

## U FINDINGS AND PURPOSE

### VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000 (Public Law No: 106-386, 114 Stat. 1464) TITLE V--BATTERED IMMIGRANT WOMEN

## SEC. 1513. PROTECTION FOR CERTAIN CRIME VICTIMS INCLUDING VICTIMS OF CRIMES AGAINST WOMEN.

### (a) FINDINGS AND PURPOSE-

#### (1) FINDINGS- Congress makes the following findings:

- (A) Immigrant women and children are often targeted to be victims of crimes committed against them in the United States, including rape, torture, kidnapping, trafficking, incest, domestic violence, sexual assault, female genital mutilation, forced prostitution, involuntary servitude, being held hostage or being criminally restrained.
- (B) All women and children who are victims of these crimes committed against them in the United States must be able to report these crimes to law enforcement and fully participate in the investigation of the crimes committed against them and the prosecution of the perpetrators of such crimes.

#### (2) PURPOSE-

- (A) The purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes described in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States. This visa will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.
- (B) Creating a new nonimmigrant visa classification will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status. It also gives law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions. Providing temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States.

(C) Finally, this section gives the Attorney General discretion to convert the status of such nonimmigrants to that of permanent residents when doing so is justified on humanitarian grounds, for family unity, or is otherwise in the public interest.

## **Working with Immigrant Crime Survivors**

Building trust is essential to working with all violence survivors, especially those who lack secure immigration status. Be aware of the barriers they experience in trying to access your help. Spend time working to overcome those barriers and building trust.

- Non-citizens in general may be unfamiliar with the systems and resources available to crime survivors in this country.
- They may think you work for the government and may fear that talking to you will get them or their family members deported.
- They may come from countries or situations where there they had few or no rights (especially if they are women or children), and they may not realize that our criminal and civil justice systems must protect them, regardless of their immigration status.
- They may not understand the services and resources you are offering if you are not communicating in the same language. As with other survivors, they may be focused on needs that seem relatively unimportant to you, but which make sense in their own realities.

### **Understanding Their Reality**

The best way for you to learn how to work with immigrant crime survivors is to adapt and expand what you know from your current work and experience. Consider these questions in the context of your work with domestic violence and sexual assault survivors generally:

- Why might they not tell you the details of their experience?
- Have they experienced violence throughout their lives<sup>10</sup> and, if so, how does this affect their actions now?
- If you ask them whether they have been “sexually assaulted” or “subjected to domestic violence” will they know what you’re talking about?
- Why might they need time to make decisions or seem paralyzed about making decisions?

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· Excerpted and adapted from the Family Violence Prevention Fund publication, collaborating to Help Trafficking Survivors: Emerging Issues and Practice Pointers, 2006 (written by Gail Pendleton).

- Why might they want to go back to the home country?
  - Why might they fear accessing or using the US criminal system?
  - Why might they not tell the truth?
  - What can you do to make sure survivors are making decisions because they think they are the best for them, not because they fear those who harmed them?
  - If their fears are legitimate, what can you do to help eliminate the reasons for their fears?
  - What additional issues may prevent immigrant survivors from talking to you?
- No information or misinformation about our legal system (*who controls their access to this information?*)
  - Fear that the criminal system will harm them (*who instills this?*)
  - Fear of deportation if they access services (*could this happen to them?*)
  - Fear of retaliation against them or their families if they tell the truth
  - They can't work legally and are economically dependent on those who harmed them
  - Their communities, here or abroad, may ostracize or punish them for challenging those who harmed them.

In addition to the answers you came up with, here are some observations from those who work with crime survivors:

- ❖ They may have difficulty identifying individual needs if they are used to thinking of their needs as irrelevant or secondary to others' needs. Many immigrant crime victims were abused or sexually assaulted in the past, have been treated like property all their lives, or have experienced the violence of war, natural disaster, or political unrest.
- ❖ Like other trauma survivors, they may minimize their problems.
- ❖ They may not have the vocabulary to communicate what they've experienced, and they may use nonverbal cues differently from you (e.g., to them, eye contact may be a sign of disrespect, not truthfulness).

- ❖ They may not understand our mental health services or, like other crime survivors, may resist because they think there is stigma attached to them. They may be suffering, however, from various mental health problems, including Post Traumatic Stress Disorder, dissociative disorders, depression and suicidal impulses or desires.

## **Understanding Your Reality**

Try to be sensitive to the things you bring to the table that might inhibit communication with survivors:

- ✓ Your professional role
- ✓ Ethnic/racial differences
- ✓ Class (within immigrant groups, as well as between different groups)
- ✓ Language
- ✓ Gender

Any or all of these factors may make communicating difficult, unless you take steps to identify and overcome them. Assumptions and stereotypes about specific ethnic groups, about immigrants, or about immigrant crime victims generally may cloud your ability to see your client's reality. The next section provides more background on these issues. Here are a few rules that are particularly relevant here:

**Be aware of your biases**, prejudices and knowledge about a victim.

- Do not make assumptions based on appearance.
- Use appropriate language.  
Are you judging your client, consciously or unconsciously?
- Recognize your professional power and avoid imposing those values.
- Use non-judgmental questions Listen to the victims.
- Let them tell their stories.
- Do not assume what they know and don't know
- Pay attention to verbal and nonverbal cues. Gather information about the victim's interpretation of their culture.  
"What is it like for you to talk about this problem with your family or in your community?"

## **Validate the victim's strengths.**

Thank them for sharing and acknowledge existing support systems and efforts to keep safe.

### **Whose Life Is This?**

Be aware that your clients have adapted and survived by allowing themselves to be dominated and manipulated. It may be hard for them to avoid replicating these roles. It is your job, therefore, to guard against this occurring. Making decisions for your clients may backfire in many ways: it can undermine trust, it may result in choices that are not what your clients want, and it may further endanger or traumatize them. To be good at this work, you must leave at home the notion that you "know what's best".

- Don't assume they understand what you're telling them, just because they say they do.
- Ask them to repeat back what you've told them, so you know they understand and are not just trying to appease you.
- Avoid imposing your goals and your ideas about the right outcomes. Discard your assumptions and judgments. They are probably wrong and certainly unhelpful.

If you can't meet your client's needs right now, get them to others who can help them with their top priorities. Maintain your relationship with them, however; you can help them navigate the other people and systems they need, and you will be there when they are ready for your help.

### **Some Basic Rules**

Here are some suggestions for communicating with non-citizen survivors. These are particularly important if you are the first person seeing the victim.

Do NOT say:

- What is your immigration status? (Do you have a green card? Are you a citizen?)
- Are you "residing" in this county? ("Lawful permanent residence" is the immigration status those with "green cards" have, so the words "residing" or "resident" may be confusing)

Do say:

- I do not work for the government, the immigration system, or the police (if this is true).  
My job is to help you.
  
- Everything you tell me is confidential and I will not share it with anyone else without permission (ensure that this is true for your professional role).
  
- I provide services regardless of your immigration status
  
- You do not have to talk about your immigration status if you do not feel comfortable.  
Some victims of crimes qualify for immigration status, however, so I may tell you about some options for applying for status that could apply to you, if you are not a US citizen.
  
- You also have rights if you are picked up by the police or by immigration.
  
- These include the right to speak to an attorney, to not sign anything or say anything without an attorney present, and to have a hearing before a judge if you are charged with a crime or with being deportable.

## Getting Ready for Outreach to Immigrant Communities

Before you start doing outreach you must be prepared.

- Do you know what immigrant populations are in your community?
- Do you know where they originally come from, what they have experienced while here?
- Are there organizations in your area that work with immigrants, including immigrant workers?

You must connect with those individuals or organizations who already work with immigrant communities. In rural areas, link with organizations that help migrant workers, such as those who provide health services.

Don't assume that immigrant and ethnic communities will not be interested or will refuse to acknowledge that domestic violence, sexual assault and trafficking occur.

- Ask to do a presentation for community-based organizations, or the people in them who may care most about this issue, such as their board of directors.
- Ask them if they know about violence against women and trafficking, tell them what you do and why you would like to work with them to reach survivors.
- Offer to serve as a buffer against backlash.
- You or another organization should be the listed contact, so the local organization does not get flack for challenging perpetrators, who may be powerful members of the community.

Working together on outreach is one way to build effective partnerships with key allies. Once community contacts know how to identify immigrant victims of domestic violence, sexual assault and trafficking, they may become an important first point of entry into services and safety. You should not take them for granted, however.

Build community contacts into future grant applications, and help key allies build capacity to work with you and with immigrant crime survivors. Help get their ideas for doing outreach funded, and get them resources to follow through on these ideas.

What other systems might unwittingly encounter immigrant survivors of domestic violence, sexual assault and trafficking? Educate them about immigrant crime victims. These systems might also be in need of cultural competency training.



Are you ready for immigrant crime victims if they come? Can you provide or get victims what they need? Have you connected already with others who can help victims with their key needs? Have you thought through what all those needs are?

If you do premature outreach, you will be scrambling to help people in crisis. You may even end up harming them unwittingly. Do your homework first.

## **Outreach When You're Ready**

Once you've got your systems in place, think about where the most isolated people might go or how they might receive information. Put posters in:

- laundromats they may use
- supermarkets they may shop in
- beauty and massage parlors where they may work
- restrooms at restaurants they may work at or go to,
- religious institutions where they may attend services, and
- parks and schools where they may take children.

**Remember** that many immigrant crime survivors may not be able to read English or even their native language, so use pictures and cartoons to communicate, not just words.

**Work with your allies from local immigrant organizations and organizations** that work with immigrant populations. They can identify crime victims; visit places survivors may frequent (such as parks where nannies take children), scan job ads in local papers, and follow up on possible leads they've discovered. They will have the best ideas on how to find victims.

