

March 10, 2022

Ms. Amanda Baran
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U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Dr.
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Via e-mail to policyfeedback@uscis.dhs.gov

RE: Comment on USCIS Policy Manual Changes: Volume 3: Humanitarian Protection and Parole, Part D, Violence Against Women Act [3 USCIS-PM D]

Dear Ms. Baran:

On behalf of ASISTA, I respectfully submit this comment in response to the February 10, 2022 Policy Alert revising a section of the U.S. Citizenship and Immigration Services' (USCIS) Policy Manual on VAWA self-petitions (hereinafter "Policy Manual"). We appreciate this opportunity to provide comments.

The mission of our agency is to advance the dignity, rights, and liberty of immigrant survivors of violence. For over 15 years, ASISTA has been a leader on policy advocacy to strengthen protections for immigrant survivors of domestic violence, sexual assault, human trafficking and other crimes that were created by the Violence Against Women Act (VAWA) and the Trafficking Victims Protection Act (TVPA). We assist advocates and attorneys across the United States in their work on behalf of immigrant survivors and submit this comment based on our guiding principles and our extensive experience.

We thank USCIS for its survivor-centered revisions to the Policy Manual. We believe many of these amendments will protect noncitizen survivors of family violence by increasing their access to lawful immigration status, independence, and physical safety. We also believe there remain areas in which USCIS should further amend its policies to better effectuate VAWA's purpose, and we urge USCIS to consider our recommendations in reviewing further changes to 3 PM-Part D, Violence Against Women Act.

These comments will focus on five issues:

- 1) The shared residence requirement for child self-petitioners should be revised in accordance with VAWA 2000's statutory amendments;
- 2) USCIS should adopt the Seventh Circuit's reasoning behind *Arguijo v. USCIS* and allow abused stepchildren to self-petition without demonstrating an ongoing relationship with their

abuser where the marriage between their natural parent and abusive stepparent terminated by death;

3) The Policy Manual should acknowledge the role abuse may play in creating the appearance of inconsistencies and comport with USCIS’s own policy regarding the issuance of RFEs and NOIDs;

4) USCIS should adopt the holding in *Moreno-Gutierrez v. Napolitano* and deem the two-year filing deadline for spousal self-petitioners subject to equitable tolling; and

5) USCIS should revise the Policy Manual to conform with the prohibitions on determinations of inadmissibility or removability and disclosure of information under 8 U.S.C. § 1367.

1. The shared residence requirement for child self-petitioners should be revised in accordance with VAWA 2000’s statutory amendments. [3 USCIS-PM D, Chap. 2.F]

The Policy Manual’s requirement that child self-petitioners have suffered battery or extreme cruelty while residing with their abusive U.S. citizen or lawful permanent resident (LPR) parent conflicts with the current statutory requirements and is based on outdated regulations. USCIS cites 8 C.F.R. § 204.2(e)(1)(i)(E) to support this requirement.¹ However, both §§ 204.2(e)(1)(i)(E) and 204.2(e)(1)(vi) were superseded by the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, 114 Stat. 1464 (October 28, 2000) (“VAWA 2000”), which removed any temporal requirement related to a child self-petitioner’s shared residence with their abusive parent. The regulations were promulgated in 1996 based on VAWA 1994’s version of INA §§ 204(a)(1)(A)(iv) and 204(a)(1)(B)(iii) but were never updated following the VAWA 2000 revisions.²

The Violence Against Women Act of 1994 (“VAWA 1994”) required that:

A[] [noncitizen] who is the child of a citizen of the United States . . . may file a petition with the Attorney General . . . if the [noncitizen] demonstrates to the Attorney General that— (I) . . . during the period of residence with the citizen parent the [noncitizen] has been battered by or has been the subject of extreme cruelty perpetrated by the [noncitizen]’s citizen parent[.]³

VAWA 2000 amended the joint residence requirement for child self-petitioners to read:

A[] [noncitizen] who is the child of a citizen of the United States . . . and who resides, or has resided in the past, with the citizen parent may file a petition with the Attorney General under this subparagraph for classification of the [noncitizen] . . . if the [noncitizen] demonstrates to the Attorney General that the [noncitizen] has been battered

¹ 3 USCIS-PM D, Ch. 2.F, n. 122, <https://www.uscis.gov/policy-manual/volume-3-part-d-chapter-2#footnote-122> (last visited Mar. 10, 2022).

