



# Domestic Violence and Immigrants in Family Court

By Veronica T. Thronson

## ABSTRACT

Immigrants, particularly women and children, are at greater risk for domestic violence not only because of their immigration status, but because of the way U.S. immigration law is structured. This article explores important aspects of the link between domestic violence and immigration law. First, it analyzes the way in which U.S. immigration law frameworks enable domestic violence and empower abusers. Second, it outlines the current relief options available in immigration law that use domestic violence as a factor. The article discusses the ways in which these issues may arise in family court proceedings and suggests approaches for addressing these issues to prevent the further victimization of vulnerable women and children.

## INTRODUCTION

The close relationship between domestic violence and U.S. immigration law is well established, if not widely understood by family court judges and advocates. Of some familiarity to many courts and advocates are some of the multiple avenues for immigration relief that are associated with domestic violence, such as immigration-related provisions of the Violence Against Women Act. These complex and constantly evolving immigration law provisions create links between immigration status options for victims and proof of various forms of domestic violence, and thus highlight the connection between immigration and domestic violence on a functional level. Less fully appreciated are the underlying reasons why such relief is needed. Immigration relief provisions are not simply mechanisms to provide a humanitarian bonus to persons who have survived domestic violence. Instead, they are a concerted effort to counteract the manner in which immigration law itself contributes to the perpetuation of domestic violence.

Immigrants, particularly women and children, are at greater risk for domestic violence not only because of their immigration status, but because of the way U.S. immigration law is structured.<sup>1</sup> As newcomers, immigrants often are less aware of their rights to protection and assistance. Immigrants without lawful status are outsiders in society and face uncertainty about

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<sup>1</sup> Because an overwhelming number of abused victims are women and children, gender references in this article refer to women. Most of the forms of immigration relief discussed in this article are gender neutral and available to male victims as well.

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their interactions with law enforcement and other societal institutions, and abusers exploit this lack of knowledge. More deeply, however, even immigrants with lawful immigration status or potential pathways to lawful status face an immigration law framework that by design puts great power and control in the hands of sponsoring relatives, including abusive spouses and parents.

Immigration law places great emphasis on formal family relationships, and abusers can use the immigration status of their spouses and their spouses' children as a potent tool of control to force victims to remain in abusive relationships. The domestic violence related relief provisions in U.S. immigration law are attempts to ameliorate the dangerous power dynamics inherent in immigration law itself. For family courts, it is important to understand not only the basics of immigration relief that may be vitally important to immigrants, but also the framework that created the need for such provisions. Both contribute to the manner, nature, and appropriateness of parties' attempts to raise immigration issues in family courts. In other instances, understanding the role of immigration law provides a fuller understanding of the out-of-court family dynamics that shape what happens in the courtroom or are left out of the courtroom due to fear.

This article explores important aspects of the link between domestic violence and immigration law. First, it analyzes the way in which U.S. immigration law frameworks enable domestic violence and empower abusers. Second, it outlines the current relief options available in immigration law that use domestic violence as a factor. The article discusses the ways in which these issues may come before family courts and suggests approaches for addressing these issues.

## I. POWER AND CONTROL AND THE U.S. IMMIGRATION LAW FRAMEWORK

With the passage of state and local laws impacting immigrants, the tension between state and federal power to regulate immigration is on constant display.<sup>2</sup> But on “a practical level most choices about who acquires lawful immigration status are neither federal nor state, but rather profoundly personal.”<sup>3</sup> It is obvious that immigration law addresses the rights of persons seeking to immigrate or remain in the United States, but it is less remarked upon that immigration law does so by determining when U.S. citizens, legal permanent residents (LPR), and businesses may exercise personal choice to generate immigration rights in others. Indeed, “this decentralization of immigration decisions is a key characteristic of U.S. immigration law and it empowers individuals, not governments, to determine who will be eligible to immigrate to the United States.”<sup>4</sup>

Immigration laws empower individuals because they permit U.S. citizens and legal permanent residents to petition for family members who meet specific criteria. The vast majority of immigrants are admitted to the United States based on relationships with family

<sup>2</sup> See, e.g., *Chamber of Commerce v. Whiting*, \_\_\_ U.S. \_\_\_ 131 S. Ct. 1968 (2011).

<sup>3</sup> David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L.REV. 393, 402 (2010).