**Use the media.** Do public service announcements in newspapers, magazines, on radio and television stations. Specifically, present your public service announcements in ethnic publications and on radio and television programs that are targeted toward immigrant populations. Make sure to include a contact phone number in your media outreach. Encourage local newspapers to cover the array of services available for immigrant crime survivors. Even the most isolated victims may have access to these media. Furthermore, neighbors and acquaintances may hear the public service announcements or read a story and realize they can help someone who lives near them.

**Be creative.** Distribute information in ways perpetrators are unlikely to notice but that workers might find in their daily life. Day laborer sites may be a good place for information. Some agencies have put their contact information on matchbooks distributed in bars, restaurants and churches, free lipstick containers given out on corners, calendars posted in nail parlors, and prayer cards given to those attending religious services.

**Repeat your message.** Those of you who've worked with domestic violence survivors know that it often takes time for your message to get through. Keep it up; once is not enough

## **Victim of Crime Advocate (Expert) Declaration Guidelines on Substantial Abuse<sup>1</sup>**

All affidavits should include:

\* A paragraph providing your “credentials” : your experience with domestic violence, sexual assault, or the crime involved in the U case (how long you’ve worked with victims, how many you’ve served, etc.);

\* A paragraph or more describing in detail what the client told you about what she/he experienced, both the crime itself and how it affected the client. These are the factors the CIS regulations specifically mention

- the nature of the injury,
- the severity of the perpetrator’s conduct,
- the severity of the harm suffered,
- the duration of the infliction of harm,
- any permanent or serious harm to appearance,
- health and physical or mental soundness, and
- any aggravation of a victim’s pre-existing conditions

But they will consider any “impairment” of the client’s “client’s emotional or psychological soundness,” so please identify and explain any evidence you see in the client’s behavior, attitude or description of her experience that would show this. How does this substantially impede the client’s well-being and/or ability to navigate life successfully.

\* A paragraph explaining how this was credible to you given your experience with crime victims like the applicant; you can tell the difference between truth and fiction;

For Inadmissibility Waivers: Harm if counseling ended because of deportation

\* A final paragraph describing why the client needs ongoing counseling and the writer’s willingness to provide such counseling. Merely stating she needs counseling is not helpful: provide details on the client and why, based on your experience, this means she needs more counseling and support.

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<sup>1</sup> Gail Pendleton, ASISTA Co-Director, prepared this guidance.

## **Ancestor Exercise**

We will begin our training by reflecting and sharing our ancestors' (or our) experiences in coming to the United States.

A caveat: We realize that not all of your ancestors were brought here voluntarily (slavery; indentured servitude), that some of you may have roots indigenous to the United States, and that some of you may have parents to whom you are not related by blood. Focus on what your family experienced in the past as they tried to build lives in the United States, or what you have experienced yourselves as recent immigrants.

### **ASSIGNMENT:**

Bring a story or an object that triggers a story about your ancestors or yourselves.

Some examples of objects (bring copies rather than originals if they are valuable):

- A photograph of a parent, grandparent, or other relative who immigrated to the United States.
- Arts/crafts created by an ancestor who came to the US.
- A piece of jewelry or other small personal item that has historical resonance in your family
- A family recipe
- A family tree or history
- Any other item that you think is especially evocative of the generation in your family that first came to the United States.

### **Questions to Generate Stories**

- Who was the first relative to come to the United States in your family?
- What do you know about this relative? Did you know that relative personally, or did you hear stories about what he or she did when he/she came to the United States?
- Why did that relative (or relatives) come to the United States? Were they coming to join other family members? Did they come entirely on their own?
- What was their social/community life like when they came to the United States?
- What languages did those first immigrants speak?
- What kind of work did those first immigrants do?
- Which generation became "American" in your family?
- What do you do today to recall the traditions of your immigrant forebears?

### **Articles**

*No Irish Need Apply*

In the early 19th Century, the descendants of the British Protestants who had originally colonized and fought for the independence of the United States were a significant force in the United States. To be born in America and to be descended from British Protestant forebears was a matter of great pride for many Americans. The leadership of the country at that time, both commercial and political, traced its lineage to British immigrant groups.

During this time period, particularly in the 1830's and 1840's, Irish immigration steadily increased. The Irish immigrants who came to the United States were fleeing starvation

and in some cases, the lethal political oppression that Great Britain exerted over Ireland. The tensions that divided the Irish from the British immigrated with them to the shores of the United States, and the Irish met a hostile resistance to their attempts to seek better lives in the New World.

The British-Americans, who were, by and large, financially and politically successful, looked upon the starving Irish immigrants as something less than human. It was not uncommon for writers, orators, and politicians of the day to look upon the Irish as having the following universal traits: incapable of overcoming poverty, incurably lazy and immoral, uneducable, completely ignorant, and superstitious (largely because of their devotion to the Catholic faith). There were fears that the Irish, who were immigrating in large numbers and who seemed, to the British-Americans, to have an alarmingly high birth-rate, would take over the country and degrade its political, commercial, educational, and religious institutions. Journalists commonly used the epithets “violent,” “drunken,” “ape-like,” “wife-beaters,” and “anarchists” to describe the Irish.

During this time, many employers expressed preferences for native-born or German immigrant workers. Employers were reported to have posted signs or placed help wanted ads that declared: “No Irish Need Apply.” As recent immigrants, the Irish took jobs that few other Americans would do, such as the lowest and foulest cleaning jobs or the most inhumane factory jobs.

Anti-Irish sentiment rose so high following riots that erupted when Protestants attacked Catholic schools and neighborhoods that politicians began to campaign on anti-immigrant platforms, leading to the Nativist movement and the Know-Nothing party in the 1850s. In some cities, the dominant British Protestant class tried to suppress the Irish immigrants by requiring them to participate in Protestant prayers in the publicly-funded schools or by passing laws or property covenants that made it very difficult for the Irish to acquire wealth or obtain middle class work. The dominant British-Americans hoped that this would contain the impact of Irish immigration on the existing culture of the United States.

Yet the inauspicious beginning of the Irish immigrants in the early 1800's changed to a story of success as significant numbers of this immigrant group took advantage of good educational and commercial opportunities in the United States. By the late 1800's subsequent generations of Irish immigrants could look to the wealthy and politically powerful Irish-American class that dominated segments of American life, particularly in New York City. By the 1880's, a young Irish immigrant could write home to his mother: Now that I am here a while, I like it better than ever. New York is a grand handsome city, but you would hardly know you had left Ireland, there are so many Irish people here. Some of them are become rich. Some of them are big men in government. For most of us it is hard work, but there is plenty of it and the pay is all right ... - letter from Patrick Murphy, New York, to his mother in Ireland September 15, 1885 (For more information, see: Museum of the City of New York, <http://www.mcny.org/Exhibitions/Irish/irish.htm>)

*Anti-immigrant sentiment on rise*  
*Growing Hispanic population targeted most heavily*

By Deborah Kong  
The Associated Press  
August 4th, 2001

A group in North Carolina plans to protest the "overwhelming number of illegal Hispanic workers invading the area." A California coalition urges people to lobby against giving legal status to undocumented immigrants.

And on New York's Long Island, the topic at a conference this weekend is the "illegal immigration disaster."

Sparked by changing demographics, examples of anti-immigration sentiment are cropping up with growing frequency around the country.

Observers say much of the hard feeling is directed at Hispanics, whose numbers grew 58 percent to more than 35 million in the last decade, according to census figures.

Anti-immigration advocates feel newcomers lower wages, increase unemployment, pollution, traffic and crime, and strain hospitals, parks and energy resources.

They're also upset that President Bush is weighing a proposal to grant legal residency to some undocumented Mexicans in the United States.

"It's because it's getting more in your face," said Gordon Lee Baum, head of the Council of Conservative Citizens, which says it has 25,000 members.

"All of the sudden they see it happening in their community. They wake up one morning like the people at the Alamo, and say 'Where did the Mexicans come from?'"

Lisa Navarrete, a spokeswoman for the National Council of La Raza, a Hispanic advocacy group, said community organizations report violence against Hispanics is growing, although La Raza does not formally track such crimes.

Tension has already boiled over in some places.

In June, a Minnesota man was sentenced to more than seven years in prison for first-degree assault after hitting a Salvadoran immigrant in the head with a piece of wood. And in Arizona, hundreds of ranchers are patrolling their lands along the border, detaining immigrants and turning them over to the Border Patrol, said Roger Barnett, who carries a pistol while cruising his 22,000-acre ranch.

"They don't need to be on my place, and they don't need to be in this country," Barnett said.

## **Realities for Immigrant Populations: How They Experience the System**

### **Lack of Knowledge and Misinformation about the Legal System**

Both citizen and noncitizen abusers routinely misinform their victims about their rights in the United States. For instance, they often claim that a noncitizen cannot obtain child custody from a U.S. court and that attempting to do so will result in the noncitizen's deportation, or the child's deportation if the child is undocumented. Courts who use a noncitizen's immigration status against her when determining child custody legitimize fears that the civil system is not a source of justice for immigrants.

Many noncitizens also come from countries where women cannot receive justice. They may lack domestic violence laws, or, if laws do exist, may be unenforced. Additionally, the proof requirements for enforcement may be absurdly onerous. Foreign courts may require oral testimony or prohibit testimony from women. They may provide justice only to those who pay for it. Social mores about "a woman's place" also may discourage women from accessing civil systems in their homeland (or in the United States).

### **Fear of the Police and Judicial System**

Similar dynamics apply to a noncitizen victim's fear of the police and the judicial system. Abusers tell victims that the police will not help them if they are undocumented, or that calling the police will result in their deportation. Noncitizens may come from countries where police are instruments of repression, respond only to bribes, or believe women should be subordinate to men. Unfortunately, some police officers in this country do discriminate against noncitizens, especially if they are people of color or do not speak English well. Reports of police helping to enforce the immigration laws by arresting, detaining, and handing noncitizens over to Department of Homeland Security (DHS) personnel undermine or eliminate trust immigrant communities might have in the police. Courts that allow or encourage DHS personnel to attend hearings (and often to arrest, and detain noncitizens) ensure that immigrants will not view them as a source of fairness or justice.

