

National Network on Behalf of Battered Immigrant Women

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October 8, 2001

Director
Policy Directives and Instructions Branch
Immigration and Naturalization Service
425 I Street, NW, Room 4034
Washington, DC 20536

RE: Comments on INS No. 2127-01

Dear Director:

We are writing on behalf of the National Network on Behalf of Battered Immigrant Women (“National Network”) to provide comments to the proposed rule on “K Nonimmigrant Classification for Spouses of U.S. Citizens and Their Children Under the Legal Immigration Family Equity Act of 2000,”(LIFE), INS No.2127-01, published in the Federal Register on August 14, 2001. The National Network is a network of battered women’s and immigrant rights advocates formed to defend and expand the rights of battered immigrant women in the United States. The National Network was extremely active in the effort that led to the immigration relief contained in the Violence Against Women Act and advocated for provisions in the 1996 welfare and immigration laws and the 2000 Trafficking Act to provide protection for battered immigrants.

Thank you for the opportunity to provide comments on the proposed K visa regulations under LIFE. The proposed rules as drafted address the issuance of K visas for spouses and children awaiting the approval of their pending I-130 visa petitions. However, the proposed rules fail to address the particular problems facing spouses and children of U.S. Citizens who are abused by the U.S. Citizen petitioner.

The Regulations Must Reflect Congressional Intent to Protect Victims of Domestic Abuse

On September 13, 1994, the Violence Against Women Act (VAWA) was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994,¹ and became effective as of January 1, 1995. In passing VAWA, Congress intended to respond to the widespread and growing national problem of domestic violence.²

Congress saw the lack of acknowledgement of domestic violence in family-based immigration law as one part of a larger societal failure to confront the problem of domestic violence. In enacting VAWA in 1994, Congress recognized that immigrants were in a unique and problematic position as it relates to domestic violence. Congress discovered that the existing immigration laws actually may foster the abuse of immigrant spouses and children by placing their ability to gain lawful residence in the control of their U.S. Citizen or Lawful Permanent Resident abusers.³

1. Pub. L. No. 103-322.

2. S. Rep. No. 545, 101st Cong., 2d Sess. (1990), p. 27; S. Rep. No. 138, 103rd Cong. 1st Sess. (1993), p. 37.

3. H.R. Rep. No. 395, 103rd Cong. 1st Sess. , 26-27 (1993) (noting that the problem of domestic violence is “terribly exacerbated in marriages where one spouse is not a citizen and the non-citizen’s legal status depends on his or her marriage to the abuser”).

In 1994, Congress created two forms of relief to protect and assist battered immigrants: the self-petitioning process,⁴ and VAWA Suspension of Deportation,⁵ now VAWA Cancellation of Removal.⁶ Congress further strengthened the Violence Against Women Act in the Battered Immigrant Protection Act of 2000 (VAWA 2000) as well as added protections for victims of severe forms of trafficking and certain crime victims.⁷

The K-Visa regulations must realize Congressional intent and deter the use of the immigration process to promote the abuse of immigrant women and children. The failure of the regulation to specifically address immigrants who are victims of domestic violence will unfairly punish battered immigrants who attempt to escape abuse— thus the regulation in its current form is inconsistent with Congress’ intent.

The Regulations should not serve, either wittingly, or unwittingly, to be used as a tool of abusive U.S. citizens. To avoid this, the Regulations must:

1. Allow K-visa extensions for those with pending or approved self-petitions;
2. Recognize domestic violence as good cause for extending a K-visa;
3. Provide an exception to K-visa revocations and terminations for those with pending or approved self-petitions in cases where the abused spouse’s I-130’s are revoked or the abused spouse is divorced from their abuser;
4. Acknowledge that the VAWA regulations preamble allows K-visa holders with approved self-petitions to adjust status based on a self-petition if the basis of the self-petition is the relationship to the abusive K-spouse;
5. Allow battered spouses who self-petition from abroad to apply for a K-visa;

4. INA § 204(a)(1)(A)(iii), (iv) and (B)(ii)(iii)

5. formerly INA §244(a)(3)

6. INA § 240A (b)(2). Illegal Immigration Reform and Responsibility Act Of 1996 (IIRAIRA), Pub. Law 104-208, 110 Stat. 3009 (INA§ 204A(b)(2))

7 Pub.L. No. 106-386, Victims of Trafficking and Violence Protection Act of 2000 (H.R. 3244)

6. Recognize the confidentiality protections under IIRAIRA §384 for victims of domestic violence.

In summary, as long as a beneficiary of a K-visa is pursuing or has acquired immigration relief as a victim of domestic violence, the Service should not alter her status as a K-visa holder. In addition, the beneficiary of a pending or approved self-petition abroad should be eligible to apply for a K-visa. To do otherwise would turn the Immigration system and the K visa regulations into another weapon in the arsenals of abusive U.S. citizens.

A. I-360 Self-Petitions

Immigrants who enter their marriage in good faith should not be punished if their abusive spouse withdraws the I-130 filed on their behalf, nor should they be punished for being domestic violence victims, or for taking steps to leave their abusers. In such situations, those on K-visas must be able to choose to substitute an I-360 self-petition for an I-130. Many K-visa recipients under current law do this as long as they meet the other requirements for K-visa status.⁸ The new regulations should not be more onerous for domestic violence than those currently in place. Nor should they encourage K-visa domestic violence victims to stay with abusers for fear they will forfeit their ability to remain in the United States. Congress specifically sought to eliminate such consequences in VAWA and VAWA 2000.

