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ONE MODEL FOR BREAKING DOWN BARRIERS

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Vigorous Representation of Undocumented Victims of Domestic Violence in State Family Court

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In the current climate of antiimmigrant sentiment, victims of domestic violence often fear initiating any action that may bring attention to their immigration status.[1] If they do seek legal protection, clients must overcome fear and mistrust of the law to navigate a system with which they are unfamiliar, often in a language they do not understand. Advocates who represent undocumented victims of domestic violence in family law proceedings should be aware of the particular concerns and obstacles that arise in these circumstances. Abusers (and their attorneys) sometimes emphasize the victim's undocumented status as a diversionary tactic, for example, introducing the victim's lack of status as a factor in determining child custody, although a parent's immigration status should be irrelevant to custody.

Here we discuss scenarios that we encounter in representing undocumented immigrant victims of domestic violence in state court and offer practice tips for deflecting any focus on a client's lack of immigration status. We offer information about the three main immigration remedies available to immigrant victims of domestic violence: self-petitions under the Violence Against Women Act (VAWA), the U visa, and conditional residence waivers.[2] We also of-

[1]A recent study confirms that, due to fear of deportation, fewer immigrant crime victims are reporting crimes against them to the police in the wake of the increasing partnerships between U.S. Immigration and Customs Enforcement and local law enforcement agencies (see American Civil Liberties Union of North Carolina Legal Foundation & Immigration and Human Rights Policy Clinic of University of North Carolina at Chapel Hill, The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina (2009), www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf).

[2]Many additional resources are available online; we especially recommend those from Asista (www.asistahelp.org), the American Bar Association Commission on Domestic Violence (www.abanet.org/domviol/resource_immigration_law.html), Legal Momentum (www.legalmomentum.org), and the Immigration Advocates Network (www.immigrationadvocates.org), the last one bringing together free resources from several advocacy organizations. See also Gail Pendleton, *Ensuring Fairness and Justice for Noncitizen Survivors of Domestic Violence,* 54 Juvenile and Family Court Journal 69 (Fall 2003), www.nationalimmigrationproject.org/DVPage/GAILncfjcj_article.pdf; Joanne Lin et al., *Immigration Relief for Survivors of Domestic Abuse, Sexual Assault, Human Trafficking, and Other Crimes: A Violence Against Women Act 2005 Update*, 40 Clearinghouse Review 539 (Jan.–Feb. 2007).

fer family law practitioners information about how discovery in the family law case can be an indispensible tool in obtaining crucial documents for the client's immigration application.[3]

Domestic violence is so pervasive, and so many attorneys represent immigrants, that all advocates for low-income clients—not just family law and immigration law practitioners—should be aware of such information. Note that advocates in programs funded by the Legal Services Corporation may now represent many undocumented immigrants who are victims of domestic violence.[4] Although domestic violence is perhaps most obviously at issue in family law proceedings, its victims need help on many other issues: to restore their credit after their abusers take out multiple lines of credit in the victims' names without their consent; to obtain housing under special public housing provisions for victims of domestic violence or if their homes are in foreclosure; to fight false charges of domestic violence made against them by their abusers.

I. Undocumented Domestic Violence Victims in Family Court

The range of issues that arise in family court affects undocumented immigrants—especially those who have experienced domestic violence—in unique ways. Advocates must understand the interconnectedness of family law and immigration law in their clients' cases.

A. When the Abuser Raises the Victim's Immigration Status in Court

Family law practitioners frequently encounter the following scenario: an undocumented woman marries a U.S. citizen and has children. The husband, physically abusive and controlling, tells his wife that he has the phone number of the immigration enforcement agency on his cellphone and repeatedly threatens to call and report her. The woman fears that if she leaves or seeks legal help, the abuser will report her to immigration officials. The woman eventually flees without being able to gather certain documents, such as her passport or her child's birth certificate. She seeks a protective order, custody of her children, spousal support, child support, and a divorce. The victim's own testimony may be her strongest—and only—evidence of abuse.

In court the abusive spouse seeks to undermine the victim's credibility and divert the court's attention from the abuse by raising the victim's undocumented status. The spouse argues that the woman is "illegal" and that she married him only "to get a green card." Alleging that the woman is unfit because she is "illegal" and that she will flee with the children, he petitions for custody. The abusive husband also demands a copy of any application she filed to adjust her status and, knowing that she does not have one, he asks for her social security number.

