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Representing Battered Women During Welfare Reform

New Protections for Immigrant Women and Children Who Are Victims of Domestic Violence

By Charles Wheeler

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I. Introduction

For years United States immigration laws have overlooked the plight of women and children who are victims of domestic violence. In fact, some might argue that these laws have fostered a system that has tolerated, if not abetted, physical violence and psychological abuse committed by U.S. citizen spouses or parents on immigrant spouses or children. Much-needed reform in this area finally occurred in 1994 with the passage of a law that added important protections for immigrant spouses and children. /1/ However, most of those statutory provisions were implemented only when the Immigration and Naturalization Service (INS) promulgated interim regulations in March 1996. /2/

Under the Violence Against Women Act (VAWA), non-U.S.-citizen spouses and children who are victims of domestic violence may apply on their own behalf for an immigrant visa without the assistance or consent of the U.S. citizen or lawful permanent resident (LPR) abuser. Alternatively, the VAWA allows abused spouses or children to assert an important defense against deportation. /3/

Under prior law, only the U.S. citizen or LPR spouse or parent could petition for the alien spouse's or child's immigration. /4/ This process was initiated by the U.S. citizen or LPR filing an I-130 petition{SYMBOL 190 \f "Symbol"}the alien spouse or child had no way of obtaining a family-based immigrant visa unless the petitioner filed this petition. U.S. citizen and LPR spouses and parents therefore controlled whether the alien spouse or child could reside or work legally in the United States. Many took advantage of this power by threatening to report the alien spouse or child to INS if either complained about physical or psychological abuse.

Therefore, under prior immigration law, the abused spouse and child were presented with a Hobson's choice: either divorce the abuser and abandon any legal right to remain in the United States or remain in the abusive relationship in the hope that such perseverance would eventually result in obtaining lawful immigration status. The situation was exacerbated further for abused immigrant spouses with U.S. citizen children since child custody and visitation decisions could be affected by whether the abused spouse was subject to deportation.

Studies and reports indicate that domestic violence within mixed households -- those containing immigrant and U.S. citizen family members -- is far from rare. For example, one study of mixed households in California revealed that 25 percent of Filipino and 35 percent of Latino women had been victims of domestic violence committed by their U.S. citizen or LPR spouses. /5/

The VAWA's purpose was to weaken the control of abusing parties and to create a mechanism for abused spouses or children to free themselves from such relationships without losing their ability to immigrate. /6/ Under the new law, the latter can either self-petition for lawful permanent resident status based on their relationship to the U.S. citizen or LPR, or, if INS has already commenced proceedings to remove them from the country, they can apply for suspension of deportation. The new law also mandates the evidentiary standard INS must use in evaluating applications for a "battered spouse waiver." It requires INS and judges to consider "any credible evidence" relevant to the petition or application. /7/

INS's interim, proposed regulations implementing the "self-petition" provisions provide detailed information on who may qualify for relief under the statute, how to file the self-petition, what documentary evidence should accompany the petition, the effect of legal termination of a marriage, and eligibility for employment authorization. /8/ Advocates had been anxiously awaiting promulgation of these regulations before deciding whether their clients were eligible for relief. As of the end of March 1996, approximately 300 to 400 applications had been filed; INS had held those applications in abeyance but will now begin adjudicating them.

The Executive Office for Immigration Review has already implemented the statutory provisions that add a new form of suspension of deportation for abused spouses and children. These provisions went into effect on September 13, 1994, when President Clinton signed the legislation.

II. Self-Petition

A. Who May Apply

The VAWA amended section 204(a)(1) of the Immigration and Nationality Act to allow certain abused spouses and children to self-petition for permanent residency. /9/ Persons eligible for self-petitioning include (1) abused spouses and children of U.S. citizens or LPRs; (2) nonabused spouses who are parents of abused children of U.S. citizens or LPRs; and (3) abused spouses of U.S. citizens or LPRs and their nonabused children, even if the children are not related to the U.S. citizen or LPR abuser.

