

# Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II

## Removing Barriers for Battered Immigrant Women: *A Comparison of Immigrant Protections Under VAWA I & II*

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### I. INTRODUCTION

In August 1994, Congress enacted the Violence Against Women Act (VAWA I), the first comprehensive federal legislation to address specifically the issue of violence against women.<sup>1</sup> VAWA I improved greatly the availability of overall support and resources for domestic violence survivors through (1) the creation of new criminal enforcement authority and enhanced penalties to combat domestic violence in federal courts<sup>2</sup> and (2) the authorization of grants to fund programs to fight violence against women.<sup>3</sup> Its implementation during the late 1990s, however, revealed the existence of legislative gaps that inhibited the full effectiveness of many VAWA I provisions.<sup>4</sup>

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1. Violence Against Women Act (VAWA I), Pub. L. No. 103-322, 108 Stat. 1941-1942 (codified as amended in scattered sections of 42 U.S.C.). See also Janice Kaguyutan, et al., *The Violence Against Women Act of 1994 and 2000: Immigration Protections for Battered Immigrants*, 6 DOMESTIC VIOLENCE REPORT 3, 33 (2001).

2. VAWA I § 40401.

3. VAWA I § 40602.

4. *Hearing on the Battered Immigrant Women Protection Act of 2000: Hearing on H.R. 3083 Before the House Immigration Subcomm.*, 106th Cong. (2000) [hereinafter *Hearings*] (testimony of Barbara Strack, Acting Executive Assoc. Comm'r, Office of Policy and Planning, Immigration and Naturalization Serv., Dep't of Justice). See, e.g., *United States v. Morrison*, 529 U.S. 598, 602 (2000) (holding that neither the Commerce Clause nor § 5 of the Fourteenth Amendment gave Congress the authority to enact 42 U.S.C. § 13981, the VAWA provision that provided a federal civil rights remedy for victims of gender-motivated violence).

Especially inaccessible and ineffective were the provisions under Subtitle G, Protections for Battered Immigrant Women and Children.<sup>5</sup> Even though "the goal of the immigration protections for battered immigrants included in the Violence Against Women Act of 1994 was to remove immigration laws as a barrier that kept battered immigrant women and children locked in abusive relationships,"<sup>6</sup> in reality, these VAWA I provisions merely extended many of the preexisting legal impediments that immigrant survivors of domestic violence faced.<sup>7</sup> Subsequent changes and additions to immigration law unintentionally eliminated or rendered inaccessible many of the VAWA I protections for battered immigrant women.<sup>8</sup> Such inefficiencies were especially lamentable because the multiple oppressions confronting battered immigrant women<sup>9</sup> necessitated the successful application of Subtitle G protections.

On October 28, 2000, Congress enacted the Violence Against Women Act of 2000 (VAWA II)<sup>10</sup> to re-authorize grants and programs established under the original Act<sup>11</sup> and, even more importantly, to attempt to remedy loopholes and inefficiencies inherent in the original Violence Against Women Act.<sup>12</sup> Title V of VAWA II, or the "Battered Immigrant Women Protection Act of 2000" (BIWPA),<sup>13</sup> was enacted specifically to (1) "improve[] access to immigration protections of [VAWA I] for battered immigrant women;"<sup>14</sup> (2) "improve[] access to cancellation of removal and suspension of deportation under [VAWA

5. VAWA I § 40701. See also *Hearings, supra* note 4 (testimony of Barbara Strack). ("[W]hile the current law and regulations have been extremely effective, our experience in implementing VAWA over several years has revealed the existence of gaps in VAWA that we believe are unintended, but that prevent many battered immigrants with approved self-petitions from completing the process by applying for adjustment of status or an immigrant visa.")

6. Victims of Trafficking and Violence Protection Act of 2000 (VAWA II), Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 42 U.S.C.) §§ 1501-1513.

7. NATIONAL CENTER FOR VICTIMS OF CRIME, PUBLIC POLICY ISSUES: VIOLENCE AGAINST WOMEN, available at [http://www.ncvc.org/law/issues/VAWA\\_chart.htm](http://www.ncvc.org/law/issues/VAWA_chart.htm) (last visited Feb. 25, 2002) (summarizing VAWA II's major new provisions, various amendments to VAWA I programs, and authorization levels through fiscal year 2005).

8. For example, one change to immigration law, the sunset provision of the Immigration Nationality Act 245(i), forced battered immigrant women to exit the United States in order to obtain lawful permanent residence status. The Immigration Nationality Act 245(i) had allowed immigrants who were here illegally, but who qualified for a permanent resident visa through family or employer sponsorship, to adjust their status without leaving the country. Dan Kowalski, *Legislative Update on 1997 Immigration Laws*, available at <http://www.shusterman.com/leg-upd.html> (Dec. 1, 1997). This change left battered immigrant women unprotected from their batterers in non-United States territories. Kaguyutan, *supra* note 1, at 47. Another change to immigration law made domestic violence a deportable crime. Although the theoretical purpose of this amendment was to increase the deportation of batterers, the empirical effect was to increase the deportation of battered women who were convicted of crimes that were both committed in self-defense and related to the domestic violence. *Id.*

9. NANCY K.D. LEMON, DOMESTIC VIOLENCE LAW 132 (2001).

10. VAWA II §§ 1501-13.

11. 146 CONG. REC. S10,190 (daily ed. Oct. 11, 2000) (statement of Sen. Hatch).

