

Deferred Action for VAWA Self-Petitioners

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Introduction

Three Immigration and Naturalization Services (INS) memoranda from 1997-1998 outlined the process for deferred action granted under the Violence Against Women Act (VAWA) for self-petitioners. According to these memoranda, deferred action was a determination that the VAWA Unit of the Vermont Service Center (VSC) of U.S. Citizenship and Immigration Services (USCIS) made following approval of a VAWA self-petition. Deferred action status is an agreement by Department of Homeland Security (DHS) personnel that they will not take action to remove (deport) an individual from the United States. It is an exercise of prosecutorial discretion making the immigrant's case a lower priority for removal. Deferred action does not however, give the immigrant victim any form of legal immigration status.¹

The VAWA Unit makes this determination without requiring the filing of any additional paperwork by the self-petitioner (other than the I-360). The factors set forth throughout this article from earlier DHS guidance serve as a basis for setting the standards for deferred action in VAWA self-petitioning cases going forward, but need updating to ensure consistency with the statutory amendments made to VAWA self-petitioning in VAWA 2000, VAWA 2005 and VAWA 2013 and with current DHS VAWA confidentiality and prosecutorial discretion policies.

This paper proposes factors USCIS should consider using as it updates its deferred action policies and/or VAWA self-petitioning regulations with regard to granting deferred action to VAWA self-petitioners and any children or parents included in the VAWA self-petition.² Since immigrant children and parents included in their parent's or child's self-petitions are considered self-petitioners,³ derivative children and parents included in VAWA self-petitions should receive deferred action status at the same time deferred action is granted to the battered immigrant filing the VAWA self-petition. No additional filing should be required.⁴

¹ Dep't of Homeland Security, *New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status; Interim Rule*, 72 Fed. Reg. 53016 (Sept. 17, 2007), available at: http://niwaplibrary.wcl.american.edu/immigration/u-visa/regulations/UVISA_interim-regs-Fed-Reg.pdf

² INA § 204(a)(1)(K); 8 CFR §274a.12(c)(31).

³ INA § 101(a)(51) defines self-petitioners as both the primary applicant and any children included in the application for a VAWA self-petition. The VAWA self-petitioning rule issued by USCIS should extend deferred action status to the primary applicant self-petitioner, children included as derivatives in their parents' self-petition. The USCIS should by regulation extend the same treatment to protective non-abusive parents included as derivative applicants in their child's self-petition.

⁴ VAWA self-petitioning adults can include their under 21 year old children in their VAWA self-petitions as "derivatives" who will then also benefit from the self-petition. Similarly, under 21 year olds victims of battering or

Analysis of Existing Deferred Action Policies

The June 5, 1997 “Interim Enforcement Procedures” memorandum listed factors to consider generally when USCIS considers granting deferred action generally:⁵

- (1) *The likelihood of ultimately removing the alien, including:*
 - a. *Likelihood that the alien will depart without formal proceedings (e.g., minor child who will accompany deportable parents);*
 - b. *Age or physical condition affecting ability to travel;*
 - c. *The likelihood that another country will accept the alien;*
 - d. *The likelihood that the alien will be able to qualify for some form of relief which would prevent or indefinitely delay removal*⁶
- (2) *The presence of sympathetic factors which, because of a desire on the part of administrative or judicial authorities to reach a favorable decision, could result in a distortion of the law with unfavorable implications for future cases;*⁷
- (3) *Whether or not the individual is a member of a class of deportable aliens whose removal has been given a high enforcement priority (dangerous criminals, alien smugglers, drug traffickers, terrorists, war criminals, habitual immigration violators)*⁸

extreme cruelty committed by a parent may include their undocumented non-abusive parent as a derivative in the child’s self-petition. Children of self-petitioners, make their requests for deferred action status usually along with their request for an Employment Authorization Document.

⁵ Immigration and Naturalization Service, *Interim Enforcement Procedures, Standard operating Procedures for Enforcement Officers: Arrest, Detention, Processing and Removal*, INS Field Manual (June 5, 1997) (on file with NIWAP) [hereinafter “Interim Enforcement (June 1997)”].

⁶ VAWA self-petitioners and derivative parents and children included in the VAWA self-petition who receive approved VAWA self-petitions are either immediately eligible to apply for lawful permanent residency as abused spouses or children of U.S citizens or are in line to file for lawful permanent residency as spouses or children of lawful permanent residents when a visa becomes available. As such, they qualify to receive a form of immigration relief that will delay and ultimately prevent removal.

