



**VAWA Self-Petition Policy Updates**

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## **Introduction**

On February 10, 2022, USCIS released several VAWA Self-Petition policy changes.<sup>1</sup> The changes include the nationwide implementation of two circuit court decisions and changes in USCIS’s interpretation of the joint residence requirement for VAWA Self-Petitioners.<sup>2</sup> This practice advisory will: summarize the policy manual additions by chapter; summarize the holdings in the two circuit court decisions that USCIS adopted nationwide; provide examples to illustrate the policy manual additions; and provide practice tips for practitioners.

## **Chapter 1 - Purpose and Background**

### *Legislative history*

USCIS has produced a chart that summarizes the statutory changes to the VAWA Self-Petition process from 1994 through 2013.<sup>3</sup> Practitioners are encouraged to review the chart and statutory citations when drafting cover letters and briefs regarding a client’s eligibility for a VAWA Self-Petition. The statutory citations and dates are particularly helpful when arguing that a regulation does not reflect the most current version of the statute. For example, the chart clarifies that the Victims of Trafficking and Violence Protection Act of 2000 (“VTVPA” or “VAWA 2000”) removed the extreme

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<sup>1</sup> See *generally* USCIS Policy Alert, PA-2022-09 (Feb. 10, 2022), 3 USCIS-PM D.

<sup>2</sup> See *id.*

<sup>3</sup> 3 USCIS-PM D.1(B).

hardship requirement for VAWA Self-Petitions.<sup>4</sup> However, the regulations have not been updated to reflect this statutory change.<sup>5</sup>

Finally, in this chapter USCIS recognized that the VAWA regulations, which were promulgated in 1996, “have not been updated to include superseding statutory provisions.”<sup>6</sup> Therefore, USCIS has recognized that some of the VAWA regulations are outdated and that any conflicting statutory provisions supersede the regulations. Practitioners are encouraged to cite USCIS’s statement regarding the regulations when arguing that certain regulations (for example, the requirement that a self-petitioner resided with the abuser in the United States) no longer apply.

## **Chapter 2 - Eligibility Requirements and Evidence**

### **A. General Overview of Eligibility Requirements**

#### *General Evidentiary Requirements*

The USCIS Policy Manual is consistent with the 1998 Virtue Memo, which stated that self-petitioners are not required to demonstrate that primary or secondary evidence is unavailable.<sup>7</sup> Thus, practitioners should challenge any USCIS statement that a self-petitioner is required to demonstrate that primary or secondary evidence is unavailable. However, the burden remains on the self-petitioner to establish each of the eligibility requirements by a preponderance of the evidence.<sup>8</sup> In order to help self-petitioners meet their burden and enhance their credibility, we encourage practitioners to have their clients explain to USCIS why primary or secondary evidence is unavailable.

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<sup>4</sup> 3 USCIS-PM D.1(B) (citing VTVPA).

<sup>5</sup> See 8 C.F.R. §204.2(c)(1)(i)(G) (requires a showing of extreme hardship upon deportation).

<sup>6</sup> 3 USCIS-PM D.1(C), footnote 11.

<sup>7</sup> See Paul W. Virtue, Memorandum For Terrence M. O’Reilly: “Extreme Hardship” and Documentary Requirements Involving Battered Spouses and Children, IMMIGRATION AND NATURALIZATION SERVICE (Oct. 16, 1998), available at <https://asistahelp.org/wp-content/uploads/2018/10/Virtue-Memo-on-Any-Credible-Evidence-Standard-and-Extreme-Hardship.pdf>.

<sup>8</sup> 3 USCIS-PM D.5(B)(1) (citing *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010); *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); and *Matter of Soo Hoo*, 11 I&N Dec 151 (BIA 1965)).

## B. Qualifying Relationship

### 1. Abuser's U.S. Citizenship or Lawful Permanent Resident Status

USCIS stated that a receipt or approval notice for an I-130 filed by the abuser in an immediate relative category and a marriage certificate or license that lists the abuser's birth in the United States may establish the abuser's U.S. citizenship.<sup>9</sup> These forms of evidence were not included in the VAWA provisions of the Adjudicator's Field Manual.<sup>10</sup> The inclusion of these two forms of evidence are particularly helpful for self-petitioners who do not have access to the abuser's passport or birth certificate. If USCIS denies a VAWA Self-Petition for failure to prove the abuser's U.S. citizenship, and the self-petitioner submitted one of the aforementioned pieces of evidence to USCIS, practitioners should challenge the denial as contrary to USCIS policy.<sup>11</sup>

USCIS reaffirmed that it will search internal records to attempt to verify the abuser's immigration status if a self-petitioner is unable to provide "documentary evidence" of the abuser's immigration or citizenship status.<sup>12</sup> USCIS has requested that self-petitioners provide identifying information for the abuser that will aid the agency in its search.<sup>13</sup> Examples of identifying information that self-petitioners may provide include name, date of birth, place of birth, country of birth, and Social Security number.<sup>14</sup> Although not specifically listed, self-petitioners should also provide the abuser's A-number (if applicable), aliases, parents' names, and the date and place of the abuser's naturalization (if applicable and known.) However, because a self-petitioner has the burden to prove the abuser's status by a preponderance of the evidence<sup>15</sup>, the self-petitioner should not rely solely on USCIS checking the abuser's status. Rather, in addition to requesting USCIS to search its systems, the self-petitioner and any other knowledgeable people should submit sworn statements of their knowledge

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<sup>9</sup> See 3 USCIS-PM D.2(B)(1).

<sup>10</sup> See generally U.S. CITIZENSHIP AND IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL, Chapters 21.14 and 21.15, available at <https://web.archive.org/web/20211117031330/https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm21-external.pdf>.

<sup>11</sup> Cf. 3 USCIS-PM D.2(B)(1).

<sup>12</sup> See *id.*

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

<sup>14</sup> *Id.*

<sup>15</sup> 3 USCIS-PM D.5(B)(1) (citing *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010); *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); and *Matter of Soo Hoo*, 11 I&N Dec 151 (BIA 1965)).

of the abuser's immigration status, including the basis for that knowledge. Self-petitioners should also explain in a sworn statement why they do not have documentary evidence of the abuser's immigration status, including abuse-related reasons (i.e. the abuser does not allow the self-petitioner to access any documents as part of the abuse).

USCIS has clarified that abused spouses and children of U.S. nationals are eligible to file VAWA Self-Petitions.<sup>16</sup> USCIS's rationale is that a U.S. national has the same rights as a Lawful Permanent Resident ("LPR.")<sup>17</sup> Thus, USCIS will treat spouses and children of U.S. nationals as spouses and children of Lawful Permanent Residents for VAWA Self-Petition purposes.<sup>18</sup>

## 2. Self-Petitioning Spouse

A marriage must be valid in the place it is celebrated for VAWA Self-Petition purposes.<sup>19</sup> USCIS has stated that "a common law marriage may be considered a legally valid marriage" for VAWA purposes.<sup>20</sup> An exception to the rule of marriage validity is that marriages that are contrary to U.S. public policy are not valid "for immigration purposes,"<sup>21</sup> including the VAWA Self-Petition process.<sup>22</sup> If possible, self-petitioners should submit primary evidence of a valid marriage to the abuser in order to meet their burden of proving a valid marriage. However, self-petitioners are not strictly required to submit a marriage certificate as proof of a legally valid marriage.<sup>23</sup>

If the self-petitioner was previously married, USCIS requires the self-petitioner to submit evidence that all previous marriage(s) "were legally terminated, and that they were legally free to enter a valid marriage with the abuser."<sup>24</sup> If possible, self-petitioners should submit primary evidence of termination of their previous marriage(s) in order to meet their burden of proving that their subsequent marriage to the abuser was valid. However,

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<sup>16</sup> See 3 USCIS-PM D.2(B)(1).

<sup>17</sup> *Id.* (citing *Matter of B--*, 6 I&N Dec. 555 (BIA 1955) and *Matter of Ah San*, 15 I&N Dec. 315 (BIA 1975)).

<sup>18</sup> 3 USCIS-PM D.2(B)(1).

<sup>19</sup> See 3 USCIS-PM D.2(B)(2) (citing *Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005) and *Matter of Da Silva*, 15 I&N Dec. 778 (BIA 1976)).

<sup>20</sup> 3 USCIS-PM D.2(B)(2).

<sup>21</sup> *Id.* (citing *Matter of H--*, 9 I&N Dec. 640 (BIA 1962)).

<sup>22</sup> See 3 USCIS-PM D.2(B)(2).

<sup>23</sup> See 3 USCIS-PM D.2(B)(2) (includes a non-exhaustive list of several "examples of evidence of a legally valid marriage", including "Any other credible evidence to establish a marital relationship.")

<sup>24</sup> See 3 USCIS-PM D.2(B)(2) (citing 8 C.F.R. §204.2(c)(2)(ii)).

self-petitioners are not explicitly required to submit primary evidence of a marriage's termination.<sup>25</sup> USCIS has stated that if a divorce decree contains "a waiting or revocable period" that has not yet ended, the marriage has not been legally terminated.<sup>26</sup> Practitioners should consult a survivor's divorce decree(s) *before* filing to ensure that the survivor did not marry the abuser before a "waiting or revocable period" ended.

USCIS has stated that if it is available, self-petitioners should submit evidence of termination of the abuser's previous marriages.<sup>27</sup> If obtaining primary evidence of termination of an abuser's prior marriage(s) will endanger the self-petitioner's safety (for example, if the self-petitioner is unable to obtain the documents from anyone other than the abuser), the self-petitioner (and others, if possible) should explain the safety concerns in sworn statement(s) in as much detail as possible. If protection orders, police reports, or other primary evidence of domestic violence are available, credible, and consistent with other evidence submitted (or inconsistencies can be explained), practitioners should include those documents with the VAWA self-petition submission and argue that those documents support the self-petitioner's statements regarding the safety concerns associated with obtaining primary evidence from the abuser. The self-petitioner should also provide alternative evidence of the termination of the abuser's previous marriage(s). The alternative evidence may include sworn statement(s) from the self-petitioner and/or other knowledgeable people that, to their knowledge, the abuser's previous marriage(s) have been legally terminated. The sworn statements should explain the basis for this knowledge. Practitioners may argue that a self-petitioner's own affidavit can be used to establish the termination of the abuser's prior marriage(s).<sup>28</sup> However, as with all evidentiary matters in VAWA Self-Petitions, **the less primary evidence there is of the termination of the abuser's prior marriage(s), the more detailed the self-petitioner's statement needs to be.** VAWA Self-Petitioners must prove each element by a preponderance of the evidence<sup>29</sup>, the burden is on the self-petitioner<sup>30</sup>, and USCIS is only

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<sup>25</sup> 3 USCIS-PM D.2(B)(2) (contains a non-exhaustive list of evidence of marriage termination, including "Any other credible evidence to establish a terminated marriage.")

<sup>26</sup> 3 USCIS-PM D.2(B)(2)

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

<sup>28</sup> See 3 USCIS-PM D.2(B)(3) (ends a non-exhaustive list of evidence to establish a step-relationship with "Any other credible evidence of a qualifying step relationship.")

<sup>29</sup> See 3 USCIS-PM D.5(B)(1) (citing *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010); *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); and *Matter of Soo Hoo*, 11 I&N Dec 151 (BIA 1965)).

<sup>30</sup> See 3 USCIS-PM D.5(B)(1) (citing 8 U.S.C. §1361 and *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966)).



required to consider evidence that is credible.<sup>31</sup> Thus, if the self-petitioner's statement will be the only evidence of the termination of the abuser's prior marriage(s), it is critical that the statement is credible.

For a marriage termination document to be considered valid, it must be issued by a civil authority.<sup>32</sup> Therefore, marriage termination documents that are issued *solely* by a *religious* body are not valid marriage termination documents for VAWA purposes.<sup>33</sup> USCIS will consult the U.S. Department of State's Foreign Affairs Manual and the U.S. Visa: Civil Reciprocity and Civil Documents by Country webpage "for country-specific information regarding the legal termination of any marriage that occurred or was terminated outside the United States."<sup>34</sup> Therefore, for survivors who married and/or divorced outside the United States, practitioners should consult these sources *before* filing to ensure that they have sufficient evidence of the termination of any prior marriages.

### *Intended Spouse*

To be eligible to file a VAWA Self-Petition as an "intended spouse", the self-petitioner must have believed that they married a U.S. Citizen or LPR.<sup>35</sup> USCIS interprets this requirement as follows: the self-petitioner must have believed that they entered a legal marriage with a U.S. Citizen or LPR "who was not already married and therefore free to enter into a valid marriage."<sup>36</sup> Thus, under USCIS's interpretation, a self-petitioner who "married" a U.S. Citizen or LPR with knowledge that the U.S. Citizen or LPR was already married to another person is not eligible to file a VAWA Self-Petition as an intended spouse.<sup>37</sup>

To qualify for a VAWA Self-Petition as an intending spouse, a self-petitioner must submit evidence of the following: their belief that they legally married a U.S. Citizen or LPR "who was not already married and therefore free to enter into a valid marriage"; that a marriage ceremony was performed; that the intended marriage was otherwise bona fide; and that the marriage was invalid solely because of the abuser's "other, preexisting

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<sup>31</sup> See INA §204(J).

<sup>32</sup> 3 USCIS-PM D.2(B)(2).