12. *Id.* at S10,191.

13. VAWA II § 1503.

14. *Id.*

I];"<sup>15</sup> (3) "offer[] equal access to immigration protections . . . for all qualified battered immigrant self-petitioners;"<sup>16</sup> (4) "remed[y] problems with implementation of the immigrant provisions of [VAWA I];"<sup>17</sup> and (5) create new VAWA II provisions, such as the "U" nonimmigrant visa, that attempt to extend protections for battered immigrant women even further.<sup>18</sup>

This recent development piece will examine whether, within its first year, these VAWA II improvements effectively remedied the Subtitle G inefficiencies of VAWA I and whether any further VAWA modifications will be needed. Section II will provide an overview of the general social and legal context in which immigrant survivors of domestic violence seek relief and assistance. Section III will summarize the respective VAWA I provisions that specifically affect battered immigrant women. Section IV will analyze the problems that VAWA I failed to address and also consider how well VAWA II remedied those shortcomings. Section V will discuss VAWA II's new substantive remedy, the U-visa. This section will also highlight the urgent need for implementation of this important provision and will also discuss the barriers facing battered immigrant women who would otherwise qualify for a U-visa.

## II. SOCIAL AND LEGAL CONTEXT: CHARACTERISTICS AND COMPLICATIONS UNIQUE TO IMMIGRANT WOMEN IN ABUSIVE SITUATIONS

Due to cultural and religious norms, economic considerations, language barriers, and overall limited access to information, services, and legal protection, immigrant women are especially vulnerable to spousal abuse.<sup>19</sup> As one family violence expert has noted, "[w]hen seeking safety and justice, battered immigrant women face the multiple barriers of economic dependency, cultural isolation, and immigration . . . . Today in this country, too many battered immigrant women are denied those basic rights."<sup>20</sup>

Researchers studying whether immigrant victims have a more difficult time than other victims in dealing with the criminal justice system concluded that domestic violence was the largest category of victimiza-

15. VAWA II § 1504.

16. VAWA II § 1505.

17. VAWA II § 1507.

18. VAWA II § 1513.

19. Leni Marin, *Identifying Battered Immigrant Women*, in DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN 5 (Deeana L. Jang et al. eds., 2d ed. 1997) [hereinafter *Domestic Violence*].

20. Press Release, Family Violence Prevention Fund, Battered Immigrant Women Harmed by Welfare Reform and New Immigration Policies, Report Concludes, at <http://endabuse.org/newsdesk/releases.php3?Search=Article&ID=8> (July 1, 1999).

tion reported by immigrant crime victims.<sup>21</sup> Furthermore, in one of the study's samples, domestic violence accounted for fifty-four percent of all incidents of victimization.<sup>22</sup>

### Cultural and Religious Norms

Many non-American<sup>23</sup> cultural beliefs and norms may inadvertently legitimize, obscure, or deny domestic violence.<sup>24</sup> A victim's culture or religion may disapprove of challenges to male domination and prohibit the dissolution of marriage, the latter of which would violate social norms or bring shame to the family or community.<sup>25</sup> While American culture emphasizes the individual, many cultures value the family as the preferred and revered societal unit.<sup>26</sup> Some cultures focus on the family as the cultural center and family relationships are dictated by a definite authority structure of age, gender, and role.<sup>27</sup> Most Asian cultures, for example, are community-oriented and emphasize the family over the individual.<sup>28</sup> Because "respect, hierarchy, and interdependence among family members are highly valued" and "preservation of family honor is of utmost importance," battered Asian women may not report their abusive situations in

21. Robert C. Davis & Edna Erez, *Immigrant Populations as Victims: Toward a Multicultural Criminal Justice System*, Research in Brief (U.S. Dep't of Justice, Nat'l Inst. of Justice) 5 (1998).
22. Among a study of several neighborhoods with strong multiethnic characters, the Jackson Heights, New York, sample reported domestic violence comprising fifty-four percent of all victimizations. *Id.*
23. The term "non-American" is used to differentiate the cultural beliefs and norms unique to immigrant women's native countries from the cultural beliefs and norms typically labeled as "American." The term "non-American" is not used to indicate that only non-American cultural standards may legitimize, obscure, or deny the prevalence of domestic violence; there are many American cultural beliefs and norms that may arguably perpetuate some aspect of domestic violence. "While domestic violence happens all over the world, it is not more a part of culture in any other country than it is a part of culture in the United States. Domestic violence is not based on ethnicity, and is not to be tolerated in any community or society." LETI VOLPP, *WORKING WITH BATTERED IMMIGRANT WOMEN: A HANDBOOK TO MAKE SERVICES ACCESSIBLE* 13 (Leni Marin, ed. 1995).
24. ASIAN AND PACIFIC ISLANDER INST. ON DOMESTIC VIOLENCE, *DOMESTIC VIOLENCE IN ASIAN AND PACIFIC ISLANDER COMMUNITIES* 1 (2001) [hereinafter Asian and Pacific Islander Inst.]; VOLPP, *supra* note 23 at 13 ("It is important to neither condone domestic violence nor ignorantly assume that because a particular culture 'tolerates domestic violence as normal behavior' or that women of a certain culture are 'naturally passive,' that immigrant women of such a culture should either expect or accept the abuse.").
25. GAIL PENDLETON, NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS' GUILD, *BARRIERS FACED BY NONCITIZEN SURVIVORS OF DOMESTIC VIOLENCE* 2 (2001), at <http://www.nlg.org/nip/domestic-violence/barriers1.doc> (last visited Feb. 26, 2002).
26. Marianna Yoshioka, *ASIAN TASK FORCE AGAINST DOMESTIC VIOLENCE, ASIAN FAMILY VIOLENCE REPORT* 41 (2000) ("One of the biggest and most important challenges to addressing family violence within Asian communities is reconciling the differences between western ideas of independence and individualism with Asian ideals of interdependence and group harmony.").
27. ABUSE COUNSELING AND TREATMENT, INC., *LATINA WOMEN: BARRIERS TO LIVING VIOLENCE FREE*, at <http://www.actabuse.com/latinas.html> (last visited Feb. 25, 2002) (discussing the barriers that Latinas face when trying to escape abusive relationships) [hereinafter Abuse Counseling and Treatment, Inc.].
28. Yoshioka, *supra* note 26, at 8.