Advocates who do not practice immigration law need a basic understanding of it in order to counsel and represent undocumented victims of domestic violence. We must be prepared to respond to abusers' allegations that the undocumented status of victims renders them ineligible for or unworthy of legal protection; we must argue strenuously that the victim's status is irrelevant under state law, which governs the proceedings at hand. For example, an advocate can argue that the victim is seeking the protections available under state law to keep her safe and minimize the effects of abuse on the victim and her children. If the judge appears concerned about the victim's status, the attorney can point out that the outcome in the civil proceedings will not affect any immigration remedy that the client might seek. Nonetheless, sometimes the judge will consider the victim's status. Some judges demonstrate annoyance or resentment toward victims who do not speak English.

[3]The information and practice pointers we offer are enhanced by responses to a short survey we distributed to family law and immigration practitioners nationally; we thank those who responded.

[4]See Letter from Helaine M. Barnett, President, Legal Services Corporation, to All LSC Program Directors (Feb. 21, 2006), www.lsc.gov/pdfs/progltr06-2.pdf; Amanda Baran, *The Violence Against Women Act Now Ensures Legal Services for Immigrant Victims*, 40 Clearinghouse Review 534 (Jan.–Feb. 2007).

When the abuser alleges that the victim is undocumented and is committing fraud, some judges seem willing to discount the victim's testimony. Some openly berate victims and reiterate a duty to uphold the law, including immigration law. Advocates should therefore be prepared to make strategic decisions about whether to raise their client's lack of status preemptively and should know when to consult with experts in immigration law. Family law, of course, is state-specific, but most states adhere to certain core concepts, such as determining custody based on the best interests of the child.[5]

When abusers raise the victim's undocumented status in court, fear on the part of clients, who are already apprehensive, escalates. Some victims are too afraid to pursue protective orders, child support, alimony, custody, or divorce. In other cases, victims' attorneys decide against aggressively pursuing certain remedies because they are afraid that the abuser will have an opportunity to reveal the victim's undocumented status. To represent undocumented victims of domestic violence forcefully, attorneys must be proactive, especially if the abuser has lawful status. Undocumented abusers are usually far less likely to make an issue of the victim's status.

B. Reclaiming Crucial Property Through Family Law Proceedings

Victims' attorneys must sometimes seek protection or return of the victim's identity documents, passports, children's birth certificates, photographs, and other personal items. Protective-order proceedings are normally precipitated by chaotic, dangerous events, with escape from violence taking priority over gathering personal property. Victims may seek help from the police in recovering documents listed on the protective orders. If the abuser destroys the documents or claims they are missing, the victim may counter that the abuser was the last person to control the documents and demand that the abuser pay the costs of replacement. A replacement passport may cost more than $100, and if a victim no longer has the necessary documents proving identity, she may not be able to replace it at all. Others may be unable to replace a passport because they cannot get to a consulate. When attorneys pursue the issue aggressively, the abusers may be willing to settle it by returning the documents. If not, the victim can at least recover the costs of replacing these documents.

C. Abuser's Preemptive Filing of Protective Order

Alleging that the victim, because she is undocumented, is likely to flee the country with the children, some abusers file for preemptive protective orders against the victim and seek temporary custody of the children. Some judges improperly assess the flight risk and grant such petitions. Victims' attorneys should argue that merely being undocumented does not make a victim of abuse more likely to flee. Emphasize instead the victim's connections to the state—health care providers, religious organizations, schools, friends, relatives, and employment. In some cases the attorneys can argue that the victim is prepared to file for a divorce or custody proceedings in order to resolve the issue of custody.

D. Child Custody Proceedings

Abusers often argue that the undocumented parent's lack of lawful status, by itself, renders her unfit to have custody of the children, that her deportation is imminent, and that the children should not be removed from the country. Most courts use a best-interest analysis to determine custody; a parent's immigration status is not among the factors that the court must consider. Therefore attorneys for victims should strenuously argue that a parent's immigration status is irrelevant.[6]

[5]See American Bar Association Commission on Domestic Violence, Child Custody and Domestic Violence by State (2008), https://www.abanet.org/domviol/docs/Custody.pdf.