² Petition to Classify [noncitizen] as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 13,061, 13,075 (Mar. 26, 1996).

³ Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1953 (1994).

by or has been the subject of extreme cruelty perpetrated by the [noncitizen]’s citizen parent. For purposes of this clause, residence includes any period of visitation.^{4,5}

Although VAWA 1994 specified that the battery or extreme cruelty of the child must occur “during the period of residence with the [citizen or LPR] parent,”⁶ VAWA 2000 amended the provision to require only that the child “resides, or has resided in the past, with the [citizen or LPR] parent...”⁷. By removing the temporal requirement, Congress demonstrated its intent to eliminate this barrier to safety for child survivors of abuse. Three separate federal district courts have already found that Congress’ elimination of the temporal requirement for joint residence in *spousal* self-petitions evinced the legislature’s intention to allow abused spouses to self-petition as long as they had resided with their abuser at any time, and USCIS has updated the Policy Manual to adopt the holdings of those cases.⁸

We note that USCIS has already identified other regulatory provisions for VAWA self-petitions as having been superseded by VAWA 2000.⁹ Updating the Policy Manual to reflect the current statutory requirements for child self-petitioners, therefore, would avoid confusion, carry out Congress’ intent, and would be consistent with USCIS’s own interpretation of VAWA 2000’s effect on other self-petition requirements.

2. USCIS should adopt the Seventh Circuit’s reasoning behind *Arguijo v. USCIS* and allow abused stepchildren to self-petition without demonstrating an ongoing relationship with their abuser where the marriage between their natural parent and abusive stepparent terminated by death. [3 USCIS-PM D, Ch. 3.A.2]

The Policy Manual update narrowly adopts the holding of *Arguijo v. USCIS*, 991 F.3d 736 (7th Cir. 2021) nationwide and now allows abused stepchildren to maintain self-petition eligibility even after the marriage between their natural parent and abusive stepparent has terminated by

⁴ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, 114 Stat. 1464, 1519 (October 28, 2000);

⁵ The joint residence requirements for children of LPRs were identical to those for children of U.S. citizens under both VAWA 1994 and VAWA 2000. *Compare* Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40701, 108 Stat. 1796, 1954 (1994), *with* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, § 1503, 114 Stat. 1464, 1521 (October 28, 2000).

⁶ Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40701, 108 Stat. 1796, 1953-4 (1994)

⁷ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, § 1503, 114 Stat. 1464, 1519; 1521 (October 28, 2000).

⁸ *See* 3 USCIS-PM D, Ch. 2.F, n. 117 (citing *Dartora v. U.S.*, No. 4:20-CV-05161-SMJ (E.D.W.A. June 7, 2021); *Bait It v. McAleenan*, 410 F. Supp. 3d 874 (N.D. Ill. 2019); *Hollingsworth v. Zuchowski*, 437 F. Supp. 3d 1231 (S.D. Fla. 2020)), <https://www.uscis.gov/policy-manual/volume-3-part-d-chapter-2#footnote-117> (last visited Mar. 10, 2022).

⁹ *See, e.g.*, 3 USCIS-PM D, Ch. 2., n. 5, <https://www.uscis.gov/policy-manual/volume-3-part-d-chapter-2#footnote-5> (regarding requirements to show extreme hardship and shared residence in United States); n. 120 <https://www.uscis.gov/policy-manual/volume-3-part-d-chapter-2#footnote-120> (regarding whether self-petitioner must reside in the United States at time of filing); n. 156 <https://www.uscis.gov/policy-manual/volume-3-part-d-chapter-2#footnote-156> (regarding derivative eligibility for children of child self-petitioners) (last visited Mar. 10, 2022).

divorce.¹⁰ We welcome USCIS’s adoption of *Arguijo*, which will offer safety and legal protection to many abused stepchildren. However, by limiting *Arguijo*’s application to situations in which the marriage of the child’s natural parent and stepparent has terminated by divorce, the Policy Manual ignores the Seventh Circuit’s reasoning and leaves abused children unprotected where their natural parent’s death terminated the marriage to the abusive stepparent.