order to preserve familial pride.<sup>29</sup> It is not socially acceptable to disrupt familial stability and, thus, "it may take some time for battered immigrant women of such a culture to consider leaving their partners."<sup>30</sup>

Furthermore, religious norms and beliefs may provide similar limitations on the number of options that a battered immigrant woman feels she has. Battered immigrant women with strong religious upbringings often accept their abusive situations with resignation and rationalize that it is better to accept the bad situation that God has given them than to arrogantly defy the will of God.<sup>31</sup> Korean participants in an Asian Family Violence Report survey noted that Buddhism and Confucianism, two prominent influences on Korean culture, emphasize a life cycle in which men are familial rulers while women are the inferior "belongings" of their husbands.<sup>32</sup>

A legacy of male dominance and sexism and the "entrenched historical tradition of unequal power between men and women within the society" cultivates an environment in which domestic violence thrives.<sup>33</sup> A Vietnamese proverb summarizes the patriarchal philosophy that denigrates the societal position of women and renders many societies especially susceptible to domestic violence: "When a woman is young, she must obey her father. When she is married, she must obey her husband. When a woman is old, she must obey her son."<sup>34</sup>

Finally, many shelters and assistance programs do not provide culturally appropriate services that respect the individualized cultural heritage of each battered immigrant survivor.<sup>35</sup> Thus, many battered immigrant women only seek outside assistance from shelters and support programs as a last resort.<sup>36</sup>

### Language Barriers

Many battered immigrant women are linguistically isolated because they speak little or no English.<sup>37</sup> As a method of power and control over his intimate partner, a batterer may sabotage the immigrant woman's efforts to learn English in an attempt to isolate her.<sup>38</sup> Moreover, even

29. *Id.*

30. ABUSE COUNSELING AND TREATMENT, INC., *supra* note 27.

31. *Id.*; Yoshioka, *supra* note 26, at 2-3.

32. Yoshioka, *supra* note 26, at 23.

33. Gail Pendleton, *Immigration Relief for Women and Children Suffering Abuse*, in DOMESTIC VIOLENCE *supra* note 19, at 80.

34. Interview with Hien Lam, Clinic Coordinator, Asian Domestic Violence Clinic, in Oakland, Cal. (April 2, 2000).

35. PENDLETON, *supra* note 25, at 2.

36. Debbie Lee, *Accessibility: Serving a Changing Community*, in DOMESTIC VIOLENCE, *supra* note 19, at 19.

37. ASIAN AND PACIFIC ISLANDER INST., *supra* note 24, at 3.

38. VOLFF, *supra* note 23, at 5.

when battered immigrant women attempt to seek help, such assistance may nevertheless remain inaccessible because of a lack of proficient translators throughout the United States criminal justice system.<sup>39</sup> A battered immigrant woman may be unable to describe her situation to the police or to other justice officials; her only translator may be the batterer himself.<sup>40</sup>

Furthermore, many domestic violence shelters categorically discriminate against non-English-speaking women and are culturally biased towards American-born, English-speaking women "who can make the best use of the program and support services."<sup>41</sup>

### Economic Constraints

A non-citizen must obtain Immigration and Naturalization Service (INS) work authorization to work legally in the United States.<sup>42</sup> A batterer may exert economic power and control over an immigrant woman by forcing her to work without a work permit and then threatening to report her to the INS if she leaves him or reports the abuse.<sup>43</sup> Moreover, a batterer may sabotage his intimate partner's attempts to obtain vocational training or education.<sup>44</sup> Consequently, a battered immigrant woman may be forced to obtain a low-paying occupation with no child care.<sup>45</sup> Additionally, each nonimmigrant work visa only authorizes the noncitizen visa-holder to work for the specific employer stated on the visa application.<sup>46</sup> If a battered woman loses her job, she must apply for another nonimmigrant work visa before she can legally work for a new employer. Thus, if her work is directly or even indirectly impacted by domestic violence, she may lose her job and ultimately find that her only remaining economic option is illegal employment.<sup>47</sup>