<sup>33</sup> *Cf. id.*

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

<sup>35</sup> INA 204(a)(1)(A)(iii)(II)(aa)(BB), INA 204(a)(1)(B)(ii)(II)(BB).

<sup>36</sup> 3 USCIS-PM D.2(B)(2)

<sup>37</sup> See *id.*

marriage.”<sup>38</sup> If the *self-petitioner* was previously married, they are also required to submit evidence that all of their previous marriages were legally terminated.<sup>39</sup>

**Example 1:** Gina met and fell in love with Bill, a U.S. citizen. Bill proposed and they had a marriage ceremony. Before the marriage ceremony, Bill told Gina that he was divorced from his first wife. At the time of the marriage ceremony, Gina believed that she legally married a U.S. Citizen who was not already married and was free to marry her. Assume that Gina has evidence of the bona fides of the intended marriage. Bill became abusive after the marriage ceremony. At this time, Gina found out that Bill was still married to his first wife. Gina is eligible to file a VAWA Self-Petition as an intended spouse, since she believed that she legally married a U.S. Citizen who was not already married and was free to marry her; a marriage ceremony actually occurred; she has evidence of the bona fides of the intended marriage; and the marriage is invalid solely because of Bill’s “other, preexisting marriage.”<sup>40</sup>

**Example 2:** Alexander met and fell in love with George, a Lawful Permanent Resident. At the time of the marriage ceremony, Alexander knew that the marriage was not legal because George was still married to his first husband. George became abusive several months after the marriage ceremony, when the couple adopted a child together. Under USCIS’s interpretation, Alexander is not eligible to file a VAWA Self-Petition as an intended spouse because he knew at the time of the ceremony that his marriage to George was not legal.<sup>41</sup>

### *Self-Petitioning Spouse Whose Child was Abused*

USCIS has stated that in cases where a self-petitioning spouse is filing based on the spouse’s abuse of the self-petitioner’s child, the self-petitioner should submit evidence of their relationship with the abused child (such as a birth certificate), in addition to evidence of the self-petitioner’s marital relationship with the U.S. Citizen or LPR spouse.<sup>42</sup>

## **3. Self-Petitioning Child**

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<sup>38</sup> 3 USCIS-PM D.2(B)(2) (citing INA §204(a)(1)(A)(iii)(II)(aa)(BB) and INA §204(a)(1)(B)(ii)(II)(aa)(BB)).

<sup>39</sup> 3 USCIS-PM D.2(B)(2).

<sup>40</sup> Cf. INA §204(a)(1)(A)(iii)(II)(BB), 3 USCIS-PM D.2(B)(2).

<sup>41</sup> See 3 USCIS-PM D.2(B)(2).

<sup>42</sup> 3 USCIS-PM D.2(B)(2).

A child who files a VAWA Self-Petition based on parental abuse must be under 21 at the time of filing<sup>43</sup>, *unless* the child files before age 25 and establishes that “the abuse was at least one central reason” for the delay in filing.<sup>44</sup> A child who files a VAWA Self-Petition based on abuse by a U.S. Citizen or LPR parent must also be unmarried at the time of filing and at the time the VAWA Self-Petition is adjudicated.<sup>45</sup> USCIS has clarified that a self-petitioning child who legally terminated all prior marriages may be considered unmarried.<sup>46</sup> Therefore, divorced noncitizens who are under 21 (or under 25 and can establish that “the abuse was at least one central reason” for the delay in filing) and otherwise meet the requirements for a VAWA Self-Petition based on parental abuse may file if they submit evidence that any prior marriages were legally terminated.<sup>47</sup> Practitioners should remember that *the abuse, battery, or extreme cruelty must have occurred when the self-petitioner was a child: that is, while they were under 21 and unmarried*. This is because the statute states that the abuse, battery, or extreme cruelty must have occurred during the qualifying relationship.<sup>48</sup>

**Example 1:** Lisa was abused by her U.S. citizen stepfather, John. John married Lisa’s biological mother when Lisa was 12 years old. John started abusing Lisa when she was 14 years old. Lisa married her boyfriend when she was 18. However, they were not compatible, so they divorced when Lisa was 19. Lisa is now 20 years old. Under USCIS’s interpretation, Lisa is eligible to file a VAWA Self-Petition as an abused stepchild of a U.S. Citizen because John abused her during the qualifying relationship: the time when she was his “child” for immigration purposes.<sup>49</sup> Lisa should submit evidence of her divorce and evidence that John abused her when she was his “child” (that is, when she was unmarried.)

**Example 2:** Steven married his girlfriend at age 17. When Steven was 19, the couple divorced due to his wife’s infidelity. Steven’s mother abused him while he was married. The abuse stopped when Steven divorced. Under USCIS’s interpretation, Steven is not eligible to file a VAWA Self-Petition

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<sup>43</sup> INA §101(b)(1) (a “child” is under 21 and unmarried).

<sup>44</sup> INA §204(a)(1)(D)(iv)

<sup>45</sup> *Id.* (citing 8 C.F.R §204.2(e)(1)(ii)). See also INA §101(b)(1).

<sup>46</sup> See 3 USCIS-PM D.2(B)(3).

<sup>47</sup> *Cf. id.*

<sup>48</sup> See INA §204(a)(1)(D)(v).

<sup>49</sup> *Cf.* 3 USCIS-PM D.2(A) and (B)(3).

based on his mother's abuse because the abuse did not occur during the qualifying relationship (when he was her "child.")<sup>50</sup>

### *Biological Child*

A self-petitioning child who was abused by their biological parent is required to submit evidence of the parental relationship.<sup>51</sup> If the parent used Assisted Reproductive Technology "and does not have a genetic relationship to the self-petitioning child", USCIS has stated that the child may still demonstrate a "a qualifying parent-child relationship in certain circumstances."<sup>52</sup> Practitioners whose clients were abused by a parent who used Assisted Reproductive Technology should consult 6 USCIS-PM B.8 and 12 USCIS-PM H.3(B) for more information.<sup>53</sup>

### *Abuser is the child's biological mother*

If the abuser is the child's biological mother, the child simply needs to submit evidence of the biological relationship.<sup>54</sup> While USCIS has stated that a birth certificate listing the mother's name is "primary evidence to demonstrate a qualifying relationship," USCIS may accept other forms of credible evidence of a biological relationship between the child and the abusive mother.<sup>55</sup>

### *Abuser is the child's biological father*

If the abuser is the child's biological father, the child is required to submit evidence of the biological relationship (similar to the evidence that may be used to establish a biological relationship with the mother), *in addition to* other evidence.<sup>56</sup> The additional evidence that must be submitted depends on whether the abused child was born in wedlock, legitimated, or born out of wedlock.

### *Child was born in wedlock*

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<sup>50</sup> Cf. 3 USCIS-PM D.2(A)

<sup>51</sup> Cf. 3 USCIS-PM D.2(B)(3).

<sup>52</sup> See *id.*

<sup>53</sup> Cf. *id.*, footnote 44

<sup>54</sup> 3 USCIS-PM D.2(B)(3).

<sup>55</sup> See *id.* (containing a non-exhaustive list of additional forms of evidence of a biological relationship.)

<sup>56</sup> See 3 USCIS-PM D.2(B)(3).

If the self-petitioning child was born in wedlock, in addition to evidence of the biological relationship to the abusive father, the child must also submit evidence of their parents' marriage before and evidence of the termination of both parents' prior marriage(s), if applicable.<sup>57</sup> While self-petitioners should submit primary evidence of their parents' marriage and termination of their parents' prior marriage(s) when possible, USCIS will accept other forms of evidence to establish the parents' marriage and termination of prior marriage(s).<sup>58</sup> If obtaining primary evidence of the abusive parent's marriage and/or termination of prior marriage(s) will endanger the child's safety (for example, if the child is unable to obtain the evidence from anyone other than the abusive father), the child and practitioner should take an approach and make arguments similar to those mentioned on pages 4-5 of this advisory. In addition, if the self-petitioning child can submit evidence that "a bona fide parent-child relationship" with the abusive father "has been established,"<sup>59</sup> practitioners may wish to argue in the alternative that the child is eligible for a self-petition as an abused child who was born of out of wedlock. This approach is discussed *infra*.

### *Child was legitimated*

A legitimated abused child who has been abused by their biological father must provide evidence of the biological relationship to the abusive father and evidence of the legitimation.<sup>60</sup> Under the statute, the legitimation must have occurred before the child turned 18 and while the child was "in the legal custody of the legitimating parent or parents at the time of such legitimation."<sup>61</sup> USCIS has stated "Generally, legitimation is governed by the law of the place of residence the parent or child."<sup>62</sup> Therefore, practitioners should research legitimation law in their child client's place of residence.<sup>63</sup> In addition, USCIS has stated that legitimation can generally be established by providing evidence that the child's parents married before the child turned 18 years old.<sup>64</sup> For more information on legitimation, practitioners should consult 6 USCIS-PM B.<sup>65</sup> While self-petitioners should

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<sup>57</sup> See 3 USCIS-PM D.2(B)(3).

<sup>58</sup> See *id.*

<sup>59</sup> Cf. *id.* (citing INA §101(b)(1)(C) and 8 C.F.R. §204.2(e)(2)(ii)(D)).

<sup>60</sup> 3 USCIS-PM D.2(B)(3).

<sup>61</sup> INA §101(b)(1)(C)

<sup>62</sup> 3 USCIS-PM D.2(B)(3).

<sup>63</sup> See *Matter of Cross*, 26 I&N Dec. 485 (BIA 2015).

<sup>64</sup> See 3 USCIS-PM D.2(B)(3) (citing INA §101(b)(1)(C) and 8 C.F.R. §204.2(e)(2)(ii)(C)).

<sup>65</sup> Cf. 3 USCIS-PM D.2(B)(3), footnote 52.

provide primary evidence of legitimation whenever possible, practitioners are encouraged to use a similar approach to the one described on pages 4-5 of this advisory if providing primary evidence of legitimation will endanger the self-petitioner's safety. In addition, if the self-petitioning child can submit evidence that "a bona fide parent-child relationship" with the abusive father "has been established"<sup>66</sup>, practitioners may wish to argue in the alternative that the child is eligible for a self-petition as an abused child who was born out of wedlock. This approach is discussed *infra*.

### *Child was born out of wedlock and has not been legitimated*

A self-petitioning child who was born out of wedlock and has not been legitimated "must provide evidence that a bona fide parent-child relationship with the abusive biological father has been established."<sup>67</sup> USCIS has stated that "A bona fide parent-child relationship should include emotional or financial ties (or both)."<sup>68</sup> To meet their burden, self-petitioning children who were born out of wedlock and abused by their biological father should provide as much evidence as possible of a "bona fide parent-child relationship." USCIS has provided a non-exhaustive list of examples of evidence of a "bona-fide parent child relationship."<sup>69</sup> While self-petitioners should provide primary evidence of a "bona fide parent-child relationship" whenever possible, practitioners are encouraged to use a similar approach to the one described on pages 4-5 of this advisory if obtaining primary evidence of a "bona fide parent-child relationship" will endanger the self-petitioner's safety.

### *Stepchild*

An abused stepchild must submit evidence of the relationship "between themselves and the biological or legal parent" and evidence that the biological/legal parent married the stepparent before the child turned 18.<sup>70</sup> If applicable, self-petitioning stepchildren must submit evidence that any prior marriage(s) of their natural/biological parent and stepparent were legally terminated.<sup>71</sup> Therefore, a self-petitioning abused stepchild may submit a copy of their birth certificate listing the name of their

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<sup>66</sup> Cf. 3 USCIS-PM D.2(B)(3) (citing INA §101(b)(1)(C) and 8 C.F.R. §204.2(e)(2)(ii)(D)).

<sup>67</sup> See 3 USCIS-PM D.2(B)(3) (citing INA §101(b)(1)(C) and 8 C.F.R. §204.2(e)(2)(ii)(D)).

<sup>68</sup> See 3 USCIS-PM D.2(B)(3).

<sup>69</sup> See *id.*

<sup>70</sup> See 3 USCIS-PM D.2(B)(3).

<sup>71</sup> See *id.*

biological/legal parent and a copy of a marriage certificate that shows that the marriage of their biological/legal parent and stepparent occurred before they turned 18 (provided that neither parent was married previously). As with other aspects of VAWA Self-Petitions, a common law marriage between the child's legal/biological parent and the child's abusive stepparent renders the child eligible to file a self-petition based on the stepparent's abuse<sup>72</sup>, as long as the common law marriage was legal in the location where it took place.<sup>73</sup> If possible, self-petitioning stepchildren should submit primary evidence of: 1) the marriage between their legal parent and stepparent, and 2) the legal termination of any prior marriage(s) of the parent(s), if applicable. However, if obtaining primary evidence of the step-relationship will endanger the self-petitioner's safety, practitioners are encouraged to use a similar approach to the one described on pages 4-5 of this advisory.

### **C. USCIS Implements 7<sup>th</sup> Circuit Decision on Stepchildren<sup>74</sup>**

On March 12, 2021, the U.S. Court of Appeals for the Seventh Circuit held in [\*Arguijo v. USCIS\*](#)<sup>75</sup> that divorce does not terminate the relationship between a stepparent and stepchild for purposes of eligibility for a VAWA self-petition. In its updated policy guidance, USCIS announced that it would implement this decision nationwide.<sup>76</sup>

At issue in *Arguijo* was whether the petitioner could file a VAWA self-petition based on abuse by her U.S. Citizen ("USC") stepfather, even though the marriage between her mother and stepfather had ended due to divorce. The INA permits an abused spouse to file a VAWA self-petition within two years of divorce if there is a connection between the divorce and the abuse.<sup>77</sup> In that situation, a stepchild can be included as a derivative on their parent's petition. This option was not available to Ms. Arguijo because her mother died shortly after the divorce and before filing an I-360 as the abused spouse of a USC. As a result, Ms. Arguijo filed her own I-360 as

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<sup>72</sup> Cf. 3 USCIS-PM D.2(B)(3).