At issue in *Arguijo* was whether the divorce of Ms. Arguijo’s biological mother and stepfather terminated her stepchild-stepparent relationship with her abusive stepfather.¹¹ USCIS had denied her VAWA self-petition based on *Matter of Mowrer*, 17 I&N Dec. 613 (1981), which requires that in assessing whether a qualifying stepparent-stepchild relationship exists, “the appropriate inquiry where there has been a legal separation or where the marriage has been terminated by *divorce or death* is whether a family relationship has continued to exist as a matter of fact between the stepparent and stepchild.”¹² The Seventh Circuit found that *Mowrer* does not apply to VAWA self-petitions, reasoning that (1) *Mowrer* created this standard “out of whole cloth” and “cited no provenance for this rule (other than one of the Board’s earlier unreasoned decisions”); and (2) *Mowrer* was created well before Congress enacted VAWA and thus does not interpret the VAWA provisions.¹³

Although the marriage in *Arguijo* happened to end through divorce, the Court’s reasoning was not limited to the divorce context. Rather, the Court examined the applicability of *Mowrer*, which addressed both marriages that terminated by divorce as well as those that terminated by death, to VAWA stepchild self-petitions.¹⁴ In fact, the Court specifically considered situations in which the marriage between the biological parent and stepparent terminated by death, noting, “Does anyone think that Cinderella stopped being the wicked stepmother’s stepchild once Cinderella’s natural father died, ending the marriage? She was still a stepchild even after she married Prince Charming and moved to the palace.”¹⁵ Further, as a practical matter, Ms. Arguijo’s biological mother had died after divorcing the abuser, but before Ms. Arguijo filed her I-360.¹⁶ If USCIS’s current interpretation were correct, then the admitted error with regard to divorce would have been harmless. That is, if her mother’s death precluded her from being a stepchild absent an ongoing relationship with the abuser, it would have been harmless that USCIS required an ongoing relationship after divorce.

¹⁰ 3 USCIS-PM D, Ch. 3.A.2, <https://www.uscis.gov/policy-manual/volume-3-part-d-chapter-3> (last visited Mar. 10, 2022).

¹¹ *Arguijo* at 737.

¹² *Mowrer* at 615 (emphasis added).

¹³ *Arguijo* at 738.

¹⁴ *Id.* (“By relying on *Mowrer*, however, the agency showed its unease with a rule under which *divorce or death* automatically ends a victim’s status as a stepchild”) (emphasis added); *see also Mowrer* at 615 (“the appropriate inquiry where there has been a legal separation or where the marriage has been terminated by divorce or death is whether a family relationship has continued to exist as a matter of fact between the stepparent and stepchild”).

¹⁵ *Arguijo* at 738.

¹⁶ *Id.* at 737.

USCIS cites *Matter of Pagnerre*, 13 I&N Dec. 688 (BIA 1971) to justify requiring a stepchild to maintain a relationship with her abusive stepparent following the death of her biological parent.¹⁷ However, *Pagnerre* suffers from the same deficiencies as *Mowrer*: (1) like *Mowrer*, *Pagnerre* cited no provenance for its rule other than the Board’s “earlier unreasoned decisions”; and (2) *Pagnerre* was created well before Congress enacted VAWA and thus does not interpret the VAWA provisions.¹⁸ In fact, *Mowrer*’s reasoning and holding are based on those of *Pagnerre*.¹⁹ Thus, it is illogical to apply *Pagnerre* to VAWA self-petitions when USCIS has already adopted the holding in *Arguijo*, which found that *Mowrer* (*Pagnerre*’s successor) was inapplicable to VAWA stepchild self-petitions.