[6]For more in-depth analysis of why status is irrelevant, see Leslye Orloff et al., Office on Violence Against Women, U.S. Department of Justice, Countering Abuser's Attempts to Raise Immigration Status of the Victim in Custody Cases (2004), http://action.legalmomentum.org/site/DocServer/www6_1_Immigration_Status_of_the_Victim_in_Custody_Cases.pdf?docID=3706 ; Leslye Orloff et al., Office on Violence Against Women, U.S. Department of Justice, Immigration Status and Family Court Jurisdiction (2004), www.legalmomentum.org/assets/pdfs/www6_5_immigration_status_and_family_court_jurisdiction.pdf.

However, attorneys must be prepared to make additional arguments that focus on the victims' strengths. If victims are not in any immediate danger of deportation and may be eligible for some form of immigration relief, make sure that the court has this information. If pressed to reveal specific steps that the victim has taken to legalize her status, be prepared to argue that consultations with immigration attorneys are privileged. Review the special confidentiality provisions governing disclosure of information related to VAWA self-petitions and U visa applications, discussed in more detail below.[7]

The most common way in which a victim's status arises is through allegations that the abusers have stronger ties to the community. Sometimes abusers seek to sway the court with the sheer number, rather than quality and depth, of their community ties. For example, the abuser may have family in the community, while the victim's family members reside in another country. The abuser will argue that because the children live in the United States, their ties are to the abuser and his family and that they do not have ties to the victim's family. However, this argument ignores "community" as encompassing neighbors, friends, teachers, counselors, religious leaders, and others who support the victim and her children. When arguing that the victim's community ties are equally strong, attorneys should emphasize both family members and nonfamily support systems.

If the abuser has status and could have petitioned for the victim, but chose not to, this choice can be powerful evidence of abuse. In such a case the victim's attorney should argue that the abuser failed to act in the family's best interest by refusing to petition or withdrawing a petition. An abuser who created the situation should not be rewarded for denying the victim all that legal status entails—the ability to work legally, obtain a social security number, and get a driver's license, among others. Explain to the court that *but for* the abuser's cruelty and desire to control, the victim would have had all that the abuser is now conveniently raising.

E. Spousal Support

Undocumented victims of domestic violence may seek spousal support in divorce proceedings. In most jurisdictions the spouse seeking support must show inability to obtain full-time employment due to lack of work experience or education or due to a health condition or injury. When a victim does seek spousal support, the abuser may claim that the victim was unwilling to work during the marriage or unable to work because she is undocumented.

Victims may respond by testifying about their attempts to find or maintain a job and about abusers' attempts to prevent them from working. Some abusers do not allow victims to work at all, while others sabotage victims' employment by refusing to care for their children, hiding the car keys, and even physically preventing the victims from leaving the house. Some abusers appear at the victim's workplace and intimidate her and other employees until she is fired. Victims can testify that the abuser refused to petition and seek a work permit for them. In order to obtain spousal support, the victim's attorney must make a strategic decision about whether to raise affirmatively the issue of the abuser's failure to petition and seek a work permit for the victim. Some attorneys are reluctant to raise it for fear that the judge will consider the victim's status in custody determinations. Others raise the issue preemptively to control the dialogue about the victim's status.

F. Annulment

Some particularly unscrupulous abusers know quite a bit about the legal remedies available to undocumented victims of domestic violence and may petition to invalidate or annul the marriage. The abusers normally claim, from among multiple grounds for annulment, that the victims committed fraud, rendering the marriage invalid, or that the marriage was bigamous on the part of the abusive spouse. Because the VAWA applies only in cases of a valid marriage, if the marriage is ultimately invalidated, abusers can prevent victims from taking

[7]See 8 U.S.C. § 1367.

advantage of VAWA remedies. A victim's attorney should challenge such a petition aggressively and file a petition for divorce instead. At the hearing on these dueling petitions an abuser often argues that the victim entered the marriage only to obtain a green card. Victims' attorneys should respond vigorously with proof that the marriage was entered into in good faith and not to evade immigration law.[8] The best outcome of the fact-finding hearing is that the marriage was valid, but, in the alternative, a finding that the victim was a putative spouse may suffice for VAWA purposes.

