

Realities for Immigrant Populations: How They Experience the System

Lack of Knowledge and Misinformation about the Legal System

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

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

Fear of the Police and Judicial System

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

Fear of Deportation or Removal

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

Abusers play on this fear in many ways, some noted above. They routinely threaten to report their victims to DHS. In many situations, they actually do

control their victims' access to immigration status, and their victims' status may be revoked by DHS if the abuser calls them. Abusers very typically call DHS when a victim starts to challenge their domination, alleging that she married him only to gain immigration status. Fortunately, with the new routes to status, noncitizens in this situation may be able to gain status without the help, and despite the interference, of the abuser.

Any systems that actually do turn noncitizens over to DHS legitimize this fear and erect an insurmountable barrier to serving immigrant communities.

Unfortunately, DHS may attempt to remove noncitizen victims reported to them by abusers, even though the victims have pending applications for immigration status based on domestic violence. ¹

Fear the Abuser Will Be Removed

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

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

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

¹ For specific case examples, copies of stays of removal and briefs, contact ASISTA Immigration Technical Assistance Project (ckellogg@asistaonline.org). The VAWA experts at DHS are attempting to create protocols that will prevent this; in the meantime, victims of domestic violence continue to be removed at the behest of their abusers.

Language and Gender Barriers

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

Cultural and Religious Barriers

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

Economic Barriers

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

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

Overview of the Immigration System and Laws

By Gail Pendleton & Ellen Kemp

The immigration system, its laws, and its regulations are complex and change frequently. What was true today may not be true tomorrow. To ensure you have current information, develop a working relationship with a local immigration expert who can answer your questions about how to help noncitizens you may encounter. Alternatively, the ASISTA Immigration Technical Assistance Project is available to provide such advice.¹ Check our website for useful document you may download for free and for the table of contents of our comprehensive training materials, and join the VAWA Updates list serve.²

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

INS & DHS: Reorganization

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

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

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

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

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

Rights of Noncitizens

In 1996, Congress passed a law making it very easy for INS/ICE to swiftly deport (now called “remove”) people from the U.S. This applies even to people who

¹ Contact Christine Kellogg at ckellogg@asistaonline.org or 515-244-2469.

² Our website is www.asistaonline.org. To join this list serve, send an email to Christine Kellogg at ckellogg@asistaonline.org.

have the right to be in the U.S. Noncitizens should know they have the following rights:

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

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

Learning the System: Basic Immigration Concepts

Noncitizen

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

Undocumented

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

Visa

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

Consular Officers

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

Removal (Formerly Called Exclusion and Deportation)

DHS may remove any person in the United States who is not a US citizen, using two sets of rules: the grounds of inadmissibility and the grounds of deportation. DHS uses the deportation grounds against those who entered legally but are not

subject to removal (for committing crimes, for instance). DHS uses the grounds of inadmissibility against those who entered the US without permission. The grounds of inadmissibility also apply to people attempting to enter the United States or, under a legal fiction, to those within the United States seeking lawful permanent residence.

Expedited Removal

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

Immigration Proceedings

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

Kinds of Immigration Status

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

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

US Citizenship

Anyone born in the United States, its territories and certain possessions (Puerto Rico, Guam and the Virgin Islands, for instance) are US citizens. This includes people born of undocumented parents. Children of US citizens who are born while their parents are in another country also may be US citizens. Everyone

else must “naturalize” to become a citizen, usually after a required period of lawful permanent residence.

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

Naturalization

Only certain noncitizens, primarily those who have had lawful permanent residence for at least three years, are eligible to become US citizens. Those who seek to naturalization must demonstrate good moral character and pass several tests, notably English proficiency and knowledge of the Constitution and US political system. There are some limited exceptions to these naturalization requirements.

Lawful Permanent Residence

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

Conditional Residence

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

In some cases, a conditional resident may have to file the joint petition by herself. To do this, she must check the box on the joint petition form asking for a waiver. DHS may grant waivers to conditional residents who are divorced from their

spouses, who would suffer extreme hardship without it, or who are abused by their spouses.

Battered Spouses and Children of US Citizens and Lawful Permanent Residents and Parents of US Citizens

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

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

Handout 5 contains more information on these special routes to status.

