Current Trends and Advanced Practice Strategies in VAWA Cases

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VAWA REAUTHORIZATION

Since its initial passage in 1994, the Violence Against Women Act (VAWA)[1] has included special provisions to help immigrant victims of domestic violence escape the control of their abusers. The provisions, such as the VAWA self-petition and VAWA cancellation of removal, eliminate the victim's reliance on the cooperation of the abuser to get immigration status. Unlike normal family immigration procedures, VAWA forms of relief allow the immigrant victim to file on his or her own without the cooperation or knowledge of the abuser.

VAWA has been reauthorized twice and is once again up for reauthorization. With each reauthorization, the law has been fine-tuned to address issues that developed in the course of its implementation and to expand its reach to other vulnerable populations, such as victims of crime and victims of human trafficking. Along with other statutes, VAWA has given many immigrant victims the opportunity to seek the services and relief needed to secure their safety and independence.

[1] Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902–55.

President Obama signed the Violence Against Women Reauthorization Act of 2013 into law on March 7, 2013.[2] The statute includes the following changes to immigration-related laws.

1. Adds "stalking" and "fraud in foreign labor contracting"[3] to the list of crimes eligible for U visas.

2. Requires the U.S. Department of Homeland Security (DHS) to report to Congress annually the number of U visa and T visa applications submitted, the dispositions of those applications, processing times, and actions taken to reduce processing times.

3. Preserves the derivative status of the surviving minor children of VAWA self-petitioners during the self-petitioning process or the adjustment of status in event of the abusive qualifying relative's death.

4. Exempts VAWA self-petitioners, U visa applicant, and battered qualified foreign nationals from public charge inadmissibility grounds.

5. Preserves the derivative status of an unmarried child of a U visa applicant as long as the child was under 21 at the time the U visa application was filed. So an unmarried child will remain eligible as a derivative even if he or she turns 21 as long as she or he was under 21 at the time the application was filed. This section is retroactive to the enactment of the Victims of Trafficking and Violence Protection Act of 2000.[4]

6. Allows conditional residents who were battered or subjected to extreme cruelty by their intended U.S. citizen or legal permanent resident spouse to file for the hardship waiver of the joint petition to remove conditions in cases where the marriage is not valid because of abuser's bigamy. The conditional resident must not have known that the intended spouse was already married at the time of their marriage.

7. Protections for non-citizen fiancé(e)

    i. Requires disclosure to the beneficiary of a K-1 visa information on the U.S. citizen petitioner regarding orders of protection, restraining orders, and other criminal history.
    ii. Requires the U.S. Attorney General to report enforcement activities of the U.S. Department of Justice under the International Marriage Broker Act of 2005.[5]
    iii. Requires International Marriage Brokers:

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[2] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4 (2013).
[3] As defined in 18 USC § 1351.
[4] Pub. L. No. 106-386, 114 Stat. 1464.
[5] Title VIII, Subtitle D, §§831-834 of Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. No. 109-162, 119 Stat. 2960 (2006).

1. To obtain birth certificate or other proof of age of the foreign national client;
2. To date stamp when proof of age is received;
3. To keep those records for seven years; and
4. To include in the U.S. petitioner's background certification attempt of crimes enumerated in the disclosure provision

iv. Allows federal judges to impose civil penalties, at the discretion of the U.S. Attorney.

8. Allows U and T visa recipients of the Commonwealth of the Northern Mariana Islands to be eligible to adjust status to legal permanent resident under the U or T adjustment rules based on continuous physical presence in the Commonwealth.

9. Creates a national security exception for the disclosure of information protected by the VAWA confidentiality provisions under 8 USC § 1367(b).

10. Makes all immigration detention facilities under the authority of DHS or the U.S. Department of Health and Human Services (HHS) facilities that maintain custody of unaccompanied alien children comply with the Prison Rape Elimination Act of 2003 (PREA).[6] DHS and HHS are to issue regulations within 180 days of the enactment of VAWA 2013 adopting the PREA national standards. The PREA requires the facilities covered under the Act to develop standards for detection, prevention, reduction, and punishment of prison rape.

11. Expands T visa derivatives to include any adult or minor children of a derivative beneficiary.

12. Requires DHS to consider the least restrictive setting available when unaccompanied alien children who have reached 18 are transferred into its care.

13. Expands the number of child advocates for trafficked and vulnerable unaccompanied alien children to six immigration detention sites.