G. Division of Marital Assets

Sometimes abusers argue that the victim should not be awarded real property, money in bank accounts, or vehicles because she is undocumented and that someone who does not have a social security number or a driver's license may not assume control of the property. An undocumented party will find it more difficult to obtain financing; this is not a reason, however, to deny the victim the property. Furthermore, many banks will open bank accounts and make loans to undocumented immigrants who have, for example, a Mexican consular identification card and an individual taxpayer identification number, available to undocumented individuals through the Internal Revenue Service.[9]

An advocate can argue that the victim should be awarded possession of the property and time to assume full control over it, especially where she has applied for relief under the VAWA and is awaiting approval. One approach is to ask that the victim be allowed to reside in the real property for a period and then refinance or sell it. If the parties own more than one vehicle, the victim should be awarded a vehicle whether or not she has a driver's license.

H. Child Support

When both parents are undocumented, the abuser is less likely to raise the victim's lack of status affirmatively. However, the victim often encounters additional difficulties when the abuser is undocumented, especially in attempts to collect child support. Often the abuser works under a false name, is paid in cash, or moves from job to job. One approach is to seek child support based on the children's needs rather than the parent's earnings. Another approach is to contact the consulate in the area to determine if procedures are available for collecting child support.[10] If the abuser uses an alias, the victim may not want to use employer-withholding provisions to avoid possibly triggering termination of the abuser's employment. One approach is to order the abuser to send payments directly to the state child-support agency. Another approach is to include the abuser's alias in the court order.

I. Divorce Pleadings

The contents of divorce pleadings can have serious immigration consequences. Sometimes the abuser will cite extreme mental cruelty as grounds for divorce, and a finding that she was abusive during the marriage could harm the victim's immigration case. Another critical issue is that the victim, to benefit from certain immigration remedies discussed below, may need to prove that her marriage was entered into in good faith. In the judgment for divorce a provision stating that "the parties entered into the marriage in good faith" can be an enormous help for the client later on.

J. Effect of Domestic Violence Conviction on Abuser

If the abuser is a noncitizen and is convicted of domestic battery, the result could be his deportation.[11] Be aware of

[8]See discussion *infra* on establishing that a marriage was in good faith.

[9]Certain Low[-]Income Taxpayer Clinics can assist undocumented immigrants in applying for an individual taxpayer identification number; see www.irs.gov/advocate/content/0,,id=151026,00.html for a list of clinics by state.

[10]The U.S. Department of State maintains a listing of foreign consular offices in the United States at www.state.gov/s/cpr/rls/fco/.

[11]See Immigration and Nationality Act § 237(a)(2)(E) (codified at 8 U.S.C. § 1227(a)(2)(E)).

this possibility so that you can respond to questions from clients about the effect of a conviction on the abuser—and on victims—in terms of financial and other support.

II. Immigration Laws and Remedies

Here we offer a synopsis of the family-based immigration process and the three main immigration remedies for immigrant victims of domestic violence. Decisions about how to proceed on immigration remedies can directly affect family law strategies. Be sure to seek immigration advice when you have noncitizen clients.

The U.S. Department of Homeland Security handles all of the applications we discuss here.[12] Three agencies of the department are relevant for immigration purposes: U.S. Citizenship and Immigration Services (USCIS), which processes applications and petitions for various immigration remedies; U.S. Immigration and Customs Enforcement (ICE), the police branch charged with enforcing the immigration laws; and U.S. Customs and Border Protection (CBP), which enforces immigration, drug, customs, and other laws along the U.S.-Mexico and U.S.-Canada borders and in U.S. airports. Here we focus mainly on USCIS, which adjudicates all three types of applications discussed below.

A. Family-Based Immigration

One of the most common ways for noncitizens to immigrate legally is through a close family member. U.S. citizens and legal permanent residents (LPRs) (green card–holders are commonly referred to as LPRs) may petition for certain family members—referred to as "beneficiaries" of the petition—to receive lawful immigration status. A complex system of "preference" categories, which reflects the perceived relative importance of various family relationships, governs how long the process will take. Immigration remedies for victims of domestic violence interact with this basic scheme.

