to the battered immigrant provisions under VAWA 1994 and its subsequent amendments in VAWA 2000. Basic eligibility requirements for VAWA immigration relief will be discussed and lastly, this memorandum will provide information on the newly enacted U visas. ¹

The Battered Immigrant Provisions of the Violence Against Women Act of 1994

The Violence Against Women Act of 1994 (VAWA) included as part of the Violent Crime Control Act of 1994, was the first piece of federal legislation in the U.S. specifically designed to help curb domestic violence.² VAWA 1994's overarching goals were to enhance the justice system protection for battered women and to expand collaboration and cooperation between battered women's supportive services and the criminal and civil justice systems. VAWA 1994 also included *special protections for immigrants abused by U.S. citizen or lawful permanent resident spouses or parents.*

Congress recognized that immigration laws were being used as tools of power and control over immigrant victims of domestic violence. Often, these non-citizen victims' legal immigration status depended on their relationship to their U.S. citizen or lawful permanent resident abuser.³ The abuser used his power over his spouse or child's immigration status to control, threaten, isolate, harass, and coerce the immigrant victim. A battered spouse or child may be deterred

¹ This project was supported by Grant No. 2000-WL-VX-K004 awarded by the Violence Against Women Office of Justice Programs, U.S. Department of Justice. Points of view in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

² Pub.L. 103-322, Stat. 1902-1955 (September 13, 1994).

³ H.R. rep. No 395, 103d Cong., 1st Sess., at 26-27 (1993).

from taking action to protect herself, such as filing for a civil protection order, filing criminal charges or calling the police because of the threat or fear of deportation by the Immigration and Naturalization Service (INS).⁴

VAWA 1994 contained provisions that limited the ability of the abuser to use immigration laws to threaten and control his immigrant spouse or child. Specifically, VAWA 1994 remedied this situation by enabling battered immigrants to attain *lawful permanent residence* (green cards) without the cooperation of their abusive spouse or parent. The Act created two forms of relief: 1). VAWA self-petitions; and 2). VAWA cancellation of removal (formerly called “suspension of deportation”). These provisions ensure that immigrant victims of domestic violence have access to lawful immigration status without having to depend on the cooperation or participation of their batterer.

The Battered Immigrant Provisions of the Violence Against Women Act of 2000

Although the VAWA 1994 helped many battered immigrants, the legislative protections for battered immigrants remained incomplete. Subsequent immigration laws effectively barred access to VAWA protection for many immigrants and implementation problems continued to plague the VAWA process. As a result, many immigrant victims of domestic violence remained trapped in these violent relationships despite the significant gains in VAWA 1994. In response, the battered immigrant advocacy community mounted an impressive campaign to legislatively respond to some of the problems battered immigrants still faced. Through the bipartisan efforts of sympathetic members of Congress working collaboratively with the advocacy community,⁵ President Clinton signed into law the Battered Immigrant Women Protection Act as a part of the Violence Against Women Act of 2000 on October 28, 2000.⁶ The immigration provisions in VAWA 2000 were designed to restore and expand access to a variety of legal protections for battered immigrants by addressing residual immigration law obstacles standing in the path of battered immigrants seeking to free themselves from abusive relationships. VAWA 2000

⁴ Ibid.

⁵ Ann Moline, “Bipartisan Women Made Anti-Violence Act Happen,” Women’s Enews, December 18, 2000.

⁶ The Violence Against Women Act of 2000, Title V of the Victims of Trafficking and Violence Protection Act of 2000 (Oct. 28, 2000), Pub. L. 106-386, 114 Stat. 1464. These new legal protections for battered immigrants went into effect October 28, 2000 and certain provisions were given retroactive effect.

amendments are incorporated into the following brief description of the VAWA immigration forms of relief.⁷

VAWA Self-petitions

Battered immigrants may obtain lawful permanent resident status (a green card) without the participation or cooperation of their abusive spouse by filing a VAWA self-petition. This is a two-step process. First, the applicant must file a VAWA self-petition, which must be approved by the INS. Second, the applicant must apply for lawful permanent residency either through the adjustment of status process while in the U.S. or consular processing abroad.