### **Fear of Deportation or Removal**

Fear of deportation (now called "removal" by Congress and DHS) is paramount for all immigrants. Although some immigrants may travel safely back and forth between their home country and the United States, victims of domestic violence are rarely in this situation. They often will lose access to their children, be ostracized and shunned in their home country, and otherwise suffer if they are returned to their home country. If the children remain here, they often remain in the hands of the abusers.

Abusers play on this fear in many ways, some noted above. They routinely threaten to report their victims to DHS. In many situations, they actually do control their victims' access to immigration status, and their victims' status may be revoked by DHS if the abuser calls them. Abusers very typically call DHS when a victim starts to challenge their domination, alleging that she married him only to gain immigration status. Fortunately, with the new routes to status, noncitizens in this situation may be able to gain status without the help, and despite the interference, of the abuser.

Any systems that actually do turn noncitizens over to DHS legitimize this fear and erect an insurmountable barrier to serving immigrant communities. Unfortunately, DHS may attempt to remove noncitizen victims reported to them by abusers, even though the victims have pending applications for immigration status based on domestic violence.

### **Fear the Abuser Will Be Removed**

Many noncitizens who suffer abuse wish to achieve safety for themselves and their children, but they do not wish their abusers to be removed. Courts should not dismiss these concerns; they are quite legitimate. Abusers often take children with them when they leave the U.S.; once this happens it is unlikely the noncitizen parent will ever see them again. If the abuser returns to the U.S., he may be even more dangerous than when he left.

The abuser may provide vital financial support to the family, especially the children, which will end with his removal. Many immigrants, including abusers, send money back to the family in the home country; this flow will end with the abuser's removal and will cause hardship to the communities and people the victim cares about. Her family and community in the homeland may shun and blame her for causing hardship to them and to the abuser and for leaving her husband.

Many noncitizens who suffer domestic violence have an immigration status that depends on the abuser's presence in the United States. Although Congress has created special routes to status for many noncitizens, not all will qualify, they may not be aware they qualify, or the process for qualifying is onerous. When DHS removes an abuser, it rarely provides information to the victim about her eligibility to apply for status.

### **Language and Gender**

Language barriers are especially problematic in the civil court system, which rarely requires competent interpretation and often lacks multi-lingual personnel. Victims are discouraged from accessing the court when they cannot communicate with court personnel. Courts may allow family members to serve as interpreters, or enlist immigrant community members who may have a bias against, or paternalistic approach to, the victim. Political, cultural and gender differences may inhibit a victim from speaking openly in court, and many interpreters may fail to provide phrase-by-phrase interpretation. In addition, many immigrant women may be reticent to discuss domestic violence in front of men, especially men from their community.

### **Culture and Religion**

As is true in some longstanding U.S. communities, cultural or religious leaders may pressure victims to submit to domestic violence. Challenging male domination or “airing dirty laundry” will be punished by isolation and social disapproval. Divorce may violate social mores and bring shame to the victim’s family or community. Even when they are ready to leave their abusers, many noncitizens find that available shelters and domestic violence resources are culturally and linguistically inappropriate. Noncitizen victims may not even realize what a “shelter” is; if they are sent there without explanation, they may believe they are in a detention center.

### **Economic Issues**

Economic control is a common form of abuse in many cultures. Its consequences are exacerbated for noncitizen victims because they cannot legally obtain work authorization without applying for immigration status. If they can work, they often cannot find child care. If they are eligible for public benefits, they often cannot obtain them because public benefits administrators are ignorant about laws authorizing noncitizens to receive benefits or are antagonistic to noncitizens generally.

Some of the obstacles noted above are common to virtually all domestic violence victims encountered in family court; some are permutations of common problems, or severe versions of what courts regularly see. However, some are specific to immigrant women who may simultaneously face race, gender, cultural, and language barriers, and must also overcome fear of removal to access the system. Thus, the immigrant women family courts see may be only the few whose desperation has overwhelmed their fears.



## **Immigration Term Glossary & Basic Cites**

**See Handout 4 for details**

### **GLOSSARY**

#### **Citizen (USC)**

Born in US (or most territories), born of US citizens, or naturalized after period in lawful permanent residence (for most).

#### **Immigrant**

Enters the US on visa, intending to make US her home

#### **Lawful Permanent Resident (LPR)**

Commonly called “green card holders,” they have most secure status short of citizenship. Usually must be sponsored by family or employer, or benefit from a special law.

#### **Nonimmigrant**

Enters the US on a visa, intending to return to the home country.

#### **Undocumented**

Overstayed visa, violated conditions of visa, otherwise lost status, or entered unlawfully

#### **VAWA**

Violence Against Women Act, which contained new routes to status for immigrant survivors of domestic violence, sexual assault, trafficking and other crimes.

### **BASIC CITES (see specific cites in individual handouts)**

#### **Immigration Law Generally**

Immigration and Nationality Act (INA) of 1952, Pub. L. No. 82-414, 66 Stat. 163, codified as amended at **8 U.S.C. §1110 et seq.**

**Crime of Violence** = 18 USC § 16

#### **Special Confidentiality Protections**

Section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (1996), codified at **8 U.S.C. § 1367.**

# Overview of the Immigration System and Laws

By Gail Pendleton & Ellen Kemp

The immigration system, its laws, and its regulations are complex and change frequently. What was true today may not be true tomorrow. To ensure you have current information, develop a working relationship with a local immigration expert who can answer your questions about how to help noncitizens you may encounter. Alternatively, the ASISTA Immigration Technical Assistance Project is available to provide such advice.<sup>1</sup>

To avoid unwittingly jeopardizing those you wish to help, you should be familiar with basic immigration rules.

## INS & DHS: Reorganization

Most people will be familiar with the former Immigration and Naturalization Service (INS), the government agency that until 2001 had authority over all noncitizens. After September 11, 2001, the U.S. created a new, Cabinet-level government agency, the Department of Homeland Security (DHS). DHS took over almost all of the functions of the former INS and reorganized them under three new bureaus. The new bureaus are:

Citizenship and Immigration Services (CIS), which provides immigration-related services and benefits such as lawful permanent residence, naturalization and work authorization;

Immigration and Customs Enforcement (ICE), which investigates and enforces federal immigration laws, customs laws, and air security laws; and

Customs and Border Protection (CBP), which is responsible for the borders.

The Department of Justice retained control only of the immigration judges and court system (also known as the Executive Office for Immigration Review, or EOIR).

## Rights of Noncitizens

In 1996, Congress passed a law making it very easy for INS/ICE to swiftly deport (now called “remove”) people from the U.S. This applies even to people who have the right to be in the U.S. Noncitizens should know they have the following rights:

- The right to speak to an attorney before answering any questions or signing any documents;
- The right to a hearing with an Immigration Judge;
- The right to have an attorney represent them at that hearing and in any interview with DHS (these are *not* government-paid attorneys as in criminal proceedings, however); and
- The right to request release from detention, by paying a bond if necessary.

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<sup>1</sup> Contact [questions@asistahelp.org](mailto:questions@asistahelp.org).

All noncitizens have these rights but will not necessarily be informed of them when detained. If they fail to assert these rights they may be deported without seeing either an attorney or an immigration judge. Leaving the U.S. in this way may have serious consequences for the noncitizen's ability to later enter or to gain legal immigration status in the U.S.

## **Learning the System: Basic Immigration Concepts**

### ***Noncitizen***

"Noncitizen" means any person in the U.S. who is not a U.S. citizen, whether the person has legal immigration documents or not.

### ***Undocumented***

Generally, the undocumented are noncitizens who either entered the U.S. without DHS permission or whose legal immigration documents have expired since they entered.

### ***Visa***

A visa is the document the U.S. gives to a noncitizen to come into the country. Visas for people who are in the U.S. temporarily are called nonimmigrant visas. Visas for people who plan to stay in the U.S. are immigrant visas. Most people with immigrant visas will eventually get a card that identifies their immigration status.

### ***Consular Officers***

Consular officers at U.S. embassies abroad grant and deny requests for immigrant and nonimmigrant visas. They are part of the U.S. Department of State. They have an enormous amount of discretion in making their decisions and no court in the U.S. may review their decisions, except in very unusual circumstances.

### ***Removal (Formerly Called Exclusion and Deportation)***

DHS may remove any person in the United States who is not a US citizen, using two sets of rules: *the grounds of inadmissibility and the grounds of deportation*. DHS uses the deportation grounds against those who entered legally but are not subject to removal (for committing crimes, for instance). DHS uses the grounds of inadmissibility against those who entered the US without permission. The grounds of inadmissibility also apply to people attempting to enter the United States or, under a legal fiction, to those within the United States seeking lawful permanent residence.

### ***Expedited Removal***

DHS may "remove" noncitizens encountered at the border or ports of entry if they lack documents or present inadequate or fraudulent documents. This "expedited removal" occurs without a hearing with an immigration judge or representation by counsel, and noncitizens are not generally apprised of their possible eligibility for immigration status, unless they express a fear of persecution in their homelands. The consequences of expedited removal are the same, however, as those flowing from full-fledged immigration proceedings, including barriers to gaining lawful permanent residence or other immigration status in the future.

### ***Immigration Proceedings***

All noncitizens inside the U.S. have the right to an immigration hearing. It is important for noncitizens arrested by DHS to assert their right to a hearing because immigration proceedings are like trials. An immigration judge presides over the hearing, a government attorney represents DHS, and the noncitizen has the right to a lawyer, although not at the government's expense. Some rules about evidence and procedure apply in immigration proceedings. The Board of Immigration Appeals (BIA) reviews all appeals from immigration judge decisions. The federal courts have some power to review BIA decisions.

### ***Kinds of Immigration Status***

Although Congress created special routes to immigration status for certain battered noncitizens in the Violence Against Women Act (VAWA), there may be other ways noncitizens you encounter could gain legal immigration status in the U.S. In addition, some may already have status and not realize it. If nothing else, this section should demonstrate that the immigration system is complicated and that determining who is or is not documented or eligible for immigration status is not simple. This information will provide you with some background, but referring noncitizens to immigration experts is the best insurance that they get the information they need, though it's important to check that the experts you find are familiar with the special routes to status for crime survivors.