1. Phase I: Filing the I-130 Petition

A citizen or LPR who wishes to petition for a relative must file by mail Form I-130 at a current cost of $355. Processing times vary widely with the relationship between the petitioner and the beneficiary and with the petitioner's status. For example, the California Service Center shows that the I-130 processing time is about six months if the petitioner is a citizen and the beneficiary a spouse, but ten years if the beneficiary is a sibling.

Once form I-130 is approved, family members proceed on one of two tracks. The lucky few who fit in the "immediate relative" category—spouses and "children" (defined as under 21 and unmarried) of U.S. citizens and parents of U.S. citizens over 21—may file for a green card immediately. For all others, the preference system governs and can result in a wait of years or even decades.

2. Phase II: The Long Wait

Most beneficiaries who are not "immediate relatives" must, after the I-130 is approved, engage in a second waiting period for their "priority date" to become "current"—i.e., for an immigrant visa to be available. The priority date is usually within a few days of the date that USCIS received the original I-130 petition. At this point, the real wait begins. The current priority dates are listed monthly in the U.S. Department of State Visa Bulletin, reprinted on page 64.[13]

To determine the wait time for a given beneficiary, first locate the column of the beneficiary's country of birth, referred to as the beneficiary's "area of chargeabili-

[12]The U.S. Department of State is responsible for conducting interviews and processing visa applications from abroad.

[13]This chart was in effect in March 2009. To view the current Visa Bulletin, go to http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html and click "Current Bulletin."

Priority Dates for Beneficiaries of Family-Based Immigration Petitions					
Family	All Chargeability Areas Except Those Listed[14]	CHINA-mainland-born	INDIA	MEXICO	PHILIPPINES
1st	22JUL02	22JUL02	22JUL02	08OCT92	15JUL93
2A	01JUL04	01JUL04	01JUL04	15OCT01	01JUL04
2B	22JUN00	22JUN00	22JUN00	01MAY92	01DEC97
3rd	08AUG00	08AUG00	08AUG00	15OCT92	08JUN91
4th	01MAR98	15NOV97	01MAR98	08APR95	15MAY86

Source: U.S. Department of State Visa Bulletin.

ty."[15] Then apply the preference category: Preference 1: unmarried children of U.S. citizens; Preference 2A: LPRs' spouses and children under 21; Preference 2B: LPRs' unmarried children 21 or older; Preference 3: married children of U.S. citizens; Preference 4: siblings of adult (21 or older) U.S. citizens.

For example, Catherine is a U.S. citizen over 21. She filed form I-130 for her brother John, a citizen of the Philippines; his priority date is May 30, 2001. To see how long John must wait, see the "Philippines" column and determine John's "preference category." As a sibling of a U.S. citizen, John has fourth preference. On the "4th" preference row under the "Philippines" column is "May 15, 1986." Only in March 2009 are beneficiaries with a priority date of 1986 eligible to apply for LPR status. Because Catherine petitioned for John in 2001, fifteen years after 1986, he will have to wait at least fifteen years from 2009—and probably longer—to apply for LPR status.

The current cost of filing for LPR status is steep: an application fee of $930 plus $80 for fingerprint fees, in addition to a medical examination, which can cost several hundred dollars. In an affidavit of support the petitioner agrees to assume financial responsibility for the beneficiary.

3. Consular Processing

"Consular processing" is the term used if the beneficiary is interviewed at a U.S. consulate abroad. The alternative, called "adjustment of status," applies when the beneficiary is already in the United States and goes through the immigration process without leaving the country. This alternative is preferable for many reasons. The beneficiary does not have to travel, take time off work, or be separated from family. It also avoids the possibility that, once the beneficiary leaves, she will be unable to return due to the three- and ten-year bars to reentry discussed in more detail below. However, some beneficiaries have no choice and must leave the United States to complete Phase II. If the beneficiary's case is granted, the beneficiary may need to remain out of the country for six to twelve months before approval of the petition.

4. Bars to Reentry

The Illegal Immigration Reform and Immigrant Responsibility Act created three-year and ten-year bars to reentry.[16] After the law's April 1, 1997, effective date, the first 180 days of "unlawful presence" in the United States (whether due to unlawful entry or expiration of documents after a lawful entry) after the beneficiary's

[14]In certain cases the chargeability area of the petitioner's spouse may be substituted if the wait is significantly shorter (see Immigration and Nationality Act § 202(b) (codified at 8 U.S.C. § 1152(b))).