1. Who are eligible VAWA self-petition applicants?

- Abused spouses or former spouses married or who were married to U.S. citizen and lawful permanent residents may apply for themselves (and for their abused or unabused children even though the children are not related to the U.S. citizen or the lawful permanent resident);⁸**

- Abused children of a U.S. citizen or lawful permanent residents may apply for themselves (and for their abused or unabused children);⁹**

- Unabused spouses or former spouses who are parents of children abused by the immigrant parent's citizen or lawful permanent resident spouse may apply for themselves. If an abused child is filing a VAWA self-petition, the unabused parent may only file her VAWA self-petition with her child's petition.¹⁰**

⁷ For further detailed information on the battered immigrant provisions of VAWA 2000, please consult the "Section by Section Chart of the Battered Immigrant Provisions of VAWA 20000". Copies may be obtained by contacting Legal Momentum at (202) 326-0040.

⁸ INA § 204 (a)(1)(A)(iii) and (B)(ii). Children included in their parent's VAWA self-petition are known as derivative children. To be included in the self-petition, the derivative child must be under 21 years of age at the time of filing.

⁹ INA § 204 (a)(1)(A)(iv) and (B)(iii). A self-petitioning child must prove that he/she is the child (natural, step-, or adopted) of a citizen or lawful permanent resident. Self-petitioning stepchildren must file while the child's mother and abusive U.S. citizen or lawful permanent resident father are still married.

¹⁰ INA § 204 (a)(1)(A)(iii) and (B)(ii).

2. What are the requirements you need to prove in a VAWA self-petition?¹¹

- a. **Marriage to the abuser.** Self-petitioners can demonstrate the marital relationship with a marriage certificate. A self-petitioning child must prove that s/he is the natural child, stepchild, or adopted child of a citizen or permanent resident.¹²

What if the self-petitioner is currently not married to the abuser by reason of the abuser's bigamy, death or divorce? The self-petitioner may still qualify if she can prove that:

- She believed that she has legally married the abuser, but the marriage was invalid due to her abuser's bigamy.** Abused spouses who did not know they married a bigamist need to provide evidence that a marriage ceremony was actually performed.¹³
- She was the spouse of a U.S. citizen who died within the past 2 years.** The self-petitioner must prove that she was the spouse of an abusive citizen and that her and that her spouse died within the past two years.¹⁴
- She was divorced from the abuser within the past 2 years.** The self-petitioner must demonstrate that she was divorced from the abuser within the past 2 years and that there was a connection between the divorce and the battery or extreme cruelty by the abusive spouse.¹⁵
- b. **The abusive spouse or parent is a U.S. citizen or lawful permanent Resident.** A self-petitioner must prove that his or her spouse, intended spouse or parent is a U.S. citizen or lawful permanent resident.

¹¹ For more information on what type of evidence can be used to prove VAWA cases, please consult "VAWA Documentary Evidence Memo". Copies may be obtained by contacting Legal Momentum at (202) 326-0040.

¹² INA § 204 (a)(1)(A)(iv) and (B)(iii).

¹³Section 1503 (a) and (b) of the Conference Report on Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464. (October 28, 2000), hereafter Conference Report.

¹⁴ Section 1503 (b)(1) of the Conference Report.

¹⁵ Section 1503(b)(1) of the Conference Report.