In addition, spouses of abusive U.S. Citizens with I-360 self-petitions filed from abroad must be permitted to apply for K-visa's while their I-360 applications are pending with the Vermont Service Center. LIFE allows those with valid marriages to US

⁸ See, Preamble to VAWA Regulations, 61 F.R. 13061, 13070 (March 26, 1996).

Citizens, who are the beneficiaries of immediate relative petitions to obtain a K visa to await the approval of such a petition. In domestic violence relationships, abused spouses of U.S. citizens must be permitted to obtain a K-visa based on the pending I-360, rather than on an I-130 application.

B. Extensions of K-Visas

§214.2(k)(10), which addresses extensions of stay for individuals who have entered on K-visas, must acknowledge self-petitioners under VAWA. INA §101(a)(15)(k)(ii) or (iii) must include an immediate relative with an approved self-petition under VAWA. An abused spouse can be a beneficiary of a petition under §201(b)(2)(A)(i) filed under INA §204, where the K-visa holder has submitted the petition, rather than the abusive U.S. citizen spouse. A minor child also may be the beneficiary of such a petition.

Given (1) Congress' concern for the plight of battered immigrants; and (2) Congress' desire to provide them with protection, including the means to free themselves from abusive relationships; the regulations should specifically provide for extensions of stay as a K-3 or K-4 for individuals who can demonstrate there is a pending or approved form-I-360, Self petition for spouse or child of abusive USC based on the marriage to the USC who filed the form I-129F. In addition, the regulation should provide for extensions where there is an application pending for an immigrant visa based either on form I-130 or I-360 described in §214.2(k)(10)(i); and in situations where there is a pending form I-485, based either on form I-130 or I-360.

C. Good Cause Includes Domestic Violence

The draft regulation provides that individuals may apply for extension of stay of their K-visa after the I-130 has been approved without filing an adjustment or immigrant visa application upon a showing of “good cause.” The K-visa regulations should provide guidance as to how the good cause factors listed in 8 CFR 214.2(k)(1)(ii) should be viewed in the context of domestic violence. The Service has already recognized that a flexible approach should be taken in cases involving battered spouses and children in other contexts,⁹ and should recognize Congressional intent and do so in this situation. The regulation, in §214.2(k)(10)(ii) should include domestic violence as a basis to establish “good cause.” A K-Visa recipient meets this good-cause requirement if she has also filed a prima-facie self-petition.

D. Non-Revocation/Termination

The regulations must specify that an individual’s lawful “K” visa status is not automatically terminated if an I-130 family visa petition is withdrawn or if she is divorced from an abusive spouse. VAWA contemplates that abused spouses will file I-360’s in lieu of relying on the I-130’s filed by abusive spouses. VAWA 2000 provides for self-petitioning within two years of divorce from an abusive spouse. The regulation regarding termination of status in section 214.2(k)(11) should provide protections for those who have established prima facie eligibility under VAWA. The regulation should

⁹ See, Virtue, Paul, General Counsel, INS, “Extreme Hardship and Documentary Requirements,” (October 16, 1998)

provide that notwithstanding §214.2(k)(11)(i)-(iv), the status of an alien admitted to the US as a K-3/K-4 under §101(a)(15)(k)(ii) or (iii) shall not be terminated where the alien has submitted a form I-360 Self-Petition under VAWA and established prima-facie eligibility.

Furthermore, where the Service intends to revoke or terminate a K-visa holder's status, the Service must provide a standard notice on the Notice of Intent to Terminate providing information to K-visa holders who are victims of domestic violence that may have an immigration remedy under VAWA. This notice should also include a referral or information number so that domestic violence victims can obtain further assistance

E. IIRAIRA §384

In many abusive relationships, abusers contact the INS, attempting to realize their threats to their victims that they will be deported. The Services' guidance to the field regarding the Service's Notices of Intent to Deny applications for extensions and terminations of K status for battered immigrants must provide instructions that INS officers are required to heed IIRAIRA §384, which provides that the Service may not make an adverse determination of admissibility or deportability of an alien . . . using information furnished solely by an abusive spouse or parent. IIRAIRA § 384 (codified at 8 U.S.C. § 1367). Thus, in any case where a the petitioner is acknowledged to be an abuser and K-visa extension has not been filed or an I-130 is withdrawn, or an I-360 has been filed, the Service should not revoke the K-visa holder's status.

F. Adjustment of Status

The regulations relating to adjustment of status should explicitly recognize successful VAWA petitioners applying for admission or adjustment to legal residency status. With respect to the regulations in Part 245.1(c)(6) Adjustment of Status, the regulation should allow adjustment following approval of Form I-130 or I-360 based on marriage to same citizen who filed the I-129F. This would make the K-visa regulations consistent with the preamble to the regulations concerning VAWA self-petitioning.¹⁰

CONCLUSION

Congress has repeatedly expressed its desire to free battered immigrants from abusive relationship, as abuse in these relationships is enhanced by immigration laws. Congress' desire to aid these immigrants can only be properly implemented if INS provides clear and definite assurance that K-visa holders will not be penalized for fleeing abuse. We urge INS to provide that assurance immediately and to provide the additional explicit direction addressing the needs of battered immigrant self-petitioners that we have discussed.

We thank you for the opportunity to provide these comments.

For the Network,

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Family Violence
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NOW Legal
Defense and
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¹⁰ Preamble to VAWA Regulations, 61 F.R. 13061, (March 26, 1996)