⁷ Not applicable in VAWA self-petitioning cases based upon self-petitioner’s path to lawful permanent residency and upon Immigration and Customs Enforcement (ICE) memoranda on prosecutorial discretion including special prosecutorial discretion protections for immigrant crime victims. See Memorandum from John Morton, Director, Immigration Customs Enforcement, to All Field Office Directors, Special Agents in Charge, and Chief Counsel, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/november-12-15-2012-atlanta-ga/family-law-track/custody/department-of-homeland-security-dhs-memos/Morton-CertainVictimsWitnessesandPlaintiffs-Memo-06-17-2011.pdf/view>; see also Memorandum from John Morton, *Exercising Prosecutorial Discretion Consistent With the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens* (June 17, 2011), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/november-12-15-2012-atlanta-ga/family-law-track/custody/department-of-homeland-security-dhs-memos/Morton%206.17.11prosecutorial-discretion-memo.pdf/view>

⁸ 8 U.S.C. § 1367 prohibits DHS from making an relying exclusively on information from inherently suspect sources, including the battering spouse, a member of the battered spouse’s family residing in the same household as the alien who battered the petitioner. For more information, see U.S. Citizenship and Immigration Services, Policy Memorandum PM-602-0022 (Dec. 15, 2010), available at: <http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2010/December/i-360-vawa-revocation-pm-602-0022.pdf>.

- (4) *Whether the alien’s continued presence in the U.S. is desired by local, state, or federal law enforcement authorities for purposes of ongoing criminal or civil investigation or prosecution.*⁹

An additional 1998 DHS memorandum addresses deferred action specifically in cases of VAWA self-petitioners.¹⁰ This memorandum states that the VSC will check five factors to determine if the VAWA self-petitioner is eligible for deferred action:

- (1) *Is there an approved I-360 [self-]petition for an abused spouse or child?*
- (2) *Has an application for adjustment of status been filed and what is the status of that application?*
- (3) *Is the self-petitioner currently in removal proceedings¹¹ or has the approved I-360 [self-petition] been revoked?¹²*
- (4) *Since the I-360 [self-petition] approval, was the self-petitioner lawfully admitted for permanent residence or adjusted to LPR status?*
- (5) *Is the self-petitioner currently residing in the U.S.?¹³*

⁹ A VAWA self-petition does NOT require any cooperation with law enforcement.

¹⁰ Acting Associate Commissioner Michael D. Cronin, *Deferred Action for Self-petitioning Battered Spouses and Children with Approved I-360 Petitions* (Dec. 22, 1998) [hereinafter “Cronin (Dec. 1998)”].

¹¹ The fact that a VAWA self-petitioner has a prior removal or deportation order or is in removal or deportation proceedings does not prevent approval of the victim’s VAWA self-petition, however it will affect their ability to adjust status to legal permanent residency. The self-petitioner should file a motion to re-open to apply for VAWA adjustment of status or cancellation of removal. INA §240(c)(7)(C)[8 U.S.C.A. §1229a(c)(7)(C)]. The victim will want to ask the OCC for dismissal without prejudice in accordance with Assistant Secretary Morton’s Memorandum, *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions* (Aug. 20, 2010), available at:

http://www.asistahelp.org/documents/resources/1_ICE_Guidance_on_Handling_Aliens_P_A2982443D66CC.pdf.

¹² ICE policies encourage ICE immigration enforcement personnel and ICE trial attorneys to exercise prosecutorial discretion to prevent removal, detention and initiation of immigration enforcement actions against immigrant crime victims and witnesses. *See* Memorandum from Janet Napolitano, Secretary, Department of Homeland Security, to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services, and John Morton, Director, U.S. Immigration and Customs Enforcement, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf/view> (ICE regarding immigrants with pending cases likely to be approved by USCIS and cases that have been approved by USCIS that should be dismissed without prejudice by ICE trial attorneys.). *See also* Memorandum from John Morton, Assistant Secretary, Immigration Customs Enforcement, *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions* (Aug. 20, 2010), available at:

<http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/aliens-pending-applications.pdf/view>. *See also* U.S. Immigration Customs Enforcement Policy Memorandum, *Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings; Revisions to the Adjudicator’s Field Manual* (February 4, 2011), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/coordination-adjud-removal-proceedings.pdf/view>.

¹³ Residence in the United States as a factor for VAWA self-petitioning was removed as a requirement in the amendments made by Sections 1503(b) and (c) of the Violence Against Women Act of 2000, Pub. L. No. 106-386 (2000).

Both of the 1997 and 1998 memoranda contain references to laws and requirements that existed in the 1990s that have been removed by statutory amendments to VAWA and state policies that have been superseded by subsequent DHS policy memoranda. This paper will discuss the statutes, legislative history, and policy background and research that support these VAWA reforms and will provide suggestions for amended factors, in line with the current VAWA law and regulations that should be considered when granting deferred action in VAWA self-petitioning cases.

As discussed in more detail below, the factors that lead to a VAWA self-petitioner's receipt of deferred action status should be updated to reflect changes in immigrant crime victim protections that have been added to U.S. immigration laws through VAWA and Trafficking Victims Protection Act (TVPA) reauthorizations and through issuance of DHS policies since 1997 and 1998. The changes that most directly impact deferred action for VAWA self-petitioners and their children are DHS prosecutorial discretion policies and VAWA confidentiality protections.