Each immigration status has different requirements and benefits. This list includes only the major categories of status likely to apply to a noncitizen you encounter.

### ***US Citizenship***

Anyone born in the United States, its territories and certain possessions (Puerto Rico, Guam and the Virgin Islands, for instance) are US citizens. This includes people born of undocumented parents. Children of US citizens who are born while their parents are in another country also may be US citizens. Everyone else must "naturalize" to become a citizen, usually after a required period of lawful permanent residence.

US citizens cannot be removed unless a court takes away their citizenship because they obtained citizenship by fraud or other illegal means. Citizens don't need DHS authorization to work and may file petitions for lawful permanent residence for their spouses, parents, sons and daughters (both married and unmarried), and brothers and sisters. Citizens are eligible for all federal, state, and local public benefits, whether they were born in the United States or otherwise obtained citizenship. Most US citizens will either have a birth certificate showing they were born in the United States or a certificate of naturalization.

### ***Naturalization***

Only certain noncitizens, primarily those who have had lawful permanent residence for at least three years, are eligible to become US citizens. Those who seek to naturalize must demonstrate good moral character and pass several tests, notably English

proficiency and knowledge of the Constitution and US political system. There are some limited exceptions to these naturalization requirements.

### ***Lawful Permanent Residence***

Lawful permanent residents are noncitizens that make the U.S. their home, have authorization to work in the U.S. and have the most stable immigration status. They may serve in the U.S. military but they cannot vote in federal elections (or other elections unless authorized by statute). They must follow certain guidelines when they travel or stay outside the U.S., and DHS may still remove them for certain reasons. After five years (and in some cases, three years), lawful permanent residents may become citizens (“naturalize”) by taking a test and fulfilling other requirements. Lawful permanent residents should have Permanent Resident Cards, often called “green cards.” Lawful permanent residents may file petitions for lawful permanent residence for their spouses and unmarried children. Anyone with a Permanent Resident Card can work legally in the United States.

### ***Conditional Residence***

Noncitizens who apply for lawful permanent resident status based on marriage to a U.S. citizen or lawful permanent resident are called “conditional residents” if they have been married for less than two years when they obtained lawful permanent residence. To keep their lawful permanent residence status, conditional residents must file a “joint” petition with their spouses two years after the first petition is granted. Conditional residents have all the rights of lawful permanent residents.

In some cases, a conditional resident may have to file the joint petition by herself. To do this, she must check the box on the joint petition form asking for a waiver. DHS may grant waivers to conditional residents who are divorced from their spouses, who would suffer extreme hardship without it, or who are abused by their spouses.

### ***Battered Spouses, Children of US Citizens and Lawful Permanent Residents and Parents of US Citizens***

In the 1994 Violence Against Women Act (VAWA) Congress created two ways certain immigrant survivors of domestic violence can gain status without their abusers’ help. Those who can show they were battered or subjected to extreme cruelty by a US citizen or lawful permanent resident spouse or parent may petition on their own. In 2005, Congress added parents of abusive US citizens to this special class of “self-petitioners.” Those who are or have been the spouses or children of abusive US citizens or lawful permanent residents, and parents whose child has been abused by its US citizen or lawful permanent resident parent are eligible for a special “cancellation of removal.”

VAWA applicants can get permission to work (“work authorization”), can receive certain federal public benefits that many noncitizens can’t get, and eventually may become lawful permanent residents.

*Handout 8* contains more information on these special routes to status.

### ***Abandoned, Neglected and Abused Children***

Some children whose parents have abandoned, neglected, or abused them may be able to get lawful permanent residence through Special Immigrant Juvenile Status (SIJS). They will need findings from a family court to qualify for immigration status; see *Handout 5* for more information on SIJS.

### ***Nicaraguan, Cuban, and Haitian Adjustment to Lawful Permanent Residence (NACARA and HRIFA)***

In 1997 Congress passed the Nicaraguan Adjustment and Central American Relief Act (NACARA). NACARA allows some categories of Nicaraguans and Cubans to apply for lawful permanent residence. In October 1998 Congress also created a new route to status for thousands of Haitians who fled political upheaval in their country years ago (HRIFA).

Nicaraguans and Cubans who entered the United States before December 1, 1995 could gain lawful permanent residence if they applied before April 1, 2000. Haitians who applied by that date qualified for lawful permanent residence if they had applied for asylum or been "paroled" into the United States before December 31, 1995. In VAWA 2000, Congress added special provisions for spouses and children abused by NACARA, Cuban/Haitian, and HRIFA applicants.

### ***Parolees***

Parole is a mechanism by which DHS allows noncitizens into the United States for specific purposes, such as attending a hearing. It may also use parole to bring in the children or spouses of VAWA, U and T visa applicants. Noncitizens paroled into the United States for a year or more are eligible for some public benefits not available to other parolees.

### ***Cancellation of Removal***

There are several forms of cancellation of removal, including one designed specifically for certain victims of domestic violence. Those who are not domestic violence survivors may seek ten-year cancellation of removal if they show they have been continuously present in the U.S. for ten years, that removing them will cause "exceptional and extremely unusual hardship" to a U.S. citizen or lawful permanent resident spouse, child or parent, and that they have good moral character. A special form of cancellation for certain abused noncitizens also is available, and is described in *Handout 8*. When a judge grants cancellation of removal, the applicant also receives lawful permanent residence

### ***Voluntary Departure and Deferred Action***

DHS and immigration judges may grant "voluntary departure" to noncitizens they could remove from the United States. Noncitizens with voluntary departure must leave by the date stamped on the notice or face stiff fines and penalties, including bars to becoming lawful permanent residents. The 1996 immigration law limited voluntary departure grants to four months.

DHS also may give "deferred action" to people they could remove. There is a special deferred action system for VAWA self-petitioners. Otherwise, deferred action is rarely

granted. Those who do receive deferred action, however, don't have to leave the United States by any particular date and don't face fines and bars to status for failing to leave.

Since deferred action and voluntary departure are discretionary grants of status, DHS may revoke them any time. People granted deferred action may request work authorization and may be eligible for some public benefits.

### ***Nonimmigrants***

Nonimmigrants have their permanent home or residence in another country. There are many kinds of non-immigrants, including visitors for business or pleasure, foreign students, and temporary workers and trainees. In 2000, Congress created several new kinds of non-immigrant categories, which some victims of violence may wish to use. These include special visas for people who have had to wait a long time to get lawful permanent residence and visas for certain victims of human trafficking or other crimes. People in these special categories may eventually gain lawful permanent residence, even though this seems contrary to the normal assumptions about nonimmigrants.

Some nonimmigrants are allowed to work with DHS permission, including the categories created in 2000. Some also may be able to get public benefits. Many nonimmigrants may bring in their spouses and children ("derivatives"), but their status is entirely dependent on maintaining the relationship with the primary nonimmigrant. In 2005 Congress added abused derivatives, spouses and children, of some nonimmigrants to the list of noncitizens who may obtain work authorization.

Nonimmigrants who stay longer than originally permitted without an extension from DHS become undocumented. Even before the dates on their visas expire, DHS may deport nonimmigrants if they work without permission or violate other conditions on their visas.

### ***New U & T Visas: Victims of Crimes and of Trafficking***

The Victims of Trafficking and Violence Prevention Act of 2000 created the new U and T visas. The U visa is for victims of designated crimes. The T visa is for those who have been subjected to sex or labor trafficking. Both lead to lawful permanent residence and have waivers of most inadmissibility grounds. The T visa provides eligible immigrants with access to public benefits and employment authorization. The U visa provides eligible immigrants with authorized stay in the United States and employment authorization. Since Congress frequently updates and expands these laws, we suggest you consult the ASISTA website at [www.asistahelp.org](http://www.asistahelp.org).

### ***The Diversity Program or "Lottery"***

Periodically, Congress creates special temporary programs that grant lawful permanent residence to people from certain countries. Those who get status this way are chosen by a lottery.

### ***Asylum, Refugee Status, Withholding of Removal and the Convention against Torture***

Asylum and refugee status are for those who show that they have a “well founded fear” of persecution in their homelands based on race, religion, nationality, political opinion or membership in a social group. *Refugees* applied for and got asylum before they came to the United States. Those who apply for asylum once they are in the United States are *asylum applicants*. If they get asylum, they become *asylees*. Some asylum applicants are granted “withholding of removal” (formerly withholding of deportation) instead of asylum. People who can't qualify for asylum or withholding of removal may ask for protection under the Convention against Torture (CAT).

Asylees and refugees can apply for lawful permanent residence after a year, but there is a limit on the number of asylees who can obtain lawful permanent residence each year. It may, therefore, take many years for the government to issue lawful permanent residence to asylees. Those granted withholding of removal or CAT protection are not eligible for lawful permanent residence.

Refugees, asylees and people granted withholding of removal are eligible for all public benefits (at least for five years) and can get work authorization. Asylum applicants are not eligible for many public benefits but may request work authorization 150 days after they file for asylum. Noncitizens granted CAT protection can get work authorization and public benefits, but only if the immigration judge decides DHS may not permanently detain them.

### ***Temporary Protected Status (TPS)***

The United States may grant this status for a limited period of time to nationals of certain countries in turmoil. TPS has been granted to nationals of Haiti, Burundi, El Salvador, Honduras, Liberia, Montserrat, Nicaragua, Sierra Leone, Somalia, and Sudan, although the list of countries changes frequently. Once the designated period of protection ends, DHS sends TPS recipients a notice that they must appear in immigration court. At this point, they must either leave the United States or apply for another immigration status.

### ***Registry***

Registry allows people who have been in the United States for a very long time, since 1972, to gain lawful permanent residence. One great advantage of registry is that most of the grounds of inadmissibility do not apply.