- Loss of citizenship or lawful permanent resident status.** In cases where the abuser has lost or renounced his immigration or citizenship status within the past 2 years, the self-petitioner must demonstrate that the loss of status or renunciation is related to an incident of domestic violence.¹⁶

- c.** **Residence in the U. S. or abroad.** Generally, self-petitioners must currently reside in the U.S. Some self-petitioners may file from abroad if they meet one of the three below requirements:
 - The abusive spouse or parent is an employee of the U.S. government;**¹⁷ or
 - The abusive spouse or parent is a member of the uniformed services;**¹⁸ or
 - The abusive spouse or parent has subjected the immigrant spouse to battery or extreme cruelty in the U.S.**

- d.** **Residence with the abuser.** A self-petitioner does not have to reside with the abuser at the time of filing, but must still prove that she once resided with the abuser. Self-petitioners need not separate from the abuser in order to file a self-petition.¹⁹

- e.** **Battery or extreme cruelty during the marriage.** Self-petitioners can submit civil protection orders, police and court records, medical reports, affidavits of school officials, clergy, social workers, and shelter workers. The INS will consider photographs of injuries and other credible evidence. Self-petitioners submitting affidavits should submit more than one.²⁰

- f.** **Good moral character.** To show good moral character, a self-petitioner

¹⁶ Section 1503(b)(1) of the Conference Report.

¹⁷ The abuse may have occurred either in the U.S. or abroad.

¹⁸ The abuse may have occurred either in the U.S. or abroad.

¹⁹ Self-petitioners who plan to continue residing with their abusers should have a safe address in which INS can reach them that is not accessible to the abuser.

²⁰ The terms “battery and extreme cruelty” include “being the victim of any act of a threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation incest (if the victim is a minor) or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under this rule. Acts or threatened acts that, in and of themselves, may not initially appear violent may be part of an overall pattern of violence.” 8 C.F.R. § 204.2(c)(vi).

should submit a local police clearance or state-issued criminal background check from each locality or state, within or outside the U.S, in which she has lived for six or more months during the three years immediate preceding the filing of the self-petition. A self-petitioner may choose to submit instead a set of INS computerized fingerprints.

- g.** **Marriage in good faith.** Self-petitioners need to demonstrate that they married or their intent to marry (in cases of bigamy) was entered into good faith.

3. Filing the VAWA Self-petition

Self-petitioners must complete INS form I-360 (Petition for Amerasian, Widow or Special Immigrant) with supporting documentation. The filing fee for this form is \$130.00. A waiver of fees may be filed. The entire package is filed with the INS Vermont Service Center. Once the VAWA self-petition is filed, it can take several months for INS to approve the self-petition.

4. Changes in Abuser’s Immigration Status

For self-petitioners married to or are the children of U.S. citizens, the denaturalization, loss or renunciation of citizenship, death of the abuser, divorce, or changes to the abuser’s citizenship status after filing the self-petition will not affect the approval of the self-petition. For self-petitioners married to or are the children of lawful permanent residents, the divorce or the loss of lawful permanent resident status will not affect the approval of the self-petition. Additionally, if the abuser subsequently becomes a citizen through naturalization after the filing the self-petition, the self-petitioner will be reclassified as a spouse or child of a citizen, and therefore will not have to wait to apply for lawful permanent residence once their self-petition has been approved.

5. Employment authorization

Approval of a self-petition makes the abused immigrant eligible for employment authorization.²¹ Once she receives the approval of her self-petition, she can file INS form I-765, Application for Employment Authorization. Additionally, all Self-petitioners who request employment authorization must demonstrate “economic necessity,” which typically includes evidence of

²¹8 C. F.R. §274a.12(c)(9)

monthly / yearly income and expenses.

6. Access to Public Benefits

Self-petitioners who submit applications that contain sufficient information on each Fact that the battered immigrant is required to prove will receive a prima facie determination from INS that allows them to apply for certain public benefits.²²

7. Obtaining lawful permanent residence status

Remember, obtaining lawful permanent residence through VAWA is a 2-step process. First, the self-petition must be approved and lastly, the self-petitioner must either file for adjustment of status in the U.S. or apply for consular processing abroad.²³

For self-petitioners abused by their citizen spouses or parents, the approval of the self-petition make them immediately eligible to apply for lawful permanent residence. The self-petitioner may file INS form I-485 (Application for Adjustment of Status) with the INS along with a copy of her self-petition approval notice. The filing fee is \$220 for self-petitioners aged 14 and older; under 14 the fee is \$160. Once the I-485 is approved, she is granted permanent residence (a green card).