Victims Who Qualify For Forms of Immigration Relief and Protections from Removal

Two recent memoranda, issued in June 2011, by Director John Morton at Immigration and Customs Enforcement (ICE) set out DHS' enforcement priorities and a framework for exercise of prosecutorial discretion in cases of immigrant crime victims and other immigrants who are a low priority for removal. These memoranda are:

- “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs”¹⁴ and
- “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens.”¹⁵

These memoranda describe how DHS will meet its multiple obligations under U.S. immigration laws: granting legal immigration status; protecting crime victims; and enforcing U.S. immigration laws. By declining to use immigration enforcement resources to initiate and pursue immigration removal actions against noncitizens who are eligible for immigration relief, who are crime victims, noncitizens who are primary care providers for children, the disabled and

¹⁴ Director John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011) [hereinafter “Morton, Certain Victims (June 2011)”], available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton-CertainVictimsWitnessesandPlaintiffs-Memo-06-17-2011.pdf>.

¹⁵ Memorandum from Director John Morton, U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec., to all Field Office Directors, All Special Agents in Charge & All Chief Counsel, U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec., *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011) [hereinafter “Morton, Exercising Prosecutorial Discretion (June 2011)”], available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton-6.17.11prosecutorial-discretion-memo.pdf>.

the elderly, DHS preserves resources for immigration enforcement of high priority removal cases (e.g. terrorism, immigrants with serious criminal convictions). A particular focus of these memoranda is to provide protection for crime victims and their children from deportation and removal. It is clear that these policies were specifically designed to prevent the initiation of immigration enforcement actions against, detention of, and removal of immigrant victims of battering or extreme cruelty, and their children. These prosecutorial discretion policies offer protection to battered immigrants and immigrant victims of child and elder abuse before and without regard to whether they ever file any case for immigration relief.

These memoranda explain that ICE officers, agents, and attorneys should consider “all relevant factors” when determining whether prosecutorial discretion might be warranted in each specific noncitizen’s case.¹⁶ The memoranda provide a non-exhaustive list of factors that can lead to the exercise of prosecutorial discretion in favor of a noncitizen. These include:

- “Whether a person is likely to be granted temporary or permanent status or other relief from removal”¹⁷
- “Whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking or other crime”¹⁸
- “Whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities”¹⁹; and
- Directive that “there are certain classes of individuals that warrant particular care.”²⁰

These memoranda also point out that officers should look at “the totality of the circumstances” in determining whether or not to exercise prosecutorial discretion.²¹

Victim Protection: A Federal Immigration Law Statutory Imperative

For over two decades, Congress has created and expanded protections for noncitizen crime victims under U.S. immigration laws. These protections include access to legal immigration status, protection from deportation, access to work authorization and under limited circumstances access to public benefits²² or legal services.²³ These reforms began with the

¹⁶ Morton, *Exercising Prosecutorial Discretion* (June 2011) at 4.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 5.

²¹ Doris Meissner, *Exercising Prosecutorial Discretion* (Nov. 2000) at 8.

²² See CECILIA OLAVARRIA, AMANDA BARAN, LESLYE ORLOFF & GRACE HUANG, *Public Benefits Access for Battered Immigrant Women and Children*, in *BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS* (NIWAP Oct. 2013), available at:

creation of the Battered Spouse Waiver in 1990²⁴ and have been repeatedly amplified with the passage of --

- The Violence Against Women Act in 1994;²⁵
- VAWA's confidentiality protections in 1996;²⁶
- Creation of the Trafficking Victims Protection Act (TVPA) of 2000;²⁷
- VAWA's expansion of immigration protections in VAWA's reauthorizations in 2000,²⁸ 2005²⁹ and 2013;³⁰ and
- Expansion of crime victim protections through the TVPA's reauthorizations in 2003,³¹ 2005,³² 2008³³ and 2013.³⁴

Protecting battered immigrants, immigrant child and elder abuse victims, and other immigrant crime victims from threats of deportation and from their perpetrators' actions designed to trigger immigration enforcement against crime victims, has been a key goal of this legislation. The creation of VAWA confidentiality in 1996³⁵, VAWA 2000³⁶ and its expansion in VAWA 2005³⁷ was specifically designed to stop batterers and other perpetrators from actively using U.S. immigration laws to harm, stalk, silence, and retaliate against victims. Responding to

http://niwaplibrary.wcl.american.edu/public-benefits/benefits-for-qualified-immigrants/4.2_PB_BB-PublBens_for_Imm_Women_and_Children-MANUAL-BB.pdf/view.