## **Gaining Legal Immigration Status**

Each immigration status has different requirements. The system for getting an immigration status is very complicated and applying for any status is risky. This section will describe various routes to lawful permanent residence. Most people want to become lawful permanent residents (get a “green card”) because this status provides the most security short of citizenship. Lawful permanent residence is hard to lose, unless someone commits a crime, and lawful permanent residents can work. Most lawful permanent residents can become citizens after five years. Up until that time, however, DHS can remove them or keep them from coming back into the United States.



People can become lawful permanent residents in many ways: through a relationship with a family member, through employment, through the "lottery," or through another special program. Applying for lawful permanent residence through an employer is very complicated; applying for status through the lottery is very easy but most applicants don't win. Getting lawful permanent residence through a relative can be a very lengthy process, depending on which relative "sponsors" (applies for) the noncitizen.

For more on getting lawful permanent residence through family members, see Handout

## **Special Immigrant Juvenile Status (SIJS)**

Special Immigrant Juvenile status (SIJS) is available for undocumented children who are dependents of a juvenile court. Often, county personnel or child protective services are involved in the process as well. The family courts, in particular, play an integral part in these applications.

SIJS may be the only route to immigration status for many abandoned noncitizen children. Family courts should take care to notify children before them of this option, if it appears they may be undocumented. A child cannot win an application for SIJS without specific findings by the family court.

An applicant must show that he or she is:

- Under the age of 21 and unmarried on date of filing application with CIS;
- A dependent of a juvenile court or who has been placed by a court in the custody of a government or other agency/individual (see CIS memorandum excerpts at the end for detail);

And the court has found that:

- Reunification with the parents is not viable;
- That it is not in the best interests of the child to be returned to the home country.

### **Excerpt from CIS 2009 Memorandum<sup>2</sup> on SIJs changes**

"An eligible SIJ alien now includes an alien:

- who has been declared dependent on a juvenile court;
- whom a juvenile court has legally committed to, or placed under the custody of, an agency or department of a State; or
- who has been placed under the custody of *an individual or entity appointed by a State or juvenile court.*

Accordingly, petitions that include juvenile court orders legally committing a juvenile to or placing a juvenile under the custody of an individual or entity appointed by a juvenile court are now eligible. For example, a petition filed by an alien on whose behalf a juvenile court appointed a guardian now may be eligible. In addition, section 235(d)(5)

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<sup>2</sup> *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions*, HQOPS 70/8 (March 24, 2009) (available at [www.uscis.gov](http://www.uscis.gov))

of the TVPRA 2008 specifies that, if a state or an individual appointed by the state is acting *in loco parentis*, such a state or individual is not considered a legal guardian for purposes of SIJ eligibility.

The second modification made by the TVPRA 2008 to the definition of special immigrant juvenile concerns the findings a juvenile court must make in order for a juvenile court order to serve as the basis for a grant of SIJ status. Previously, the juvenile court needed to deem a juvenile eligible for long term foster care due to abuse, neglect or abandonment. Under the TVPRA 2008 modifications, the juvenile court must find that the juvenile's *reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law*. In short, the TVPRA 2008 removed the need for a juvenile court to deem a juvenile eligible for long-term foster care and replaced it with a requirement that the juvenile court find reunification with one or both parents not viable. If a juvenile court order includes a finding that reunification with one or both parents is not viable due to a *similar basis found under State law*, the petitioner must establish that such a basis is similar to a finding of abuse, neglect, or abandonment. Officers should ensure that juvenile court orders submitted as evidence with an SIJ petition filed on or after March 23, 2009, include this new language.

A petitioner is still required to demonstrate that he or she has been the subject of a determination in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence."

## **APPLYING FOR LAWFUL PERMANENT RESIDENCE THROUGH FAMILY MEMBERS**

US citizens and lawful permanent residents can file applications for their closest family members. Only U.S. citizens can "sponsor" their parents, brothers and sisters, and married children over 21. Citizens must be at least 21 to sponsor their parents, and brothers and sisters of citizens must wait many, many years (sometimes decades) before they receive lawful permanent residence. The difference in waiting times depends on a complicated quota system involving the number of visas already used by applicants from the same country and the "preference" category the immigrant is in. For instance, spouses and children under 21 are in one category; children of U.S. citizens over 21 (called "sons and daughters") are in another.

The family immigration process requires two applications: a petition and a visa application. The petition shows that the immigrant has a family relationship with the sponsor that qualifies her or him for lawful permanent residence. The visa application is the actual application for lawful permanent residence. Applicants for lawful permanent residence must show they are not "inadmissible" as defined by the immigration statute.

Spouses and children of lawful permanent residents must file the two applications separately. When DHS approves the first application, it assigns a "priority date" to the immigrant. The immigrant must wait to file the second part, the application for lawful permanent residence, until the quota system allows all applicants in the immigrant's category with the same priority date to file for lawful permanent residence. The quota system doesn't apply to spouses and children under 21 of US citizens, so they can file both the petition and the visa application at the same time.

DHS usually wants to interview the sponsor and the immigrant before making a decision on the application. It makes decisions on both parts of the application at the same time if the immigrant is the spouse or child of a U.S. citizen. Applicants who must wait to apply for lawful permanent residence usually have a separate interview on this application (DHS usually approves the first part without an interview). These interviews take place either at a DHS office in the United States or at a US consular office abroad.

### **How Long Will It Take to Get Lawful Permanent Residence?**

It used to be that spouses, children, and parents of US citizens got lawful permanent residence fairly quickly. Now DHS has so many pending applications for these immigrant visas that applicants often may wait for more than a year for an interview. At the same time, the waiting periods for spouses and children of lawful permanent residents have become very long. Because of these problems, Congress passed a law in December, 2000, that allows some of these applicants to live and work in the United States with legal immigration status (a "nonimmigrant" visa) until they receive permanent residence. This only applies, however, to people who had filed applications before December 21, 2000 and who already have waited three years for their status.

DHS and Congress believe many noncitizens marry US citizens or lawful permanent residents just to get immigration status. For this reason, applicants who were married for less than two years when they get their permanent resident cards are “conditional” residents. They must file another petition in two years to keep their lawful permanent residence status.

### **Can the Applicant Stay Here to Get Lawful Permanent Residence?**

If possible, noncitizens should try to stay in the United States for the interview on their lawful permanent residence applications. This is called “adjusting status.” If they entered the United States without government permission or worked without authorization, however, they may have to go to a US embassy abroad (usually in their home countries) to get “immigrant” visas, which will confer lawful permanent residence once they return to the United States. This is called “consular processing.” There are a number of other reasons why they may have to process their visas abroad.

Normally, noncitizens who entered the United States without government permission, lost their status, or worked without government approval can only get lawful permanent residence by going abroad. In 2000, Congress exempted VAWA applicants from the normal rules that apply; all VAWA applicants should now be able to stay in the United States to process their lawful permanent residence applications.

It is often harder for people to get their applications approved abroad than in the United States because they usually can’t bring their family members or legal representatives with them to the consular interview. Without this support it is much more difficult to challenge a consular officer’s decision that there are problems with an application. Unfortunately, while an applicant can appeal an adjustment denial, there is no right to appeal a consular denial.

## ROUTES TO STATUS FOR DOMESTIC VIOLENCE SURVIVORS

### **Background**

In the traditional family-based petition process noncitizens must rely on their U.S. citizen or lawful permanent resident relatives to file applications, rendering them particularly vulnerable to abusive sponsors. Congress first addressed this problem in 1990 with the battered spouse waiver for conditional residents<sup>1</sup> who otherwise had to rely on abusive spouses to file a “joint” petition with them. It soon became evident, however, that this remedied only part of the problem; many spouses and parents failed to file petitions for their noncitizen relatives, using their control of the immigration process as a weapon of abuse. In the 1994 VAWA, Congress added two new forms of immigration relief to help this latter population: “VAWA self-petitioning” and “VAWA suspension of deportation.”

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act reframed VAWA suspension of deportation as VAWA cancellation of removal. In October 2000, President Clinton signed the Victims of Trafficking and Violence Protection Act of 2000,<sup>2</sup> which removed many of the problems noncitizens encounter in pursuing VAWA status. It also included new nonimmigrant visas leading to adjustment of status for other victims of crimes, including domestic violence survivors who do not qualify for VAWA relief. In 2005 Congress added protections for abused parents of US citizens and abused spouses and children of certain nonimmigrants.

ASISTA, of which the author is a Co-Director, has a nationwide network of experts, including criminal and family court judges, that works together to ensure DHS implements the will of Congress. In addition, the author has served as the primary liaison with DHS (and former INS) on VAWA and U visas for over a decade. Unfortunately, many immigration attorneys are not familiar with the special routes to status and often fail to present adequate cases because of their inexperience with domestic violence issues. Noncitizens are most likely to profit from referrals to those in ASSITA's network, who are encouraged to employ a partnership model involving both domestic violence advocates and immigration attorneys.

Gender-based asylum is the framework under which most domestic violence claims by those abused abroad will fall. Gender-based asylum operates in the general asylum system, which is separate from the system noted above for forms of relief specifically designed for domestic violence survivors. Applying for any form of asylum requires expertise beyond that needed for the other forms of status for domestic violence survivor. Nevertheless, if a noncitizen primarily fears being harmed in the

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<sup>1</sup> INA §216(c)(4)(C), 8 U.S.C. §1186a(c)(4)(C), created by Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

<sup>2</sup> Pub. L. No. 106-386, § 2002, 114 Stat. 1464 (2000).

homeland, she may wish to pursue this form of relief. To win such a case, she will need an attorney with experience in both asylum and domestic violence.<sup>3</sup>

## **Self-Petitioning, VAWA Cancellation, and the Battered Spouse Waiver**

A key aspect of the special routes to status based on domestic violence is the “any credible evidence” standard dictated by Congress.<sup>4</sup> This is the most liberal evidentiary standard in the immigration law, acknowledging that the “primary” evidence normally required may be unavailable to many noncitizen survivors of domestic violence.<sup>5</sup> Findings, judgments, and documents from family court are inherently “credible” and extremely helpful to noncitizens seeking immigration status.