### Lack of Knowledge and Misconceptions about the Legal System<sup>48</sup>

Battered immigrant women may be afraid to seek legal remedies or to report abuse because of misinformation about the legal system and judi-

39. PENDLETON, *supra* note 25, at 2.

40. Yoshioka, *supra* note 26, at 3.

41. Lee, *supra* note 36 at 17.

42. PENDLETON, *supra* note 25 at 3.

43. IMMIGRANT WOMEN PROGRAM, FAMILY VIOLENCE PREVENTION FUND, POWER AND CONTROL TACTICS USED AGAINST IMMIGRANT WOMEN, at <http://endabuse.org/programs/display.php3?DocID=112> (last visited Feb. 25, 2002) (adapting the domestic violence power and control wheel for immigrant women) [hereinafter Immigrant Women Program].

44. See generally VOLPP, *supra* note 23.

45. PENDLETON, *supra* note 25, at 3.

46. Brenda A. Eckert, *Hiring Foreign Nationals?—Be Prepared: ABC's of Immigration Law*, CONN. TECH. TRIB. (Sept. 17, 2001), available at [http://www.shipmangoodwin.com/news\\_story.php?aid=88](http://www.shipmangoodwin.com/news_story.php?aid=88) (last visited Feb. 25, 2002).

47. IMMIGRANT WOMEN PROGRAM, *supra* note 43.

48. PENDLETON, *supra* note 25, at 1.

cial proceedings.<sup>49</sup> Many battered immigrant women have had negative experiences with legal systems in their native countries and are therefore reluctant to seek legal assistance in the United States.<sup>50</sup> For example, based on the perceptions among the Korean community of the Korean government as notoriously corrupt, abused Korean immigrants may generalize this distrust to the United States legal system.<sup>51</sup> In addition, battered immigrant women originally from civil law nations are accustomed to courts that only allow signed, sealed, and notarized affidavits as admissible evidence and are thus unaware that American courts would accept their oral testimonies.<sup>52</sup>

### Threat of Deportation

Battered immigrant women may fear the assistance of the police or other authorities because of the perceived threat that they will report the often undocumented women to INS officials who will deport them.<sup>53</sup> Additionally, an abuser will often threaten to report the battered immigrant woman to INS if she does not comply with his orders to hide the abuse.<sup>54</sup> Also, the battered immigrant woman may fear that the batterer will be deported if she reports the abuse and, consequently, that she will also lose her financial support, children, or residency status once the abuser is deported.<sup>55</sup>

### III. RELEVANT VAWA I PROVISIONS: SUBTITLE G'S PROTECTIONS FOR BATTERED IMMIGRANT WOMEN AND CHILDREN<sup>56</sup>

VAWA I contained three primary provisions, sections 40701-40703, that specifically protected battered immigrant women and children. These three provisions, collectively known as Subtitle G, provided two new ways for battered immigrant women and children to gain legal immigration status, independent of their batterers.<sup>57</sup>

First, section 40701 granted a battered immigrant woman the right to self-petition for legal residency, so long as she could prove that (1) the

49. *Hearings*, *supra* note 4 (statements by Bree Buchanan, Pub. Policy Dir., Tex. Council on Family Violence).

50. Leslye E. Orloff & Minty Siu Chung, *Responding to Domestic Violence: an Overview of Civil and Criminal Remedies*, in DOMESTIC VIOLENCE, *supra* note 19, at 101.

51. Yoshioka, *supra* note 26, at 23.

52. DAVID FRAZEE ET AL., VIOLENCE AGAINST WOMEN § 21:1 (1998).

53. Orloff & Chung, *supra* note 50, at 101.

54. Yoshioka, *supra* note 26, at 3.

55. PENDLETON, *supra* note 25, at 2.

56. VAWA I §§ 40701-40703.

57. THE BATTERED WOMEN'S JUSTICE PROJECT, BATTERED IMMIGRANT WOMEN PROVISIONS IN VAWA (1994) FACT SHEET (Aug. 1996), available at <http://www.vawnet.org/vnl/library/general/biwpfact.htm> (last visited Feb. 25, 2002).

marriage between the abused immigrant woman and the batterer was "entered into in good faith by the alien;"<sup>58</sup> (2) the self-petitioner's deportation would result in "extreme hardship" to either herself or her child;<sup>59</sup> (3) the battered immigrant woman is a person of "good moral character;"<sup>60</sup> (4) during the marriage, either the self-petitioner or any of her children had been battered or had been the subject of extreme cruelty perpetrated by the spouse;<sup>61</sup> (5) the batterer is a United States citizen or a lawful permanent resident;<sup>62</sup> and (6) the battered immigrant woman resided in the United States with her citizen or legal permanent resident spouse.<sup>63</sup>

The self-petition option created under VAWA I greatly advanced battered non-citizen women's abilities to escape their abusive situations.<sup>64</sup> Prior to VAWA I, non-citizen spouses and children could only apply for legal residency if their United States citizen or legal permanent resident husbands or fathers filed legal residency applications on behalf of the women and children.<sup>65</sup> An abusive spouse often forced his spouse and children to remain in the abusive situation by threatening to either deport the victims or refusing to petition on their behalf for permanent resident status if they were to report the abuse or leave the batterer.<sup>66</sup>