<sup>4</sup> *Id.*

members, such as a spouse, parent, or child.<sup>5</sup> For example, a U.S. citizen may petition for his spouse; children, married or unmarried; parents; and brothers and sisters.<sup>6</sup> A legal permanent resident may petition for his spouse and his unmarried children under 21.<sup>7</sup>

Sponsoring petitioners have absolute control over decisions to file for qualifying relatives. No matter how close the relationship, beneficiaries have no right to force the filing of petitions on their behalf.<sup>8</sup> Only U.S. citizens or legal permanent residents can begin the process by filing a petition that establishes the family relationship that exists between them and their qualifying relatives. Once this step is completed, additional processing to obtain an immigrant visa at a U.S. consulate abroad or to adjust status in the United States is required. In the best of cases, this is a lengthy process, and the status of the petitioner and the nature of the relationship determine the priority given to the request.<sup>9</sup>

Throughout, control of the process continues in the hands of the person with status, and the beneficiary has no guarantee that the petition process will be completed. The petitioner not only controls the decision of whether and when to file a petition initially, but he may withdraw a pending petition at any time. Where domestic violence is present, it is common to see petitioners file immigration petitions for spouses, and then withdraw them only to re-file again once the couple reconciles as the cycle of violence moves through a contrition phase. This pattern of filing and then withdrawing can go on without limit, and becomes a powerful tool to control a spouse.<sup>10</sup>

In family-sponsored immigration, immigration law gives all power in the immigration process to the person with status. Because of the power given by immigration law to U.S. citizens or legal permanent residents, immigrant relatives who are in an abusive relationship face difficulties trying to leave the abuser, such as fear of losing immigration options or possibly facing detention or deportation, that are beyond those faced by U.S. citizen victims. Where petitions for spouses include children from prior relationships, withdrawal of a petition for the spouse will impact children's opportunities as well, creating additional incentive for women to remain in violent relationships. Deportation can cause fear not only of losing contact with children, but also of being removed from any position to protect children facing abuse.

Even immigrant women with status or a pathway to status may feel trapped not only because of their immigration status, but also because they may face other societal obstacles such as inability to speak English or dependency on the abuser's financial resources as they adjust to

5 The U.S. Department of Homeland Security Office of Immigration Statistics reports that family-sponsored immigrants (immediate relatives of U.S. citizens) represented 66% of the total legal permanent residents in 2010. Spouses of U.S. citizens represented 57% of immediate relatives. In addition, "derivatives" of employment-based immigrants are granted status based on family relationships.

6 See Immigration and Nationality Act, 8 U.S.C. § 1151(b)(2)(A)(i).

7 See Immigration and Nationality Act, 8 U.S.C. § 1153(a).

8 See *Fornalik v. Perryman*, 223 F.3d 523, 527-8 (7th Cir. 2000); David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 992-94 (2002).

9 See Immigration and Nationality Act, 8 U.S.C. § 1151(b). The fact that a visa may be immediately available does not mean that the person will obtain status right away. For example, the spouses, children, or parents of U.S. citizens may wait for periods in excess of a year to complete bureaucratic processing in order to obtain status. The spouse and/or children of a legal permanent resident are subject to backlogs of many years. According to the latest Visa Bulletin for December 2011, the wait for the spouse of a legal permanent resident is approximately three years.

10 See generally, Mariela Olivares, *A Final Obstacle: Barriers to Divorce for Immigrant Victims of Domestic Violence in the United States*, 34 HAMLINE L. REV. 149 (2011).

life in a new country. Commonly, the worldview and understanding of the legal system for an immigrant spouse are shaped by the person with status who has more familiarity with the United States. Abusers can easily take advantage of the situation and feed misinformation to abused partners about their rights and options in a strange land.

For abused immigrants without lawful status, abusers stoke perceptions of vulnerabilities by threatening the invocation of immigration enforcement and raising the specter of banishment of their noncompliant partners. When women have children who were born in the United States, abusers commonly threaten deportation for mothers and subsequent loss of children who will be permitted to remain in the United States. This perverse and limited notion of child custody rights is patently contrary to custody law, but a convincing narrative to an abused immigrant whose understanding of the country derives from her abuser.<sup>11</sup> For many, even confiding in someone or reporting the abuse is out of the question for fear of losing the children or facing deportation proceedings.

The power that U.S. immigration law places with abusers makes it very difficult for vulnerable immigrant spouses to leave violent relationships and allows abusers to leverage immigration law as a powerful tool of control. The immigration relief related to domestic violence is a direct response to this aspect of our immigration law, and attempts to place some limits on abusers who seek to exploit immigration law to exert control and power in their relationships.