²³ Benish Anver, Henrissa Bassey & Leslye Orloff, *And Legal Services Access for All: Implementing the Violence Against Women Act of 2005's New Path to Legal Services Corporation Funded Representation for Immigrant Survivors of Domestic Violence, Sexual Assault, Human Trafficking, and Other Crimes* (Sept. 2014), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/access-to-legal-services-for-immigrant-victims/civil-society/2014-lsc-regulations/And-LSC-for-All.pdf/view>.

²⁴ Pub. L. No. 101-649, 104 Stat. 4978 (codified at INA § 216(c)(4)(C))

²⁵ Violent Crime Control and Law Enforcement Act ("VAWA 1994"), Pub. L. No. 103-322, §§ 40701-40703, 108 Stat. 1796 (1994).

²⁶ Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA") of 1996 § 384; 8 U.S.C. § 1367 (2001).

²⁷ Victims of Trafficking and Violence Protection Act of 2000 ("VAWA 2000"), Pub. L. No. 106-386, Div B, Title V, § 1513(d) (2000).

²⁸ VAWA 2000, Pub. L. No. 106-386 (2000) § 1513.

²⁹ Violence Against Women and Department of Justice Reauthorization Act of 2005 ("VAWA 2005"), Pub. L. No. 109-162, Title II, § 205, 119 Stat. 2960 (2006).

³⁰ Violence Against Women Reauthorization Act of 2013 ("VAWA 2013"); Pub. L. 113-4.

³¹ Trafficking Victims Reauthorization Act of 2003 ("TVPRA 2003"), Pub. L. 108-193, 117 Stat. 2875 (2003) (codified as amended in scattered sections of the U.S.C.).

³² Trafficking Victims Reauthorization Act of 2005 ("TVPRA 2005"), Pub. L. 109-164, §§ 101, 201, 119 Stat. 3558, 3560, 3567 (2005) (codified as amended in scattered sections of the U.S.C.).

³³ William Wilberforce Trafficking Victims Protection Act of 2000 ("TVPRA"), Pub. L. 110-457, § 201(a)(2008).

³⁴ Trafficking Victims Reauthorization Act of 2013 ("TVPRA 2013"), Pub. L. 113-4, 18 § U.S.C. 2255.

³⁵ IIRAIRA § 384; 8 U.S.C. § 1367 (2001).

³⁶ INA § 101(a)(15)(U).

³⁷ 42 U.S.C. 11383; VAWA 2005 § 605.

research³⁸ and case story³⁹ documentation of the dynamics of domestic violence experienced by noncitizen crime victims Congress created VAWA confidentiality provisions.⁴⁰ This research documented how abusers and crime perpetrators use immigration related abuse against immigrant victims. Congress found that domestic violence was “terribly exacerbated in marriages where one spouse is not a citizen and the non-citizen’s legal status depends on his or her marriage to the abuser.”⁴¹ Perpetrators use threats of deportations to exert coercive control over victims.⁴² This fosters dependence of a victim on an abuser or perpetrator of domestic violence.⁴³ Immigration related abuse includes:

³⁸ See Nawal H. Ammar et al., *Battered Immigrant Women in the United States and Protection Orders: An Exploratory Research*, 37(3) CRIM. JUST. REV. 337 (2012); Nawal H. Ammar et al., *Calls to Police and Police Response: A Case Study of Latina Immigrant Women in the USA*, 7 INT’L. J. OF POLICE SCIENCE & MANAGEMENT 230 (March 2005); Nawal H. Ammar et al., *VAWA IV Legislative History House Mark-Up Researcher’s Perspective on Immigration Protections for Immigrant Victims of Domestic Violence and Sexual Assault* (May 15, 2012) available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/2012/september-9-12-2012-san-diego-ca/research/VAWA-IV-House-Researcher-Data-Sign-on.pdf>; Mary Ann Dutton et al., *Use and Outcomes of Protection Orders by Battered Immigrant Women Revised Technical Report*, Prepared for Nat’l Institute of Justice (Nov. 10, 2006), available at: <https://www.ncjrs.gov/pdffiles1/nij/grants/218255.pdf>; Giselle Aguilar Hass et al., *Battered Immigrants and U.S. Citizen Spouses* (Legal Momentum Apr. 2006), available at: http://www.ncdsv.org/images/LM_BatteredImmigrantsAndUSCitizenSpouses_4-24-2006.pdf; Giselle Aguilar Hass et al., *Social Science Research Documents the Need for VAWA Self-Petitions and U Visas* (NIWAP Dec. 2012), available at: http://www.ncdsv.org/images/NIWAP_SocialScienceResearchDocumentsTheNeedFor%20VAWASelf-PetitionsAndU-Visas_12-6-2012.pdf; Anita Raj & Jay Silverman, *Violence Against Immigrant Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence*, 8 VIOLENCE AGAINST WOMEN 367 (2002), available at: <http://vaw.sagepub.com/content/8/3/367.full.pdf>; & Anita Raj et al., *Immigrant South Asian Women at Greater Risk for Injury from Intimate Partner Violence*, 93(3) AM J. PUBLIC HEALTH 435 (2003), available at: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447758/>.