[15]*Id.*

[16]These provisions of the Illegal Immigration Reform and Immigrant Responsibility Act are incorporated into the Immigration and Nationality Act § 212(a)(9)(b)(i) (codified at 8 U.S.C. § 1182(a)(9)(B)(i)).

18th birthday carry no penalty should she leave and then want to return to the United States. However, once she has accumulated from 181 to 364 days of unlawful presence, the moment she sets foot outside the country she may not return for three years; after accumulating 365 days of unlawful presence, the reentry bar extends to ten years. Though available, waivers are difficult to obtain, expensive, and available only to those who can show that their absence will cause "extreme hardship" to a U.S. citizen or LPR spouse or parent.[17]

B. Self-Petitions Under the VAWA

The traditional family-based immigration pathway described above did not contemplate family violence. Before Congress passed the VAWA in 1994, beneficiaries were wholly at the mercy of their petitioners.[18] If the petitioner-abuser ignored correspondence from USCIS or decided to withdraw his petition, the beneficiary had no recourse. The pre-VAWA immigration laws gave victims two options: remain in a violent relationship in the hope of eventually gaining legal status, or leave an abusive spouse and forgo any chance of legal status. Even after the VAWA, petitioner-abusers count on their victims' ignorance of these remedies and use the petitioning process as another tool for abuse, threatening victims with deportation and the loss of custody of their children. The petitioner-abuser may use his power to file the petition—or to refuse to do so—as another means of control.

The VAWA strives to protect victims of domestic violence in numerous ways—in effect, it allows the spouse of an abusive U.S. citizen or LPR to assume the role, in a legal sense, of both petitioner and beneficiary and self-petition, without the abuser's knowledge or consent, for lawful status for herself and her children if they, too, are undocumented.[19] Here we focus on battered spouses, although the VAWA also protects parents and children who suffer abuse from U.S. citizens and LPRs.

One who self-petitions under the VAWA must demonstrate (1) a valid marriage to a U.S. citizen or LPR; (2) abuse by the spouse; (3) residence with the abuser in the United States for any period; (4) good moral character for three years before filing the petition; and (5) residence in the United States at the time of filing.[20] A VAWA self-petitioner must file within two years after a final judgment of divorce.[21]

The VAWA self-petition is filed on Form I-360 with the Vermont Service Center; there is no charge to file and no in-person interview. A written request of the applicant or applicant's legal counsel is made for any additional information that is needed. If prima facie eligibility is found—usually this determination takes four to six weeks—the self-petitioner is given a "prima facie notice" that she can take to a local public aid office to support an application for benefits for herself and her children. This provides crucial financial independence.[22]

If the VAWA self-petition is approved—a process that currently takes about fourteen months—the self-petitioner is placed in "deferred action," which is less an immigration status than a temporary protection against deportation and allows the self-petitioner to obtain essential tools for self-reliance: a work authorization card, social security number, and driver's license.

An approved VAWA self-petition takes the place of an approved I-130 petition. Thus, if the abusive spouse is a U.S. citizen, the self-petitioner is an "immediate relative" and may immediately adjust her

[17]See *id.* § 212(a)(9)(B) (codified at 8 U.S.C. § 1182(a)(9)(B)).

[18]See *id.* § 204(a) (codified at 8 U.S.C. § 1154(a)).

[19]See *id.* § 204(a)(1)(A)(iii)(I) (codified at 8 U.S.C. § 1154(a)(1)(A)(iii)(I)).

[20]*Id.*; 8 C.F.R. § 204.2(c)(1)(i)(C) (2008).

[21]See Immigration and Nationality Act § 204(a) (codified at 8 U.S.C. § 1154(a)).

[22]See 8 U.S.C. § 1641(c), making certain domestic violence victims "qualified aliens" for federal benefit purposes.

status. If the abuser is an LPR, the self-petitioner must wait until her priority date is current. Her priority date is the *earlier* of the date she filed her VAWA self-petition or the date her spouse filed an I-130 if at all for her. An LPR's spouse is second preference, subgroup A, for which the priority date as of March 2009 for immigrants from Mexico, for example, was October 15, 2001—a significant wait.