Abandoned, Neglected and Abused Children

Some children whose parents have abandoned, neglected, or abused them may be able to get lawful permanent residence through Special Immigrant Juvenile Status (SIJS). They will need findings from a family court to qualify for immigration status; see *Handout 6* for more information on SIJS.

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

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

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

Parolees

Parole is a mechanism by which DHS allows noncitizens into the United States for specific purposes, such as attending a hearing. It may also use parole to bring in the children or spouses of VAWA, U and T visa applicants. Noncitizens

paroled into the United States for a year or more are eligible for some public benefits not available to other parolees.

Cancellation of Removal

There are several forms of cancellation of removal, including one designed specifically for certain victims of domestic violence. Those who are not domestic violence survivors may seek ten-year cancellation of removal if they show they have been continuously present in the U.S. for ten years, that removing them will cause “exceptional and extremely unusual hardship” to a U.S. citizen or lawful permanent resident spouse, child or parent, and that they have good moral character. A special form of cancellation for certain abused noncitizens also is available, and is described in *Handout 5*. When a judge grants cancellation of removal, the applicant also receives lawful permanent residence

Voluntary Departure and Deferred Action

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

DHS also may give “deferred action” to people they could remove. There is a special deferred action system for VAWA self-petitioners and U interim relief applicants. Otherwise, deferred action is rarely granted. Those who do receive deferred action, however, don’t have to leave the United States by any particular date and don’t face fines and bars to status for failing to leave.

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

Nonimmigrants

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

Some nonimmigrants are allowed to work with DHS permission, including the categories created in 2000. Some of these nonimmigrants may be able to get public benefits as well. Many nonimmigrants may bring in their spouses and children (“derivatives”), but their status is entirely dependent on maintaining the

relationship with the primary nonimmigrant. In 2005 Congress added abused derivatives, spouses and children, of many nonimmigrants to the list of noncitizens who may obtain work authorization.

Nonimmigrants who stay longer than originally permitted, without an extension from DHS, become undocumented. Even before the dates on their visas expire, DHS may deport nonimmigrants if they work without permission or violate other conditions on their visas. The 1996 immigration law added several penalties and barriers to immigration status for people who stay beyond the expiration dates on their nonimmigrant visas.

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

The Victims of Trafficking and Violence Prevention Act of 2000 created the new U and T visas. The U visa is for victims of designated crimes. The T visa is for those who have been subjected to sex or labor trafficking. Both lead to lawful permanent residence and have waivers of most inadmissibility grounds, including public charge and health-related grounds such as HIV/AIDS. The T visa provides eligible immigrants with access to public benefits and employment authorization. The U visa provides eligible immigrants with authorized stay in the United States and employment authorization. For more information on T and U visas, consult the Asista website at www.asistaonline.org.

The Diversity Program or “Lottery”

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

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

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

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

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

Temporary Protected Status (TPS)

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

Salvadorans, Guatemalans, and Eastern Europeans

The NACARA law noted above also created special routes to immigration status for certain Salvadorans, Guatemalans, and Eastern Europeans. The rules and process are complicated.

People from former Soviet Republics or former Eastern European states may qualify if they entered the United States by January 1, 1991 and filed for asylum by January 1, 1992. Guatemalans may qualify if they entered the United States before October 1, 1990 and either applied for asylum before April 1, 1990 or signed up as part of the "American Baptist Churches" lawsuit agreement (called the "ABC class").

Salvadorans may qualify if they entered the United States before September 19, 1990 and either applied for asylum by April 1, 1990, or are in the ABC Class, or applied for Temporary Protected Status by October 31, 1991.

Registry

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

Gaining Legal Immigration Status

Each immigration status has different requirements. The system for getting an immigration status is very complicated and applying for any status is risky. This section will describe various routes to lawful permanent residence. Since many lawful permanent residents may not be able to get the public benefits they need, it also will describe how these immigrants may become U.S. citizens.

Most people want to become lawful permanent residents (get a "green card") because this status provides the most security short of citizenship. Lawful

permanent residence is hard to lose and lawful permanent residents can work. Most lawful permanent residents can become citizens after five years. Up until that time, however, DHS can remove them or keep them from coming back into the United States.

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

APPLYING FOR LAWFUL PERMANENT RESIDENCE THROUGH FAMILY MEMBERS

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

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

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

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

How Long Will It Take to Get Lawful Permanent Residence?