In addition, section 40702 further amended the Immigration and Nationality Act (INA) to require the Attorney General to consider any credible evidence relevant to the immigrant woman's application for legal residency.<sup>67</sup> Determination of both the "credibility" of the evidence and the weight given to that evidence was within the sole discretion of the Attorney General.<sup>68</sup>

Section 40703 also created another new means for battered immigrant women and children to gain legal status. Subtitle G created a special form of suspension of deportation for battered spouses or children to apply to become lawful permanent residents.<sup>69</sup> Suspension of deportation was a necessary additional means for battered non-citizen women to achieve lawful permanent residency. This alternative method was especially crucial for those battered women who could not self-petition for legal status because they did not meet all the required criteria.<sup>70</sup> This was

58. VAWA I § 40701(a)(1)(C)(iii)(I).

59. VAWA I § 40701(a)(1)(C)(iv)(II).

60. VAWA I § 40701(a)(1)(C)(iii).

61. VAWA I § 40701(a)(1)(C)(iii)(I).

62. VAWA I § 40701(a)(1)(C)(iii).

63. VAWA I §§ 40701(a)(1)(C)(iii), 40701(a)(2)(B)(ii).

64. *Id.*

65. *Id.*

66. 146 CONG. REC. S10,195 (daily ed. Oct. 11, 2000).

67. VAWA I § 40702(a) (amending INA § 216(c)(4)).

68. *Id.*

69. VAWA I § 40703(a) (amending INA § 244(a)).

70. FRAZEE, *supra* note 52, at § 21:8.



the only form of relief available to a divorced woman who had been abused by a United States citizen or legal permanent resident during her marriage because VAWA I self-petitioning required battered self-petitioners to be married to the batterer at the time they filed their self-petitions.<sup>71</sup>

#### IV. VAWA I'S SHORTCOMINGS AND VAWA II'S RESPONSE

Despite VAWA I's overall progress in providing relief to battered immigrant women, both the complexities of immigration law and the unique complications of battered immigrant women's situations continued to "place barriers in the way of the very people who need[ed] relief the most."<sup>72</sup> VAWA I's self-petitioning process had four major shortcomings that VAWA II attempted to remedy.<sup>73</sup> VAWA II also improved upon VAWA I's cancellation of removal and suspension of deportation provisions. Finally, VAWA II generally expanded access and improved enforcement of VAWA I's earlier provisions.

The implementation of the self-petition process established under Subtitle G proved extremely problematic for four main reasons.<sup>74</sup> First, to self-petition for legal residency, a battered immigrant woman bore the burden of proving the abuser's status as a United States citizen or lawful permanent resident.<sup>75</sup> It was difficult for battered women to provide these documents because INS databases are often inaccurate and their batterers sometimes lacked official documents.<sup>76</sup> Furthermore, if a batterer convicted of domestic violence lost his permanent resident status prior to approval of the self-petition, the INS would automatically deny the battered woman's petition.<sup>77</sup>

Firstly, VAWA II has alleviated some of the difficulties associated with the battered immigrant woman's burden of proof. Even though the abuser is still required to have been a United States citizen or lawful permanent resident, a battered immigrant woman is now eligible to self-petition if her batterer was a United States citizen who died within the past two years or her batterer lost or renounced his immigrant status within the past two years due to an incident "related" to the domestic violence.<sup>78</sup> VAWA II amended section 204(a)(1)(A) of the INA which provides that reclassification of the abuser's status after the battered im-

71. *Id.*

72. *Hearing, supra* note 4 (statement of Rep. Janice Schakowsky).

73. *Hearing, supra* note 4 (statement of Barbara Strack).

74. Pendleton, *supra* note 33, at 80.

75. *Id.* at 72.

76. *Id.*

77. *Id.* at 73.

78. VAWA II § 1503(b)(1)(A).

migrant spouse has filed the petition will neither adversely affect approval of the petition nor preclude the classification of the eligible self-petitioner spouse or child as an immediate relative.<sup>79</sup> Thus, even if the abuser dies, divorces the battered spouse, is denaturalized, or otherwise suffers a loss or renunciation of citizenship, the abused spouse's self-petition will not be detrimentally affected.

Although a change in the abuser's citizenship status will no longer automatically nullify a battered immigrant women's self-petition for legal residency prior to the petition's approval, the VAWA II modification does not eliminate all implementation difficulties. The battered self-petitioner still needs to provide proof that the abuser is or had been either a United States citizen or lawful permanent resident and that the abuser's loss of citizenship status was somehow due to an incident "related" to the domestic violence.<sup>80</sup> It may often be difficult for the battered self-petitioner to demonstrate a link between the abuser's loss of status and the domestic violence, which may be only remotely related.<sup>81</sup>

Secondly, the good-faith marriage clause of VAWA I's self-petition provision prevented victims from divorcing their batterers. The good-faith marriage provision required that an abused immigrant woman prove that she had entered into her marriage in good-faith, she was married to the abuser at the time she filed the self petition, and the abuser had legally terminated all his prior marriages.<sup>82</sup> Consequently, a self-petitioner could not divorce the abuser before she had properly filed the self-petition.<sup>83</sup> Battered immigrant women with pending divorces could not request fee waivers for their petitions without the risk that such waiver requests would potentially delay the filing of the self-petitions until after their divorces had been finalized.<sup>84</sup>