Requiring an abused child to maintain a relationship with the abuser flies in the face of VAWA’s purpose to “seek both safety and independence from their abuser.”²⁰ Inasmuch as USCIS applies *Arguijo* nationwide, which we applaud, it should also adopt the underlying reasoning for the Seventh Circuit’s decision – that the termination of the marriage between the natural parent and stepparent, whether by divorce or death, does not terminate the relationship between the abused stepchild and abusive stepparent.

3. USCIS should revise the Policy Manual to acknowledge the role abuse may play in creating the appearance of inconsistencies and to comport with USCIS’s own policy regarding the issuance of RFEs and NOIDs. [3 USCIS-PM D, Ch. 5.B.2]

The Policy Manual states that “evidence that does not conform to external facts, such as information contained in USCIS electronic databases, is likely not credible on an external basis” and that “USCIS may issue a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID) to notify self-petitioners of deficiencies in the self-petition and to allow them an opportunity to respond before issuing a final decision.”²¹ However, this language fails to recognize that external facts, including those contained in government databases, may be influenced by abusers. To account for this possibility, USCIS should revise the Policy Manual to recognize the ways in which abuse can render external facts unreliable and instruct officers to issue RFEs and NOIDs to allow self-petitioners to address apparent inconsistencies.

¹⁷ 3 USCIS-PM D, Ch. 3.A.2, n. 7, <https://www.uscis.gov/policy-manual/volume-3-part-d-chapter-3#footnote-7> (last visited Mar. 10, 2022).

¹⁸ Compare *Mowrer* (issued in 1981; citing *Matter of Simicevic*, 10 I&N Dec. 363 (BIA 1963) and *Matter of Pagnerre*, 13 I&N Dec. 688 (BIA 1971) among other Board decisions), with *Pagnerre* (issued in 1971; citing *Simicevic* and other Board decisions).

¹⁹ *Mowrer* at 615 (“It is our opinion that such a test is consistent with both our decisions in *Matter of Simicevic* and *Matter of Pagnerre*”).

²⁰ 3 USCIS-PM D, Ch.1.A, <https://www.uscis.gov/policy-manual/volume-3-part-d-chapter-1> (last visited Mar. 10, 2022).

²¹ 3 USCIS-PM D, Ch. 5.B.2, <https://www.uscis.gov/policy-manual/volume-3-part-d-chapter-5> (last visited Mar. 10, 2022).

a. Reliability of external facts

Congress created VAWA self-petitions to prevent abusers from manipulating the immigration legal system against their victims.²² Congress also required USCIS to consider “any credible evidence” when adjudicating a VAWA self-petition because many survivors face barriers to obtaining evidence.²³ For example, some abusers may limit a survivor’s access to documentation, or a survivor may have fled the abuse without gathering evidence beforehand. While the Policy Manual does address the “any credible evidence” requirement, the blanket statement that “evidence that does not conform to external facts, such as information contained in USCIS electronic databases, is likely not credible on an external basis” ignores the fact that information in government databases may be influenced by the abuser and therefore, unreliable.

For example, many abusers file I-130s for their victims which can then be used to manipulate the victim into obedience. USCIS may initiate a fraud investigation while adjudicating the I-130, and the investigation may reveal red flags, such as when abusers have a secret second home or are engaging in extramarital relations. Nonetheless, the survivor is typically an innocent victim of the abuser’s duplicity. Although USCIS’s databases may contain evidence of investigative findings that conflict with the self-petitioner’s version of events, those inconsistencies should not be assumed to show a lack of credibility of the self-petitioner.

b. Issuance of RFEs or NOIDs

USCIS should revise the guidance on RFE and NOID issuance in VAWA self-petitions for consistency with the agency’s general RFE and NOID policy. When referring to VAWA self-petitions, the Policy Manual merely states, “USCIS *may* issue a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID) to notify self-petitioners of deficiencies in the self-petition and to allow them an opportunity to respond before issuing a final decision.”²⁴ However, this language is less prescriptive than the general policy on issuing RFEs and NOIDs, which instructs that officers “*should generally issue* an RFE or NOID” if there is a possibility the noncitizen can address the deficiency by submitting additional evidence.²⁵ There is no basis for applying a more generous RFE and NOID policy in non-humanitarian cases than in VAWA self-petitions, especially given the particular evidentiary concerns survivors face.