14. Extends Federal Foster Care benefits and Unaccompanied Refugee Minor benefits to certain U visa recipients.

ADJUDICATION TRENDS AND STRATEGIES TO BUILD A WINNING VAWA CASE

In order to apply for self-petitioning status under VAWA, the applicant must show that she was, or still is, in a qualifying relationship with a U.S. citizen or lawful permanent resident (LPR); was subjected to battery or extreme cruelty by that person; lived with the abuser at one point; and is living in the United States (with some small exceptions). The applicant also must show that, if the abuser was a spouse, the marriage was entered into in good faith, and that the self-petitioner

[6] Pub. L. No. 108-79 (2003); 42 U.S.C. § 15607.

possesses good moral character.[7] Each item must be thoroughly documented in a VAWA application.

Bona Fides of the Underlying Marriage

A recent trend that AILA's VAWA, T, and U Committee has noticed is an increase in Requests for Evidence (RFE) asking for additional information regarding the bona fides of the underlying marriage, where the abusive relationship was a marital one. This practice pointer, therefore, will focus on this one component of filing a VAWA I-360, but please do not overlook the other criteria in preparing the application package.

Many advocates spend a great deal of effort and time to establish extreme cruelty, but it is just as important to demonstrate a bona fide marriage where the qualifying relationship is spousal.[8] In the event that an I-130 was previously filed, much of the work in this area may have already been done. A copy of the receipt and the approval notice should be part of the VAWA application package. Duplicating the same exhibits is not necessary, but a listing of what was previously submitting may be helpful to the adjudicator.

Often, though, there has been no prior I-130 filing, and advocates must therefore work with their clients to demonstrate the good faith marriage requirement from scratch. The self-petitioner's statement should walk the adjudicator through the relationship's development, from the good, to the bad, and to the ugly. Since there will be no interview conducted on the I-360, this is her only chance to address the marriage. Although it may be difficult for the self-petitioner to remember the good times and what attracted her to the abuser, the VSC must understand the beginnings of the relationship and believe in its bona fide nature before looking at the battery or extreme cruelty. A great deal of abuse may have taken place, but unless the foundation has been laid by showing the good faith marriage, a grant of self-petitioning VAWA status cannot be made.

Items that may be traditionally available in I-130 cases may not be available in VAWA situations.[9] For example, finances are frequently used as a tool for the abuser to control his spouse. The self-petitioner may not have joint bank statements to submit. Similarly, the self-petitioner may not have been included on a lease or on utility bills, again, because of the controlling nature of the abuser. The self-petitioner's affidavit must address these issues. If certain items that you would normally submit with an I-130 are not available, explain why they are not and tie that into the extreme cruelty she suffered at the hands of the abuser.

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[7] The qualifications for VAWA self-petitioners are found at§204(a)(1)(A),(B) of the Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq.*). If the self-petitioner does not reside in the United States at the time of filing the I-360, please see INA §204(a)(1)(A)(v).

[8] A "good faith" marriage is one in which the self-petitioner married the abuser in order to share a life together, not solely to obtain an immigration benefit. 8 CFR §204.2(c)(2)(iv).

[9] Common examples include, but are not limited to: birth certificates of children born of the relationship; joint property documents; joint financial documents; jointly filed tax returns; and wedding photos and invitations. 8 CFR §204.2(c)(2)(vii).

Finally, the self-petitioner may have fled the shared home in an emergency situation. She will not have had the wherewithal to have grabbed family pictures and joint documents. Anticipate that the adjudicator will want to know why these items are not available and address them in her affidavit.

VAWA WAIVERS AND STATUTORY EXCEPTIONS TO INADMISSIBILITY AND DEPORTABILITY

VAWA recipients often face special circumstances regarding their ability to be admitted to the United States. In order to make the law kinder and gentler, several provisions relating grounds of inadmissibility or removability have been created for VAWA recipients.

Good Moral Character

In order to be granted self-petitioning status under VAWA, the applicant must demonstrate that she possesses good moral character. While there is no set definition of what is good moral character, what constitutes a lack of it is found at Immigration and Nationality Act (INA) §101(f). Carefully review this list to ensure that none of these bars applies to the self-petitioner. Should a bar apply, though, there may be an exception for the VAWA self-petitioner. VAWA 2000[10] eased the good moral character standard for VAWA self-petitioners and an act or conviction under INA §101(f). The exception may be utilized where the offense in question would be waivable for purposes of admissibility or removability and if there is a connection between the offense and the battery or extreme cruelty.[11] Please note, though, that if the adjudicator finds that the conviction is an aggravated felony, a Notice to Appear may be issued.[12] The self-petitioner does not have to show that the waiver would be granted, just that it would be available when the time came for adjustment of status.[13] The next step is connecting the act or conviction to battery or extreme cruelty by the abusive spouse. A clear example would be where the abusive spouse forced the self-petitioner to commit the violation in question, such as instructing the self-petitioner to shoplift items. However, if the connection may not be quite so clear, this will be an opportunity to argue creatively. For example, if the act or conviction had a financial component to it, explore the link between that and potential economic control the abuser may have exercised in the relationship.