<sup>73</sup> Cf. 3 USCIS-PM D.2(B)(2) (citing *Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005), and *Matter of Da Silva*, 15 I&N Dec. 778 (BIA 1976)).

<sup>74</sup> This subsection of the Practice Advisory ("USCIS Implements 7<sup>th</sup> Circuit Decision on Stepchildren" and associated practice pointers) was written by Catholic Legal Immigration Network, Inc. ("CLINIC"). This subsection of the Practice Advisory was **not** funded by the U.S. Department of Justice Office on Violence Against Women.

<sup>75</sup> *Arguijo v. USCIS*, 991 F. 3d 736 (7th Cir, 2021).

<sup>76</sup> USCIS Policy Alert, PA-2022-09, Feb. 10, 2022, p. 2.

<sup>77</sup> INA § 204 (a)(1)(A)(iii)(II)(aa)(CC)(CCC).

the abused child of a USC. The INA definition of a “child” includes a stepchild who is unmarried and under the age of 21 and who was under the age of 18 when the marriage creating the stepparent/stepchild relationship occurred.<sup>78</sup> Ms. Arguijo was under the age of 18 when her mother married her stepfather and she filed her I-360 prior to turning 21. In denying Ms. Arguijo’s I-360, USCIS took the position, based on the BIA’s decision in *Matter of Mowrer*, that a stepchild loses that status when the child’s parent and stepparent divorce unless “a family relationship has continued to exist as a matter of fact between the stepparent and stepchild.”<sup>79</sup> Finding that there was no ongoing family relationship, USCIS denied Ms. Arguijo’s VAWA self-petition.

Writing for the court, Judge Easterbrook questioned the rationale behind applying the BIA’s decision in *Mowrer* to a VAWA case, thereby requiring an abused stepchild to continue a familial relationship with their abuser in order to obtain immigration benefits. The court found that *Mowrer* does not interpret VAWA, which it predates. The court also looked to what the term “stepchild” means elsewhere in law and found that the common answer is that stepchildren count as children, even after divorce. For these reasons, the court concluded that, in the context of VAWA, a stepchild retains that status in spite of divorce and regardless of whether there is an ongoing family relationship.

The USCIS Policy Manual update reflects nationwide implementation of *Arguijo* and states that:

If the marriage between a parent and a stepparent terminates due to divorce, a self-petitioning stepchild and a self-petitioning stepparent continue to be eligible for the self-petition. A stepchild of an abusive U.S. citizen or LPR parent and a stepparent of an abusive U.S. citizen son or daughter may continue to be eligible to self-petition despite the divorce provided that:

- The stepchild had not reached 18 years of age at the time the marriage creating the step relationship occurred; and

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<sup>78</sup> INA § 101(b)(1)(B).

<sup>79</sup> *Arguijo*, 991 F.3d at 737-38 (citing *Matter of Mowrer*, 17 I&N Dec. 613, 615 (BIA 1981)).



- The step relationship existed, by law, at the time of the abuse.<sup>80</sup>

#### **D. PRACTICE POINTERS**

- Practitioners should keep in mind the different requirements for abused stepchildren filing their own VAWA self-petitions and abused spouses filing a VAWA self-petition and including a derivative child in the petition. Stepchildren who have suffered abuse are not required to file the self-petition within any particular time frame after the divorce since, under the new USCIS interpretation, the stepparent-stepchild relationship has survived the divorce. For example, the petitioner in *Arguijo* did not file her I-360 petition until more than four years after the divorce of her mother and abusive stepfather but remains eligible for VAWA protection. Abused stepchildren are also not required to show a causal relationship between the divorce and the abuse. In contrast, an abused spouse who is filing his or her own I-360 self-petition and including a derivative child is required to file the I-360 self-petition within two years of divorce and to show a connection between the battery or extreme cruelty and the divorce.
- Practitioners should also keep in mind the importance of a self-petitioning stepchild remaining unmarried. Self-petitioning children must be unmarried when the self-petition is filed and when the self-petition is approved. A self-petitioning child who marries after filing the self-petition and who remains married at the time the VAWA self-petition is adjudicated, no longer meets the definition of a child, as there are no VAWA provisions for married sons and daughters. Therefore, it is vitally important that practitioners remember that a marriage will adversely impact these individuals' ability to continue with the VAWA self-petition process.

#### **Death of the abused step-child's biological/legal parent<sup>81</sup>**

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<sup>80</sup> USCIS Policy Manual, Vol. 3: Humanitarian Protection and Parole, Part D, Violence Against Women Act.

<sup>81</sup> Except for one remaining subsection, which will be clearly identified, the remainder of this Practice Advisory, including this subsection, was supported by Grant No. 15JOVW-21-GK-02240-MUMU, awarded to ASISTA by the Office on Violence Against Women, U.S. Department of Justice.

According to USCIS, if the abused stepchild's *biological/legal parent died* prior to filing, the abused stepchild can only self-petition if they have maintained a "relationship in fact" with the abusive stepparent at the time the VAWA Self-Petition is filed.<sup>82</sup> USCIS cited *Matter of Pagnerre*, 13 I&N Dec. 688 (BIA 1971) as support for this requirement.<sup>83</sup> USCIS's interpretation is flawed for several reasons.

First, *Matter of Pagnerre* was decided 23 years before the VAWA Self-Petition was created. Thus, the decision did not consider the unique safety concerns inherent in a requirement that an abused stepchild maintains a "relationship in fact" with an abusive stepparent. Second, *Arguijo* does not support requiring a continued "relationship in fact" when the biological parent dies. *Arguijo* held that a "family relationship" could only continue post-divorce if divorce does *not* end the stepparent/stepchild relationship.<sup>84</sup> *Arguijo* further questioned: "And if divorce does not un-make a stepchild relation that arose from a marriage, why should it matter whether a "family relationship" exists?"<sup>85</sup> Practitioners can make analogous arguments for why a "relationship in fact" requirement should not exist in death cases: *Matter of Pagnerre* held that a stepchild relationship can continue after the death of the child's "natural" parent.<sup>86</sup> A stepchild relationship can only continue after the death of the child's "natural" parent if the death of the "natural" parent does *not* end the stepparent/stepchild relationship.<sup>87</sup> If death "does not un-make a stepchild relation that arose from a marriage,"<sup>88</sup> it should not matter whether a stepparent/stepchild relationship continues to exist after the death.<sup>89</sup> Indeed, regarding the stepparent/stepchild relationship upon the death of the "natural" parent, *Arguijo* stated: "Does anyone think that Cinderella stopped being the wicked stepmother's stepchild *once Cinderella's natural father died*, ending the marriage?"<sup>90</sup> (emphasis added). Other than citing *Matter of Pagnerre* – which is highly

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<sup>82</sup> See 3 USCIS-PM D.2(B)(3) (citing *Matter of Pagnerre*, 13 I&N Dec. 688 (BIA 1971)).

<sup>83</sup> 3 USCIS-PM D.2, at 8, footnote 59.

<sup>84</sup> *Arguijo*, 991 F.3d at 737-38.

<sup>85</sup> *Id.* at 738.

<sup>86</sup> See *Pagnerre*, 13 I&N Dec. at 689 ("It should govern in a case such as the present one, where **the marriage creating the relationship was terminated by death** during the existence of the relationship **and the stepparent-stepchild relationship continued in fact thereafter.**") (emphasis added).

<sup>87</sup> *Cf. Arguijo*, 991 F.3d at 737-38.

<sup>88</sup> *Cf. id.* at 738.

<sup>89</sup> *Cf. id.*

<sup>90</sup> *Id.*

similar to *Matter of Mowrer*, the BIA decision that *Arguijo* repudiated<sup>91</sup> – USCIS has not explained why *Arguijo* cannot be extended to death cases.

Third, the continued “relationship in fact” requirement is contrary to the intent of the VAWA self-petitioning process, which is to allow abused noncitizens to self-petition without involving the abusive relative.<sup>92</sup> If the abused stepchild is required to maintain a “relationship in fact” with an abusive relative to remain eligible to self-petition, *USCIS is necessarily requiring the abused stepchild to involve the abusive relative* in the immigration process – an outcome that USCIS has recognized the VAWA self-petitioning statute was intended to prevent.<sup>93</sup> Finally, it may be impossible for an abused stepchild to maintain a “relationship in fact” with the abusive stepparent if the abused stepchild is the beneficiary of a protection or no-contact order issued against the abusive stepparent.<sup>94</sup> It is contrary to the intent of the VAWA self-petition statute to penalize otherwise eligible stepchildren who are unable to demonstrate a continued “relationship in fact” with the abusive stepparent because they have availed themselves of legal protections that forbid the abusive stepparent from having continued contact with them.

**Practice Pointer:** Where the biological/legal parent’s death terminated the marriage to the abusive stepparent prior to filing the I-360, USCIS will likely deny the self-petition, and clients should be advised accordingly. However, practitioners may consider presenting arguments similar to the reasoning in *Arguijo* in federal litigation, particularly in the 7<sup>th</sup> Circuit.

### *Intended Spouse Provision and Self-Petitioning Children*

The “intending spouse” provisions of the VAWA statute do not extend to children who were abused by the biological/legal parent’s intended spouse.<sup>95</sup> Therefore, children who were abused by their biological/legal parent’s intended spouse cannot self-petition if the marriage between their biological/legal parent and stepparent was invalid. However, the stepchild’s

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<sup>91</sup> Cf. *Arguijo*, 991 F.3d at 738.

<sup>92</sup> Cf. 146 Cong. Rec. S10170 (2000) (statement of Senator Kennedy), 3 USCIS-PM D.1(A).

<sup>93</sup> Cf. 3 USCIS-PM D.1(A).

<sup>94</sup> Cf. 3 USCIS-PM D.2(B)(3) (USCIS included emails and social media posts between a stepchild and stepparent as examples of evidence to demonstrate a continued “relationship in fact” with the abusive stepparent. These forms of contact with the child by the abusive stepparent may be prohibited if the abused stepchild is the beneficiary of an order of protection issued against the abusive stepparent.)

<sup>95</sup> See INA §204(a)(1)(A)(iii)(II)(aa)(BB), INA §204(a)(1)(B)(ii)(II)(aa)(BB) (the statutory “intending spouse” provisions do not include options for “intended stepchildren” to self-petition), 3 USCIS-PM Part D.2(B)(3).

biological/legal parent may include the child as a *derivative* on the *biological/legal parent's* self-petition if the biological/legal parent can establish eligibility for a VAWA Self-Petition under the “intended spouse” provision of the statute.<sup>96</sup> Remember that an intended spouse can file a VAWA Self-Petition based on the U.S. Citizen or LPR intended spouse’s *abuse of the noncitizen intending spouse’s child*.<sup>97</sup> The below example illustrates how a child who was abused by a legal/biological parent’s intended spouse may benefit from a VAWA Self-Petition.

### **Example**

Miriam met and fell in love with Sarah, a U.S. citizen. Sarah proposed and they had a marriage ceremony. Before the marriage ceremony, Sarah told Miriam that she was divorced from her first wife. At the time of the marriage ceremony, Miriam believed that she married a U.S. Citizen who was not already married and was free to marry her. Miriam’s son Jason was 9 years old at the time of Miriam and Sarah’s marriage ceremony. Assume that Miriam has evidence of the bona fides of the intended marriage and that Jason is now 12 years old. After the marriage ceremony, Sarah began abusing Jason and Miriam found out that Sarah was still married to her first wife at the time of Sarah and Miriam’s marriage ceremony. Miriam is eligible to file a VAWA Self-Petition as an intended spouse, since she believed that she legally married a U.S. Citizen who was not already married and was free to marry her; a marriage ceremony actually occurred; she has evidence of the bona fides of the intended marriage; the marriage is invalid solely because of Sarah’s bigamy; and Sarah has abused Miriam’s child Jason.<sup>98</sup> There is no statutory requirement that Jason is considered *Sarah’s* child in order for *Miriam* to be eligible to file a VAWA Self-Petition.<sup>99</sup> Miriam can include Jason as a derivative child on her VAWA Self-Petition.<sup>100</sup> Therefore, even though Jason cannot petition on his own, he can obtain the benefits of a VAWA Self-Petition as a derivative child on his mother’s petition.

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<sup>96</sup> 3 USCIS-PM D.2(B)(3).

<sup>97</sup> See INA §204(a)(1)(A)(iii)(I), INA §204(a)(1)(A)(iii)(II)(aa)(BB), INA §204(a)(1)(B)(ii)(II)(aa)(BB), INA §204(a)(1)(B)(ii)(I)(bb).

<sup>98</sup> See INA §204(a)(1)(A)(iii)(II)(aa)(BB), 3 USCIS-PM D.2(B)(2).