B. Basic Requirements

According to the statutory provisions, to be eligible for the self-petition form of relief, the alien spouse of a U.S. citizen or LPR must demonstrate the following: (1) that the alien spouse is of good moral character; (2) that the marriage was entered into in good faith; (3) that the alien spouse resided in the United States with the U.S. citizen or LPR spouse and is currently residing in the U.S.; (4) that during the marriage the alien spouse or his or her child was battered by or was the

subject of extreme cruelty committed by the U.S. citizen or LPR spouse; and (5) that deportation would result in extreme hardship to the alien spouse or his or her child. /10/

Similarly, the alien child of a U.S. citizen or LPR must establish the following: (1) that the alien child is of good moral character; (2) that the alien child resided in the United States with the U.S. citizen or LPR parent and is currently residing in the United States; (3) that during that residence the alien child was battered by or was the subject of extreme cruelty committed by the U.S. citizen or LPR parent; and (4) that deportation would result in extreme hardship to the alien child. /11/

The interim regulations provide the details on how the self-petition provisions are to be implemented.

Residence. The self-petitioner must be residing in the United States and must have resided in the United States with the abuser at the time the abuse occurred. However, the law does not require the self-petitioner to have resided in the United States with the abuser for any specific period of time. Most important, the law does not require that the self-petitioner be currently residing with the abuser. /12/

Marital relationship. The self-petitioning spouse must be legally married to the abusing spouse at the time the self-petition is filed. But legal termination of the relationship through divorce, annulment, or death of the abuser while the self-petition is pending with INS will not affect the agency's decision. Nor will legal termination after approval of the self-petition affect an approved petition. However, a self-petition will be denied or approval revoked if the abused spouse remarries before obtaining LPR status. /13/

Good-faith marriage. The self-petitioning spouse must establish by a preponderance of the evidence (unless he or she married while in deportation or exclusion proceedings, in which case the standard is by clear and convincing evidence) that the marriage was entered into in good faith. The most important factor in establishing a good-faith marriage is whether the couple intended to establish a life together at the time of the marriage. Conduct after a couple is married{SYMBOL 190 \f "Symbol"}even separation shortly thereafter{SYMBOL 190 \f "Symbol"}is relevant only to establish intent at the time the marriage was entered into. /14/

Parent-child relationship. The self-petitioning child must be unmarried and under 21 years of age. He or she must also be the child of the abusive U.S. citizen or LPR parent but need not be the child of a self-petitioning spouse. The self-petitioning child does not have to be in the abuser's legal custody, nor do changes in parental rights or legal custody affect the status of the child's self-petition. /15/

Status of abuser. The abusing spouse or parent must be a U.S. citizen or LPR at the time the self-petition is filed. But subsequent changes in the abuser's citizenship or immigration status will not affect an approved self-petition. /16/

Definition of "abuse." To qualify as abuse under the statute, the spouse or child must show that he or she "has been battered or has been the subject of extreme cruelty" perpetrated by the alien's spouse or parent. /17/ This phrase is identical to the one used in a section of the law that waives the

joint petition requirement for conditional resident aliens who must petition to remove the condition after two years. /18/ The regulation implementing the self-petition provisions uses the same definition of battery or extreme cruelty that governs the battered spouse waiver to the joint petition requirement. /19/ Thus, abuse is "any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury." It includes psychological abuse, rape, incest, and forced prostitution. /20/

Good moral character. Although the statute does not specify any definite period during which good moral character must be established, the regulation requires three years of good moral character preceding the filing of the self-petition. Children under age 14 are presumed to be of good moral character. /21/ Legal bars to establishing good moral character are set forth in the Immigration and Nationality Act. /22/

Extreme hardship. Self-petitioning spouses must show that their deportation would result in extreme hardship to themselves or their children. Self-petitioning children must show that their deportation would result in extreme hardship to themselves. The phrase "extreme hardship" has acquired a settled judicial and administrative meaning since it is also used as an eligibility requirement for suspension of deportation. /23/ The same factors that are considered by immigration judges in determining extreme hardship for suspension of deportation will be considered by INS when adjudicating self-petitions. These include the alien's age; the alien's ties to family in the United States and abroad; how long the alien has resided in the United States; the alien's health and availability of medical facilities in the home country; the alien's work skills and ability to obtain adequate employment in the home country; the alien's immigration history; the alien's position in the community; potential disruption of education opportunities; and the adverse psychological impact of deportation. /24/