Inadmissibility Waivers

[10] Pub.L. No. 106-386, §§ 1501-13, 114 Stat. 1464, 1518-37.
[11] INA §204(a)(1)(C); *See* USCIS Memorandum, W. Yates, "Determinations of Good Moral Character in VAWA-Based Self-Petitions" (Jan. 19, 2005), *published on* AILA InfoNet at Doc. No. 05012561 (*posted* Jan. 25, 2005). Included in this memo is a chart that walks through each of the different bars and notes whether or not conduct is waivable, the waiver provision, and the criteria for the waiver.
[12] *Id.*
[13] *Id.*

Many inadmissibility grounds found at INA §212 have special provisions for VAWA applicants.[14] Often, the standard for VAWA recipients will be lower and the qualifying relative may be the VAWA recipient herself. Also, when the standard for the waiver is "extreme hardship," practitioners should look beyond the standard-bearer, *Matter of Cervantes*,[15] and include the special VAWA hardship factors found in the regulations in exploring the hardship to the VAWA self-petitioner.

Three out of the four health-related grounds of inadmissibility have waivers available.[16] VAWA recipients have a special waiver available for communicable diseases, where the standard is simply that she merits a favorable exercise of discretion.[17] She need not have a qualifying relative.[18]

Certain criminal convictions may be waived under INA §212(h).[19] VAWA self-petitioners, unlike others seeking a waiver under this section, only need to show that a favorable exercise of discretion is merited. This is essentially a balancing test where the positive factors in a case are stronger than the negative factors.[20] There is also no requirement to have a qualifying relative.[21] However, simply because the standard is reduced is no excuse for not putting forth a compelling application that shows a possible connection involving the act or conviction and the battery or extreme cruelty.

Technically, there is no waiver for the public charge of ground of inadmissibility, but VAWA self-petitioners are afforded a special exception. VAWA self-petitioners cannot be considered a public charge for any benefits she received because of the battery or extreme cruelty.[22] Likewise, there are certain types of benefits that cannot be considered in making the public charge determination.[23] If the VAWA self-petitioner has received public benefits, advocates will still want to submit evidence that the applicant is moving forward. Such evidence might include a letter of employment or offer of employment, or evidence that she is in school to receive training for future employment.

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[14] A thorough discussion of the VAWA waivers available is beyond the scope of this article. The authors recommend *The Waivers Book: Advanced Issues in Immigration Law Practice*, Irene Scharf *et al.* (Eds.) (AILA 2011).
[15] *Matter of Cervantes*, 22 I&N Dec. 560 (BIA 1999); 8 CFR § 1240.58(c).
[16] INA §212(a)(1)(A)(i)-(iv). There are no waivers available for drug abusers or addicts. INA §212(a)(1)(A)(iv).
[17] INA §212(g)(1)(C).
[18] *Id.*
[19] If the act or commission was violent or dangerous, a waiver will only be granted under "extraordinary circumstances," meaning that a denial would result in exceptional or extremely unusual hardship. 8 CFR §212.7(d).
[20] *Matter of Mendez*, 21 I&N Dec. (BIA 1996).
[21] INA §212(h)(1)(C).
[22] INA §212(p). See also INS Memorandum, M. Pearson, "Public Charge: INA Section 212(a) and 237(a)(5)" (May 20, 1999)(effective May 21, 1999) (64 Fed. Reg. 28686 (May 26, 1999).
[23] This includes, but is not limited to, Medicaid, food stamps, WIC, emergency disaster relief, foster care and adoption services. *Id.*

While the three– and ten- year bars for unlawful presence lack VAWA-specific waivers, the so-called 'permanent' bar found at INA §212(a)(9)(c) does provide for potential relief for VAWA self-petitioners.[24] The permanent bar is triggered when an individual has been present in the United States for more than year without lawful status, then departs or is removed, and then re-enters or attempts to reenter the United States without authorization.[25] For this waiver to apply, the VAWA self-petitioner must establish a connection between the battery or extreme cruelty and her removal and reentries. Practitioners must be able to demonstrate how the self-petitioner's departure and reentry fits into the larger context of the battery or extreme cruelty.

Fraud or willfully misrepresenting a material fact may result in inadmissibility.[26] The standard for a VAWA self-petitioner seeking this waiver for inadmissibility ground is that extreme hardships must be shown to herself, or to her U.S. citizen or lawful permanent resident child or parent, or other "qualified alien."[27] Thus, this is a departure from the lower standard found in the previously discussed waivers.