<sup>99</sup> See INA §204(a)(1)(A)(iii)(I) (“An alien who is described in subclause (II) may file a petition with the Attorney General under this clause for classification of the alien (and any child of the alien) if the alien demonstrates to the Attorney General that—(bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien **or a child of the alien** has been battered or has been the subject of extreme cruelty perpetrated by the alien’s spouse or intended spouse”) (emphasis added).

<sup>100</sup> See INA §204(a)(1)(A)(iii)(I), INA §204(a)(1)(A)(iii)(II)(aa)(BB).

## 4. Self-Petitioning Parent

According to the USCIS Policy Manual, the requirements to demonstrate a qualifying “parent-child relationship” are similar for self-petitioning parents and self-petitioning children.<sup>101</sup> Therefore, practitioners should refer to the discussion in the “Self-Petitioning Children” section of this advisory on evidentiary requirements for establishing a parent-child relationship.

### *Stepparent*

Now that USCIS has implemented *Arguijo v. USCIS* nationwide as a matter of policy, abused stepparents remain eligible to self-petition even if their marriage to the legal/biological parent of the abusive U.S. citizen stepson or stepdaughter ended in divorce.<sup>102</sup> However, similar to self-petitioning stepchildren, if the *biological/legal parent* of the abusive U.S. citizen stepson or stepdaughter died before filing, USCIS continues to require self-petitioning stepparents to demonstrate a “relationship in fact” with the abusive U.S. citizen stepson or stepdaughter at the time of filing.<sup>103</sup>

### *Adoptive Parent*

Unlike abused adopted children, who are not required to show two years of continuous residence and two years under the adoptive parent’s legal custody<sup>104</sup>, self-petitioning adoptive parents *are required* to demonstrate two years of legal custody and two years of joint residency with their abusive adopted U.S. citizen son or daughter.<sup>105</sup>

## E. Good Faith Marriage (Self-Petitioning Spouses Only)

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<sup>101</sup> See 3 USCIS-PM D.2(B)(4).

<sup>102</sup> See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> See INA §101(b)(1)(E) (the term “child” includes a child who was adopted under the age of sixteen and who has resided in the legal custody of the adoptive parents for at least two years, *or* who has been a victim of battery or extreme cruelty by the adoptive parent or a family member of the adoptive parent residing in the same household), 3 USCIS-PM D.2(B)(3).

<sup>105</sup> See 3 USCIS-PM D.2(B)(4) (citing INA §101(b)(1)(E)). For an abused adoptive parent to qualify for a VAWA Self-Petition, the abused adopted son or daughter must have qualified as the abused adoptive parent’s “child” before they turned 21, see 3 USCIS-PM D.2, at 9 (citing *Matter of Hassan*, 16 I&N Dec. 16 (BIA 1976)), and the definition of “child” for adopted children only contains an exception to the residency and legal custody requirements if the *child* is subjected to battery or extreme cruelty, not if the *parent* is subjected to battery or extreme cruelty. In addition, a person is only a “parent” for immigration purposes “where the relationship exists by reason of any of the circumstances set forth in [INA §101(b)(1).]” See INA §101(b)(2).

The USCIS Policy Manual contains a non-exhaustive list of documents that may establish a good-faith marriage.<sup>106</sup> Practitioners are encouraged to submit as much credible evidence as possible of good-faith marriage, including a detailed affidavit from the self-petitioner; affidavits of people with knowledge about the marriage; and documentary evidence such as birth certificates of children in common; joint residential leases, mortgages, or property deeds; photos of the couple together; and joint insurance policies. However, if the self-petitioner’s affidavit is credible and demonstrates that their “intentions for entering into the marriage” were in good faith, the affidavit may be sufficient on its own to demonstrate good faith marriage.<sup>107</sup>

If obtaining documentary evidence of good faith marriage will endanger the self-petitioner’s safety, the practitioner should take an approach and make arguments similar to those mentioned on pages 4-5 of this advisory.

#### **D. Eligible for Immigrant Classification**

USCIS has clarified that VAWA Self-Petitioners are subject to INA §§204(a)(2), (c), and (g).<sup>108</sup> This section of the advisory will only discuss INA §204(a)(2). Further discussion of INA §§204(c) and (g) is in Chapter 3 of this advisory and at 3 USCIS-PM D.3.

USCIS has clarified that INA §204(a)(2)’s general prohibition (with exceptions) of approval of marriage-based petitions filed by some LPRs *does* apply to VAWA Self-Petitioners who adjust status and *subsequently* file a second-preference (LPR) petition for a *new* spouse.<sup>109</sup> However, USCIS’s position is that 8 U.S.C. §1154 (a)(2) *does not* apply to VAWA Self-Petitioners who are filing a *self-petition* based on their marriage to an abusive LPR who obtained *their* LPR status through a prior marriage to a U.S. Citizen or LPR.<sup>110</sup>

#### **Example 1**

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<sup>106</sup> See 3 USCIS-PM D.2(C) (“Examples of evidence to demonstrate good faith entry into the marriage may include, **but are not limited to:**”) (emphasis added.)

<sup>107</sup> See *id.* (“Evidence to demonstrate good faith entry into marriage may include...Any other credible evidence that demonstrates the self-petitioner’s intentions for entering into the marriage.”)

<sup>108</sup> See 3 USCIS-PM D.2(D).

<sup>109</sup> See *id.*

<sup>110</sup> See *id.*

Sam was previously married to Barbara, an abusive U.S. Citizen. While Sam was still married to Barbara, he filed a VAWA Self-Petition. Sam divorced Barbara after his VAWA Self-Petition was approved. His VAWA adjustment was approved in 2019. Sam married Carla in 2021. Sam wants to file a family petition for Carla. Sam's family petition for Carla is subject to the bar at 8 U.S.C. §1154(a)(2). Because only three years have passed since Sam became an LPR, before any family petition he files for Carla can be approved, *Sam* must demonstrate "by clear and convincing evidence" that he did not marry *Barbara* "for the purpose of evading any provision of the immigration laws."<sup>111</sup> Alternatively, Sam can wait until he has been an LPR for 5 years to file the family petition for Carla.<sup>112</sup>

## **Example 2**

Mary is married to Scott, an abusive LPR. Scott obtained his LPR status in 2019 based on his prior marriage to a U.S. citizen. Even though Scott obtained his LPR status based on a prior marriage to a U.S. citizen and he has only been an LPR for three years, USCIS's position is that the INA 204(a)(2) bar does not apply to *Mary's VAWA Self-Petition* that is based on her marriage to Scott.<sup>113</sup>

### **E. Subjected to Battery or Extreme Cruelty**

USCIS has clarified that battery or extreme cruelty committed by a person other than the abusive relative may be considered abuse in certain circumstances.<sup>114</sup> Specifically, USCIS has stated that "battery or extreme cruelty" that is committed by a person other than the abusive relative may be considered abuse if the abusive relative "...acquiesced to, condoned, or participated in the abusive act(s)."<sup>115</sup> For example, one spouse who allows his relatives to harm the other spouse may have committed abuse that allows the harmed spouse to file a VAWA Self-Petition.<sup>116</sup>

USCIS has stated that self-petitioning abused children must have been residing with the abusive parent when the abuse occurred.<sup>117</sup> However, the

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<sup>111</sup> Cf. INA §204(a)(2)(A)(ii).

<sup>112</sup> Cf. INA §204(a)(2)(A)(i).

<sup>113</sup> Cf. 3 USCIS-PM D.2(D).

<sup>114</sup> See 3 USCIS-PM D.2(E).

<sup>115</sup> See *id.* (citing 61 FR 13061, 13065 (Mar. 26, 1996)).

<sup>116</sup> Cf. 61 FR 13061, 13065 (Mar. 26, 1996), 3 USCIS-PM D.2(E).

<sup>117</sup> See 3 USCIS-PM D.2(E)(citing 8 C.F.R. §204.2(e)(1)(i)(E)).

regulation that USCIS cites for this proposition—8 C.F.R. §204.2(e)(1)(i)(E)—conflicts with the statute, which contains no requirement that the abuse occurred while the child was residing with the abusive parent.<sup>118</sup> USCIS has recognized, as a matter of policy, that the VAWA regulations were promulgated in 1996, have not been updated to reflect superseding statutory provisions, and that some regulatory provisions no longer apply.<sup>119</sup> Therefore, practitioners should argue that there is no statutory requirement that the parent abused the child while the child was residing or visiting with the parent; that USCIS has recognized that the regulations have not been updated to reflect superseding statutory provisions; and that the statute supersedes any outdated regulatory provisions that require an abused child to have lived with the parent at the time of the abuse.

## 1. Battery and Extreme Cruelty

USCIS has stated that “The definitions for battery and extreme cruelty are flexible and broad.”<sup>120</sup> Thus, there is no narrow, rigid definition of battery or extreme cruelty. USCIS has provided a non-exhaustive list of examples of battery.<sup>121</sup> Evidence of battery may include police or civil or criminal court records containing battery allegations or findings as well as any other credible evidence.

When determining whether an abuser has engaged in “extreme cruelty”, USCIS considers whether the abuser’s actions demonstrate “a pattern or intent...to attain compliance from or control over the self-petitioner.”<sup>122</sup> USCIS’s focus on the abuser’s intent to exert compliance or control over the self-petitioner is analogous to the 9<sup>th</sup> Circuit’s definition of “extreme cruelty” in *Hernandez v. Ashcroft*, which focused on controlling tactics that were “intertwined with the threat of harm in order to maintain the perpetrator’s dominance through fear.”<sup>123</sup> Thus, the extreme cruelty inquiry is highly individualized and focuses on how the abuser’s behavior has impacted *this* particular survivor. USCIS has provided a non-exhaustive list of behaviors that may constitute extreme cruelty, including “threats of

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<sup>118</sup> See INA §204(a)(1)(A)(iv), INA §204(a)(1)(B)(I)(iii).

<sup>119</sup> See 3 USCIS-PM D.1(C), footnote 11.

<sup>120</sup> See 3 USCIS-PM D.2(E)(1).

<sup>121</sup> See *id.*

<sup>122</sup> See 3 USCIS-PM D.2(E)(1).

<sup>123</sup> Cf. *Hernandez v. Ashcroft*, 345 F.3d 824, 840 (9<sup>th</sup> Cir. 2002) (*Hernandez* was cited in 3 USCIS-PM D.2(E)(1), footnote 111, as support for USCIS’s definition of extreme cruelty.)



deportation” and “[t]hreats to remove a child from the self-petitioner’s custody.”<sup>124</sup>

In cases where a survivor did not suffer violence that can be categorized as “battery”, practitioners should focus on the abuser’s behavior demonstrates the abuser’s intent to “attain compliance from or control over” the survivor.<sup>125</sup> Practitioners may point to the fact that survivor has suffered behavior that is listed in the Policy Manual section on extreme cruelty. However, the practitioner and survivor should still explain why that particular behavior demonstrates “a pattern or intent...to attain compliance from or control over the self-petitioner” *in this particular relationship*.<sup>126</sup> The survivor’s statement and the other evidence submitted with the self-petition should explain in detail how and why the abuser’s actions allowed the abuser to exert control and dominance over the survivor. For example, the survivor’s statement should not simply say that the abuser threatened her with deportation. Instead, the survivor’s statement should also detail *how* the abuser’s threats of deportation influenced the survivor’s behavior and how they made the survivor feel. Whether a particular action or series of actions were taken in order to exert control over the abused person is a highly context-specific determination. The determination often depends on the abusive dynamics of the particular relationship, particularly when the abuser’s behavior may not appear abusive at first glance. Therefore, practitioners should work with survivors to describe the dynamics of the relationship in detail in order to paint the picture for USCIS as to why the abuser’s action(s) were successful in inducing compliance or exerting control over *this particular survivor*. With the survivor’s permission, practitioners are encouraged to consult with domestic violence experts and counselors whenever possible in extreme cruelty cases. The below example illustrates how actions that may not initially appear abusive may constitute extreme cruelty.

**Example:**

Mara is married to Robert, an LPR. Mara’s father was a political activist in their native country. When Mara was a young child, her father was “disappeared” by the native country’s secret police. Immediately before the “disappearance”, the police forced Mara’s father to pack a suitcase with his belongings. Mara witnessed the entire interaction between her father and

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<sup>124</sup> See 3 USCIS-PM D.2(E)(1).

<sup>125</sup> Cf. *id.*

<sup>126</sup> Cf. *id.*

the secret police. She remains traumatized by the incident to this day. Robert is aware that Mara witnessed the incident and was traumatized. Robert has told Mara that he expects her to arrive home from work promptly at 8:00 PM. One night when Mara arrived home at 8:05 PM, she discovered a packed suitcase outside her and Robert's bedroom. Robert also expects his breakfast to be cooked to perfection. When Mara accidentally burnt Robert's breakfast, he left a packed suitcase by her car before he left for work. Mara is petrified of what Robert will do the next time she comes home late or fails to cook a perfect breakfast.

Robert's expectation that Mara arrive at a particular time and prepare a perfect breakfast are evidence of coercive control. In addition, in the context of this particular relationship, Robert's other actions may constitute extreme cruelty. However, Robert leaving a packed suitcase where Mara can see it would not appear abusive to a person who is unfamiliar with the relationship and Mara's past trauma. Therefore, it is critical that Mara and her attorney describe her childhood trauma and the dynamics of her relationship in detail when she files her VAWA Self-Petition. It would also be beneficial for Mara's attorney to include an evaluation from Mara's counselor or a domestic violence expert in the VAWA Self-Petition filing.