## II. IMMIGRATION RELIEF OPTIONS FOR VICTIMS OF DOMESTIC VIOLENCE

After many years of advocacy on behalf of immigrant victims of domestic violence, federal legislation now contains a series of measures to ameliorate the inherent power imbalance in immigration law. These measures have been adopted and implemented individually over time, but they establish a pattern for how immigration law approaches domestic violence issues and seeks to address the problems it creates at various points in the immigration process for discrete groups of immigrants.

### A. A Baseline—The Violence Against Women Act

In 1994, the Violence Against Women Act (VAWA) introduced into U.S. immigration law specific provisions to allow battered immigrants abused by their U.S. citizen or legal permanent resident spouses to petition for legal status in the United States without relying on abusers.<sup>12</sup> VAWA specifically acknowledged that many victims were trapped in abusive relationships because of their immigration status. In creating VAWA, Congress recognized that abusive petitioners used their power to control the immigration process as another way to abuse

11 See Leslye Orloff et al., *Countering Abuser's Attempts to Raise Immigration Status of the Victim in Custody Cases*, in *BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS*, ch. 6.I, at 1 (2004); David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 *HASTINGS L.J.* 453, 463-65 (2008).

12 See Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii).

their spouses. VAWA allows victims the opportunity to “self-petition,” or independently seek legal immigration status in the U.S. based on qualifying relationships without having to rely on abusers to file petitions on their behalf. Later provisions in immigration law are largely modeled after VAWA in allowing abused immigrants to seek relief.

VAWA thus takes the limited step of sharing the power to initiate immigration petitions with abused beneficiaries. VAWA self-petitioners must meet specified additional requirements and are subject to the same waiting periods associated with family petitions.<sup>13</sup> Waivers of some barriers to inadmissibility are available to VAWA applicants, but applicants generally must have the same qualifying relationships and meet the same criteria as family-sponsored immigrants.<sup>14</sup>

VAWA is an immigration relief provision, but most requirements for VAWA relief flow from issues present in many family court proceedings, and family courts often provide the best or even the only forum to develop proof that the abused spouse meets the eligibility criteria. For example, to qualify for immigration relief under VAWA, the immigrant spouse, parent, or child must show that she has suffered battery or extreme cruelty.<sup>15</sup> The self-petitioner must show that she entered the marriage in good faith, that she resided with the abuser, that the abuser is either a U.S. citizen or a legal permanent resident, and that the self-petitioner is a person of good moral character.<sup>16</sup> Each of these criteria can be important in family court proceedings for divorce or child custody.

### 1. *Battery or Extreme Cruelty*

The first requirement is the presence of battery or extreme cruelty. Battery and extreme cruelty “includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury.”<sup>17</sup> Acts of violence include “[p]sychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution.”<sup>18</sup> Most states have their own statutes defining what constitutes battery or extreme cruelty, but a battery or any other abusive actions that are part of an overall pattern of violence are sufficient to meet this prong of a VAWA claim. In fact, actions “may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence.”<sup>19</sup> The abuse or extreme cruelty must have been committed by the citizen or lawful permanent resident with the qualifying relationship.<sup>20</sup>

Abusive spouses need not be charged with or convicted of inflicting a battery on the immigrant spouse. In supporting a VAWA claim filed with Citizenship and Immigration

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* See also Immigration and Nationality Act, 8 U.S.C. § 1255(a) & (e).

<sup>15</sup> 8 CFR § 204.2(c)(1). Note that this article speaks mostly of abused spouses, but VAWA protections are also available to children abused by U.S. citizen and legal permanent resident parents. 8 CFR § 204.2(e).

<sup>16</sup> *Id.*

<sup>17</sup> 8 CFR § 204.2(c)(1)(H)(vi).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> 8 CFR § 204.2(c).

Services, “any credible evidence relevant to the petition” will be considered.<sup>21</sup> In particular, reports and affidavits from medical personnel, social workers, an order of protection against the abuser, or evidence that the abused immigrant sought refuge in a battered women’s shelter are frequently used. Claims of extreme cruelty regularly rely on affidavits of victims who detail life together with the abuser, difficulties in leaving, social isolation, threats, emotional harm, and any other behavior that establishes power and control over victims.