VAWA DERIVATIVES

Children and VAWA

An abused child has two options in filing for VAWA. The child can either file his or her own I-360 Petition as a primary VAWA applicant, or the parent who was abused can include the child as a derivative on the parent's I-360. A child can be a derivative on his or her parent's I-360 application even if the child has not been abused. If filing as a primary applicant, the child has to show that he or she is an abused child of a U.S. citizen or LPR parent.[28] A child is defined as a person who is unmarried, under 21 years of age, and is the biological child, step-child, or adopted child of the abuser. There are a few clarifications for stepchild and adopted child.

For stepchildren, the marriage creating the stepchild relationship must occur before the child reaches 18 years of age.[29] For adopted children, the child must be adopted while under the age of 16.[30] However, in 2005, Congress passed the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005).[31] This Act eliminated the two-year custody and residency requirement for adopted children who were abused.[32] Both these policies follow the general definitions of stepchild and adopted child under INA §101(b)(1).

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[24] INA §212(a)(9)(C)(ii).
[25] INA §212(a)(9)(C)(i)(I),(II).
[26] Inadmissibility may be found at INA §240(a)(6)(C) and removability is found at INA §237(a)(1)(H).
[27] INA § 212(i); 8 USC § 1641(b).
[28] See INA §204(a)(1)(A)(iii), INA §204(a)(1)(B)(ii).
[29] *See* INA §201(b)(1)(B).
[30] *See* INA §201(b)(1)(E).
[31] Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. No. 109-162, 119 Stat. 2960 (2006).
[32] *See* INA §101(b)(1)(E)(i).

It is interesting to note that if the child applies as a primary applicant, the abused child's unmarried children under the age of 21 may be derivatives. However, general policy has shown that a child of a derivative (the grandchild of the primary applicant) cannot receive status along with the derivative child. In those cases, humanitarian parole has been granted. But, if the derivative ages out and becomes a self-petitioner, would the grandchild in that case be able to benefit? That is a question that has not been directly answered yet and practitioners are figuring out through filing their own applications.

Additionally, as detailed below, there is an exception where an abused child may petition until the age of 25 if he/she can demonstrate that abuse was at least one central reason for the filing delay. Conversely, in cases where the child files as a derivative, the child does not need to prove abuse if the parent, who is the primary applicant, can demonstrate abuse.

Aging Out Considerations for Derivatives

In 2002, the Child Status Protection Act (CSPA)[33] was passed and as a result afforded generous provisions to child derivatives. For example, as long as an immediate relative VAWA applicant filed the Form I-360 provision for her child/children before they hit 21 years old, those children, as long as they remain unmarried, can benefit from the application and their date is locked in.[34] With regard to adjustment of status issues for aging out children, CSPA also provides a formula by first determining the date the age of the derivative on the date the visa number become available.[35] From that date, subtract the number of days the Form I-360 was pending, as long as the derivative beneficiary files a From I-485, within one year of availability.[36] The period that the application is determined to be pending is the date that it is properly filed (receipt date) until the date an approval is issued on the petition.[37]

In 2005, an additional provision for aging out derivatives was added through VAWA 2005.[38] VAWA 2005 allows for VAWA child self-petitioners, between the ages of 21 and 25 to file an I-360 petition if the abuse was at least one central reason for the filing delay.[39] With VAWA 2005, Congress realized that there may have been several reasons that a child self-petitioner was unable to file the I-360 before the age of 21 and added a new provision that would allow a late filing of the VAWA petition in certain instances.[40] The qualifications are that: 1) the self-petitioner must

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[33] Child Status Protection Act (CSPA), Pub. L. No. 107-208, 116 Stat. 927 (2002).
[34] USCIS Policy Memorandum HQOPRD 70/6.1.1, "Age-Out Protections Afforded Battered Children Pursuant to The Child Status Protection Act and the Trafficking and Violence Protection Act," (August 17, 2004).
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. No. 109-162, 119 Stat. 2960 (2006).
[39] USCIS Memorandum, "Continued Eligibility to File for Child VAWA Self-Petitioners After Attaining Age 21; Revisions to Adjudicator's Field Manual (AFM) Chapter 21.14 (AFM Update AD07-02," (Sept. 6, 2011), *published on* AILA InfoNet at Doc. No. 11090861 (*posted* Sept. 8, 2011).
[40] *Id.*

have been qualified to file the self-petition on the day before the individual turned 21 years old;[41] 2) the qualifying abuse must be one central reason for the self-petitioner's delay in filing and even though may not be the sole reason, the nexus between the abuse and the filing delay must be more than tangential;[42] 3) the self-petition must be filed prior to attaining age 25;[43] and 4) the self-petitioner must be and remain unmarried.[44] Despite this positive new aspect of VAWA 2005, there is still an aspect of the law that can be potentially troubling for some self-petitioners with regard to their adjustment of status. Even though self-petitioning derivatives receive this allowance in filing their I-360 application, when they want to file for adjustment of status, they will still be required to following the regulations that address adjustment of status.[45]