## **F. Residence with the Abusive Relative**

USCIS *no longer requires* the self-petitioner to have resided with the abuser during the qualifying relationship.<sup>127</sup> USCIS also does not require that the self-petitioner lived with the abuser in the United States.<sup>128</sup> In adopting the holdings of *Hollingsworth v. Zuchowski*<sup>129</sup>, *Bait It v. McAleenan*<sup>130</sup>, and *Dartora v. U.S.*<sup>131</sup>, USCIS applied the holdings to all self-petitions, not just spousal self-petitions. Thus, the lack of shared residence during the qualifying relationship or in the United States is no longer a barrier to self-petitions.

**Example 1:** Anna is married to Lucas, a U.S. Citizen. Lucas and Anna lived together in Panama before they married. After their marriage in Panama, Anna moved to the U.S. to be closer to Lucas. For employment reasons,

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<sup>127</sup> See 3 USCIS-PM D.2(F), USCIS Policy Alert, PA-2022-09 (Feb. 10, 2022).

<sup>128</sup> See 3 USCIS-PM D.2(F).

<sup>129</sup> 437 F. Supp. 3d 1231 (S.D. Fla. 2020)

<sup>130</sup> 410 F. Supp. 3d 874 (N.D. Ill. 2019)

<sup>131</sup> No. 4:20-CV-05161-SMJ (E.D.Wa. June 7, 2021)

she lived apart from Lucas. Lucas started abusing Anna after they got married. Anna is eligible to file a VAWA Self-Petition because: 1) she lived with Lucas in the past and 2) the abuse occurred during the qualifying relationship. It is irrelevant that Lucas and Anna only lived together outside the United States and before they were married.

**Example 2:** Jenny is 19 years old. She has never been married. Jenny’s mother married Joseph, an LPR, when Jenny was 8 years old. Joseph abused Jenny while he was married to Jenny’s mother. Jenny lived with Lucas until she was 16 years old, when Lucas and her mother divorced. Jenny is eligible to file a VAWA Self-Petition because: 1) Jenny is currently under 21 and unmarried; 2) Joseph married Jenny’s mother when Jenny was under 18, 3) Joseph abused Jenny while he was married to Jenny’s mother, 4) Jenny was under 21 and unmarried at the time that Joseph abused her, and 5) Jenny lived with Lucas in the past. It is irrelevant that Joseph and Jenny’s mother are now divorced.<sup>132</sup>

**Example 3:** Patrick is the father of Jill, a 23-year-old U.S. citizen. Patrick lived with Jill until she moved out at age 19. Jill started abusing Patrick after she moved out and has continued to abuse him until the present day. Patrick is eligible to file a VAWA Self-Petition because: 1) he lived with Jill in the past, and 2) the abuse occurred during the qualifying relationship. Patrick is not required to demonstrate that he lived with Jill during the qualifying relationship.<sup>133</sup>

## **G. Good Moral Character**

### **A. USCIS’s nationwide implementation of *DaSilva v. Attorney General***

On February 10, 2022, USCIS updated the [USCIS Policy Manual](#) to implement the *Da Silva v. Attorney General decision nationwide*.<sup>134</sup> *Da Silva* held that when evaluating good moral character in Violence Against Women Act (VAWA) cases, an act or conviction is “connected to” the

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<sup>132</sup> Cf. *Arguijo v. USCIS*, 991 F.3d 736 (7<sup>th</sup> Cir. 2021).

<sup>133</sup> See 3 USCIS-PM D.2(F).

<sup>134</sup> 948 F.3d 629 (3<sup>rd</sup> Cir. 2020).

battery or extreme cruelty when a “causal or logical relationship” can be shown.<sup>135</sup>

## **Background on Good Moral Character in VAWA Self-Petitions**

VAWA self-petitioners must establish that they are of good moral character (GMC) by showing that none of the bars to GMC listed in INA § 101(f) applied during the three years immediately prior to their filing the VAWA self-petition.<sup>136</sup> If any of the bars do apply, the self-petitioner needs to show they are eligible for the special VAWA exception to the bars to good moral character.<sup>137</sup> In evaluating GMC in VAWA cases, USCIS also considers “the standards of the average citizen in the community”<sup>138</sup> and may look beyond the three years immediately preceding the self-petition filing.<sup>139</sup>

The special VAWA exception for the statutory bars to good moral character is found at INA § 204(a)(1)(C). Under that exception, if the self-petitioner has committed an act or has a conviction listed under INA § 101(f), that act or conviction does not bar USCIS from finding that the self-petitioner is a person of good moral character if (1) the act or conviction is waivable with respect to the self-petitioner for purposes of determining whether the self-petitioner is admissible or deportable, and (2) the act or conviction was connected to the abuse suffered by the self-petitioner.<sup>140</sup>

Prior to its February 10, 2022 policy change, USCIS relied on guidance from 2005 on for the exception to the good moral character requirement for VAWA self-petitioners.<sup>141</sup> The old guidance defined “connected to” as a showing that the abuse experienced by the self-petitioner “compelled or coerced” the self-petitioner to commit the act or crime that precludes good moral character. Under the old standard, the evidence had to establish that

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<sup>135</sup> *Da Silva*, 948 F.3d at 636.

<sup>136</sup> See INA § 204(a)(1)(A)(iii)(II)(bb) (spouses and intended spouses of USC); INA § 204(a)(1)(B)(ii) (spouses and intended spouses of LPR); INA § 204(a)(1)(B)(iii) (children of LPR). Note self-petitioning children under fourteen years old are presumed to be persons of good moral character, however USCIS may still request evidence of good moral character and the presumption does not preclude a finding that a self-petitioner under fourteen years old lacks good moral character. See 8 CFR § 204.2(e)(2)(v).

<sup>137</sup> INA § 204(a)(1)(C).

<sup>138</sup> See 3 USCIS Policy Manual (USCIS-PM) D.2(G)(3); 8 CFR §§ 204.2(c)(1)(vii), (e)(1)(vii), 316.10(a)(2).

<sup>139</sup> 3 USCIS-PM D.2(G)(3).

<sup>140</sup> *Id.* See also 3 USCIS-PM D.2(G)(4).

<sup>141</sup> See Interoffice Memorandum from William R. Yates, Ass. Dir. Oper. on Determinations of Good Moral Character in VAWA-Based Self-Petitions to Paul E. Novak, Director of Vermont Service Center (Jan. 19, 2005), <https://asistahelp.org/wp-content/uploads/2018/10/USCIS-Memo-Determination-of-GMC-in-VAWA-January2005.pdf>.

the self-petitioner would not have committed the act or crime in the absence of the battering or extreme cruelty.

### **Summary of the *Da Silva* Case**

Ludimilla Ramos Da Silva, a native of Brazil, faced challenges demonstrating good moral character in her VAWA case<sup>142</sup> because she was convicted of assault after confronting her abusive husband's mistress, a conviction that would bar her from showing GMC under INA § 101(f) unless she could show the special VAWA exception applied. Initially, although she was found to otherwise meet the requirements for VAWA relief, both the immigration judge and BIA held that her assault convictions were not connected to her abusive husband's battery and cruelty because he did not provoke her to commit the assault,<sup>143</sup> thus she was ineligible for VAWA solely based on the GMC issue.

Da Silva's U.S. citizen husband subjected her to emotional, psychological, and physical abuse throughout their marriage. He refused to file immigration paperwork for her, used her lack of immigration status as a method to control her, and threatened to take away her children due to her undocumented status. He also hit her daughter and pushed Da Silva against a wall multiple times. Additionally, he engaged in numerous extramarital affairs.

During an encounter with a woman with whom her husband was having an affair, the other woman told Da Silva she would continue the extramarital affair. In response, Da Silva "exploded" and, in "a blind rage," struck the other woman in the nose.<sup>144</sup> Da Silva was arrested the following morning. In 2016, she pleaded guilty to two counts of assault and was sentenced to eighteen months' imprisonment.<sup>145</sup>

The immigration judge (IJ) held that Da Silva did not qualify for the special VAWA exception because her assault convictions were not "connected to"

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<sup>142</sup> Da Silva was seeking VAWA cancellation of removal in proceedings. The GMC requirement and exception, however, are the same as with a VAWA self-petition.

<sup>143</sup> *Da Silva*, 948 F.3d at 632-33 ("*Da Silva's assault convictions were not 'connected to' her husband's cruelty because she was not 'encouraged or induced' by him to commit the assault. Rather, they were 'connected to her having been provoked by a woman who was carrying on an affair with her husband' and were 'a result of her anger toward her husband's infidelity and anger toward the mistress' behavior.*").

<sup>144</sup> *Da Silva*, 948 F.3d at 632.

<sup>145</sup> *Id.*

her husband's cruelty because she was not "encouraged or induced" by him to commit the assault.<sup>146</sup> The BIA affirmed the IJ's decision, agreeing that the assault convictions were not "connected to" the cruelty because her abusive husband did not "ask, encourage, compel, or coerce" her to commit them nor did she "commit the assault on behalf of or for her husband."<sup>147</sup> Da Silva timely appealed her case to the Third Circuit Court of Appeals which disagreed with the IJ and BIA and instead held that "connected to" unambiguously means "having a causal and logical relationship."<sup>148</sup> Moreover, the Third Circuit held that a more narrow interpretation of "connected to" would be at odds with the intent and purpose of VAWA, "by limiting the [VAWA GMC] exception to those who committed crimes at the direction of their abuser."<sup>149</sup> The Third Circuit found that Da Silva's convictions met this more expansive interpretation of the standard and thus did not disqualify her from VAWA relief.

### **Current Definition: "Have a Causal or Logical Relationship" between the Act or Conviction and the Battery or Extreme Cruelty**

The *Da Silva* case's interpretation of "connected to" that will now be implemented nationwide, not just for cases arising in the Third Circuit, defines "connected to" as "having a causal or logical relationship" to the battery or extreme cruelty. Updated guidance in the USCIS Policy Manual directs USCIS officers to apply this new standard by considering the "full history" of abuse in the case and to look to evidence of the circumstances surrounding the act or conviction and the asserted connection,<sup>150</sup> which "does not require compulsion or coercion."<sup>151</sup>

## **B. Practice Pointers**

This policy is effective immediately, applying to all currently pending VAWA self-petitions as well as all VAWA self-petitions filed on or after February 10, 2022, regardless of where the self-petitioner resides.

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<sup>146</sup> *Da Silva*, 948 F.3d at 633.

<sup>147</sup> *Id.*

<sup>148</sup> *Da Silva*, 948 F.3d at 635-38.

<sup>149</sup> *Da Silva*, 948 F.3d at 636-37.

<sup>150</sup> 3 USCIS-PM D.2(G)(4).

<sup>151</sup> *Id.*

To prove GMC, self-petitioners generally must submit affidavits of good moral character, police clearance letters, criminal background checks or other evidence of good moral character for the three years preceding filing of the VAWA self-petition.<sup>152</sup> In addition to demonstrating the three years' absence of a statutory bar to good moral character or eligibility for an exception to a bar, the self-petitioner must also present sufficient information to allow USCIS to conclude that they are a person of good moral character. The applicant's declaration is primary evidence of their good moral character.<sup>153</sup> It must be accompanied by police clearances from each place where the self-petitioner has lived for six months or more during the past three years.<sup>154</sup> USCIS could also conceivably look beyond the most recent three years if they have reason to believe the self-petitioner was not a person of good moral character.<sup>155</sup>

In terms of showing a causal or logical relationship between an act or conviction and battery or extreme cruelty for the purposes of qualifying for the special VAWA exception to the good moral character bars, it is important to remember that a history of past abuse can sometimes help demonstrate the required connection and explain why a person may react in certain ways to current situations. For example, in the *Da Silva* case the Third Circuit noted that Da Silva had been subjected to abuse throughout her life including abuse perpetrated by her mother and first husband as well as being raped at a friend's house as a teenager. As a result, she later suffered from and was diagnosed with post-traumatic stress disorder. When past abuse is part of a VAWA self-petitioner's history, what may at first glance seem like outsized reactions to simple acts, resulting in potentially disqualifying convictions like the assault convictions in Da Silva's case, can sometimes be explained by contextualizing the actions. Showing how past abuse or experiences could contribute to current reactions may help establish a connection to the abuse even if it appears less direct than actions taken at the abuser's direction, which would have been required under the old standard.

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<sup>152</sup> 8 CFR § 204.2(c)(2)(v).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> 3 USCIS-PM D.2(G)(3).

### 3. Evaluating Good Moral Character<sup>156</sup>

#### *Acts or Convictions Under INA 101(f) That Occur Outside the 3-Year Period*

In cases where a self-petitioner's actions would be a conditional bar to good moral character but fall *outside* the 3-year period, USCIS will consider "all evidence in the record to make an individualized determination as to whether the self-petitioner has established good moral character."<sup>157</sup> When making this determination, USCIS considers "the totality of the evidence, including all positive and negative factors, to determine whether under the standards of the average citizen of the community" a self-petitioner has demonstrated good moral character.<sup>158</sup> USCIS has stated that the severity of the prior "act or conviction" and evidence of rehabilitation may be "relevant considerations" in the good moral character consideration.<sup>159</sup> Because USCIS will consider "the totality of the evidence,"<sup>160</sup> in cases where a self-petitioner's actions would be a conditional bar to good moral character but are outside of the 3 year period, it is critical that the self-petitioner includes voluminous evidence of positive equities to demonstrate that they are a person of good moral character. Evidence of rehabilitation may include the passage of several years without subsequent arrests or convictions. Third-party evidence of good moral character and rehabilitation is also helpful to include if it is available. Third-party evidence may include affidavits of good moral character from people who know the petitioner; evidence of regular attendance at drug/alcohol rehabilitation or meetings; evidence of volunteer work or other community involvement; evidence of charitable contributions; and, if the self-petitioner is religious, evidence of the self-petitioner's worship attendance and active participation in their faith community. If the self-petitioner's act(s) would have been eligible for the exception to the good moral character requirement for acts that are connected to domestic violence victimization<sup>161</sup>, that is a significant mitigating factor that should be included. Specifically, the self-petitioner

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<sup>156</sup> The remainder of this Practice Advisory, including this subsection, was supported by Grant No. 15JOVW-21-GK-02240-MUMU, awarded to ASISTA by the Office on Violence Against Women, U.S. Department of Justice.