VAWA II also acknowledged and addressed the good faith requirement's divorce dilemma. A battered immigrant woman is now eligible to self-petition if the legal termination of the marriage within the past two years was "connected" to battering or extreme cruelty by the United States citizen spouse or legal permanent resident.<sup>85</sup> Battered immigrant women still find it difficult to meet the eligibility requirements for self-petition even with this modified provision, however, because it is often difficult for them to prove that the divorces had been "connected" to domestic violence.<sup>86</sup> Nevertheless, the new BIWPA modifications are an

79. VAWA II § 1507(a) (amending 8 U.S.C. 1154(a)(1)(A)).

80. Telephone interview with Kavitha Sreeharsha, Esq., Staff Attorney, Nihonmachi Legal Outreach (Dec. 3, 2001).

81. *Id.*

82. Pendleton, *supra* note 33, at 74.

83. *Id.* at 75.

84. *Id.*

85. VAWA II § 1503(b)(1)(A)(iii)(II)(CC)(ccc).

86. Telephone interview with Kavitha Sreeharsha, *supra* note 80.

improvement over the old VAWA I protections. BIWPA allows divorced victims of abuse access to naturalization, which was previously unavailable to divorcees.<sup>87</sup> There is an automatic upgrade of the battered ex-spouse's immigrant status to "immediate relative" if the abuser naturalizes without the requirement of a relationship at the time of the batterer's naturalization.<sup>88</sup> Such immediate relative status is important to the battered self-petitioner because it allows her to apply for legal permanent residency on the basis of a marriage to a United States citizen or legal permanent resident, even though she is now divorced and the batterer had not been a United States citizen nor legal permanent resident at the time of marriage.<sup>89</sup> BIWPA also permits battered immigrant self-petitioners to remarry during the self-petition process.<sup>90</sup> In addition, a battered immigrant woman can now petition for residency status even if she was unaware that her batterer had failed to legally terminate his other previous marriage(s) prior to entering into marriage with her.<sup>91</sup>

Thirdly, VAWA I's "good moral character" requirement often effectively barred access to self-petitions for abused immigrants.<sup>92</sup> There were procedural problems with the original "good moral character" requirement were twofold. First, many factors limited a battered immigrant woman's ability to prove good moral character.<sup>93</sup> For example, most criminal convictions, regardless of whether those actions were in self-defense against the abuser, automatically precluded a finding of good moral character.<sup>94</sup> In addition, the INS often concluded that factors such as the battered immigrant woman's receipt of public assistance or the abuser's retaliatory counterclaims against the battered woman (e.g., that she was a bad mother or an undocumented immigrant) demonstrated that the abused woman lacked good moral character.<sup>95</sup> Furthermore, the INS favored supplementary material, such as police reports, that bolstered the self-petitioner's affidavit. Such police documentation was difficult to provide, especially if the battered immigrant woman had resided internationally for a substantial amount of time during the three-year period prior to the self-petition.<sup>96</sup> VAWA II partially remedied these problems associated with the "good moral character" requirement and thus has improved equal

87. VAWA II § 1503(c).

88. GAIL PENDLETON, VAWA II IMMIGRATION FIXES, available at <http://www.nlg.org/nip/domestic-violence/VAWA%202000%20Immigration%20Fixes.doc> (last visited Feb. 20, 2002).

89. Telephone interview with Kavitha Sreeharsha, *supra* note 80.

90. VAWA II § 1507(b).

91. VAWA II § 1503(b)(c); 146 CONG. REC. S10,195 (daily ed. Oct. 11, 2000).

92. Pendleton, *supra* note 33, at 77.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

access to immigration protections for all qualified battered immigrant self-petitioners.<sup>97</sup>

The VAWA II modification of the "good moral character" eligibility requirement parallels the VAWA II modification of the "good-faith marriage" eligibility requirement for self-petitioners. A battered immigrant self-petitioner who has never been the primary perpetrator of violence in the relationship, yet who has committed, been arrested for or convicted of, or has pled guilty to committing a crime, can nevertheless demonstrate good moral character if she can prove that there was a connection between the crime and the abuse.<sup>98</sup>

Fourthly, VAWA II remedied unexpected difficulties the Subtitle G self-petition provisions.<sup>99</sup> First, BIWPA eliminated the "extreme hardship" requirement originally needed to file a self-petition for legal immigration status.<sup>100</sup> Second, although the battered immigrant woman is still required to have resided with the batterer, there are some exceptions to the requirement that she had lived with him in the United States.<sup>101</sup> For example, spouses and children living abroad who were either abused by a United States citizen employed by the United States government or by a uniformed serviceperson, or who were subjected to battery or extreme cruelty in the United States by a citizen, can also file a self-petition for legal residency.<sup>102</sup>

Although these corrections were originally integrated into BIWPA to specifically to remedy the self-petition process, several of these modifications were extended to include the Subtitle G cancellation of removal and suspension of deportation protections.<sup>103</sup> For example, the abuse need not have taken place in the United States<sup>104</sup> and the batterer may be either a lawful permanent resident or a past lawful permanent resident.<sup>105</sup>

Also, BIWPA remedied one primary difficulty unique to the implementation of VAWA I cancellation of removal and suspension of deportation provisions. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) created stringent restrictions on suspension of deportation, which is granted to non-citizens who have maintained continuous physical presence in the United States for ten years, exemplified the good moral character, and demonstrated that deportation

97. VAWA II § 1505.

98. VAWA II § 1505(b)(1).

99. VAWA II § 1507.

100. VAWA II § 1503(b)(1)(A).

101. *Id.*

102. VAWA II § 1503(b)(3). The law only states that this provision is applicable to spouses of United States citizens and does not mention whether it applies to spouses of legal permanent residents.