When domestic violence is present in a family court case, any records, findings, or transcripts of proceedings can be critical in proving this aspect of a VAWA claim.

## 2. *Good Faith Marriage*

Because VAWA permits only self-petitions essentially as replacements for petitions that abusers should have filed, self-petitions based on marriages must include evidence of the marriage.<sup>22</sup> Generally, a marriage is considered valid for immigration purposes if it is valid in the jurisdiction where it was performed.<sup>23</sup> In states that recognize common law marriages, immigration law will recognize them as valid. VAWA provisions also accommodate situations in which marriages may not be valid due to the abuser’s prior or concurrent marriage that has not been legally terminated. In these cases, the immigrant spouse must have intended to marry in good faith and must not have had knowledge that the marriage was invalid.<sup>24</sup>

VAWA self-petitioners must submit evidence to Citizenship and Immigration Services of items that demonstrate the relationship, such as evidence that one spouse was included as the other’s spouse on insurance policies, property leases, income tax forms, or bank accounts, and testimony or other evidence regarding courtship, wedding ceremony, shared residence, and experiences.<sup>25</sup> In abusive relationships, family court judges need to be aware that the abuser may intimidate his immigrant spouse by hiding or destroying important documents, such as the spouse’s or children’s passports or birth certificates, destroying wedding pictures, and most importantly, not adding the immigrant spouse’s name to any documents to show that the marriage was entered into in good faith. Protective orders often are necessary to prevent destruction of documents by the abuser. Moreover, in many instances the abused spouse may not be able to obtain copies of existing documents. Family courts may play an important role in facilitating access to such documents through discovery. Discovery options are almost non-existent in the immigration petitioning process, and access to documents through the Freedom of Information Act (FOIA) can take several months or even years, even where available.

Immigrants need not stay in an abusive marriage to benefit from VAWA provisions. Immigrants who have suffered abuse and whose marriage ends in divorce before they are able

21 8 CFR § 204.2(c)(2)(i).

22 *See, e.g.*, 8 U.S.C. § 1154(a)(1)(A)(iii).

23 To date, immigration law does not recognize same-sex marriages or civil unions as a basis for immigration benefits.

24 Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii), describing “intended” and bigamous marriages, entered into in good faith by the immigrant spouse.

25 8 CFR § 204.2(c)(2)(vii). Other types of readily available evidence may include the birth certificates of children born to the abuser and spouse.

to file under VAWA can still self-petition as long as they file their application within two years of the divorce.<sup>26</sup> Self-petitioners will still need to establish the validity of the marriage while it was in effect.<sup>27</sup>

Given the importance to self-petitioners of proving a valid marriage, it is not surprising that abusers routinely seek to deny the validity of marital relationships. To undermine the prospects for immigration relief, abusers commonly allege that marriages are fraudulent and that the immigrant spouses married solely to obtain immigration benefits. In many instances, abusers go further and contact immigration officials, alerting them of the allegedly fraudulent nature of the marriage.<sup>28</sup> However, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 specifically prohibits immigration officials from making adverse determinations against an abused immigrant by relying solely on information provided by abusers.<sup>29</sup> Despite this protection, immigrant victims still live in fear of being reported to immigration authorities by abusers because they simply do not know this protection exists. Indeed, many times even immigration officials need to be reminded of this prohibition.

Another common practice of abusers is the choice to seek annulment instead of divorce. An annulment makes the marriage invalid and null, as if the marriage never took place. For immigration purposes, if the marriage terminates in an annulment prior to the filing of a self-petition, the self-petitioner will not have the family relationship to qualify for the immigration benefit. Family court judges need to be aware of this tactic and be leery of granting an annulment when a case involves an immigrant spouse. Importantly, however, the legal termination of the marriage (whether by divorce, death, or annulment) after the self-petition is properly filed with the immigration service will not be the basis for denying the application.<sup>30</sup>

In some divorce actions, abusers may seek to obtain copies of the abused spouse's VAWA petition through family court discovery. Such petitions are considered highly confidential in immigration law. Indeed, section 384(a)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 provides that in no case may any immigration employee "permit use by or disclosure to anyone . . . of any information which relates to an alien who is the beneficiary of an application for relief" under the VAWA provisions, which relate to battered spouses and children.<sup>31</sup> It is important to emphasize that the prohibition extends to any information relating to the battered spouse or child, which could include verification of status

<sup>26</sup> See Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(CC)(ccc).