Self-petitioners with approved self-petitions who were abused by their permanent resident spouse or parent are not immediately eligible for lawful permanent residency, and therefore cannot file an Application for Adjustment of Status. These self-petitioners are subject to a visa quota system where the self-petitioner must wait in line until a visa is available before lawful permanent residence is granted. This wait can possibly take several years. In the meantime, these self-petitioners are placed in deferred action status and can access employment authorization while they wait for a visa to become available. Once the visa becomes available, Self-petitioners may then file INS form I-485 (Application for Adjustment of Status) and obtain lawful permanent residence.

²² For more information on what public benefits are available to battered immigrants, see “Access to Public Benefits for Battered Immigrant Women and Children,” Clearinghouse Review, Journal of Poverty Law and Policy. September – October 1999.

²³ All VAWA self-petitioners may now adjust their status in the U.S. under INA secs. 245(a) and 245(c) without having to paying a \$1,000 fine. Section 1506(a) of the Conference Report.

8. VAWA Suspension of Deportation / Cancellation of Removal

VAWA cancellation of removal (formerly suspension of deportation) is a form of immigration relief in which the immigration courts waive the grounds for removal.²⁴ Removal is the new name for what is commonly referred to as deportation. Once the immigration judge grants cancellation, the successful applicant is awarded lawful permanent residency.²⁵

Cancellation of removal may only be requested while in removal proceedings before an immigration judge. For applicants not in removal proceedings, current procedures require a VAWA applicant to turn herself in to the INS and request that she be placed in removal proceedings. This process could take over six months in some jurisdictions, and is unavailable altogether in others. Once the INS issues a charging document, the applicant will have a hearing (master calendar) before an immigration judge in removal proceedings where she will receive permission to file a cancellation application. After the application is filed, she will be eligible for employment authorization.²⁶

Cancellation of removal is complex; therefore, **no one should attempt to file for cancellation of removal without the assistance of an immigration attorney or advocate.** To locate an immigration attorney or advocate in your area, please refer to the organizations listed at the end of this memo.

9. Who can apply for VAWA Cancellation of Removal?

- Abused spouses, former spouses and intended spouses of U.S. citizens and lawful permanent residents.**

- Abused children of U.S. citizen or lawful permanent resident parents.**

²⁴ INA § 240B(a)(2).

²⁵ Children of applicants granted VAWA cancellation may be granted parole until such time as their family-based visa petition filed by their battered parent can be approved. Section 1504(b) of the Conference Report.

²⁶ 8 C.F.R. 274a.1 2(c)(10).

- Parents of children abused by the child's citizen or lawful permanent resident other parent.**²⁷

For some battered immigrants, cancellation of removal is the only VAWA option. These include:

- Mothers of abused children who may or may not have been abused themselves who were never married to their child's abuser
- Child abuse and incest victims who were abused while they were under 21 years old and who are now over 21 years old.
- Child abuse cases where the child may not be able to establish residence with the abuser.
- Abused spouses divorced more than 2 years before filing for VAWA protection.
- Abused spouses and children of permanent residents who died before the self-petition was approved or filed.
- Abused spouses or children whose citizen or permanent resident parent gave up citizenship or lost status more than 2 years before the battered immigrant could file for VAWA protection.

10. What do you need to prove to the immigration judge?

- Continuous Residence in the U.S. for 3 years immediately preceding filing a cancellation of removal request.**
- Battery or extreme cruelty while in the U.S. by their spouse or parent.**
- Good moral character.**
- Applicant or their child would suffer extreme hardship if deported.** (See section on Extreme Hardship).
- Applicant is currently deportable / removable (undocumented or out of status).** Note: This

²⁷When the immigrant is married to the US citizen or lawful permanent resident who abused the child, the abusive parent need not be the natural parent of the abused child. The parent of an abused child may file for VAWA cancellation whether or not she was ever married to the child's other abusive parent.

is an important qualification, because some battered immigrants will not qualify for cancellation if they are in status, e.g. if they have a current non-immigrant visa (i.e. student or tourist). However, to qualify, the battered immigrant must not be deportable for marriage fraud, certain criminal convictions, or because they are a threat to U.S. national security.