³⁹ *Stories from the Field: A Collection of Stories of Immigrant Survivors Documenting the Need for VAWA Immigration Protections in the Violence Against Women Act (VAWA) Reauthorization of 2012* (NIWAP May 16, 2012), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/immigrant-victims-stories/Stories%20From%20the%20Field-Need%20for%20VAWA%20Immigration%20Protections%209.15.12.pdf>; Robin L. Campo & Leni Marin, *Cases Documenting Abuse by U.S. Citizens and Lawful Residents of Immigrant Spouses*, available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/immigrant-victims-stories/Untold%20Stories%20VAWA%201994.pdf>; Janice Kaguyutan & Leslye Orloff, *Crossing the Threshold to Safety: Stories of Immigrant Crime Victims who will Benefit from Attaining U-Visas* (Aug. 16, 2011), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/immigrant-victims-stories/U%20visa%20stories.pdf>.

⁴⁰ See DEP’T OF JUSTICE APPROPRIATIONS AUTHORIZATION ACT, FISCAL YEARS 2006 THROUGH 2009: REPORT OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, TO ACCOMPANY H.R. 3402, H.R. REP. NO. 109-233, at 123 (2005); see also 151 CONG. REC. E2606-07 (2005) (statement of Rep. Conyers) (Hereinafter “Conyers remarks”).

⁴¹ H.R. REP. NO. 103-395 at 26-27 (1993).

⁴² See David Stauffer, Krisztina Szabo, Benish Anver, and Leslye Orloff, *Early Access to Work Authorization for VAWA Self-Petitioners and U Visa Applicants* 9 (citing a list of articles on this point) (Aug. 18, 2011), available at: <http://www.whitehouse.gov/blog/2011/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources>.

⁴³ Anita Raj & Jay Silverman, *Violence Against Immigrant Women: Roles of Culture, Context and Legal Immigrant Status on Intimate Partner Violence*, VIOLENCE AGAINST WOMEN, Vol 8-3, 385 (2002), available at: http://iwp.legalmomentum.org/reference/additional-materials/research-reports-and-data/research-US-VAIW/RSRCH_DV_Violence_Against_ImmWomen.pdf/view.

- Threatening and actually calling immigration enforcement authorities to turn victims in for being undocumented;
- Attempting to obtain information about the victim including the victim's location, the fact that an immigration case exists, and information contained in the victim's immigration case;
- Sending DHS enforcement officials to courthouses and other protected locations to conduct immigration enforcement activities against a victim.

VAWA confidentiality protections are particularly important as research by the National Immigrant Women's Advocacy Project (NIWAP) has found that as many 43.1% of VAWA self-petitioners continue to live with their perpetrators and suffer ongoing abuse while their VAWA self-petition applications are pending before USCIS.⁴⁴ Those living with their perpetrators continue to experience abuse at high level with 55.8% of VAWA self-petitioners who live with their domestic abuser reporting abuse on a monthly basis (17.39% experience weekly and 19.4% experience daily abuse).⁴⁵ NIWAP research has also shown that abusers also initiate immigration enforcement against their partners after the VAWA self-petition has been filed, but before a decision has been made by USCIS. 38.3% of VAWA self-petitioners reported that their perpetrator or the perpetrator's family member reported the victim to immigration for enforcement action.⁴⁶ Additionally, in 15.4% of cases law enforcement arrests the victim, usually because of failure to perform a primary aggressor analysis, dual arrest policies, or failure to use a qualified interpreter.⁴⁷

Research has found that these arrest rates may be related, at least in part, to the failure on the part of the law enforcement officials to use qualified interpreters at crime scene investigations when immigrant and limited English proficient (LEP) victims call the police for help during domestic violence incidents.⁴⁸ Officers were able to communicate effectively with LEP crime victims in only 29.4% of the cases in which immigrant victims called the police for help⁴⁹ and were able to identify the language spoken by the LEP victim in only 42.6% of the cases.⁵⁰ In addition, officers also were reported to have used perpetrators to interpret at the scene when responding to domestic violence calls in 8.1% of the cases.⁵¹

⁴⁴ Krisztina E. Szabo, David Stauffer, Benish Anver & Leslye E. Orloff, *Early Access to Work Authorization For VAWA Self-Petitioners and U Visa Applicants* 22 (Feb. 12, 2014), available at: <http://niwap.org/reports/Early-Access-to-Work-Authorization.pdf>.

⁴⁵ *Id.* at 24.

⁴⁶ *Id.* at 27.