In addition, self-petitioners may submit evidence of the nature and extent of the physical and psychological consequences of battery or cruelty, the effect of loss of access to U.S. courts, the continuing need for medical or psychological counseling that is not available in the home country, and the existence of laws or social customs in the home country that would penalize or otherwise adversely affect the abused party. /25/

Documentary evidence. INS will consider all credible evidence submitted with the petition before reaching a conclusion. /26/ Primary evidence, such as medical, police, or court records, is preferred over secondary evidence, such as affidavits. /27/ The self-petitioning spouse or child must submit documentation establishing (1) a legal relationship to the abuser; /28/ (2) the abuser's citizenship or LPR status; /29/ (3) suffering from battery or extreme cruelty, as evidenced by photographs, reports or affidavits from police, court officials, medical personnel, school officials, clergy, and social service agency personnel, and even unsupported affidavits from the abused person; /30/ (4) good moral character, as evidenced by an affidavit from the self-petitioner and police clearance letter(s) from jurisdictions where the self-petitioner resided for six months or more during the preceding three years; /31/ (5) residence with the abuser in the U.S. and current residence at the time the self-petition is filed; /32/ (6) good-faith marriage, as evidenced by joint property or leasehold interests, bank accounts, income tax returns, birth certificates of children born of the marriage, and evidence of courtship and marriage ceremony; /33/ and (7) extreme hardship, as evidenced by birth

certificates of children, medical reports, police reports, and other court documents indicating abuse. /34/

Derivative children. Children of the abused spouse who are unmarried and under age 21 can qualify for derivative status provided they are included on the spouse's self-petition. Children are not required to have been the victims of abuse or to have resided in the United States They must meet the requirements only for immigrant visa issuance abroad or adjustment of status in the United States. /35/

C. Procedure for Filing

The self-petitioner must complete and file an INS form I-360. If the self-petition is being filed together with an application for adjustment of status, forms I-360 and I-485 usually are filed with the INS district director's office with jurisdiction over the applicant's place of residence. If only the I-360 is being filed, it must be mailed to the INS regional service center with jurisdiction over the applicant's place of residence. The filing fee is \$80, but low-income persons can request a fee waiver. /36/

D. Employment Authorization

Self-petitioners may qualify for employment authorization if they are filing simultaneously for adjustment of status. /37/ Alternatively, self-petitioners who apply for and are granted voluntary departure may obtain employment authorization. /38/

III. Suspension of Deportation

A. Who May Apply

The VAWA also created a new form of relief -- suspension of deportation -- for abused spouses or children of U.S. citizens or LPRs. /39/ Suspension of deportation existed under prior law but was available only to persons of good moral character whose deportation would result in extreme hardship and who had either seven or ten years' physical presence in the United States. /40/ In a significant change, the VAWA shortened the physical-presence requirement to three years for abused spouses and children. The applicant for this new form of suspension of deportation must be a spouse or child suffering from domestic abuse or the parent of a child suffering from domestic abuse. If a child is not suffering from domestic abuse but his or her parent is, the parent's suspension application may not include his or her children. /41/

B. Basic Requirements

The new provisions for suspension of deportation are available to abused spouses and children who are in deportation proceedings and can demonstrate that they (1) are persons of good moral

character, (2) suffered battery or extreme cruelty at the hands of a U.S. citizen or LPR spouse or parent, (3) would suffer extreme hardship if deported, and (4) have resided continuously for three years' in the United States. /42/

Battering or extreme cruelty. The abuser must be a U.S. citizen or LPR spouse or parent, and the applicant must have been battered or subjected to extreme cruelty in the United States by the spouse or parent. While applicants for this form of suspension of deportation do not have to show that the marriage was entered into in good faith, they are ineligible if they are deportable for having committed marriage fraud. /43/ Termination of the marriage before filing for suspension of deportation does not affect eligibility.

Continuous physical presence. Applicants must have been physically present in the United States for a continuous period of not less than three years immediately preceding the date of the application. While "brief, casual, and innocent" departures are permitted for suspension applicants with seven or ten years' presence, any departures during the three-year period may preclude eligibility for abused spouses and children. /44/ Unlike the requirement for self-petitioners, applicants for suspension are not required to have resided with the abuser.