<sup>27</sup> *Id.*

<sup>28</sup> Notably, this happens even in cases where abusers have previously filed petitions with Citizenship and Immigration Services based on the validity of the marriage. Given the skewed power allocations of immigration law, the abuser who claims to have participated in a fraudulent petition faces few consequences, while a fraudulent marriage petition is of great consequence to the beneficiary.

<sup>29</sup> IIRAIRA § 384 prohibits immigration officers and immigration judges from making an adverse determination of admissibility or deportability using information provided solely by the abusive spouse or parent or other member of the household. Violation of either of these prohibitions can result in disciplinary action or in civil penalties of up to \$5,000 for each violation.

<sup>30</sup> See T. Alexander Aleinikoff, Executive Associate Commissioner, *Memorandum: Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents* (April 16, 1996) (addressing VAWA provisions for battered immigrants).

<sup>31</sup> IIRAIRA § 384(a)(2).

or any other routine information. Family court judges should be skeptical of attempts to seek copies of self-petitions via discovery which seek to accomplish little more than intimidation.<sup>32</sup>

### 3. *Residence with Abuser*

Self-petitioners must submit to Citizenship and Immigration Services proof that the self-petitioner and the abuser resided together in the United States.<sup>33</sup> Employment records, utility receipts, school records, or any other type of relevant credible evidence of residency may suffice.<sup>34</sup> Where the abused spouse has no access to documents, affidavits from friends or relatives or even the proof of service of a complaint indicating the same address would be sufficient to show that the parties resided together.<sup>35</sup> Again, discovery in family court may be the immigrant spouse's only tool to obtain proof that she resided with the abuser.

### 4. *Proof of Status of Abuser*

Recall that self-petitioning allows abused spouses only to file petitions that are equivalent to what abusers should have filed. As such, self-petitioning is available only when the abusive spouse is a U.S. citizen or lawful permanent resident. In many cases, this proof is difficult to obtain because the immigrant spouse may not have access to the abuser's documents. However, proof of immigration status could be requested during discovery in family court. Testimony on the record from the abuser indicating his place of birth or citizenship can help establish the factual basis required for establishing that the abuser has status. In immigration matters, discovery generally is not available and Freedom of Information Act requests may be useful in obtaining some of this information, however, such requests can take several months or even years, if they are even available.<sup>36</sup>

### 5. *Good Moral Character of Self-Petitioner*

To qualify for a VAWA self-petition, the abused spouse must show that she is a person of good moral character.<sup>37</sup> This generally is less about a general showing of a person's positive attributes and more a demonstration of the absence of particularly negative characteristics. In short, the abused spouse must prove that she has not committed specified criminal acts, immigration offenses, or other actions that would disqualify her from applying.<sup>38</sup>

<sup>32</sup> See Guillermo M. Hernandez, *Closing the Courthouse Doors: The Implications of the Discovery of Immigration Related Facts and the Effects of §30.014 of the Texas Civil Practice & Remedies Code*, 13 THE SCHOLAR 673, 701-704 (2011).

<sup>33</sup> 8 CFR § 204.2(c)(2)(iii).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> The Freedom of Information Act permits a self-petitioner to view her immigration file, if it exists. However, to request someone else's file the individual must have the consent of that person in writing. Initial relative petitions are filed by the spouse with status, and thus are available under FOIA only to the petitioner, not the beneficiary. See 5 U.S.C. § 552 and 552a.

<sup>37</sup> See, e.g., 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(bb).

<sup>38</sup> See Immigration and Nationality Act, 8 U.S.C. §1101(f) (2009), stating that a person will be barred from showing good moral character if he or she is or was a habitual drunkard; convicted of a single offense of simple

VAWA has no specific definition of good moral character, but the Immigration and Nationality Act bars a person from establishing good moral character if, during the period for which good moral character is required to be established, he or she meets any of a long list of criteria.<sup>39</sup> A person who has engaged in one or more of the specified activities cannot show good moral character, but VAWA has an exception for self-petitioners if the Attorney General finds that the act or conviction was connected to the person's having been battered or subjected to extreme cruelty.<sup>40</sup>

In addition to the statutory bars, many other factors are considered in determining good moral character, such as having an order of protection issued against the VAWA applicant, any law enforcement interaction, failure to pay child support, failure to file taxes, civil charges of abuse or neglect in child welfare proceedings, failure to protect, or welfare fraud. The issuance of orders of protection or personal protection orders requires some attention because it is problematic for victims of abuse. In many jurisdictions, judges readily issue mutual orders of protection. In jurisdictions in which initial orders are issued *ex parte*, family courts should take steps to ensure that service has been properly performed.