⁴⁷ *Id.*

⁴⁸ Natalia Lee, Daniel J. Quinones, Nawal Ammar & Leslye E. Orloff, *National Survey of Service Providers on Police Response to Immigrant Crime Victims, U Visa Certification and Language Access* (2013), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/research-reports-and-data/Police-Response-Survey-Report-FINAL-bja.pdf/view>

⁴⁹ *Id.* at 36.

⁵⁰ *Id.* at 36.

⁵¹ *Id.* at 37.

The “Morton, Prosecutorial Discretion: Certain Victims (June, 2011)” memorandum⁵² recognizes the important role prosecutorial discretion plays in cases of victims of crimes, including domestic violence.⁵³ This memorandum advises the “exercise [of] all appropriate prosecutorial discretion to minimize any effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to call police and pursue justice.”⁵⁴ The memorandum goes on to explain that ICE routinely hears of incidents where police “book multiple people at the scene of alleged domestic violence,” including a victim or witness of domestic violence.⁵⁵ Recognizing this problem, ICE implemented a prosecutorial discretion policy that encourages victims and witnesses of crimes to report these crimes and seek help from the justice system.

Congress also sought to counter immigration related domestic violence when it created VAWA confidentiality provisions which were designed to undermine perpetrators’ coercive power and control over victims. These provisions aimed to stop DHS officials from responding to perpetrators’ reports against their victims. DHS implemented VAWA confidentiality protections through a series of policy memoranda.⁵⁶ Specifically, VAWA confidentiality:

- Limits DHS’ reliance on information provided by perpetrators and their family members for immigration enforcement purposes and in connection with adjudication of cases filed by victims.⁵⁷ These protections apply to immigrant victims who have filed cases with DHS and those who have not yet filed any application.
- Precludes DHS enforcement actions at prohibited locations including courthouses in connection with cases that involve domestic violence, sexual assault trafficking or stalking; rape crisis centers; shelters; family justice centers; supervised visitation centers; and victims’ services programs.⁵⁸ This provision applies to all victims whether or not an immigration case has been filed.
- Bars disclosure of the fact that a VAWA confidentiality protected immigration case has been filed. It also bars release of information contained in the file of any such

⁵² Morton, Certain Victims (June 2011).

⁵³ *Id.* at 1.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ DEP’T OF JUSTICE APPROPRIATIONS AUTHORIZATION ACT, FISCAL YEARS 2006 THROUGH 2009: REPORT OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, TO ACCOMPANY H.R. 3402, H.R. REP. NO. 109-233, at 123 (2005); *see also* 151 CONG. REC. E2606-07 (2005) (statement of Rep. Conyers) (“Conyers remarks”); *See* LESLYE E. ORLOFF, *VAWA Confidentiality: History, Purpose, DHS Implementation and Violations of VAWA Confidentiality Protections*, in EMPOWERING SURVIVORS: LEGAL RIGHTS OF IMMIGRANT VICTIMS OF SEXUAL ASSAULT (NIWAP 2012) available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/2012/sepember-20-21-2012-new-orleans-la/vawa-confidentiality/vawa-confidentiality-chapters/Ch3-SA-Man--Confidentiality-MANUAL-ES.pdf/view>.

⁵⁷ *See* Virtue (May 1997) at 3; 17 IIRAIRA § 384 (a)(1); 8 U.S.C. 1367(a)(1); *see also* Dep’t. of Homeland Security, *DHS Directive Number 002-02, Implementation of Section 1367 Information Provisions* (Nov. 1, 2013), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/implementation-of-section-%201367-%20information-provisions-directive-002-02.pdf>.

⁵⁸ INA § 239(e); 8 U.S.C. § 1229(e).

immigration case.⁵⁹ These protections protect victims that file VAWA confidentiality protected immigration cases including, VAWA self-petitions, battered spouse waivers, VAWA cancellation of removal, and U and T visa cases.

- Creates a special VAWA confidentiality “384” Central Index System code protecting against initiation of immigration enforcement or removal actions against victims with pending and approved VAWA confidentiality protected immigration cases. This index enables DHS to quickly verify if an immigrant victim is covered by the VAWA confidentiality provisions.⁶⁰

A directive issued by DHS in 2013 applying VAWA confidentiality protections to cases involving all DHS officials including those working at Customs and Border Patrol (CBP), USCIS, and ICE provided helpful clarification with regard to implementation of VAWA confidentiality.⁶¹ The directive also warned officers that adverse information received about a victim of domestic violence, sexual assault, human trafficking, or other enumerated crime by DHS from the perpetrator of the crime is “inherently suspect.”⁶²

Implications and Recommendations for Deferred Action Policy in VAWA Self-Petitioning Cases

The process of applying for immigration relief for immigrant victims provides a series of increasingly effective protections against deportation as victim’s applications advance through the adjudication process:

- (1) ICE Morton memoranda protections of prosecutorial discretion before and after filing of a VAWA related immigration case;
- (2) VAWA confidentiality’s bars against reliance on perpetrator provide information that applies both before and after filing;
- (3) Upon filing for VAWA, T or U visa immigration relief, VAWA confidentiality’s “384” Central Index System code of admission allows DHS immigration enforcement officials to check before pursuing immigration enforcement, including issuance of a detainer against an individual protected by VAWA confidentiality.
- (4) Protection against disclosure of information about or contained in a VAWA confidentiality protected case upon filing; and
- (5) Deferred action upon approval.