The blanket statement that evidence that conflicts with the information in USCIS databases is likely not credible endangers survivors because it risks using the abuser’s misconduct to find the

²² See 3 USCIS-PM D, Ch. 1, <https://www.uscis.gov/policy-manual/volume-3-part-d-chapter-1> (last visited Mar. 10, 2022) (noting “Some U.S. citizens and LPRs use their control over this process as a tool to further abuse the noncitizen, threatening to withhold or withdraw the petition in order to control, coerce, and intimidate their family members”).

²³ INA 204(a)(1)(J) (“[T]he Attorney General shall consider any credible evidence relevant to the petition”); see also 3 USCIS-PM D, Ch. 5.B.2, <https://www.uscis.gov/policy-manual/volume-3-part-d-chapter-5> (last visited Mar. 10, 2022).

²⁴ 1 USCIS-PM E, Ch. 6.E (emphasis added), <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-6> (last visited Mar. 10, 2022).

²⁵ U.S. Citizenship & Immigr. Serv., PA-2021-11, *Policy Alert: Requests for Evidence and Notices of Intent to Deny* (June 9, 2021), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210609-RFEs%26NOIDs.pdf> (last visited Mar. 10, 2022).

survivor not credible. USCIS should amend the Policy Manual to acknowledge the complex interplay between information contained in databases and domestic violence. In addition, USCIS should instruct officers that they “should generally issue an RFE or NOID” to allow the self-petitioner to address any perceived inconsistencies.

4. USCIS should adopt the holding in *Moreno-Gutierrez v. Napolitano* and deem the two-year filing deadline for spousal self-petitioners subject to equitable tolling. [3 USCIS-PM D, Ch. 3.A.1]

The Policy Manual states that the two-year filing deadline for divorced self-petitioners cannot be equitably tolled “because the statute allows for self-petitioning during the marriage and creates a cut-off date for filing when the marriage has terminated.”²⁶ This interpretation fails to consider the reasoning in *Moreno-Gutierrez v. Napolitano*, 794 F. Supp. 2d 1207 (D. Colo. 2011) (finding equitable tolling to apply to the VAWA filing deadline) and is inconsistent with Congressional intent.

In VAWA 2000, Congress amended INA § 204(a)(1)(A)(iii) and INA § 204(a)(1)(B)(ii)(II) to allow abused noncitizen spouses to file self-petitions up to two years after the termination of the qualifying relationship, i.e., after the marriage to the abuser had terminated, the abuser had lost their status, or, in the case of U.S. citizen abusers, after the abuser had died.²⁷ However, at times, survivors are unable to file their self-petition by the deadline through no fault of their own, such as when they are victims of ineffective assistance of counsel. USCIS should deem the two-year filing deadline for spousal self-petitioners subject to equitable tolling because (a) the deadline is tollable as a statute of limitations under *Moreno-Gutierrez v. Napolitano*; and (b) such an interpretation is consistent with Congressional intent.

a. *Moreno-Gutierrez v. Napolitano*

In *Moreno-Gutierrez*, the survivor’s first attorney failed to submit her VAWA self-petition within two years of her abusive LPR spouse’s loss of status even though the petition was completed several months prior to the deadline.²⁸ USCIS denied her self-petition and a subsequent motion to reopen and reconsider and appeal on the basis that the two-year filing deadline was a statute of repose, and therefore was not subject to equitable tolling.²⁹ The Court distinguished statutes of repose from statutes of limitations, which are subject to equitable tolling, in that statutes of repose “typically bar[] the right to bring an action after the lapse of a specified period, unrelated to the time when the claim accrued. The bar instead is tied to an independent event [...]”³⁰ The Court determined that the filing deadline at INA § 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa) was properly read as a statute of limitations because “her right to self-petition under this section accrues only upon the [abusive] spouse’s loss of status,”³¹

²⁶ 3 USCIS-PM D, Ch.. 3.A.1,

²⁷ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, 114 Stat. 1464, 1519-20 (October 28, 2000).