Primary evidence of the self-petitioner's good moral character is her affidavit accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the three-year period immediately preceding the filing of the self-petition.<sup>41</sup>

Similar to protective orders, in divorce actions in some jurisdictions judges commonly issue a "behavior order," or a "stay away" order to ensure that the parties are civil to each other and to make them refrain from certain behavior. Without a finding of past domestic violence, such future-oriented orders will not preclude a finding of good moral character. When behavior orders are issued to set parameters for future interactions between the parties and to promote civility, but are not issued based on past illegal conduct, they will not raise good moral character issues for immigration.

## B. Expanding Immigration Options—U Visas

Domestic violence victims who were married to U.S. citizens or legal permanent residents can benefit from VAWA, but VAWA still leaves unprotected a very large population of victims who are not married to their abusers or who are abused by persons who lack

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possession of thirty grams or less of marijuana; engages in prostitution; has engaged in smuggling; has been previously removed from the United States; whose income is derived principally from illegal gambling activities; has been convicted of two or more gambling offenses committed during such period; has given false testimony for the purpose of obtaining an immigration benefit; has been confined, as a result of a conviction, to a penal institution for an aggregate period of 180 days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period; at any time has been convicted of an aggravated felony; at any time has engaged in conduct related to Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings; makes a false claim of citizenship, or registers to vote or votes in a Federal, State, or local election.

<sup>39</sup> *Id.*

<sup>40</sup> See Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(C) (2009).

<sup>41</sup> 8 CFR § 204.2(c)(2)(v). Immigration adjudicators will consider other credible evidence of good moral character, such as affidavits from responsible persons who can knowledgeably attest to the self-petitioner's good moral character.

immigration status. To reach the broader population, an additional immigration relief for victims was created in 2000, the U visa.<sup>42</sup> The U visa is designed to “strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes. . . . while offering protections to victims of such offenses in keeping with the humanitarian interests of the United States.”<sup>43</sup>

This visa provides immigration relief for immigrants who suffer “substantial physical or mental abuse” as a result of specified criminal activity perpetrated against them.<sup>44</sup> The specified crimes include domestic violence, but the list of qualifying crimes is much longer.<sup>45</sup> Unlike eligibility under VAWA, the U visa does not require that the victim be related to the perpetrator of the crime or that the perpetrator have any legal immigration status in the United States.<sup>46</sup> A victim must possess information related to the criminal activity and must show that she “has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting the criminal activity.”<sup>47</sup> Victims must obtain a certification indicating his or her helpfulness.<sup>48</sup> Importantly, victims must be helpful in “investigating or prosecuting” crimes. Convictions, or even decisions to prosecute, are not required. Merely reporting a crime in some situations is sufficient assistance in investigating the activity. When victims are children, a parent’s helpfulness will be sufficient.<sup>49</sup>

The statute specifically identifies judges as among persons who may sign the required certification indicating that the victim helped in the investigation or prosecution of a crime. As with law enforcement, the judge is asked to confirm only the victim’s helpfulness. Responsibility for establishing all other eligibility criteria lies with the immigrant, and the final determination of visa eligibility will be made by Citizenship and Immigration Services.<sup>50</sup>

U visas give victims temporary non-immigrant status, employment authorization, and protection against removal from the United States. They also provide an avenue to apply for legal permanent status in the United States after three years if the victim has not refused to provide required assistance to law enforcement, and can show that continued presence in the United States is “justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.”<sup>51</sup>

42 See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U).

43 Battered Immigrant Women Protection Act of 2000, § 1513(a)(2)(A), 114 Stat. at 1533-34. See also Leticia M. Saucedo, *A New “U”: Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891 (2008).

44 Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U).

45 The criminal activity is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: 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; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U)(iii) (2009).

46 See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U).

47 See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U)(i)(III).

48 See Immigration and Nationality Act, 8 U.S.C. § 1184(p)(1).

49 See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U)(i)(III).

50 See Immigration and Nationality Act, 8 U.S.C. § 1184(p)(1).

51 See Immigration and Nationality Act, 8 U.S.C. § 1255(m)(1)(B).

The U visa has generous derivative provisions as well. For example, if the victim of the crime is a child under 21, U visa status also becomes available to the person's "spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents."<sup>52</sup> This availability means that when a child qualifies for a U visa, the child's family members also may qualify, including the child's parents. This is particularly important in child abuse or neglect cases in which Child Protective Services agencies investigate crimes, even if the crimes are prosecuted by another agency, and can certify helpfulness. Also, it means that the U visa can be an important tool in regularizing the status of entire families.