11. Extreme Hardship

Cancellation cases require that the applicant prove that her removal would result in extreme hardship to herself or to her children. Extreme hardship has a technical legal significance under immigration law, and the following situations alone will not constitute extreme hardship: economic deprivation, loss of employment, and readjustment to life in the native country.

Extreme hardship is a fact-based finding. Applicants can prove extreme hardship by including in their cancellation applications evidence demonstrating the following VAWA extreme hardship factors:²⁸

- the nature and extent of the physical and psychological consequences of the battering or extreme cruelty;
- the impact of the loss of access to the U.S. courts and criminal justice system (including, but, not limited to, the ability to obtain and enforce orders of protection, criminal investigations and prosecutions, and family law proceedings or court orders regarding child support, maintenance, child custody and visitation);
- the applicant's or applicant's child's need for social, medical, mental health, or other supportive services which would not be available or reasonably accessible in the foreign country;
- the existence of laws, social practices, or customs in the foreign country that would penalize or ostracize the applicant or applicant's child for leaving an abusive situation, or for taking action to stop the abuse.

²⁸ 8 C.F.R. §240.20(c) and §240.58(c). See also INS Memo from Paul Virtue, INS General Counsel on “Extreme Hardship and Documentary Requirements Involving Battered Spouses and Children,” October 16, 1998.

- the abuser's ability to travel to the foreign country and the ability and willingness of foreign authorities to protect the applicant and/or the applicant's child from future abuse;
- the likelihood that the abuser's family, friends, or others acting on the abuser's behalf in the foreign country would physically or psychologically harm the applicant and/or the applicant's child.

In addition, applicants may provide evidence on the extreme hardship factors relevant in non-domestic violence cases, but wherever possible should for each factor emphasize the nexus between the factor and the violence, the consequences of the violence, the victim's inability to recover from the violence. The traditional extreme hardship factors used include: (1) age of the person; (2) age and number of the person's children, the children's ability to speak the native language of the foreign country, and the children's ability to adjust to life there; (3) serious illness of the person or her child that necessitates medical attention not adequately available in the foreign country; (4) a person's inability to obtain adequate employment abroad; (5) the person and her children's length of residence in the U.S.; (6) existence of other family members residing legally in the U.S; (7) irreparable harm arising from a disruption of educational opportunities and; (8) the adverse psychological impact of removal. Other facts which may be considered include (9) the impact of separation on both mother and children if the mother is removed; (10) the extent to which deportation would interfere with court custody, visitation and child support awards and; (11) the extent to which the battered woman is an asset to her community in the U.S. (i.e., involvement in church/temple; children's school, community, other service programs.)²⁹

11. Immigrant Crime Victim U-Visas in VAWA 2000

VAWA 2000 created a new non-immigrant visa (U-visa) for a limited group of immigrant crime victims who have suffered substantial physical or emotional injury as a result of being subjected to specific crimes committed against them in the U.S.³⁰ To obtain the visa, a law enforcement official (police officer, prosecutor, judge, EEOC or other federal or state officials investigating or prosecuting criminal activity) must certify that the applicant has been helpful, is being helpful or

²⁹61 Fed. Reg. 13067 (1996).

³⁰Section 1513 of the Conference Report.

is likely to be helpful to an the investigation or prosecution of criminal activity. The maximum number of U visas in any one-year is 10,000 for the primary applicants. There is no limit on the number of visas available for the applicants' spouses or children. U visa recipients can get work authorization, but not public benefits.

Crimes covered include: 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.

In the Attorney General's discretion, a U-visa holder who has been physically present in the U.S. for three years may adjust their status to that of a permanent resident when such adjustment is justified on humanitarian grounds, to ensure family unity or when it is otherwise in the public interest, unless the immigrant has unreasonably refused to cooperate in an investigation or prosecution or criminal activity.