Deferred action status, once granted, may be renewed every year, and thus the client is able to work legally until she is eligible to file for her green card.[23] While an individual is in deferred action status, "unlawful presence" for purposes of the three- and ten-year bars to reentry, discussed above, does not accrue.[24] Furthermore, the three- and ten-year bars are no longer triggered upon departure once an immigrant gains lawful permanent residence.[25] VAWA-based applications for LPR status, unlike their non-VAWA counterparts, do not require an affidavit of support from a sponsor.

C. The Role of the Family Law Attorney in VAWA Self-Petitions

Family law attorneys serve an indispensable role in the VAWA application process. Most clients can themselves gather documents (such as police reports, protective orders, medical records, and letters from domestic violence counselors) substantiating the abuse and proof (results of state or Federal Bureau of Investigation background check) of good moral character. However, other documents are much more difficult, and sometimes impossible, to obtain without help. To prove the abuser's lawful status, the client needs any of the following: a copy of the abuser's green card, birth certificate (if the abuser was born in the United States), or naturalization certificate; his "A number" (assigned to immigrants by USCIS); or his social security number. Evidence that the marriage was entered into in good faith can be wedding photos or invitations; joint tax returns, leases, insurance policies, bank account, or credit card statements; or admissions from the abuser that he and the client lived together in cases where there is little or no proof of joint residency (e.g., where the abuser was so controlling that he did not put the client's name on any accounts or allow mail to be sent to her). Joint residency may also be shown through correspondence to the individual parties at the same address in the same period.

Judges have asked to see the actual VAWA self-petition when the abuser convinces the judge that the victim's immigration status is relevant. In these rare cases the victim's attorney should *strenuously* object. The VAWA self-petition normally contains extremely private information about the victim's abuse, details of her immigration history, information about her family, and, in some cases, information about her own criminal history. Federal law imposes harsh penalties for the unauthorized disclosure of information relating to VAWA self-petitions.[26] Attorneys should educate the judge about the penalties and argue that the rationale for the provision imposing harsh penalties for unauthorized disclosure of information in immigration law should also apply in family court.[27] If these arguments do not succeed and disclosing the application's contents is absolutely necessary, disclosure should be made *in camera*.

D. I-751—Petition to Remove the Conditions of Residence

An immigrant who, within two years of marrying a U.S. citizen, is granted lawful permanent residence based on the

[23]Once an immigrant gains legal permanent resident (LPR) status (a green card), she no longer needs a work authorization card.

[24]Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations, Immigration and Naturalization Service, U.S. Department of Justice, to Regional Directors et al. 3 (n.d.) http://asistahelp.org/VAWA/memoUnlawPres.pdf.

[25]See Immigration and Nationality Act § 212(a)(9)(B)(i) (codified at 8 U.S.C. § 1182(a)(9)(B)(i)).

[26]See 8 U.S.C. § 1367.

[27]For an excellent, comprehensive memorandum on these issues, see Tülin D. Açikalin, Memorandum of Points and Authorities Re: Using Immigration Status in Custody Proceedings (June 6, 2007), www.asistahelp.org/Family%20Advocates.Attorneys.htm.

marriage receives a two-year conditional green card.[28] In most cases, to remove the condition, within ninety days before the card's expiration husband and wife must jointly file Form I-751 and may be required to attend an interview with USCIS. If they show that they married in good faith (or if they are not required to attend an interview), the noncitizen spouse will receive a regular green card, which will not need to be renewed for another ten years.

The noncitizen spouse need not file jointly with the citizen spouse to remove the condition in case of divorce or annulment, battery or extreme mental cruelty to the noncitizen spouse, death of the citizen spouse, or extreme hardship to the noncitizen spouse if she returned to her country of origin.[29] In those cases the noncitizen spouse must apply for a waiver to remove the condition and submit evidence of good-faith marriage and her eligibility for the exception. For purposes of the waiver, the supporting evidence to establish "battery or extreme mental cruelty" is the same as that used with VAWA self-petitions, discussed above. The noncitizen spouse may file the battered-spouse waiver at any time; she need not wait until the ninety days preceding expiration of her conditional residence.