<sup>157</sup> 3 USCIS-PM D.2(G)(3).

<sup>158</sup> *See id.*

<sup>159</sup> *See id.*

<sup>160</sup> *See id.*

<sup>161</sup> *See* INA §204(a)(1)(C)



should provide evidence of the connection to the domestic violence and the practitioner should make the “connection” arguments in the brief or cover letter. USCIS has stated that it will consider “any other credible evidence of good moral character,”<sup>162</sup> so self-petitioners are encouraged to provide as much evidence of good moral character as possible to aid USCIS’s assessment.

#### **4. Evaluating Acts or Convictions Falling Under the Conditional Bars Listed in INA 101(f) (acts committed within 3 years prior to the filing of the self-petition)**

##### *Step 1: Determine Whether a Waiver Would Be Available*

To establish eligibility for the exception to the good moral character requirement for acts that are connected to domestic violence victimization, USCIS requires the self-petitioner to submit evidence that a waiver is available for the act or conviction. The waiver may be a waiver of inadmissibility – found at INA §212 – or a waiver of deportability – found at INA §237.<sup>163</sup> USCIS has stated that relevant waivers include INA §212(h)(1); INA §212(i)(1); INA §237(a)(7), and INA §237(a)(1)(H)(ii).<sup>164</sup> USCIS has stated that officers only need to consider whether a waiver would be *available* at the time the noncitizen applied adjustment of status or immigrant visa application – not whether the waiver would be granted.<sup>165</sup> Therefore, practitioners should address in their briefs or cover letters which specific waiver(s) would be available to a client. Practitioners are also encouraged to highlight USCIS’s own position that there is *no requirement* to demonstrate that the waiver *would* be granted.<sup>166</sup>

##### *Step 2: Determine Whether the Act or Conviction is “Connected” to the Battery or Extreme Cruelty*

In its discussion of whether an act is “connected to” the battery or extreme cruelty, USCIS has stated that the self-petitioner is not required to demonstrate that the act or conviction occurred during the qualifying relationship.<sup>167</sup> Specifically, USCIS has stated: “If the self-petitioner

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<sup>162</sup> 3 USCIS-PM D.2(G)(3).

<sup>163</sup> See INA §204(a)(1)(C)

<sup>164</sup> See 3 USCIS-PM D.2(G)(4), footnote 151.

<sup>165</sup> See 3 USCIS-PM D.2(G)(4).

<sup>166</sup> Cf. 3 USCIS-PM D.2(G)(4).

<sup>167</sup> See 3 USCIS-PM D.2(G)(4).

establishes battery or extreme cruelty occurred prior to *and* during the qualifying relationship, the officer may find that the self-petitioner has established the required “connection” between the act or conviction and the battery or extreme cruelty, even if the act or conviction occurred prior to the qualifying relationship.”<sup>168</sup> (emphasis added). Thus, the self-petitioner is still required to establish that “battery or extreme cruelty” *also* occurred during the qualifying relationship.<sup>169</sup> While the language in the Policy Manual is helpful, it is not mandatory (“the officer *may* find...”).<sup>170</sup> Therefore, self-petitioners and practitioners should provide as much evidence as possible to establish the “connection” between the offense that predated the qualifying relationship and the “battery or extreme cruelty.” This showing should include evidence that the self-petitioner suffered battery or extreme cruelty before the relationship *and* evidence that the battery or extreme cruelty continued after the qualifying relationship was established. The below example demonstrates how an offense that occurred *prior to* the qualifying relationship may be “connected” to the “battery or extreme cruelty.”

**Example:**

Rita’s boyfriend Donald is an LPR. Donald strangled Rita shortly after they began dating. Rita was unable to breathe, so she slapped Donald’s hand away from her neck. Donald called the police. Rita was arrested and convicted of simple assault. Donald and Rita later married. Donald has continued to abuse Rita during the marriage. Even though Rita’s conviction occurred before she married Donald, she may still be able to establish that the conviction was “connected” to the abuse she suffered.

*Step 3: Determine Whether the Self-Petitioner Warrants a Finding of Good Moral Character in the Exercise of Discretion*

Critically, USCIS’s interpretation is that “Whether a self-petitioner is a person of good moral character under the exception at INA 204(a)(1)(C) is a discretionary determination made by USCIS.”<sup>171</sup> Therefore, under USCIS’s interpretation, *it is not sufficient to simply argue that a survivor meets the technical requirements of eligibility for the statutory exception for offenses that are connected to domestic violence — the survivor must also*

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<sup>168</sup> 3 USCIS-PM D.2(G)(4).

<sup>169</sup> *See id.*

<sup>170</sup> *Cf. id.*

<sup>171</sup> *See id.*

demonstrate that they merit a finding of good moral character as a matter of *discretion*. Thus, the survivor must demonstrate that, after an assessment of all evidence in the record, the mitigating factors outweigh the aggravating factors. Therefore, even in cases where survivors meet the technical requirements for eligibility for the statutory exception, practitioners and survivors should provide the mitigating evidence previously discussed.

## **Chapter 3 - Effect of Certain Life Events**

### **A. Divorce Prior to Filing the Self-Petition**

#### **1. Self-Petitioning Spouse's Divorce**

USCIS has stated that it considers the requirement that a self-petitioner files within 2 years of divorce from the abusive spouse to be “a condition of eligibility for which there is no waiver or equitable tolling available.”<sup>172</sup> USCIS stated that equitable tolling is not available because “the statute allows for self-petitioning during the marriage and creates a cut-off date for filing when the marriage has terminated.”<sup>173</sup> Essentially, USCIS is arguing that the 2 year filing deadline in the event of divorce is a statute of repose rather than a statute of limitations.<sup>174</sup> However, USCIS has provided no statutory, regulatory, or binding caselaw support for its contention that the 2-year divorce filing deadline is not subject to equitable tolling. Notably, *Moreno-Gutierrez v. Napolitano* held that a portion of the VAWA statute that allowed a self-petition within 2 years of the spouse's *loss of status* was a statute of limitations that was subject to equitable tolling.<sup>175</sup> While *Moreno-Gutierrez* focused on the *loss of status* provision of the statute, its reasoning can be analogized to divorce situations.

**Practitioners should file a survivor's spousal self-petition within two years following the survivor's divorce, the death of the abuser, or the abuser's loss of status.** Practitioners should also keep in mind that multiple non-precedent Administrative Appeals Office (“AAO”) decisions

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<sup>172</sup> 3 USCIS-PM D.3(A)(1).

<sup>173</sup> *Id.*

<sup>174</sup> Federal statutes of limitations are generally subject to equitable tolling. See *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946). In contrast, statutes of repose are generally not subject to equitable tolling. See *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042, 2050 (2017).

<sup>175</sup> 794 F. Supp. 2d 1207, 1216 (D. Colo. 2011)

have held that the 2-year divorce deadline is not subject to equitable tolling.<sup>176</sup> The AAO has also held in non-precedent decisions that it is not bound to follow *Moreno-Gutierrez* because it is a district court decision.<sup>177</sup> However, practitioners can make similar arguments to those in *Moreno-Gutierrez*, if necessary, to argue that the divorce deadline is subject to equitable tolling.

### *Evidence*

While self-petitioners are required to submit evidence that there was a connection between the divorce and “the battery or extreme cruelty”,<sup>178</sup> USCIS has stated that there is no requirement that the legal ground for the divorce or annulment was abuse.<sup>179</sup>

## **2. Termination of a Step-Relationship Due to Divorce or Death**

### *Divorce*

USCIS has stated that, to be eligible to self-petition after divorce, abused stepchildren and stepparents must establish that “The step relationship existed, by law, at the time of the abuse.”<sup>180</sup> As stated previously, USCIS has implemented *Arguijo v. USCIS* nationwide.<sup>181</sup> *Arguijo* held that a “family relationship” could only continue post-divorce if divorce does *not* end the stepparent/stepchild relationship.<sup>182</sup> Thus, *Arguijo* held that the stepparent/stepchild relationship continues after divorce.<sup>183</sup> One ***possible*** interpretation of *Arguijo* is that, if the stepchild/stepparent relationship exists after divorce, it necessarily exists “in law” after divorce, thus allowing a step-relative to file a VAWA Self-Petition even if the abuse only occurred *after* the divorce. However, ***USCIS has not explicitly interpreted Arguijo this way***, and it is uncertain how USCIS would react to this argument.

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<sup>176</sup> See, e.g., *In re: 13064913*, at 2 (AAO Jan. 27, 2022), *In re: 1359292999* (AAO Nov. 2, 2021).

<sup>177</sup> See, e.g., *In re: 103064913*, at 3 (citing *Matter of K-S*, 20 I&N Dec. 715 (BIA 1993)). *Matter of K-S* held that the **BIA** is not obligated to follow published district court decisions. See 20 I&N Dec. at 718.

<sup>178</sup> 3 USCIS-PM D.3(A)(1) (citing INA §204(a)(1)(A)(iii)(ii)(aa)(CC)(ccc) and INA §204(a)(1)(B)(ii)(II)(aa)(CC)(bbb)).

<sup>179</sup> See 3 USCIS-PM D.3(A)(1)

<sup>180</sup> See 3 USCIS-PM D.3(A)(2).

<sup>181</sup> USCIS Policy Alert, PA-2022-09 (Feb. 10, 2022).

<sup>182</sup> See *Arguijo v. USCIS*, 991 F.3d at 737-38.

<sup>183</sup> *Cf. id.*

## C. Marriage-Related Prohibitions on Self-Petition Approval

### 1. Self-Petitioning Spouses – Marriage While in Removal Proceedings

INA §204(g) creates a bar to approval of petitions based on a marriage that was entered into during removal proceedings.<sup>184</sup> The two exceptions are if the self-petitioner resided outside the U.S. for at least two years after the date of the marriage<sup>185</sup> or if the self-petitioner can show “by clear and convincing evidence”, that they entered the marriage in good faith, the marriage was legal in the jurisdiction where it took place, they did not enter the marriage for the purpose of gaining admission to the U.S. as an immigrant, and no fee “or other consideration” was given for the filing of an immigrant petition based on the marriage (with the exception of a fee paid to an attorney).<sup>186</sup> USCIS now requires a VAWA self-petitioner to request one of the exemptions to INA §204(g) ***in writing*** and to provide evidence that the self-petitioner meets the requirements for the exemption.<sup>187</sup> The self-petitioner should include this request in their own statement.<sup>188</sup>

Even when considering whether there is “clear and convincing evidence” that the marriage on which the self-petition is based is not subject to the INA §204(g) bar, USCIS remains bound by the “any credible evidence” standard for VAWA Self-Petitions.<sup>189</sup> USCIS policy allows a self-petitioner to meet the “clear and convincing evidence” standard through their own affidavit, as long as the affidavit is credible and establishes that the self-petitioner did not enter the marriage to “evade the immigration laws of the United States.”<sup>190</sup> While the good faith marriage exemption can be established by the self-petitioner’s own credible affidavit, practitioners are strongly encouraged, if possible, to submit extensive primary and secondary evidence of good faith marriage if the client’s marriage was entered during removal proceedings because USCIS will generally give

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<sup>184</sup> INA §204(g)

<sup>185</sup> *See id.*

<sup>186</sup> *See id.*, INA §245(e)(3).

<sup>187</sup> *See* 3 USCIS-PM D.3(C)(1).

<sup>188</sup> *See* <https://asistahelp.org/wp-content/uploads/2022/03/Bona-Fide-Marriage-Exemption.pdf> for sample request

<sup>189</sup> *Cf.* INA §204(J) (USCIS “shall consider *any* credible evidence *relevant* to the petition.”) (emphasis added.) Evidence of good faith marriage for purposes of overcoming the INA §204(g) bar is still “relevant” to the self-petition because that evidence goes to the approvability of the self-petition.

<sup>190</sup> *See* 3 USCIS-PM D.3(C)(1) (contains a non-exhaustive list of examples of evidence to meet the good faith marriage exemption, including “Any other credible evidence to establish that the marriage was not entered into in order to evade the immigration laws of the United States.”)

more weight to such evidence.<sup>191</sup> While USCIS must consider “any credible evidence”<sup>192</sup>, the self-petitioner must prove good faith marriage by “clear and convincing evidence” in order to avoid the INA §204(g) bar.<sup>193</sup> Due to the higher standard a self-petitioner is required to meet if the marriage was entered into during removal proceedings, the best practice is to provide extensive, detailed, and diverse evidence of good faith marriage. If, for safety or other reasons, the only evidence of good faith marriage is the survivor’s own affidavit, the survivor should explain in detail in her affidavit why other evidence of good faith marriage is unavailable. If the survivor’s affidavit is the only evidence of good faith marriage in the context of the heightened INA §204(g) standard, it is absolutely critical that the survivor’s affidavit is internally and externally credible.