Extreme hardship. To be eligible for suspension, applicants must show that they would suffer extreme hardship if they were deported; the hardship may be to the suspension applicant or the applicant's parent or child. /45/ The factors that the immigration judge considers in determining extreme hardship are those that INS considers when adjudicating a self-petition and are described above.

Good moral character. Persons seeking suspension of deportation must prove that they were of "good moral character" during the three-year period required for suspension. /46/ It is unclear whether applicants must also show good moral character for the entire time they have resided in the United States.

Deportability. Applicants seeking this form of suspension must be deportable only under certain grounds, such as illegal entry, violation of nonimmigrant status, or smuggling. /47/ Applicants who are deportable based on certain criminal convictions, use of fraudulent documents, or for security reasons do not qualify for this relief. /48/ On the other hand, deportability due to receipt of public benefits or HIV seropositivity are not bars to suspension under the VAWA.

C. Procedure for Filing

Since abused spouses and children may file for suspension of deportation only before an immigration judge, they must wait until INS commences deportation proceedings against them before they can file for this relief. Unlike the self-petitioning provision, the new suspension statute does not allow parents to include their children in their applications. Abused children have to file their own applications, although they may do so at the same time their abused parent files. Children who are not abused may not obtain status through suspension. Applicants complete and submit form EOIR-40, together with a filing fee of \$100, directly with the immigration court. Low-income persons can request a fee waiver. /49/

D. Employment Authorization

INS will grant suspension applicants employment authorization in one-year increments during the pendency of their applications, provided they demonstrate an economic need to work. /50/

IV. Conclusion

By amending serious defects in immigration law, recent legislation and implementing regulations have provided critical relief for immigrant spouses and children who are victims of domestic violence or abuse. The self-petition and suspension of deportation provisions give this vulnerable group important options that they did not have previously and allow them both to leave the abusive relationship and obtain or maintain lawful immigration status. The new law attempts to remove those inequities in prior immigration law that practically encouraged domestic violence and, at a minimum, to put immigrant spouses and children in no worse a position than their U.S. citizen counterparts.

Footnotes

/1/ The Violence Against Women Act (VAWA) is contained in Title IV of the Violent Crime and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). The provisions that amend immigration law are codified at 8 U.S.C. Secs. 1151, 1154, 1186, 1186a note, 1254, and 2245.

/2/ 61 Fed. Reg. 13061 (Mar. 26, 1996).

/3/ Violent Crime and Law Enforcement Act of 1994, Pub. L. No. 103-322, Secs. 40701-03, 108 Stat. 1953 -- 55.

/4/ Immigration and Nationality Act Sec. 204(a)(1).

/5/ C. Hogeland & K. Rosen, *Dreams Lost, Dreams Found: Undocumented Women in the Land of Opportunity* 15 (1990). See also J. Calvo and M. Davis, *Congress Nears Approval of Legislation to Protect Abused Aliens*, 70 *Interpreter Releases* 1665 (Dec. 20, 1993).

/6/ H.R. Rep. No. 395, 103d Cong., 1st Sess., at 37.

/7/ Immigration and Nationality Act Secs. 204(a)(1)(H), 244(g), 8 U.S.C. Secs. 1154(a)(1)(H), 1254(g).

/8/ 61 Fed. Reg. 13061 (Mar. 26, 1996).

/9/ Violent Crime and Law Enforcement Act of 1994, Pub. L. No. 103-322, Sec. 40701, 108 Stat. 1953 (adding Immigration and Nationality Act Sec. 204(a)(1)(A)(iii) -- (iv), 204(a)(1)(B)(ii) -- (iii), 8 U.S.C. Sec. 1154(a)(1)(A)(iii) -- (iv), 1154(a)(1)(B)(ii) -- (iii)).

/10/ Immigration and Nationality Act Sec. 204(a)(1)(A)(iii), 204(a)(1)(B)(ii), 8 U.S.C. Sec. 1154(a)(1)(A)(iii), 1154(a)(1)(B)(ii).

/11/ Id. Sec. 204(a)(1)(A)(iv), 204(a)(1)(B)(iii), 8 U.S.C. Sec. 1154(a)(1)(A)(iv); 1154(a)(1)(B)(iii).