E. I-918—Petition for U Nonimmigrant Status

Self-petitions under the VAWA may proceed only when the abuser has a lawful immigration status. If both the victim and the abuser are undocumented, or if the client is not eligible for relief under the VAWA for some other reason, she may turn to the U visa, which protects undocumented immigrant victims of certain crimes, not just domestic violence.[30] Qualifying crimes for the U visa are, among others, rape, incest, domestic violence, sexual assault, abusive sexual contact, kidnapping, false imprisonment, homicide, witness tampering, and inchoate crimes.[31] To receive a U visa, one must suffer "substantial abuse" as a result of the crime and cooperate with law enforcement in the investigation or prosecution of the crime. Both remedies allow certain family members, such as children, to be included in the main application. The key differences between the VAWA and the U Visa are set out below.

The U Visa is a far newer remedy than the VAWA; although Congress created the U

VAWA	U VISA
Abuser and victim have spousal or parent-child relationship.	Relationship is irrelevant; perpetrator and victim may be strangers.
Abuser must be a U.S. citizen or an LPR.	Abuser's status is irrelevant.
Victim was subject to battery or extreme mental cruelty.	Victim suffered "substantial abuse."
Cooperation with law enforcement is unnecessary.	Victim must cooperate with law enforcement, which must attest to the cooperation.
Self-petitioner must live in the United States at the time of the application.	Applicant need not live in the United States.

[28]See Immigration and Nationality Act § 216(c)(4) (codified at 8 U.S.C. § 1186a(c)(4)).

[29]*Id.*

[30]See *id.* § 212(d)(14) (codified at 8 U.S.C. § 1182(d)(14)). The U visa can waive virtually any negative factor in an applicant's history—criminal convictions, deportation orders, and fraud, among others. The Violence Against Women Act (VAWA) waiver provisions are far less expansive. As a result, many a domestic violence victim whose spouse is a citizen or legal resident, and who otherwise meets VAWA requirements but has a criminal conviction, deportation order, or other event in her past which may not be waived under the VAWA applies instead for the U Visa.

[31]See *id.* § 101(a)(15)(U)(iii) (codified at 8 U.S.C. § 1101(a)(15)(U)(iii)).

Visa in 2000, implementing regulations were not promulgated until September 17, 2007.[32] As of October 2008, only fifty U Visa applications had been approved; some 12,000 applications were pending, many of them for several years, with only two adjudicators to consider them.[33] Since then, seven adjudicators have been added, but we still know little about the standards that USCIS will use for U visa applications. Therefore the U visa is a much more uncertain remedy than the VAWA.

A successful U visa applicant receives a work authorization card, valid for four years; she may use the card to obtain a social security number and, depending on the state, a driver's license.[34] The U visa may be extended only in limited circumstances.[35] However, three years after holding a U visa, the holder may apply for adjustment of status if she can show that she has been continuously physically present in the United States for three years and that she has not unreasonably refused to assist law enforcement requests for assistance.[36]

■ ■ ■

If you work in an organization that provides both immigration and family law services, consider adopting a policy to require staff members to consult with one another when an undocumented victim of domestic violence seeks services. By doing so, you will offer clients superior service and holistic representation. You will also enhance your program's working across substantive areas of law to help clients be less intimidated by the system, more self-sufficient, and empowered with the knowledge of their legal rights.

COMMENTS?

We invite you to fill out the comment form at http://tinyurl.com/MayJuneSurvey. Thank you.

—The Editors

[32]New Classification for Victims of Criminal Activity: Eligibility for "U" Nonimmigrant Status: Interim Rule, 72 Fed. Reg. 53014 (Sept. 17, 2007) (to be codified at 8 C.F.R. pts. 103, 212 *et seq.*).

[33]See Office of the Citizenship and Immigration Services Ombudsman, U.S. Department of Homeland Security, Improving the Process for Victims of Human Trafficking and Certain Criminal Activity: The T and U Visa (Jan. 29, 2009), www.dhs.gov/xlibrary/assets/cisomb_tandu_visa_recommendation_2009-01-26.pdf.

[34]See Immigration and Nationality Act § 212(p)(6) (codified at 8 U.S.C. § 1184(p)(6)).

[35]*Id.*

[36]*Id.* For most clients, continuous presence is not an issue since they are subject to the three- and ten-year bars to reentry even if they have a U visa. Any client who has accrued more than six months of unlawful presence should not travel outside the United States until she becomes an LPR, when leaving the country no longer triggers the bar.

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