103. VAWA II § 1504.

104. Compare VAWA I § 40703(a)(3) with VAWA II § 1504(a)(2)(A)(i)(I).

105. *Id.*



would result in exceptional and extremely unusual hardship.<sup>106</sup> The IIRIRA established a new stop-time rule that detrimentally stopped the clock on the individual's required continuous physical presence at the moment that INS initiated removal proceedings.<sup>107</sup> Because many batterers withhold their spouses' mail, battered immigrant women were denied access to cancellation of removal and suspension of deportation because they were unaware that INS had initiated proceedings against them and, therefore, had stopped the clock on their required minimum ten years of continuous physical presence in the United States.<sup>108</sup>

VAWA II remedies this barrier to cancellation of removal by eliminating the application of the stop-time rule to battered immigrant women and children and by allowing a VAWA-eligible battered immigrant spouse or child to file a motion to re-open removal proceedings within one year of the entry of an order of removal.<sup>109</sup> Absences connected to the battery or extreme cruelty do not destroy the battered immigrant's "continuous physical presence" in the United States.<sup>110</sup>

Additionally, BIWPA has expanded access to VAWA I protections to include battered immigrant women and children whose batterers were virtually immune from prosecution. It has also improved the enforcement of earlier protections covered in state and tribal protection orders, domestic violence laws, and family law statutes.<sup>111</sup> BIWPA has equalized access to immigration protections by granting authority to the Attorney General to waive certain bars to admissibility or grounds of deportability for battered immigrant spouses and children.<sup>112</sup> For example, the Attorney General can waive misrepresentations in cases of extreme hardship where there are health-related grounds for inadmissibility, or where the battered immigrant woman's unlawful status stems from a prior immigration violation connected to the abuse.<sup>113</sup>

#### V. NEW VAWA II PROTECTION: CREATION OF THE "U" NONIMMIGRANT VISA

In addition to the protections improved under BIWPA, section 1513 of Division B of VAWA II has created a new "U" nonimmigrant visa

106. Press Release, Att'y Gen., Administration Proposes Fine-tuning for 1996 Immigration Law to Mitigate Harsh Effects of Applying New Rules to Pending Cases, available at <http://www.usdoj.gov/opa/pr/1997/July97/290ag.htm> (July 10, 1997).

107. 146 CONG. REC. S10,195 (daily ed. Oct. 11, 2000).

108. *Id.*

109. VAWA II § 1506. See also *id.* at S10,196.

110. VAWA II § 1504(a)(2)(B).

111. VAWA II §§ 1502(a)(3), 1502(b)(2).

112. VAWA II § 1505; 146 CONG. REC. S10,195 (daily ed. Oct. 11, 2000).

113. *Id.*

category under INA 101(a)(15)<sup>114</sup> to strengthen the ability of law-enforcement agencies to detect, investigate, and prosecute cases of domestic violence and twenty-five other criminal violations.<sup>115</sup> Few non-citizen crime victims willingly contribute to criminal prosecutions without some protective immigration status shielding them from retaliatory deportations.<sup>116</sup> The U-visa theoretically provides immigration status protection to noncitizen crime victims who aid in the criminal prosecution of their assailants.

To qualify for the U-visa, the battered immigrant must have suffered substantial physical or mental abuse as a result of the battering<sup>117</sup> and the criminal activity must either be in violation of some federal, state, or local criminal law, or have occurred in the United States or its territories and possessions.<sup>118</sup> Additionally, the visa applicant must have been helpful, be helpful, or be likely to be helpful in the investigation or prosecution of the criminal activity.<sup>119</sup> Such "helpfulness" of the battered applicant must be certified by a federal, state, or local law enforcement official or authority.<sup>120</sup>

The U-visa is especially important because it has the potential to assist battered immigrant women who may otherwise not qualify for remedies under VAWA provisions.<sup>121</sup> For example, battered immigrant women who have been divorced for more than two years from their United States citizen or lawful permanent resident spouses and who cannot qualify for VAWA self-petitions can seek legal residency status through the U-visa.<sup>122</sup> Additionally, inadmissibility waivers are broader for U-visa cases than for VAWA cases.<sup>123</sup>

On December 6, 2000, in its preliminary suggestions on INS implementation of the new U-visa for immigrant crime victims, the National Network on Behalf of Battered Immigrant Women (Network) directed that "ease, swiftness, and control by the victims should be the most prominent features of the [U-visa application] process."<sup>124</sup> Difficulty, sluggishness, and a lack of the victims' control, however, characterize the current U-visa application process; this is demonstrated by the fact that

114. Visas: Documentation of Immigrants and Nonimmigrants-Visa Classification Symbols, 66 Fed. Reg. 117, (June 18, 2001) (to be codified at 22 C.F.R. pts. 41, 42).