²⁸ *Moreno-Gutierrez* at 1209.

²⁹ *Id.*

³⁰ *Id.* at 1213.

³¹ *Id.* at 1214.

regardless of her ability to self-petition as an existing spouse of an LPR under INA § 204(a)(1)(B)(ii)(II)(aa)(AA) prior to the abuser's loss of status.

b. Congressional intent

Congress created VAWA self-petitions in order to protect immigrant survivors and prevent U.S. citizen and LPR abusers from weaponizing the immigration legal system to further harm their victims.³² Prior to VAWA 1994, noncitizen victims often remained in abusive situations because they were utterly dependent on their abuser to regularize their immigration status. VAWA 1994 created self-petitions as a mechanism for immigrant survivors to escape abuse and achieve safety and independence.³³ However, VAWA 1994 left a loophole for abusers: because the statute required the self-petitioning spouse to be married to the U.S. citizen or LPR abuser when filing the self-petition, abusers could still control victims' access to legal protection by simply divorcing them.

Congress sought to close this loophole in VAWA 2000 by "addressing adverse incentives that trap [survivors] in violent relationships."³⁴ It recognized that "[s]avvy abusers often sprint to the courthouse for a quick divorce because they know this will cut off [the victim's] access to immigration relief."³⁵ It also corrected the unintended effect of penalizing battered spouses whose abusers had lost their immigration status due to an incident of domestic violence.³⁶ By allowing self-petitioners to maintain eligibility after the termination of their qualifying relationship to the abuser, Congress intentionally *expanded* VAWA's reach. Allowing equitable tolling of the filing deadline would carry out the spirit and intent of the law.

5. USCIS should revise the Policy Manual to conform with the prohibitions on determinations of inadmissibility or removability and disclosure of information under 8 U.S.C. § 1367. [3 USCIS-PM D, Ch. 5.D]

The Policy Manual states that if a person with a pending family-based I-485 notifies USCIS that she or he will file a VAWA self-petition but then does not file it in the time allotted, "USCIS concludes they do not want to be treated as a VAWA self-petitioner and the protections of 8 U.S.C. § 1367 will not apply to the adjudication of any forms."³⁷ However, this is an inaccurate interpretation of 8 U.S.C. § 1367 that contradicts the Department of Homeland Security's (DHS) guidance on the implementation of the statute and ignores the fact that many survivors may require additional time to file a self-petition.

³² See, e.g., 3 USCIS-PM D, Ch. 1, <https://www.uscis.gov/policy-manual/volume-3-part-d-chapter-1> (last visited Mar. 10, 2022).

³³ *Id.*

³⁴ Battered Immigrant Women Protection Act of 1999: Hearing Before the Subcommittee on Immigration and Claims of the House Committee on the Judiciary, 106th Cong. 32 (2000) (statement of Rep. Janice Schakowsky).

³⁵ *Id.*

³⁶ *Id.*

³⁷ 3 USCIS-PM D, Ch. 5.D, <https://www.uscis.gov/policy-manual/volume-3-part-d-chapter-5> (last visited Mar. 10, 2022).

a. 8 U.S.C. § 1367

The plain language of 8 U.S.C. § 1367(a)(1) does not require a battered spouse, child, or parent to file a self-petition before USCIS is barred from making determinations of admissibility or deportability based on information provided by a prohibited source.³⁸ Rather, § 1367(a)(1) applies to noncitizens who have been subjected to battery or extreme cruelty by certain family members regardless of whether they have actually filed any benefit request. The filing of a VAWA self-petition, therefore, is irrelevant to whether these protections apply.

b. DHS's implementation of 8 U.S.C. § 1367

In fact, DHS has issued policy guidance implementing 8 U.S.C. § 1367 that recognizes the applicability of the nondisclosure and adverse determination prohibitions prior to any filing of a VAWA self-petition. For example, Instruction No. 002-02-001, Implementation of Section 1367 Information Provisions states:

*The nondisclosure provision provides protection as soon as a DHS employee has reason to believe that the [noncitizen] may be the beneficiary of a pending or approved victim-based application or petition, and the limitation ends when the application for relief is denied and all opportunities for appeal of the denial have been exhausted.*³⁹

Notably, the only condition for ending the application of the nondisclosure provision is the denial of the benefit request and exhaustion of all appeals, which of course could not occur prior to the filing of the self-petition. The memorandum adds:

*Section 1367 also prohibits DHS officers and employees from making an adverse determination of admissibility or deportability against a[] [noncitizen] using information furnished solely by a prohibited source associated with the battery or extreme cruelty, sexual assault, human trafficking or substantial physical or mental abuse, regardless of whether the [noncitizen] has applied for VAWA benefits, or a T or U nonimmigrant status.*⁴⁰

DHS then reiterates that the lack of a pending application does not negate the 8 U.S.C. § 1367 protections:

The lack of a pending or approved VAWA self-petition does not necessarily mean that the prohibited source provisions do not apply and that the [noncitizen] is not a victim of

³⁸ See, e.g., 8 U.S.C. § 1367(a)(1)(A) (Prohibiting employees of DOJ, DOS, DHS from making determinations of admissibility or deportability based on information provided solely by “a spouse or parent who has battered the [noncitizen] or subjected the [noncitizen] to extreme cruelty”).

³⁹ U.S. Dep’t of Homeland Sec., Instruction No. 002-02-001, *Implementation of Section 1367 Information Provisions*, § VI.A.1.c. (emphasis added), <https://asistahelp.org/wp-content/uploads/2019/04/Implementation-of-Section-1367-Information-Provisions-Instructions.pdf> (last visited Mar. 10, 2022).

⁴⁰ *Id.* at § VI.A.2.a

battery or extreme cruelty . . . Employees will be sensitive to the fact that the [noncitizen] at issue may be a victim and that a victim-abuser dynamic may be at play.⁴¹

8 U.S.C. § 1367 protections are critical to ensuring survivors' safety and access to justice, and according to DHS's own guidance, they do not depend on the actual filing of a VAWA self-petition. USCIS must adhere to the statutory requirements and agency policy in applying § 1367 where required.

c. Barriers to filing

The Policy Manual also ignores the barriers that many survivors face when preparing a self-petition. In ASISTA's experience, the approach of an interview date for the family-petition-based I-485 can prompt a crisis in an abusive relationship whereby the abuser refuses to appear for the interview. The survivor then must scramble to obtain his or her own counsel, who in turn must request that USCIS hold the I-485 in abeyance in order for the survivor to file a VAWA self-petition. However, 30 days is often insufficient to prepare a VAWA self-petition filing due to the immense trauma and instability that many survivors suffer as well as evidentiary barriers. The survivor eventually files the self-petition, but it is inaccurate and premature for USCIS to conclude, based on a delay in the filing of the petition, that "they do not want to be treated as a VAWA self-petitioner."⁴²

Conclusion

For the reasons above, we urge USCIS to issue final guidance that comports with VAWA 2000's statutory amendments for child self-petitioners; that is consistent with the Court's reasoning in *Arguijo v. Holder*; that accounts for the evidentiary barriers many survivors encounter; that protects divorced spousal self-petitioners who miss the two-year filing deadline through no fault of their own; and that comply with the protections at 8 U.S.C. § 1367. We appreciate the work USCIS has done in promulgating the Policy Manual and look forward to working with the agency to ensure that survivors of abuse can fully access the legal protections created for them.

Thank you for your consideration of these comments. Please address any questions you may have about our recommendations to me at amy@asistahelp.org.

Respectfully submitted,



Amy Cheung
Senior Legal Counsel on behalf of ASISTA Immigration Assistance

⁴¹ *Id.* at § VI.A.2.d.

⁴² 3 USCIS-PM D, Ch. 5.D, <https://www.uscis.gov/policy-manual/volume-3-part-d-chapter-5> (last visited Mar. 10, 2022).