If a VAWA Self-Petition is denied under INA §204(g) for lack of documentary evidence, and the survivor is only able to obtain that evidence from the abuser, practitioners are encouraged to take an approach and make arguments similar to those mentioned on pages 4-5 of this advisory. Practitioners may also argue that a denial on these grounds is contrary to USCIS policy because USCIS has recognized as a matter of policy the difficulties that petitioners may have obtaining evidence in abusive situations and has required its officers to “be aware of and consider these issues when evaluating the evidence.”<sup>194</sup>

USCIS has clarified that, if USCIS denied a prior VAWA Self-Petition because the marriage occurred during removal proceedings, the survivor may file a new petition if the survivor subsequently lived outside of the United States for at least two years following the marriage.<sup>195</sup>

## **2. Prior Marriage Fraud**

INA §204(c) bars approval of family-based immigration petitions if: 1) the noncitizen beneficiary of the petition has *previously sought immediate relative or preference status* based on a marriage that the Attorney General has determined was entered “for the purpose of evading the immigration

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<sup>191</sup> Cf. 3 USCIS-PM D.5(B)(2) (“Officers generally should give more weight to primary evidence and evidence provided in court documents, medical reports, police reports, and other official documents.”)

<sup>192</sup> Cf. INA §204(J)

<sup>193</sup> See INA §204(g) (references the exception at INA §245(e)(3), which requires the self-petitioner to meet a heightened “clear and convincing evidence” standard)).

<sup>194</sup> See 3 USCIS-PM D.5(B)(2).

<sup>195</sup> See 3 USCIS-PM D.3(C)(1).

laws” or 2) the Attorney General determined that the noncitizen has ever “entered or conspired to enter into a marriage for the purpose of evading the immigration laws.”<sup>196</sup> Unlike the bar on approving a self-petition if the marriage was entered into during removal proceedings, there are no exceptions to the INA §204(c) bar.<sup>197</sup> For part one, USCIS interprets the statute as requiring that *USCIS* is the agency that determines that the noncitizen entered the marriage “for the purpose of evading the immigration laws.”<sup>198</sup> Thus, noncitizens who previously sought immediate relative or preference status based on a marriage that USCIS determined was entered into in order to evade immigration laws, or who married a person in order to evade the immigration laws, will have their VAWA Self-Petitions denied. USCIS must find that the noncitizen falls within the marriage fraud statute by “substantial and probative evidence.”<sup>199</sup> “Substantial and probative evidence” is a higher standard than preponderance of the evidence, but lower than clear and convincing evidence.<sup>200</sup> When determining that a VAWA Self-Petitioner is barred from relief due to marriage fraud, USCIS may not rely on a prior finding of marriage fraud alone.<sup>201</sup> Instead, USCIS “must make a separate and independent determination that the self-petitioner previously engaged in marriage fraud.”<sup>202</sup>

Even if USCIS finds by “substantial probative evidence” that the self-petitioner has engaged in marriage fraud, the burden shifts to the self-petitioner to overcome the finding.<sup>203</sup> Thus, a self-petitioner may overcome an initial USCIS finding of marriage fraud.<sup>204</sup> The self-petitioner will have the opportunity to overcome the finding by responding to a Request for Evidence (“RFE”) or a Notice of Intent to Deny (“NOID”).<sup>205</sup>

If USCIS denies a VAWA Self-Petition based *solely* on a *prior* marriage fraud finding, practitioners are encouraged to argue that such a denial is barred by *Matter of Tawfik*, which holds that the agency generally must make an independent determination of marriage fraud based on the

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<sup>196</sup> See INA §204(c)

<sup>197</sup> Cf. *id.*

<sup>198</sup> See 3 USCIS-PM D.3(C)(2).

<sup>199</sup> See *id.*

<sup>200</sup> See *Matter of Singh*, 27 I&N Dec. 598, 607 (BIA 2019).

<sup>201</sup> See 3 USCIS-PM D.3(C)(2) (citing *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990)).

<sup>202</sup> See 3 USCIS-PM D.3(C)(2) (citing *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990)).

<sup>203</sup> See 3 USCIS-PM D.3(C)(2) (citing *Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988)).

<sup>204</sup> Cf. *Matter of Kahy*, 19 I&N Dec. 803, 806-07 (BIA 1988)).

<sup>205</sup> See 3 USCIS-PM D.3(C)(2).

available evidence, rather than giving “conclusive effect” to determinations of marriage fraud made in prior proceedings.<sup>206</sup> If USCIS denies a VAWA Self-Petition due to marriage fraud without giving the self-petitioner an opportunity to rebut the finding, practitioners are encouraged to argue that such a denial is barred by *Matter of Kahy*, which creates a burden-shifting framework and thus requires that petitioners be given the opportunity to rebut a marriage fraud finding.<sup>207</sup> If the survivor’s prior or current marriage was *not* fraudulent but USCIS has made a finding of fraud and shifted the burden to the survivor, the survivor and practitioner should respond with as much evidence as possible of good faith marriage. The evidence should ideally include a detailed affidavit from the survivor that addresses the following regarding the marriage that USCIS is alleging is fraudulent: their courtship and relationship with this person; their reason for marrying this person; their state of mind at the time of the marriage; and their shared life with this person. Survivors are also encouraged to submit affidavits from individuals with knowledge of the marriage and extensive, varied, and detailed documentary evidence of good faith marriage. If the survivor is unable to obtain documentary evidence for safety or other reasons, the survivor should explain their inability to obtain this evidence in a detailed affidavit.

Due to the harsh consequences of INA §204(c), practitioners should have candid conversations with their survivor clients about all of their prior marriages and immigration applications before filing a VAWA Self-Petition. Practitioners should explain the consequences of marriage fraud to their clients and emphasize the importance of honesty when sharing information about prior marriages with their attorneys. In addition to presenting INA §204(c) bar concerns, clients who filed previous immigration applications based on fraudulent marriages may also be inadmissible for fraud or misrepresentation. To avoid post-filing marriage fraud issues for a survivor client, practitioners should not file a VAWA Self-Petition for a client who previously engaged in marriage fraud or attempted to obtain immigration status based on a fraudulent marriage. Practitioners should also file FOIA requests to obtain prior immigration filings before filing an I-360.

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<sup>206</sup> See *Tawfik*, 20 I&N Dec. at 168.

<sup>207</sup> Cf. *Kahy*, 19 I&N Dec. at 806-07.



## D. Death of the U.S. Citizen, Lawful Permanent Resident, or Self-Petitioner

### 1. Abusive U.S. Citizen's Death

#### *Abusive U.S. Citizen Dies Prior to the Filing of the Self-Petition*

USCIS has stated that the requirement for a self-petitioner to file within 2 years of the death of the abusive U.S. citizen relative “is a condition of eligibility for which there is no waiver or equitable tolling available.”<sup>208</sup> Essentially, USCIS is arguing that the 2 year filing deadline in the event of divorce is a statute of repose rather than a statute of limitations.<sup>209</sup> For a discussion of equitable tolling and strategies for filing after the abusive relative has died, please refer to the “Divorce” section of this Advisory.

#### **Abusive Lawful Permanent Resident's Death**

USCIS has clarified that a survivor is not eligible to file a VAWA Self-Petition if their abusive LPR relative dies before the self-petition is filed.<sup>210</sup> If the abusive LPR relative dies while the self-petition is pending or after it is approved, USCIS has stated that it may continue to adjudicate the petition or a subsequent Application for Adjustment of Status under INA §204(l) “as a matter of discretion.”<sup>211</sup> However, USCIS’s discretion to deny the self-petition or adjustment application is limited under the statute. The statute states that the noncitizen “*shall* have such petition...or application for adjustment of status...adjudicated notwithstanding the death of the qualifying relative, *unless*” USCIS determines “in the unreviewable discretion of the Secretary, that approval would not be in the public interest.”<sup>212</sup> (emphasis added). While *DHS’s discretionary determination that approval is not in the public interest* is not reviewable, the statute does *not* grant USCIS discretion to deny the self-petition or adjustment application in surviving relative situations for *any* reason – rather, USCIS’s discretion is *limited* to a determination that approval is not in the public interest.<sup>213</sup> Therefore, practitioners are encouraged to challenge any “discretionary” denial of a surviving relative’s self-petition or adjustment

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<sup>208</sup> See 3 USCIS-PM D.3(D)(1).

<sup>209</sup> See footnote 173, *supra*, at page 32.

<sup>210</sup> See 3 USCIS-PM D.3(D)(2).

<sup>211</sup> See *id.* (citing INA §204(l)(2)(B)).

<sup>212</sup> See INA §204(l)(1).

<sup>213</sup> *Cf. id.*

application that is not grounded in an explicit finding that approval is not in the public interest. Practitioners are also encouraged to argue that approval of the self-petition and/or adjustment application for a surviving abused relative *is* in the public interest, because the approval accords with the congressional intent of allowing these noncitizens to self-petition for lawful immigration status.

To benefit from surviving relative protection, the statute requires that the self-petitioner: 1) lived in the United States at the time of the abusive relative's death **and** 2) continues to live in the United States.<sup>214</sup> However, USCIS has stated that it *may* approve the self-petition or adjustment application for the self-petitioner and all derivatives “as a matter of discretion” as long as the self-petitioner **or** *at least one* derivative met the residency requirements in the statute.<sup>215</sup>

### **3. Self-Petitioner's Death**

USCIS has stated that it may approve, “as a matter of discretion,” a self-petition or adjustment application *for derivatives* under INA §204(l) if *the self-petitioner* dies while the self-petition or adjustment application is pending.<sup>216</sup> In these cases, the “qualifying relative” under the statute is the principal VAWA self-petitioner. However, just as in situations when the abusive LPR relative dies after the self-petition is filed, USCIS's discretion to deny the self-petition or adjustment application is limited under the statute.<sup>217</sup> Because the statute does not grant USCIS unlimited discretion to deny the self-petition or adjustment application when the self-petitioner dies after the petition is filed<sup>218</sup>, practitioners are encouraged to challenge a “discretionary” denial of a self-petition or adjustment of status application for surviving derivatives that is not grounded in an explicit determination that approval is not in the public interest.

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<sup>214</sup> See INA §204(l)(1).

<sup>215</sup> See 3 USCIS-PM D.3(D)(2).

<sup>216</sup> 3 USCIS-PM D.3(D)(3).

<sup>217</sup> Cf. INA §204(l)(1).

<sup>218</sup> Cf. *id.*

## **E. Loss or Renunciation of U.S. Citizenship or Loss of Lawful Permanent Resident Status**

### **1. Loss or Renunciation of U.S. Citizenship or Loss of Lawful Permanent Resident Status Prior to Filing**

USCIS has stated that the 2-year filing deadline after the abuser's loss or renunciation of U.S. Citizen or LPR status "is a condition of eligibility for which no waiver or equitable tolling is available."<sup>219</sup> Essentially, USCIS is arguing that the 2 year filing deadline in the event of divorce is a statute of repose rather than a statute of limitations.<sup>220</sup> For a discussion of equitable tolling and strategies for filing after the abusive relative has died, please refer to the "Divorce" section of this Advisory.

## **G. Child Turning 21 Years Old**

### **2. Self-Petitioning Child or Derivative Turns 21 Years Old After the Self-Petition is Filed**

USCIS has stated that derivative children and child self-petitioners may marry after the VAWA Self-Petition is approved, and that after marriage the noncitizen will be moved to the preference category that best matches their situation.<sup>221</sup> However, according to USCIS, child self-petitioners and derivative children lose protection under the Child Status Protection Act ("CSPA") and the VTVPA if they marry.<sup>222</sup> Therefore, practitioners should advise child self-petitioners or child derivatives of this fact *before* they marry.

In addition, **there is no preference category for married sons and daughters of LPRs.**<sup>223</sup> Therefore, *derivative children of abused spouses of LPRs and abused children of LPRs should **not** marry until their adjustment of status applications are approved.* If these noncitizens marry before their adjustment applications are approved, they will lose eligibility for adjustment of status.

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<sup>219</sup> See 3 USCIS-PM D.3(E)(1).

<sup>220</sup> See footnote 173, *supra*, at page 32.

<sup>221</sup> See 3 USCIS-PM D.3(G)(2) (citing INA §204(a)(1)(D)(i)).

<sup>222</sup> See 3 USCIS-PM D.3(G)(2) (citing Pub. L. 107-208, 116 Stat. 927 (August 6, 2002) and Title V of Pub. L. 106-386, 114 Stat. 1464 (October 28, 2000)).

<sup>223</sup> See generally INA §203(a)

Further, even if a client *is* theoretically able to marry after the self-petition is approved, practitioners should advise the client of the significant delays associated with adjustment of status as a married son or daughter of a U.S. citizen. Practitioners should check the Department of State’s visa bulletin monthly to determine the current priority dates for the “F3” (married sons and daughters of U.S. citizens) category.