There are many kinds of evidence that may be helpful to noncitizens seeking status as victims of domestic violence. This section describes those most helpful.<sup>6</sup>

### ***Battery or Extreme Cruelty***

A requirement for self-petitioning, VAWA cancellation, battered spouse waivers and work authorization for abused spouses and children of nonimmigrants is proof of battery or extreme cruelty.<sup>7</sup> U visa applicants must show they suffered “substantial physical or emotional abuse”<sup>8</sup> as the result of a crime (including domestic violence and sexual assault). For self-petitioning and VAWA cancellation, battery or extreme cruelty to either the applicant or the applicant’s child will qualify a noncitizen for status.

**Extreme cruelty** is a broad concept for immigration purposes, covering any kind of abuse designed to exert power and control over the victim. It is not limited to any state definition (if there is one) and includes psychological, emotional and economic abuse, coercion, threats (to anyone or anything the victim cares about), intimidation, degradation, social isolation, possessiveness, harassment of employers and other employment-related abuse, manipulating and using immigration status, and harming children, family members and pets.

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<sup>3</sup> ASISTA Immigration Technical Assistance Project can connect you to experts on domestic violence as a basis for asylum. Contact ASSITA Co-Director, Gail Pendleton, for referrals: [gailpendleton@comcast.net](mailto:gailpendleton@comcast.net)

<sup>4</sup> See, e.g., Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 at § 204(a)(1)(H); (codified as amended at 8 U.S.C. § 1110 *et seq.*; hereinafter INA), 8 U.S.C. § 1154(a)(1)(H); INA § 240A(b)(2)(D); 8 U.S.C. § 1229b; INA § 216(c)(4)(C); 8 U.S.C. § 1186a(c)(4)(C).

<sup>5</sup> See, e.g., 8 C.F.R. § 204.2(c)(2)(i).

<sup>6</sup> For in-depth descriptions of eligibility requirements and filing procedures for the immigration applications described here, please visit the Clearinghouse section of [www.asistahelp.org](http://www.asistahelp.org).

<sup>7</sup> See, e.g., INA § 204(a)(1)(A)(iii)(I)(bb), 8 U.S.C. § 1154(a)(1)(A)(iii)(I)(bb).

<sup>8</sup> INA § 101(a)(15)(U)(i)(I), 8 U.S.C. § 1101(a)(15)(U)(i)(I).

### *VAWA Cancellation Factors*

In addition to showing the requirements for self-petitioning, VAWA cancellation applicants must show extreme hardship to themselves or to their children (regardless of the children's immigration status). The factors DHS considers for VAWA cancellation (also for self-petitioning before VAWA 2000) are summarized in the following considerations:

- The need for access to courts and to the criminal justice system in this country;
- The applicant's need for and use of services or support systems in this country juxtaposed against the lack or unavailability of similar services and support in the homeland;
- The lack of laws or enforcement of laws that protect victims of domestic violence, and the likelihood the abuser will follow her back (or already is there);
- The likelihood people in the home country (including his relatives, her relatives or their community) will harm the applicant;
- The abuse the victim suffered was very severe or longstanding;
- Laws, social mores, and customs in the home country that penalize or ostracize women who challenge the subordination of women, who are divorced, or who have adopted "Western" values; and
- The application of all the above factors to the children.

### **Visas for Victims of Crime**

The two new visas Congress created in 2000 are for certain victims of crimes. Neither the status of the victim nor the perpetrator is relevant for either visa. Thus, the U visa in particular should prove helpful to domestic violence survivors whose abusers are undocumented or are not their spouses or parents.

Accessing the criminal justice system is essential to both visas, but family courts may help make noncitizens aware of their options, including a U or T visa, and refer them to advocates or attorneys who can help them.

#### **The U Visa**

Victims of a large array of crimes are eligible for U visas. They include victims of domestic violence, nannies subjected to abuse from their employers, trafficking victims, and victims of rape in the workplace or by non-intimates. To qualify for a U visa, victims must show that they have suffered "substantial physical or mental abuse." The proof noted in the section on battery and extreme cruelty will, therefore, be helpful in these cases as well.

In addition, judges who have authority to investigate crimes can provide certificates to noncitizens who are qualifying victims of crimes and "have been, are being, or are likely to be helpful" in an investigation or prosecution.<sup>9</sup> This will both encourage

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<sup>9</sup> For the U forms, including the certification form, go to the U visa section of the Clearinghouse at [www.asistahelp.org](http://www.asistahelp.org).



undocumented victims of crimes to report them and help the criminal justice system prosecute perpetrators who prey on immigrant communities.

### **The T Visa**

These visas for victims of trafficking for sex or labor are often the bailiwick of the federal law enforcement, but local law enforcement may provide support for these applications, especially in states that have passed their own anti-trafficking laws and in cases which may be a low priority for federal law enforcement, such as cases involving individuals, as opposed to groups, trafficked for forced labor (i.e., nannies and "fiancées" who become indentured servants). Trafficking victims may gain T visas without certification by showing otherwise how they've been helpful, so the family court system may provide valuable "secondary" evidence to support T applications. Such evidence could include findings or documents that show the noncitizen is a victim of sex or labor trafficking.

### **Gender-Based Persecution**

A victim of domestic violence seeking asylum must show that she fears persecution in her homeland because she has been or is likely to be subjected to domestic violence if returned there. In most cases, the claim is based on past abuse; fleeing to the U.S. was the victim's final desperate attempt to save herself and her children. Often, the abuser may now be in the U.S., continuing his persecution of his family. These are the cases in which the family courts may be helpful by making findings. It is virtually impossible to win an asylum claim without the help of an experienced advocate or attorney, so making helpful referrals is especially important in these cases.

## **CREATING A HELPFUL RECORD FOR IMMIGRATION STATUS**

### **Findings**

Findings about domestic violence, and protection orders themselves, are helpful. Even if you cannot issue an order, it is helpful to explain why the law may not allow this and, if possible, to describe the abuse you believe is occurring, even though it does not legally sufficient for an order. Some examples:

### **U Visa for Victims of Domestic Violence, Sexual Assault, & Other Crimes**

If you are empowered under state law to “detect, investigate or prosecute” domestic violence crimes, you may sign a certificate for a U visa applicant. The certificate must state, among other things, that the applicant “has been, is being, or is likely to be” helpful in an investigation or prosecution of the crime. This document is essential to obtaining a U visa for victims of crimes.

### **VAWA Immigration Provisions**

The following measures will help noncitizens who must show “battery or extreme cruelty” to achieve immigration status (self-petitioning, waivers of conditional residence, VAWA cancellation of removal, abused spouses and children of nonimmigrants seeking work authorization):

- Ask the victim questions on the record about the abuse, including abuse noted in police reports, and note any criminal convictions of the abuser;
- Ensure both oral and written witness testimony is in the record;
- Enter as part of the record any physical evidence, such as photos, letters, weapons, clothing, medical records, and subpoenaing these, if necessary;
- Incorporate expert affidavits into the record, including those of domestic violence, sexual assault, and mental health counselors (DHS considers them experts on these issues);
- Subpoena documents or proof that the abuser or system are loath to provide; and
- Describe on the record any threats made by the abuser or other relevant behavior while the abuser is in court.\
- 
- Findings about the abuse noncitizens have suffered, using descriptive, detailed terms that cover not only physical abuse, but psychological and other forms of non-physical power and control, will help DHS make a finding of “extreme cruelty” such as
  - immigration status manipulation;
  - economic control;
  - isolation;
  - belittling & degradation;
  - using children, family members, pets as weapons of abuse, etc.
  - stalking or intent to stalk the victim or her children;

- threats to follow the victim or the children back to the home country or findings that the abuser has done so in the past;

### **Effects on Children**

VAWA applicants may base their applications, at least in part, on domestic violence suffered by their children, whether the children have immigration status or not. If there are children involved

- Include evidence such as that above concerning abuse of the children; and
- If children were not directly abused, but lived in the household while abuse was occurring, include evidence of the effects on children, such as teacher's and counselor's affidavits, school records, and statements by the children (if they are willing and it is safe for them to do so).

### **Evidence about the abuser**

Self-petitioners and applicants for VAWA cancellation of removal must show several things about their abusers, or their relationship to their abusers, that may be difficult for them to document because the abuser controls the information. This includes such information as:

- The abuser is or was a legal spouse or parent;
- The abuser is or was a U.S. citizen or lawful permanent resident;
- The abuser resided with the applicant (not necessarily in the United States); and
- The marriage was legal, unless the abuser committed bigamy and the victim did not know about it; and
- the marriage was not solely for the purpose of conferring immigration status on the noncitizen (good faith marriage).

Because manipulation of immigration status is part of the pattern of abuse, judges should sanction this manipulation by requiring the abuser to provide documentation of these proof requirements. This can be done in several ways, depending on the posture of the case, and may include:

- Asking police to help noncitizens retrieve needed documents when helping battered immigrants collect possessions in the home;
- If the victim is obtaining an emergency protection order, encouraging her to bring any documents about her children, her marriage, her life with her spouse, and his status in the U.S. with her to court;
- Requiring the abuser to provide information or to cooperate in an ongoing immigration petition as part of discovery or sanctions against abuse; and
- If a judge has direct knowledge of information the applicant lacks, making findings providing the basis and content of that knowledge.