It used to be that spouses, children, and parents of US citizens got lawful permanent residence fairly quickly. Now DHS has so many pending applications for these immigrant visas that applicants may wait for more than a year for an interview. At the same time, the waiting periods for spouses and children of lawful permanent residents have become very long. Because of these problems, Congress passed a law in December, 2000, that allows some of these applicants to live and work in the United States with legal immigration status (a

"nonimmigrant" visa) until they receive permanent residence. This only applies, however, to people who had filed applications before December 21, 2000 and who already have waited three years for their status.

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

Can the Applicant Stay Here to Get Lawful Permanent Residence?

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

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

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

VAWA Self-Petitions, 2006

To win a VAWA self-petition case, a immigrant survivor of domestic violence must show:

1. Relationship with U.S. citizen or lawful permanent resident

Only those who are or have been spouses or children of U.S. citizens or lawful permanent residents qualify for immigration status under the VAWA provisions. In VAWA 2005 Congress added abused parents of US citizen sons and daughters (over 21) to the protected classes. Self-petitioners must be:

- The spouse, child or parent of a U.S. citizen or the spouse or child of a lawful permanent resident
- The spouse or child of a U.S. citizen or lawful permanent resident who lost his status within the past two years because of domestic violence
- The former spouse of a US citizen or lawful permanent resident whose divorce took place in the past two years and was related to domestic violence
- The spouse of a U.S. citizen or lawful permanent resident who was a bigamist
- The spouse of a U.S. citizen who died within the past two years

2. Where they reside and where the abuse took place

The abuser must have subjected the applicant to "battery or extreme cruelty." This abuse need not have taken place in the United States, except in one circumstance noted below. At some point the applicant must have resided with the abusive spouse, parent or child. They need not have resided together in the United States and there is no minimum co-residency requirement, however.

People in the categories above who reside abroad qualify if the abuser works for the U.S. government, is a member of the U.S. military or subjected the applicant to domestic violence in the United States. This last situation is the only time when at least some abuse must have occurred in the U.S.

3. Good faith marriage and good moral character

Spouses must show they didn't marry the abuser solely for the purpose of gaining immigration status. All applicants must show they have good moral character. INS primarily is concerned with criminal records when determining good moral character.

4. Extreme hardship

Self-petitioners no longer need show extreme hardship to win VAWA self-petitions. Those applying for VAWA cancellation in immigration proceedings, however, still must show they or their children will suffer extreme hardship if they are deported.

U & T Visas

The Victims of Trafficking and Violence Protection Act of 2000³ created two new nonimmigrant visas for noncitizen victims of crimes. Both visas are designed to provide immigration status to noncitizens that are assisting or willing to assist authorities investigating crimes. After three years, both U and T visa holders may apply for lawful permanent residence (some trafficking victims may be able to apply sooner).

DHS has not yet issued regulations governing the U visa, but will grant “interim relief” to those who are eligible until there is a process for applying. See separate “U Interim Relief” document for practice pointers on this.

T Visa Eligibility

The T visa is designed specifically for those who have been subjected to sex or labor trafficking. The statute defines sex trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.” It defines “severe” trafficking as:

sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.⁴

For more information on trafficking, see articles on Asista website (www.Asistaonline.org).

³ 114 Stat. 1464, Pub. L. 106-386 (Oct. 28, 2000).

⁴ Victims of Trafficking Act, §§ 103(8) & (9).

U and T Visas: Outline of Requirements

Both new visas, created in 2000:

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

The U Visa

The crimes

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

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

Criminal system involvement

Certification required from state, local or federal

- Law enforcement official, prosecutor, judge or
- Other authority investigating the crimes listed
Judges and other court personnel charged with investigating or prosecuting these crimes can sign certificates

That states that the applicant:

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

Applicant also must show

- “Substantial physical or mental abuse.”
Civil court findings helpful

The T Visa

The Crimes

Trafficking (humans) for sex or labor

Criminal system involvement

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

- Federal law enforcement certification
- Local and state also accepted
- Other evidence if can't get certification

Judges and court personnel can help document

Applicant also must show

“Extreme hardship involving unusual and severe harm if removed”

Judges and court personnel can help document