115. VAWA II § 1513(a)(2)(A).

116. NOW LEGAL DEFENSE AND EDUCATION FUND, U-VISA FACT SHEET (2001) [hereinafter NOW Legal Defense and Education Fund].

117. VAWA II § 1513(b)(3)(i)(I).

118. VAWA II § 1513(b)(3)(i)(IV).

119. VAWA II § 1513(c)(o)(1).

120. *Id.*

121. NOW LEGAL DEFENSE AND EDUCATION FUND, *supra* note 116.

122. *Id.*

123. *Id.*

124. Letter from National Network on Behalf of Battered Immigrant Women to Immigration and Naturalization Serv. (Dec. 6, 2000) (on file with author).

while VAWA II limits the number of U-visas to ten thousand primary applicants in any given fiscal year,<sup>125</sup> in the first twelve months following VAWA II's enactment, not one U-visa has been issued.

No U-visas have been issued because there are no regulations for the U-visa.<sup>126</sup> On August 30, 2001, Michael Cronin, the Acting Executive Associate Commissioner of the INS Office of Programs, distributed a memorandum providing interim procedure instructions to be followed while the regulations implementing the U-visa were being "promulgated by INS."<sup>127</sup> The memorandum specified the necessary prerequisites for a noncitizen to qualify as a potential principal U nonimmigrant applicant.<sup>128</sup> The memorandum instructed service personnel to use existing mechanisms, such as parole, deferred action, continuances, and stays of removal to grant work authorization to possible qualified U-visa applicants.<sup>129</sup> Finally, the memorandum required the Direct Counsel to refer any potential U-visa applicants encountered during legal proceedings to the District Victim-Witness Coordinator.<sup>130</sup>

In December, 2001, INS distributed a new memorandum to local INS offices providing further interim instructions for the U-visa application process.<sup>131</sup> This new memorandum, which supplements and does not supersede the previous INS memorandum from August, 2001, instructs local offices to forward all requests for the U-visa or for interim release to the VAWA Unit at the Vermont Service Center (VSC).<sup>132</sup> It is probable that once INS has promulgated its regulations for the U-visa application process, a special adjunct of the VAWA Unit at VSC will adjudicate the U-visas.<sup>133</sup>

## VI. CONCLUSION

"Of all the victims of domestic abuse, the immigrant dependent on an abusive spouse for her right to be in this country faces some of the most severe problems."<sup>134</sup> On balance, VAWA II's battered immigrant women provisions are a significant step forward. BIWPA modifications to the original VAWA immigration provisions have weakened batterers'

125. VAWA II § 1513(c)(2).

126. Telephone interview with Gail Pendleton, Esq., Assoc. Dir. of Nat'l Lawyer's Guild's Nat'l Immigration Project, (Dec. 3, 2001).

127. Memorandum from Michael D. Cronin, Acting Executive Assoc. Comm'r of the Immigration and Naturalization Serv. Office of Programs, to Michael A. Pearson, Executive Assoc. Comm'r Office of Field Operations (Aug. 30, 2001) (on file with author).

128. *Id.*

129. *Id.*

130. *Id.*

131. Letter from Network to Immigration and Naturalization Serv., *supra* note 124.

132. *Id.*

133. *Id.*

134. 146 CONG. REC. S10,211 (daily ed. Oct. 11, 2000) (statement of Mr. Abraham).

ability to use immigration laws as an instrument of coercion over their victims.<sup>135</sup> VAWA II has remedied many of the implementation and accessibility problems inherent in the original VAWA I protections for battered immigrant women.

There are, however, unresolved difficulties that originated with the VAWA I protections, and now difficulties that have arisen out of the new VAWA provisions. For example, the battered immigrant self-petitioner still has the burden of proving her abuser's United States citizenship or legal resident status.<sup>136</sup> Furthermore, in cases that involve a divorce "related" to the domestic violence or that involve a loss of citizenship or legal status because of an incident "connected" to the domestic violence, the battered self-petitioner has the enormous obstacle of proving such arbitrary and often nebulous connections. In addition, INS still has not finalized regulations for the U-visa application process.<sup>137</sup> Once such residual shortcomings are remedied, battered immigrant women will be able to better actualize the original goal of the VAWA protections: "To free abused immigrant spouses to cooperate in their abuser's prosecution and to obtain justice system protection for themselves and their children."<sup>138</sup>

135. VIOLENCE AGAINST WOMEN OFFICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, SUMMARY OF CHANGES MADE TO ORIGINAL ACT BY VAWA 2000, at [http://www.ojp.usdoj.gov/vawo/laws/vawa\\_summary2.htm](http://www.ojp.usdoj.gov/vawo/laws/vawa_summary2.htm) (April, 3, 2001).

136. VAWA II §§ 1503(b)(c).

137. Telephone Interview with Gail Pendleton, *supra* note 126.

138. *Hearing*, *supra* note 4 (statements of Leslye Orloff).