⁵⁹ IIRAIRA § 384 (a)(2); 8 U.S.C. 1367(a)(2).

⁶⁰ U.S. Citizenship and Immigration Services, *DHS Broadcast Message on New 384 Class of Admission Code* (Dec. 21, 2010), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message-to-DHS-384-COA-Final-12.21.10.pdf>.

⁶¹ Dep’t. of Homeland Security, *DHS Directive Number 002-02, Implementation of Section 1367 Information Provisions* (Nov. 1, 2013), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/implementation-of-section-%201367-%20information-provisions-directive-002-02.pdf>.

⁶² *Id.* at 4.

Grants of deferred action are a form of protection meaning the noncitizen is a low priority for immigration enforcement. Deferred action and the protection against deportation it offers encourages immigrant victims of domestic violence or other crimes to come forward and seek help.

The “Virtue, Supplemental Guidance” memorandum recognized the importance of specialized training for immigration officials responsible for adjudication of VAWA self-petition cases to ensure sensitivity, discretion, and the appropriate communications skills to fairly and expeditiously adjudicate cases filed by immigrant victims while at the same time effectively detecting fraudulent applications.⁶³ Congress recognized the importance of the special training VAWA Unit staff receives in the legislative history of VAWA 2005.⁶⁴ Specialized staff familiar with the dynamics of domestic violence can help detect fraud. Having a specialized staff determining deferred action status for victims of violence is helpful in VAWA self-petitioning cases.

Based on the aforementioned reasoning and history, these are the suggested factors and information to include in future policy memoranda on deferred action in VAWA self-petitioning cases are:

- (1) The existence of an approved I-360 self-petition application filed by an immigrant spouse, former spouse, intended spouse,⁶⁵ child, or step-child who has been subjected to battering or extreme cruelty⁶⁶

⁶³ Virtue at 2-3 (May 1997).

⁶⁴ DEP’T OF JUSTICE APPROPRIATIONS AUTHORIZATION ACT, FISCAL YEARS 2006 THROUGH 2009: REPORT OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, TO ACCOMPANY H.R. 3402 H.R. REP. NO. 109-233, at 123 (2005); *see also* 151 CONG. REC. E2606-07 (2005) (statement of Rep. Conyers) (“Conyers remarks”); *See also* Immigration Committee of the National Task Force to End Sexual and Domestic Violence, *Without Evidence of a Systemic Problem, House VAWA Bill Proposes Radical Changes that Undermine VAWA Protections for Immigrant Victims Current System Saves Thousands of Lives Each Year, but Changes Will Jeopardize Victims and Empower Abusers* (2012), http://www.nationalimmigrationproject.org/press_releases/VAWA.pressrelease.5-15-12-OppeHR4970.2012.05.15.pdf; William A. Kandel, *Immigration Provisions of the Violence Against Women Act (VAWA)*, CONGRESSIONAL RESEARCH SERVICE (May 15, 2012); *See also* Dep’t of Homeland Security, U.S. Citizenship and Immigration Service, *Report on the Operations of the Violence Against Women Act Unit at the USCIS Vermont Service Center Report to Congress* (2010), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/vawa-unit-statistics/USCIS%20-%20Operations%20of%20the%20Violence%20Against%20Women%20Act.pdf>.

⁶⁴ INA § 204; 8 U.S.C. §1154(a)(1)(iii).

⁶⁵ Memorandum from Johnny N. Williams, Executive Associate Commissioner, Dep’t of Justice, Immigration and Naturalization Service, Office of Field Operations, to Regional Directors, Deputy Exec. Assoc. Comm’r, Immigration Services Division, *Eligibility to Self-Petition as an Intended Spouse of an Abusive U.S. Citizen or Lawful Permanent Resident* (Aug. 21, 2002), available at: http://niwaplibrary.wcl.american.edu/immigration/vawa-self-petition-and-cancellation/government-memoranda-and-factsheets/VAWA_Williams%20bigamy%20memo_8.21.02.pdf/view (VAWA 2000 created access to VAWA self-petitioning for battered immigrants whose U.S. citizen or lawful permanent resident spouse committed bigamy. DHS policies confirm that in situations of bigamy, a self-petitioner can be eligible even if they are not legally married due