It is important to note that the U-visa could possibly help several new groups of battered immigrants who are:

- Abused by boyfriends and other persons who are not their spouse or parent
- Abused by a boyfriend, spouse or parent who is a student, non-immigrant visa holder, a diplomat or who is an undocumented immigrant.

The U-visa will also help immigrant victims:

- Of rape or sexual assault (including sexual assault in the workplace)
- Who are nannies abused by their employees
- Who are held hostage by a spouse, family member or an employer

Obtaining a U-visa is, however, is more difficult that seeking relief under VAWA because to qualify, the battered immigrant must suffer substantial physical or emotional injury and must be cooperate with law enforcement.

12. CRUCIAL PRACTICE POINTS

- **No one should apply for a self-petitioning, cancellation of removal, or a U-visa without the assistance of an immigration advocate/attorney who understands the new law.** This memo serves as a basic introduction to the immigration protections found in VAWA 1994 and 2000. Many details have been left out and reliance on this memo without first consulting the appropriate advocates or reference materials could result in removal. At this point, few immigration practitioners or advocates will be familiar with VAWA relief, especially with the new amendments in VAWA 2000. If you have battered immigrant clients you want to assist, we can help you locate an immigration lawyer or if you have an immigration lawyer or advocate, have them contact any of the experts listed below for assistance with the case.
- **Clients in removal proceedings may wish to ask for a continuance or administrative closure to allow them to self-petition with the INS, if they are eligible.** Clients who opt to proceed in removal proceedings should not do so without the assistance of an immigration lawyer.
- **Clients anticipating divorce must properly file their self-petition within two years of their divorce becoming final.** Where possible, it is best to obtain an approval of the self-petition while still married or well in advance of the two-year deadline following divorce.
- **We recommend that all VAWA applicants start preparing documentation for their self-petitioning cases.** You should obtain civil protection orders for all clients where orders are available under state law given the circumstances of your client's case. Protection orders will be very helpful in bolstering her case.
- **When safety planning with a battered immigrant woman, encourage her to make copies of the following documents and help her identify a safe place to store them.** Examples include: marriage licenses, the abuser's passport, the abuser's social security number, photos of their wedding, wedding invitations, income tax forms, dates on which the police were called, medical records, bills in her name, postmarked letters addressed to her, leases or mortgage documents in her name or listing her residing with the abuser, bank records, abuser's pay stubs, etc.
- **Identify an immigration advocate/ lawyer who can handle the case before the INS.** We recommend that domestic violence advocates/attorneys work as a team with immigration

advocates/attorneys on each case. The immigration advocate/attorney has experience working with INS and domestic violence advocates have experience documenting abuse and are more familiar with state civil protection order statutes.

- **If you do not speak the language of the battered immigrant woman who seeks your help ALWAYS find a sensitive and qualified interpreter to assist you. Do not use the battered immigrant victim's children as translators and do not assume that the person who accompanies the victim is a safe interpreter to use. Your agency should identify other community or church based organizations who work with minority populations, develop a relationship with them, train their staff on domestic violence and seek help of their trained staff or volunteers as interpreters.**

The following lawyers and advocates are available to answer questions. If you have a client who is in deportation/exclusion/removal proceedings or has a case pending with INS, we urge you to contact one of us immediately:

National Network on Behalf of Battered Immigrant Women:

- **Amanda Baran, Joyce Noche, or Moira Fisher Preda**
Legal Momentum
1522 K Street, N.W., Suite 550, Washington, D.C. 20005
(202) 326-0040 Tel., (202) 589-0511 Fax., iwp@legalmomentum.org
- **Gail Pendleton, National Immigration Project of the National Lawyer's Guild**
14 Beacon Street, Suite 602, Boston, MA 02108
(617) 227-9727 Tel., (617) 227-5495 Fax., nipgail@nlg.org
- **Leni Marin, Family Violence Prevention Fund**
383 Rhode Island Street, Suite 304, San Francisco, CA 94103
(415) 252-8900 Tel., (415) 252-8991 Fax., leni@fvpf.org