As discussed with VAWA above, the family court may be an important forum for victims to establish the various eligibility criteria, through discovery or findings of the court. Also, family courts can serve an important function identifying cases in which U visas might be available, particularly in child welfare proceedings. Many judges who hear child welfare matters are familiar with special immigrant juvenile status as an option for abused and neglected children, but in some cases the U visa is a viable alternative that will extend relief to other family members and thus enhance prospects for reunification with a stable family unit. Awareness of the full range of options available to children can help the court advance the best interests of children.

### C. Combating Marriage Fraud and Conditional Residence

Another way in which the family-sponsored immigration provisions of U.S. immigration law enable abusers to keep victims in violent relationships is the use of "conditional" status.<sup>53</sup> To combat marriage fraud, immigration law requires all applicants who receive legal permanent resident status on the basis of a marriage that is less than two years old to be granted only conditional status. They then must comply with a two-year conditional residence requirement before being granted full lawful permanent residence.<sup>54</sup> In order to convert the conditional status to permanent status, the spouses must file a joint petition to remove the condition 90 days before the expiration of the two-year conditional resident status, and must appear for a joint interview with a Citizenship and Immigration Services official.<sup>55</sup> Conditional status also applies to any children of the beneficiary spouse.<sup>56</sup>

For immigrant victims of domestic violence, the joint filing and interview requirements are highly problematic because they require the cooperation of the abuser. Some immigrant victims feel compelled to stay in dangerous and abusive relationships in order to fulfill the joint filing requirement. Even at the end of two years, some abusers refuse to sign the joint petition as a means of control. The failure to file results in the termination of the immigrant spouse's permanent resident status.<sup>57</sup>

<sup>52</sup> Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U)(ii)(I). Importantly, abusers may not qualify for relief based on crimes they have perpetrated. If a parent or spouse is the abuser, that abuser will not benefit from the U visa.

<sup>53</sup> 8 U.S.C. § 1186a(a)(1).

<sup>54</sup> 8 CFR § 235.11(b).

<sup>55</sup> 8 U.S.C. § 1186a(c)(1).

<sup>56</sup> 8 U.S.C. § 1186a(a)(1).

<sup>57</sup> 8 U.S.C. § 1186a(c)(2).

To counteract the need to obtain the cooperation of an abusive spouse, the law contains a hardship waiver for battered spouses.<sup>58</sup> The waiver allows the battered immigrant to file an application to remove the conditions on her permanent residence without her abusive spouse's assistance.<sup>59</sup> This waiver is available if the qualifying marriage was entered in good faith, but during the marriage the beneficiary spouse "was battered by or was the subject of extreme cruelty perpetrated by his or her spouse," and the immigrant spouse was not at fault in fulfilling the joint petition requirement.<sup>60</sup>

## CONCLUSION

For many immigrants, options under U.S. immigration law are entirely about family relationships. It is important to understand this reality to appreciate the dynamics at work in immigrant families. Where domestic violence is present, a basic understanding of this interrelation will inform family courts of how abusers can use the immigration status of their partners and their partner's children to control and prolong abusive relationships. Immigration law has made significant strides to consider victims of abuse and other crimes. However, abusers will continue to try to find other forums to control their partners. Family courts must be aware that abusers may use the courts to continue to perpetrate abuse on their partners and must prevent exploitation of family proceedings to perpetuate abuse.

Immigrant women who are victims of abuse face a number of obstacles. Having to deal with legal proceedings in which custody of their children will be determined, while facing fear of deportation, adds to the myriad issues they confront. Fear of losing their children or of being deported, and barriers of culture, language, financial dependency, and isolation, are just a few of the obstacles that these women face. Family courts must remain a safe haven where immigrants can feel that their rights will be protected without regard to their immigration status. Family courts are uniquely positioned to prevent the abuser from bringing baseless immigration claims to intimidate their partners.

58 Immigration and Nationality Act, 8 U.S.C. § 1186a(c)(4).

59 See also Leslye Orloff et al., *Legal Momentum, Introduction to Immigration Relief for Immigrant Victims of Sexual Assault and Glossary of Terms*.