- (2) The following derivative family members included in a victim's VAWA self-petition should receive deferred action status at the same time as deferred action is granted to battered immigrant VAWA self-petitioner who filed the VAWA self-petition as a principal applicant without any additional paperwork or filing requirements--
 - a. Children included, as derivatives, in the applicant's VAWA self-petition
 - b. In the case of child VAWA self-petitioners, parents included as derivative applicants of the abused immigrant child's VAWA self-petition.
- (3) Whether the immigrant has a VAWA self-petition application that has been revoked.
- (4) The sympathetic facts in the petitioner's case that support USCIS' exercise of its discretion to provide deferred action to the immigrant.⁶⁷
- (5) Deferred action can be provided to VAWA self-petitioners residing outside of the United States so that the grant of deferred action will take effect if and when the approved VAWA self-petitioner enters the United States. This enhances protection of the immigrant victim and/or fosters family reunification.⁶⁸
- (6) For cases in which the VAWA self-petitioner has an outstanding removal or deportation order or has an a pending case before an immigration judge, the regulations, preamble, and policies on deferred action should refer self-petitioners to the special motions to reopen statutes⁶⁹ that apply to cases of VAWA self-petitioners and the ICE prosecutorial discretion policies designed to protect immigrant crime victims from removal.⁷⁰

to an abuser's bigamy. The memorandum examines the intent to marry from the self-petitioner's perspective. Future rules and policies on deferred action will need to include this special category of self-petitioners).

⁶⁶ The authors of this paper recognize that DHS has the discretion to issue deferred action to VAWA self-petitioners at an earlier time in the VAWA self-petitioning case prior to approval. *See* Memorandum from Leslye E. Orloff, Dir. NIWAP & Benish Anver, to Alejandro Mayorkas, Dep. Sec'y U.S. Dep't of Homeland Security (Feb. 20, 2014) (on file with NIWAP).

⁶⁷ These sympathetic factors include the importance of offering immigrant crime victims protection from deportation to cut off their perpetrator's efforts to have them removed from the United States. This often happens in retaliation for having left the perpetrator or for seeking help from police, prosecutors or courts to end the abuse. *See* Krisztina E. Szabo, David Stauffer, Benish Anver & Leslye E. Orloff, *Early Access to Work Authorization For VAWA Self-Petitioners and U Visa Applicants*, NIWAP at 2 (Feb. 12, 2014), available at: <http://niwap.org/reports/Early-Access-to-Work-Authorization.pdf> (38.3% of VAWA self-petitioners who become the target of immigration enforcement after filing their self-petition report that enforcement actions were as a result of their perpetrators' or their perpetrators' family members' reports to DHS enforcement officials). To enhance protection against immigration enforcement, detention and removal of immigrant crime victims and to prevent DHS officials from responding to tips from perpetrators and their family members, DHS implemented a VAWA Confidentiality 384 Class of Admission system that is logged in the DHS Central Index System. *See* U.S. Citizenship and Immigration Services, *DHS Broadcast Message on New 384 Class of Admission Code* (Dec. 21, 2010), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message-to-DHS-384-COA-Final-12.21.10.pdf>.

⁶⁸ INA § 204; 8 U.S.C. §1154(a)(1)(iii) (Allows for self-petitioning from outside of the United States when all or part of the pattern of abuse occurred in the United States and when all of the abuse occurred outside of the United States perpetrated by a citizen or lawful permanent resident who is a U.S. government employee or a member of the Uniformed Services).

⁶⁹ INA § 240(c)(6)(C)(iv); 8 U.S.C. §1229(a).

⁷⁰ Morton, *Certain Victims* at 1 (June 2011).

The granting of deferred action based on these factors in the cases of battered immigrant VAWA self-petitioners and their derivative children and parents helps DHS ensure that immigration enforcement officials do not waste immigration enforcement resources on this group of immigrants. It will also promote consistency with VAWA confidentiality protections and policies designed to protect crime victims and witnesses. Factors similar to those discussed above are currently being applied in practice.

Including these factors in an updated policy and/or VAWA self-petitioning regulation would provide helpful guidance and direction to the field. Such guidance will provide further direction and be particularly helpful for victims who file self-petitions *pro se*, with the help of victim advocates or with representation by attorneys who are not immigration experts (e.g. non-immigration lawyers representing victims pro bono including lawyers working in legal services, victim services and pro bono law firms).

Issuing an updated policy or regulation will also assist adjudicators at the Vermont Service Center in consistently providing deferred action to VAWA self-petitioners. These new policies should also streamline the procedures granting deferred action status to the children and parents of VAWA self-petitioners who were included in VAWA self-petitions as derivative family members. Updating the 1997 and 1998 deferred action memoranda to include the amendments to VAWA self-petitioning and VAWA confidentiality in VAWA 2000, 2005 and 2013 and to improve consistency with current DHS policies that benefit VAWA self-petitioners and other immigrant crime victims would be very helpful in improving safety and protection from deportation for VAWA self-petitioners and the derivative family members included in the protections they receive through VAWA self-petitioning.