Supporting Evidence in Derivative Applications

If a child is filing an I-360 petition as a primary applicant, then the same guidelines of supporting evidence should be followed as you would if you were filing for an abused spouse. This supporting evidence includes: 1) qualifying relationship between the child and abuser must be shown; 2) that the abuser was a U.S. citizen or LPR; 3) that there was extreme battery or cruelty in the relationship; 4) residence with the abuser; 5) good moral character for the past three years for children age 14 and older. Children under 14 are presumed to have good moral character.[46] All of the supporting evidence can be creatively filed and may not be the same from case to case.

If a child is filing as a derivative under their abused parent who is the primary applicant, he or she need not submit the above-referenced documents of abuse with respect to that child. It is important, however to document the derivative's relationship to the parent. For example, a birth certificate or national document demonstrating the parent/child relationship between the child and abused parent must be submitted.

New Policy for Obtaining an Employment Authorization Document (EAD)

In December 2012, U.S. Citizenship and Immigration Services (USCIS) issued a new draft policy clarifying VAWA 2005[47] with regard to EAD's for VAWA self-petitioners and derivatives. This policy is still in draft form and, as of this date of writing this article, has not been finalized. Presently, once an I-360 Petition is filed, a VAWA self-petitioner is granted deferred action status. Next, the derivative is able to request deferred action and obtain an EAD based on the primary beneficiary's 1-360 approval. The derivative may obtain the status through the following processes: 1) mail in a request for deferred action to VSC; 2) send a similar request to VSC through email hotline (hotlinehollowupi360.vsc@uscis.dhs.gov), which is considered the

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[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] E. Abriel & S. Kinoshita, *The VAWA Manual,* §3.17 (5th Ed. 2008).
[47] Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. No. 109-162, 119 Stat. 2960 (2006).

quickest route; or 3) include the request in the cover letter that is submitted with the I-765 application(s).[48] These methods are current and practitioners should still utilize them. Self-petitioning children are able to access an employment authorization document (EAD) via the same methods as a primary applicant parent who had been abused. This method involves filing an I-765 application immediately after the I-360 petition has been approved, or filing the I-765 application concurrently if and only if the I-485 application is being concurrently filed.

With this draft policy, USCIS clarified VAWA 2005 and stated principal beneficiaries need not rely only on deferred action to obtain an EAD.[49] This draft memorandum supports the current policy of derivative children relying on deferred action in order to be eligible for employment authorization still stands.[50] However, for children who have aged out after the filing of the I-360 petition, there is a new policy. The child who attains age 21 converts to a VAWA self-petitioner and is eligible for work authorization regardless of deferred action status, provided the individual was included as a derivative in his/her parent's original approved application.[51] That derivative child who converts to a VAWA self-petitioner also remains eligible for an EAD under deferred action if deferred action was provided.[52] This policy by USCIS, while leaning toward a positive resolution for EAD's for derivatives in deferred action status, is confusing because it treats derivatives differently for purposes of obtaining an EAD whether the derivative has aged out or not. The comments to this proposed policy address the confusion, and now we are waiting to see if USCIS will address this inconsistency.[53]

As the regulations currently stand, a child who converts to a self-petitioner may file an I-485 application and I-765 application concurrently with a pending I-360 application. As a result of the filing of these applications, the child can file for an I-765 as a pending adjustment of status applicant and not have to rely on deferred action. However, those derivative children who do not age out must wait for approval of the I-360 application before requesting deferred action and an EAD. As of this date, there has been no resolution to this point.

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[48] Policy clarified at VSC Teleconference held on February 13, 2013.
[49] Draft Policy Memorandum, Draft PM-602-XXXX, "Eligibility for Employment Authorization upon Approval of a Violence Against Women Act (VAWA) Self-Petition; and, Eligibility for Employment Authorization for Battered Spouses of Certain Non-Immigrants,"(*posted* Dec. 12, 2012). Comment period ended January 10, 2013.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] Comment Letter on USCIS VAWA EAD Guidance *available at* www.asistahelp.org/documents/news/Comments_on_USCIS_VAWA_EAD_Guidance_3C87287ADCDEB.pdf (Jan. 10, 2013).