Examples of helpful evidence include:

- Legal Marriage
  - Copies of the abuser's prior divorce agreements and the couple's marriage certificate and marriage license (legal marriage);
  - Findings that show common law marriage, if a judge's state recognizes such marriages (DHS recognizes common law marriages from any jurisdiction where they are legal);
  - Findings or documents in the record that a divorce between the abuser and the noncitizen applicant for status is connected to domestic violence (self-petitioners must show this if they file for status within two years of a divorce from their abuser); and
  - If it turns out the abuser is a bigamist, the judge should make findings, or include documents in the record that support this. Self-petitioners whose abusers are bigamists are still eligible for status, even though their marriages are not legal. If a judge believes the noncitizen married the abuser in good faith, not realizing he was a bigamist, he or she should make such findings on the record.
- His Status
  - Copies of the abuser's immigration documents (lawful permanent residence card or naturalization certificate), U.S. passport, or birth certificate (proving he was born in the U.S.);
  - Copies of documents relating to children that might indicate his status, such as children's birth certificates, baptismal certificates, registration for school, etc; and
  - Anything relating to military service (only U.S. citizens and lawful permanent residents may serve in the U.S. military).
- Residence and Good Faith Marriage (often the same kind of documents)
  - Copies or evidence of bills, mortgages, tax forms, bank accounts, leases/rent payments, mail to both parties, school records, work records, any documents that show the couple resided together (shows co-residence and good faith marriage);
  - Children's documents that show co-residence, such as birth certificates;
  - Affidavits or statements from neighbors, landlords, family or others who know the couple's living situation and marriage;
  - Wedding and vacation pictures, insurance policies listing victim as beneficiary; and
  - Letters from the abuser to the noncitizen or her family demonstrating they had a real marriage.
- Noncitizen's Documents

- Documents belonging to the noncitizen controlled by the abuser, including any immigration papers filed for her, her and the children's identification documents, wedding pictures, invitations, etc.

### **Victim's Behavior**

Findings about why victims may have engaged in criminal behavior may help overcome legal barriers to gaining immigration status based on that behavior. DHS may forgive that behavior if it flowed from or was related to domestic violence or, generally, was coerced

### **Extreme Hardship**

For VAWA cancellation and the T visa, applicants must show they or their children will suffer extreme hardship in the homeland if they are removed from the United States. Similarly, special immigrant juveniles need a finding by a civil court judge that it is not in their best interests to be removed. If it appears that an abuser has succeeded in bringing DHS into the picture, and DHS is going to try to remove the victim, these findings will be particularly helpful.

Much of the evidence noted in the section concerning battery and extreme cruelty will help prove these factors. In addition, judges can help by including in the record evidence that:

- The abuser stalks or intends to stalk the victim or her children;
- The abuser has threatened to follow the victim or the children back to the home country or has done so in the past;
- The applicant is receiving and needs social, medical, or mental services and support in this country, or that the judge has referred or recommended such services for her;
- The applicant needs ongoing access to the court for future custody determinations or redeterminations, further orders or actions if the abuser violates court orders, child support, maintenance, visitation, etc.;
- The long-term nature of the abuse or its high level of violence (e.g., rape, aggravated assault, etc.);
- The noncitizen parent is and should be primary caretaker of the children;
- The children will suffer if forced to choose between staying with the abuser in this country or returning to the home country with their mother (where they may not speak the language, will not have access to counseling or adequate schooling, will be ostracized, etc.); and
- The effect of the abuse on the children and their need for support and services here.

### **T Visa Extreme Hardship Findings**

- The age and personal circumstances of the applicant;
- Serious physical or mental illness of the applicant that necessitates medical or psychological attention not reasonably available in the home country;
- The nature and extent of the physical and psychological consequences of severe forms of trafficking in persons;
- The impact of the loss of access to the United States courts and the criminal justice system for purposes relating to the incident of severe forms of trafficking in persons or other crimes perpetrated against the applicant, including criminal and civil redress for acts of trafficking in persons, criminal prosecution, restitution, and protection;
- The reasonable expectation that the existence of laws, social practices, or customs in the home country to which the applicant could be returned would penalize the applicant severely for having been the victim of a severe form of trafficking in persons;
- The likelihood that the trafficker in persons or others acting on behalf of the trafficker in the home country would severely harm the applicant; and
- The likelihood that the applicant's individual safety would be seriously threatened by the existence of civil unrest or armed conflict as demonstrated by the designation of Temporary Protected Status, under Section 244 of the Act, or the granting of other relevant protections.

**Asylum: Domestic Violence as Gender-Based Persecution**

Judges may make helpful findings about, or include in the record documents and oral testimony concerning:

- The abuse suffered by the victim at the hands of her abuser;
  - The history of abuse, especially that which occurred in the home country;
  - The abuser's reasons for choosing the victim (believes he has right to control his family members, any threats, etc. he makes in court or otherwise);
  - The abuser's history of traveling to the home country;
  - The abuser's threats to follow the victim and her children back to the home country; and
  - The lack of protection in the home country for the victim, including her past attempts to access safety and the consequences, or her reasons for believing accessing the system was pointless or dangerous.
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## Useful Protection Orders

Judges may use the catch-all provision, the “other” check box on standard forms, to require abusers to provide information their immigrant victims need to get status. The court can order the abuser to provide documentation necessary for the victim’s application to DHS and sanction the abuser’s attempts to manipulate the victim’s immigration status by controlling her documents or interfering with her DHS application.

### Helpful evidence includes

#### *Abuser’s status*

- Copies of the abuser’s immigration documents (lawful permanent residence card or naturalization certificate), U.S. passport, or birth certificate;
- Copies of documents relating to children that might indicate his status, such as children’s birth certificates, baptismal certificates, registration for school, etc.; and
- Anything relating to military service (only U.S. citizens and lawful permanent residents may serve in the U.S. military).

#### *Legal Marriage*

- Copies of the abuser’s prior divorce agreements and the couple’s marriage certificate and marriage license;

#### *Family Members’ Documents*

- Family members’ immigration documents in their control or copies of any immigration applications he has filed on their behalf;

#### *Residence/Good Faith Marriage*

- Copies or evidence of bills, mortgages, tax forms, bank accounts, leases/rent payments, mail to both parties, school records, work records, any documents that show the couple resided together (shows co-residence and good faith marriage);
- Children’s documents that show co-residence, such as birth certificates;
- Wedding and vacation pictures, insurance policies listing victim as beneficiary; and
- Letters from the abuser to the noncitizen or her family demonstrating they had a real marriage.

### Sanctioning Immigration Status Manipulation

- Prohibit the abuser from contacting DHS to undermine the victim’s current status or application for future status;
- Require abusers to pay the fees for his victim’s application for status;
- Require abusers to pay the costs for replacement identification and travel and immigration documents;

### Other Creative Remedies

Judges may modify normal check boxes to meet the needs of immigrant applicants, for instance, allowing them to continue to living together but requiring that the abuser attend an intervention program (in his language) and to refrain from threatening, assaulting, or harassing her.

Sample provision:

Respondent shall not molest, assault, harass, or in any manner threaten or physically abuse the petitioner or the minor children; respondent shall not enter the family residence during working hours (9-5, Monday to Friday); respondent shall not enter the bedroom occupied by the petitioner and the parties' children.

### **Track compliance**

Subsequent acts could serve as basis for victim's U Visa, so it may be particularly helpful in cases involving immigrants to track and sanction abuser non-compliance.

### **Sample Provisions Helpful to Immigration Documentation**

Respondent shall relinquish possession and/or use of the following personal property as of [date/time]:

Petitioner's birth certificate, passport, and any documents relating to petitioner's immigration status (i.e., lawful permanent resident card, approval notices from Citizenship and Immigration Services or the Executive Office for Immigration Review)

Children's birth certificates, passports, and any documentation relating to their immigration status (see above)

Marriage certificate issued to petitioner and respondent

Other documents demonstrating good faith marriage (leases, joint account records, utility bills, wedding pictures, joint tax filings, etc.)

Documents showing respondent's previous marriages and dissolutions thereof

Respondent's immigration documents (lawful permanent resident card, naturalization approval) or US birth certificate

Any immigration documentation filed with or received from the Department of Homeland Security (or the Immigration and Naturalization Service, for papers dating before the establishment of the Bureau of Citizenship and Immigration Services of the Department of Homeland Security).

Respondent shall not contact any agency regarding the petitioner or the petitioner's children's immigration status, including the Department of Homeland Security (Citizenship and Immigration Services, Immigration and Customs Enforcement or Customs and Border Protection), the Executive Office for Immigration Review (the immigration court system) or the Department of State.



Respondent shall pay all fees relating to petitioner's or petitioner's children's applications for immigration status.

Respondent shall not take the children out of the United States. Respondent shall turn over the passports of the parties' minor children to the court and shall refrain from applying for new passports. *(Court may notify the U.S. State Department that such an order has been issued, submit a copy to the State Department, and ask that no new passports be issued to the respondent on behalf of the minor children.)*

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## **U and T Visas: Outline of Requirements & Where Courts May Help (see italics)**

### **Both visas created in 2000:**

- For victims of certain crimes;
- Perpetrator & victim can be out of status & no familial relationship required;
- Some criminal justice system involvement required; and
- Civil courts can help document and make referrals.

### **The U Visa**

#### **The crimes**

“Criminal activity,” “any similar activity,” and attempts, conspiracies and solicitation to commit:

- Rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation;
- Being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion;
- Manslaughter, murder, felonious assault; and
- Witness tampering, obstruction of justice, perjury.

#### **Criminal system involvement**

Certification required from state, local or federal

- Law enforcement official, prosecutor, judge or
- Other authority investigating the crimes listed

*Judges and other court personnel charged with detecting, investigating or prosecuting these crimes can sign certificates*

That states that the applicant:

- Is/was a victim of one of the listed crimes
- “Is being, has been or is likely to be helpful” in the
- Investigation or prosecution of one or more listed crimes

#### **Applicant also must show**

- “Substantial physical or mental abuse.”

*Court findings helpful*

### **The T Visa**

#### **The Crimes**

Trafficking (humans) for sex or labor

#### **Criminal system involvement**

To show victim of crime and “complied with reasonable requests” to help criminal system

- Federal law enforcement certification

- Local and state also accepted
- Other evidence if can't get certification  
*Judges and court personnel can help document*

**Applicant also must show**

“Extreme hardship involving unusual and severe harm if removed”  
*Judges and court personnel can help document*

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## DO'S AND DON'TS, DETAILS

### Do Not Involve or Function as DHS

The most obvious pitfall to avoid is to not allow DHS personnel, usually from Immigration and Customs Enforcement (ICE) to attend hearings, or to wait outside to arrest and detain noncitizens in the court. This is most likely to occur because an abusive spouse has called ICE, hoping to intimidate the victim from attending the hearing or asserting her rights.