/12/ 8 C.F.R. Sec. 204.2(c)(1)(v), 204.2(e)(1)(v).

/13/ Id. Secs. 204.2(c)(1)(ii), 205.1(a)(3)(i)(E).

/14/ Id. Sec. 204.2(c)(1)(ix).

/15/ Id. Sec. 204.2(e)(1)(ii).

/16/ Id.. Sec. 204.2(c)(1)(iii), 204.2(e)(1)(iii).

/17/ Immigration and Nationality Act Sec. 204(a)(1)(A)(iii)(I), (iv)(I), 8 U.S.C. Sec. 1154(a)(1)(A)(iii)(I), (iv)(I).

/18/ Id. Sec. 216(c)(4)(C), 8 U.S.C. Sec. 1186a(c)(4)(C).

/19/ Compare 8 C.F.R. Sec. 204.2(c)(1)(vi), 204.2(e)(1)(vi), with Sec. 216.5(e)(3)(i).

/20/ Id. Secs. 204.2(c)(1)(vi), 204.2(e)(1)(vi).

/21/ Id. Sec. 204.2(c)(1)(vii), 204.2(e)(1)(vii).

/22/ Immigration and Nationality Act Sec. 101(f), 8 U.S.C. Sec. 1101(f).

/23/ Id. Sec. 244(a), 8 U.S.C. Sec. 1254(a).

/24/ See *In re Anderson*, 16 I&N Dec. 596 (BIA 1978). See also 61 Fed. Reg. at 13067 (Mar. 26, 1996).

/25/ 8 C.F.R. Sec. 204.2(c)(1)(viii), 204.2(e)(1)(viii). See also 61 Fed. Reg. at 13067 (Mar. 26, 1996).

/26/ Id. Sec. 204.1(f)(1), 204.2(c)(2)(i), 204.2(e)(2)(i).

/27/ Id. Sec. 204.2(c)(2)(i), 204.2(e)(2)(i).

/28/ Id. Sec. 204.2(c)(2)(ii), 204.2(e)(2)(ii).

/29/ Id.

/30/ Id. Sec. 204.2(c)(2)(iv), 204.2(e)(2)(iv).

/31/ Id. Sec. 204.2(c)(2)(v), 204.2(e)(2)(v).

/32/ Id. Sec. 204.2(c)(2)(iii), 204.2(e)(2)(iii).

/33/ Id. Sec. 204.2(c)(2)(vii).

/34/ Id. Secs. 204.2(c)(2)(vi), 204.2(e)(2)(vi).

/35/ Id. Sec. 204.2(c)(4).

/36/ Id. Sec. 103.7(c).

/37/ Id. Sec. 274a.12(c)(9).

/38/ Id. Sec. 274a.12(c)(12). Eligibility for voluntary departure is set forth in id. Sec. 242.5(a)(2)(v) -- (vii).

/39/ Violent Crime and Law Enforcement Act of 1994, Pub. L. No. 103-322, Sec. 40703(a) (adding Immigration and Nationality Act Sec. 244(a)(3), 8 U.S.C. Sec. 1154(a)(3)).

/40/ Immigration and Nationality Act Sec. 244 (a)(1) -- (2), 8 U.S.C. Sec. 1254(a)(1) -- (2).

/41/ Id. Sec. 244 (a)(3), 8 U.S.C. Sec. 1254(a)(3).

/42/ Id.

/43/ Id.

/44/ Id. Sec. 244(b)(2), 8 U.S.C. Sec. 1254(b)(2).

/45/ Id. Sec. 244(a)(3), 8 U.S.C. Sec. 1254(a)(3).

/46/ Id.

/47/ Id. See id. Sec. 241(a)(1), (5), 8 U.S.C. Sec. 1251(a)(1), (5).

/48/ Id. Sec. 244(a)(3), 8 U.S.C. Sec. 1254(a)(3). See id. Sec. 241(a)(2) -- (4), 8 U.S.C. Sec. 1251(a)(2) -- (4).

/49/ 8 C.F.R. Sec. 103.7(c).

/50/ Id. Sec. 274a.12(c)(10).