60 Immigration and Nationality Act, 8 U.S.C. § 1186(c)(4)(C). See also 8 C.F.R. § 216.5(3). A similar waiver is available after a termination of the marriage if the immigrant spouse can establish that "the qualifying marriage was entered into in good faith by the alien spouse." 8 U.S.C. § 1186a(c)(4)(A).

## Resources for Immigration Assistance

**American Bar Association, Commission on Immigration Policy, Practice and Pro Bono**—[www.abanet.org/immigprobono](http://www.abanet.org/immigprobono)

The Commission on Immigration Policy provides grants, technical assistance, and support for pro bono programs and lawyers working with detained and released children in immigration proceedings.

**Americans for Immigrant Justice (formerly Florida Immigrant Advocacy Center)**—[www.aijustice.org](http://www.aijustice.org)

Americans for Immigrant Justice represents dependent children in foster care who can obtain lawful permanent residence as special immigrant juveniles, as well as Cuban-Haitian entrants, refugees, and asylees in obtaining lawful permanent residency.

**ASISTA Technical Assistance Project**—[www.asistahelp.org](http://www.asistahelp.org)

ASISTA provides free technical assistance nationally for advocates and attorneys representing immigrant victims of domestic violence and sexual assault.

**Catholic Legal Immigrant Network, Inc. (CLINIC)**—[www.cliniclegal.org](http://www.cliniclegal.org)

CLINIC provides technical assistance, training, and materials to non-profit organizations representing victims of domestic abuse and crime on VAWA self-petitioning and cancellation of removal, U-visa, T-visa and Special Immigrant Juvenile Status, and gender-related asylum.

**The Center for Gender and Refugee Studies**—[www.uchastings.edu/cgrs](http://www.uchastings.edu/cgrs)

The Center for Gender and Refugee Studies provides legal expertise and resources to attorneys representing women who are asylum seekers fleeing gender-related harm.

**The Coalition to Abolish Slavery and Trafficking (CAST)**—[www.castla.org](http://www.castla.org)

CAST provides services to victims to human trafficking and technical assistance to advocates working on behalf of those victims.

**Immigrant Legal Resource Center**—[www.ilrc.org](http://www.ilrc.org)

IOLTA-funded legal services providers in California and any San Francisco Bay Area non-profit organization assisting children in juvenile court proceedings can contact the ILRC to get free advice and technical assistance on individual cases or policy issues.

**Legal Aid Foundation of Los Angeles (LAFLA)**—[www.lafla.org](http://www.lafla.org)

LAFLA provides direct representation to victims and technical assistance and training to advocates providing services to victims of human trafficking.

**National Immigration Law Center**—[www.nilc.org](http://www.nilc.org)

NILC provides advice over the telephone and has expertise in public benefits law affecting immigrants.

**National Immigration Project of the National Lawyers Guild—**

[www.nationalimmigrationproject.org](http://www.nationalimmigrationproject.org)

The Project provides assistance, advice and resources to attorneys and community groups throughout the country with a special emphasis in the area of VAWA.

**Legal Momentum—Immigrant Women Program—**<http://iwp.legalmomentum.org>

Legal Momentum is one of the nation's experts on the rights and services available to immigrant victims of domestic and other violence.

**Tapestri—**[www.tapestri.org](http://www.tapestri.org)

Tapestri works to eradicate violence in refugee and immigrant families.

**U.S. Citizenship and Immigration Services—**[www.uscis.gov](http://www.uscis.gov)

Description of VAWA self-petitioning, Special Immigrant Juvenile Status, U and T visas, asylum, and forms and instructions are available.

**U.S. Department of Health and Human Services—**[www.acf.hhs.gov](http://www.acf.hhs.gov)

Information about human trafficking, special information for law enforcement, social services organizations, and health care providers and fact sheets are available.

**U.S. Department of State—**[www.state.gov/g/tip](http://www.state.gov/g/tip)

Annual State Department reports on trafficking in persons, description of international efforts to combat human trafficking, and U.S. government's role are available here. This Web site publishes a monthly Visa Bulletin, which has information on family and employment-based immigration and wait times.

**U.S. Office of Refugee Resettlement, Department of Health and Human Services—**  
[www.acf.hhs.gov](http://www.acf.hhs.gov)

ORR provides resettlement benefits to asylees and victims of human trafficking. The Web site contains instructions for applying for benefits and contact information for state refugee coordinators.