Being in the United States without documents is not a crime; it is not a violation of a criminal provision of the immigration laws, but of the civil provisions. Enforcement of the civil provisions of the immigration law is vested with federal enforcement authorities. Unless and until Congress passes a law making mere unlawful presence a crime, case law and policy concerns dictate that enforcement of the civil provisions remains with the arm of government empowered by the Constitution to govern our borders.

Some policy reasons for keeping the enforcement of the civil immigration laws separate from local police and judicial functions include the fact that immigrants will not call the police or access the court system if they hear they will be exposed to DHS by doing so, and that Congress, the creator of our immigration laws, has mandated that noncitizen victims of violence be encouraged to access the system, achieve safety, and obtain immigration status. Other systems should not undermine this mandate.

An issue paper on domestic violence prepared for the National Council of Juvenile and Family Court Judges provides an apt summary:

Local courts and law enforcement officers have no authority to enforce the non-criminal provisions of the Immigration and Nationality Act. There is also no requirement that a victim or witness state her place of birth or immigration status when filing a complaint or a police report. Under federal law, the police have no duty to inquire into the immigration status of a victim, witness, or arrestee (*Gonzalez v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983)). Despite this fact, some judges and law enforcement officers do inquire into immigration status in domestic violence cases. Such inquiries during police investigations or at trial significantly erode community confidence in the judiciary and cooperation with the police. For victims of family violence this practice can be lethal. It can drive a victim who has finally turned to the courts or the police for protection back into an increasingly violent home.<sup>2</sup>

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<sup>2</sup> Issue Paper on Domestic Violence Cases Involving Immigrant and Refugee Communities: The Response of the Courts (1991), prepared by the Family Violence Prevention Fund for the National Council of Juvenile and Family Court Judges, at 18.

## **Avoid Red Herrings**

Parties often raise immigration status, or the lack of status, as a factor civil court should consider in making its decisions. Courts should view such attempts as red flags for underlying domestic violence and avoid being sidetracked from normal evidentiary examination. When a party raises the issue, judges should consider why, or if, immigration status is relevant. Judges should question whether the party is attempting to invoke bias rather than raising a legitimate factual issue. If the former is true, a judge can analogize to how he or she would view a party raising race or gender to impugn another party. Attempts to manipulate immigration status, as a weapon of abuse is exactly what Congress has attempted to stymie in VAWA and its progeny.

## **Sounds Fishy 1: Asking for a Party's Immigration Application**

The most common ways abusers use immigration status in family court are to ask the judge to require the victim to provide a copy of her application for immigration status and then to argue that she should not receive custody of children because she is undocumented. Ironically, the very reason she is undocumented may be that he never filed or finished an application for immigration status for her.

The contents of an immigration application are not relevant for many reasons. Abusers generally allege that victims are making up the domestic violence charges so they can obtain immigration status. If it is the application itself that impugns the victim's credibility, the contents of the application should not be relevant. Congress created a special law ensuring confidentiality of such immigration applications;<sup>3</sup> any DHS or Department of Justice employee who violates this provision is subject to a \$5,000 fine. The family courts should not be complicit in the abuser's attempts at intimidation by forcing victims to reveal the contents of their applications. The abuser should be subjected to the normal evidentiary requirements and standards for proving domestic abuse.

## **Sounds Fishy 2: Best Interests for Children**

Lack of immigration status per se is not relevant to the issue of child custody. It cannot be in the best interests of a child to be placed with an abusive parent solely because he is a citizen or has immigration papers. Lack of status does not make a person an unfit parent.

## **Sounds Fishy 3: Alleged Flight Risk**

Nor does the fact that a person is undocumented mean that she is a flight risk or faces imminent removal (unless the abuser has called in DHS). If a noncitizen has been living in the United States for awhile and is accessing the civil court to obtain its protections, it is no more likely that she will flee the jurisdiction than would a citizen in

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<sup>3</sup> Section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (1986), codified at 8 U.S.C. § 1367.

her shoes. If a judge is concerned, he or she should ask the usual questions concerning flight risk, but should not apply an unexamined presumption against noncitizens.

#### **Sounds Fishy 4: Alleged Imminent Removal**

Unless a noncitizen is facing a final order of removal from an immigration court, having pursued all possible appeals, she is not facing imminent removal, regardless of the abusers' allegations. The immigration system provides some due process for noncitizens before they may be removed from the United States. Because abusers often succeed in getting their victims placed into removal proceedings, Congress created a special route to status for victims of domestic violence in such proceedings.

#### **Examine Assumptions**

Sometimes courts make presumptions about parties who appear before them that may be true for the vast majority of the population, but are not true for noncitizens. This seems to be particularly true when children are involved. For instance, a standard presumption applied to mothers who are victims of domestic violence seems to be that they can work and obtain public benefits, and therefore leave their abusers. This assumption is inaccurate for noncitizens. They cannot legally work without authorization. If they successfully apply for immigration status as a victim of crime they will be able to work, but a judge may be the first person to tell them this is an option. In addition, few noncitizens, including lawful permanent residents, are eligible for most federal public benefits. Although states have filled in some gaps, there are still very few benefits available to noncitizens. Moreover, if benefits are available, using them may make it difficult to ultimately gain lawful permanent residence (green card), or may be perceived as a barrier to gaining such status.

A noncitizen mother's inability to work is unrelated to lack of character; it is dictated by our laws. Requiring noncitizen mothers to forfeit their children if they cannot work or obtain public benefits is not in the best interests of the child, if the alternative is living with the abuser or in foster care. Instead of applying presumptions based on mainstream experience judges should examine the underlying reason for the presumptions. If it is economic independence or living away from the abuser, judges should give the noncitizen the chance to show alternative ways she can do this, and give her time to do it.

#### **Credibility Concerns**

Most family court judges are familiar with how the experience of domestic violence and post-traumatic stress syndrome may affect a party's ability to present testimony.<sup>4</sup> For instance, numerous studies have demonstrated that most abused women minimize, rather than exaggerate, the severity of the violence to which they

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<sup>4</sup> See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Women's Syndrome*, 21 Hofstra L. Rev. 1191, 1195 & n.16 (1993)

have been subjected.<sup>5</sup> Some victims may be reluctant to discuss the abuse or may omit significant details about incidents of abuse to which they do testify. In addition, trauma such as that associated with spousal abuse often results in impaired memory.<sup>6</sup> Various coping mechanisms may affect memory.<sup>7</sup>

In addition, judges should consider special credibility issues arising from cultural differences. Many cultures still view domestic violence as a private and shameful matter that is not to be discussed openly, and view battered women with contempt.<sup>8</sup> Immigrant women may come from cultures where looking another person in the eye is a form of disrespect; judges should avoid assuming that this is, instead, a sign of mendacity. Immigrants with less education may not remember events by calendar dates, but are used to assessing time frames through significant events, such as birthdays and time of the year. Attempts to pin them down using a framework with which they are unfamiliar will result in inaccurate facts and contradictions due not to lack of credibility but to desire to appease or please an authority figure

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<sup>5</sup> See, e.g., Angela Browne, *When Battered Women Kill* 126 (Free Press, 1987) (noting battered women's tendency to under-report the severity of abusive acts and resultant injuries); Judith Herman, *Trauma and Recovery* 82-83 (Basic Books, 1992) (noting women's common attempts to minimize domestic violence); Liz Kelly, *How Women Define Their Experiences of Violence*, in *Feminist Perspectives on Wife Abuse* 124-28 (Kentsi Yilo and Michele Bograd, eds., 1988) (observing that women are often loathe to label abuse as abuse); Larry L. Tiftt, *Battering of Women: The Failure of Intervention and the Case for Prevention* 59 (Westview Press 1993) (noting minimization tendency).

<sup>6</sup> Inger Agger, *The Blue Room: Trauma and Testimony among Refugee Women – A Psycho-Social Exploration* 13 (Mary Bille, trans., Zed Books, 1994) (explaining the phenomenon as “an alteration of consciousness in which experiences and affects are not integrated into memory and awareness”), citing I.L. McCann & L.A. Pearlman, *Psychological Trauma and the Adult Survivor* 41 (Brunner/Mazel, 1990).

<sup>7</sup> See Browne, *supra* note 5 at 91 (noting that victims of domestic violence commonly experience flashback or loss of memory for parts of traumatic episodes); Herman, *supra* note 5 at 187 (noting blurring effect); Tiftt, *supra* note 5 at 64 (“[T]he battered partner may suffer cognitive distortions, including dissociation, memory loss, a traumatic reexperiencing when exposed to associated stimuli, and a hypersensitivity to episodes of violence . . .”).

<sup>8</sup> See K.J. Wilson, *When Violence Begins at Home, A Comprehensive Guide to Understanding and Ending Domestic Violence* 105-07 (Volcano Press, 1997) (noting cultural reticence of Latina women to discuss domestic violence and observing that Latina women are taught to “tolerate abuse for the sake of family pride;” women who attempt to leave battering husbands receive little familial support and in fact are often convinced to return); The Center for Health and Gender Equity, *Population Reports: Ending Violence Against Women* 6 (Dec. 1999) (observing that in a variety of countries including Mexico, “studies find that violence is frequently viewed as physical chastisement – the husband’s right to ‘correct’ an erring wife”) found at [www.jhuccp.org](http://www.jhuccp.org). See also Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 *Geo. J. on Poverty L. & Pol.* 245 (Summer 2000); Giselle Haas et al., *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications, Domestic Violence: Global Responses*, at 93-113 (2000) (noting that Latinas “reported the longest duration of abuse and were the least likely to contact a friend, minister or agency for help” among group including Anglo and Black women).