## **Chapter 4 - Filing Requirements**

### **A. Filing Requirements and Initial Review**

#### **1. Priority Dates**

USCIS has clarified that if a self-petitioner is the beneficiary of a Form I-130 family petition filed by the abuser, the self-petitioner “may retain the priority date from the Form I-130” for purposes of determining eligibility to file for Adjustment of Status.<sup>224</sup> The regulation holds that it is the self-petitioner’s burden to establish that a petition has previously been filed for them by the abuser, but that DHS will attempt to verify a petition through a search of its records.<sup>225</sup> Therefore, survivors should include primary evidence that the abuser previously filed a family petition for them if possible. Primary evidence may include a receipt or approval notice. If the survivor does not have access to this evidence, similar to situations when the survivor requests DHS to search its systems for evidence of the abuser’s immigration or citizenship status, the survivor should provide as much information as possible about the previously filed petition to aid DHS’s search. The information may include the name and identifying information for the abuser who filed the petition, the name of the attorney or representative who filed the petition, a filing date and location for the petition, a receipt number, and/or the petition’s approval date. In addition, USCIS has stated that derivatives “may retain” the self-petitioner’s priority date associated with the previously filed family petition.<sup>226</sup>

#### **Example:**

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<sup>224</sup> See 3 USCIS-PM D.4(A)(1) (citing 8 C.F.R. §204.2(h)(2)).

<sup>225</sup> See 8 C.F.R. §204.2(h)(2).

<sup>226</sup> See 3 USCIS-PM D.4(A)(1) (citing 8 C.F.R. §204.2(c)(4) (states that derivatives “may” retain the same priority date as the principal.))

Alejandro is married to Angela, an abusive Lawful Permanent Resident. Angela filed an I-130 for Alejandro on June 30, 2015. Alejandro never filed for adjustment of status based on the I-130. On January 5, 2022, Alejandro filed a VAWA Self-Petition based on Angela’s abuse. Alejandro included his 16-year-old child from a previous relationship as a derivative on his VAWA Self-Petition. For purposes of VAWA-based adjustment eligibility, Alejandro and his child may retain the priority date from the previously-filed I-130, which is June 30, 2015. The earlier priority date is helpful for Alejandro and his child in the event the “F2A” category in the visa bulletin (spouses and children of LPRs) retrogresses or becomes oversubscribed.

## **Chapter 5 - Adjudication**

### **A. Prima Facie Review**

In the Adjudicator’s Field Manual (“AFM”), USCIS stated that they *would not* issue Prima Facie Determinations (“PFDs”) for self-petitioning parents of U.S. citizens until they were “recognized as “qualified [noncitizens]”<sup>227</sup>” under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”).<sup>228</sup> PRWORA allows individuals who are deemed “qualified [noncitizens]” to access certain public benefits.<sup>229</sup> While abused parents of U.S. citizens are still not considered “qualified noncitizens” under PRWORA<sup>230</sup>, USCIS ***will*** now issue PFDs to eligible self-petitioning abused parents of U.S. citizens.<sup>231</sup> USCIS’s decision to issue PFDs to abused parents of U.S. citizens is welcome, since the PFDs may strengthen any requests for prosecutorial discretion with ICE, including OPLA; and/or may

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<sup>227</sup> While the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 uses the term “alien,” ASISTA uses the term “noncitizens” instead of “aliens.”

<sup>228</sup> UNITED STATES CITIZENSHIP AND IMMIGRATION SERVS., ADJUDICATOR’S FIELD MANUAL Chapter 21.15, at 258, *available at* <https://web.archive.org/web/20211117031330/https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm21-external.pdf>.

<sup>229</sup> *See generally* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193 (1996).

<sup>230</sup> *See generally id.*

<sup>231</sup> *See* 3 USCIS-PM D.5(A).

strengthen any motions for continuance or administrative closure of removal proceedings.<sup>232</sup>

## **B. Review of Evidence**

### **1. Any Credible Evidence Provision**

USCIS has recognized, as a matter of agency policy, the difficulties that self-petitioners may have “obtaining specific documentation” due to the abuser controlling access to or destroying documentation or the self-petitioner fleeing an abusive situation.<sup>233</sup> USCIS further stated that “officers *should* be aware of and consider these issues when evaluating the evidence.”<sup>234</sup> (emphasis added).

#### *Weighing and Determining the Credibility of Evidence*

USCIS interprets the statutory requirement to “consider any credible evidence” as creating a rule that a VAWA Self-Petition “may not be denied for failure to submit a particular piece of evidence.”<sup>235</sup> According to USCIS, a petition may only be denied if “the evidence submitted is not credible or otherwise fails to establish eligibility.”<sup>236</sup> Therefore, to avoid denials, practitioners must ensure that all evidence submitted with a VAWA Self-Petition is both internally and externally credible.<sup>237</sup> In addition, credible primary and third-party evidence of abuse (such as court documents or medical records) should be submitted if available, since USCIS generally gives “more weight” to “primary evidence and evidence provided in court documents, medical reports, police reports, and other official documents.”<sup>238</sup> Practitioners are encouraged to cite these Policy Manual provisions in cover letters or briefs that accompany VAWA Self-Petitions

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<sup>232</sup> Cf. *Matter of L-A-B-R*, 27 I&N Dec. 405, 406 (2018) (continuances) and *Matter of Avetisyan*, 25 I&N Dec. 688, 696 (2012) (administrative closure) (both decisions consider the likelihood that the respondent’s request for relief outside of removal proceedings will be approved). *Matter of Cruz-Valdez* held that, unless a circuit court has held otherwise, IJs and the BIA “should apply the standard for administrative closure set out in *Matter of Avetisyan* and *Matter of W-Y-U*.” *Matter of Cruz-Valdez*, 28 I&N Dec. 326, 329 (A.G. 2021).

<sup>233</sup> See 3 USCIS-PM D.5(B)(2).

<sup>234</sup> See *id.*

<sup>235</sup> See *id.* (citing INA §204(a)(1)(J), 8 C.F.R. §204.2(c)(2)(i), 8 C.F.R. §204.2(e)(2)(i), and 61 FR 13061 (March 26, 1996)).

<sup>236</sup> 3 USCIS-PM D.5(B)(2).

<sup>237</sup> Cf. *id.*

<sup>238</sup> See *id.*

that contain little or no documentary evidence but nevertheless contain credible evidence of each of the eligibility requirements. Similarly, practitioners are encouraged to challenge a VAWA Self-Petition denial that is based on lack of documentary evidence and/or lack of a particular piece of evidence as contrary to USCIS policy.<sup>239</sup>

## **C. Decision**

### **1. Discretion**

USCIS has acknowledged that approval of a VAWA Self-Petition “is not discretionary” under the statute.<sup>240</sup> While USCIS’s position is that the good moral character requirement is discretionary<sup>241</sup>, *the actual approval of the self-petition* if all requirements have been met is not discretionary.<sup>242</sup> Therefore, if a VAWA Self-Petitioner meets all of the eligibility requirements, the self-petition *must* be approved. A self-petitioner who meets all eligibility requirements does not need to make an *additional* showing that her VAWA Self-Petition should be approved as a matter of discretion.<sup>243</sup>

### *Deferred Action*

USCIS has stated that derivative beneficiaries are required to submit two documents with their deferred action request: 1) a copy of the self-petition approval notice; and 2) “evidence of the qualifying derivative relationship.”<sup>244</sup> Therefore, derivatives who are requesting deferred action based on their parent’s approved VAWA Self-Petition must submit their birth certificates or other evidence of the relationship a second time when requesting deferred action. According to USCIS, they cannot rely on evidence of the parental relationship that was previously submitted with the VAWA Self-Petition.

## **D. Special Considerations for Self-Petitions Filed Subsequent to Family-Based Immigrant Petition and Adjustment Application**

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<sup>239</sup> Cf. 3 USCIS-PM D.5(B)(2).

<sup>240</sup> See 3 USCIS-PM D.5(C)(1) (citing INA §204(b)).

<sup>241</sup> See 3 USCIS-PM D.2(G)(4).

<sup>242</sup> Cf. INA §204(b), 3 USCIS-PM D.5(C)(1).

<sup>243</sup> Cf. INA §204(b), 3 USCIS-PM D.5(C)(1).

<sup>244</sup> 3 USCIS-PM D.5(C)(2).

If the VAWA Self-Petitioner has a family-based I-485 pending with USCIS, USCIS allows the self-petitioner to notify the USCIS office where the I-485 is pending of the pending self-petition, to request that USCIS holds the adjudication of the pending I-485, and to request a change in the underlying basis of the pending I-485.<sup>245</sup>

Similarly, if the survivor intends to file a self-petition but has not yet done so, USCIS allows the survivor to contact the USCIS office where the family-based I-485 is pending to notify them of the intent to file a VAWA Self-Petition and to request that USCIS holds the adjudication of the pending I-485.<sup>246</sup> The notification should contain the survivor's name, A-number, and a safe address where they can be contacted.<sup>247</sup> Survivors have 30 days to file a VAWA Self-Petition after USCIS receives notice of the intent to file a VAWA Self-Petition.<sup>248</sup> Therefore, it is important that a VAWA Self-Petition is filed at the Vermont Service Center **as soon as possible after USCIS is notified of the intent to file the self-petition.**

When contacting a USCIS office where a survivor's family-based I-485 is pending, practitioners are encouraged to attach and highlight this section of the Policy Manual that allows for requests to hold adjudication of the pending I-485. Practitioners should also flag the confidentiality protections at 8 U.S.C. §1367 when contacting the local USCIS office, since the local office may be unfamiliar with the protections.<sup>249</sup>

USCIS has clarified that it considers the confidentiality protections at 8 U.S.C. §1367 to apply to noncitizens with pending VAWA Self-Petitions *and* to noncitizens who have notified USCIS that they *intend* to file a self-petition.<sup>250</sup> However, USCIS has stated that the statutory protections "will not apply to the adjudication of any forms" if a VAWA Self-Petition is never filed after notification of an intent to file the self-petition.<sup>251</sup> This statement is of course limited by the fact that USCIS is statutorily *required* to apply the confidentiality protections to any other applications or petitions that the

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<sup>245</sup> See 3 USCIS-PM D.5(D).

<sup>246</sup> See *id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> See sample request to hold I-485 in abeyance: <https://asistahelp.org/wp-content/uploads/2018/11/Hold-in-Abeyance-Letter.docx>

<sup>250</sup> See 3 USCIS-PM D.5(D) (citing DHS Directive, "Implementation of Section 1367 Information Provisions," Instruction Number: 002-02-001, issued November 1, 2013).

<sup>251</sup> 3 USCIS-PM D.5(D).



survivor files that fall under 8 U.S.C. §1367, such as a petition for U Nonimmigrant Status. However, practitioners should advise their survivor clients that USCIS may determine that the confidentiality protections do not apply if the survivor never files the self-petition or any other victim-based application for relief.

## **Chapter 6 - Post-Adjudicative Matters**

### **A. Revocations**

USCIS has stated that a VAWA Self-Petition may be revoked if a self-petitioner is “no longer a person of good moral character.”<sup>252</sup> Thus, under USCIS’s interpretation, VAWA Self-Petitioners are required to maintain good moral character until their VAWA-based application for adjustment of status is approved. For VAWA Self-Petitioners who are unable to adjust for inadmissibility or other reasons, under USCIS’s interpretation, they must maintain good moral character in perpetuity or at least until the time that they obtain LPR status some other way. Practitioners should advise all of their VAWA Self-Petition clients that the good moral character requirement continues past approval of the self-petition. However, if USCIS issues a notice of intent to revoke a VAWA Self-Petition due to good moral character issues, and the good moral character issues are connected to battery or extreme cruelty by the U.S. Citizen or LPR relative, practitioners are encouraged to submit evidence of the connection and argue that the self-petition should not be revoked because of the connection between the “battery or extreme cruelty” and the good moral character violation.<sup>253</sup>

#### **1. Authority to Revoke a Self-Petition**

USCIS has clarified that “service center officers have the sole authority to revoke the approval of a self-petition.”<sup>254</sup>

#### **2. USCIS Field Office – Officer’s Request for Review of an Approved Self-Petition**

USCIS has also clarified that officers in USCIS field offices who adjudicate an approved self-petitioner’s Adjustment of Status application “generally

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<sup>252</sup> 3 USCIS-PM D.6(A).

<sup>253</sup> Cf. INA §204(C)

<sup>254</sup> See 3 USCIS-PM D.6(A)(1).

may not inquire about instances of abuse or extreme cruelty or attempt to re-adjudicate the merits of the underlying approved self-petition.”<sup>255</sup> Officers at USCIS field offices are instructed to submit a memorandum to their supervisor if they encounter “new information that leads them to reasonably believe that the approval of the self-petition should be revoked.”<sup>256</sup> USCIS has reminded officers that they must follow 8 U.S.C. §1367, which USCIS interprets as forbidding the agency from “making an adverse determination using information provided solely by an abuser.”<sup>257</sup>

Therefore, officers at USCIS field offices may not unilaterally revoke VAWA Self-Petitions and are required to submit a memorandum to a supervisor in the event they encounter new derogatory information. Further, USCIS states that they are forbidden from “making an adverse determination using information provided solely by an abuser.”<sup>258</sup> If an officer at a USCIS field office tries to unilaterally revoke a self-petition or attempts to “re-adjudicate the merits of the underlying approved self-petition”, the practitioner is encouraged to point the officer to the relevant section of the Policy Manual, argue that any unilateral revocation is contrary to USCIS policy, and highlight that the officer is bound by the 8 U.S.C. §1367 confidentiality protections. The practitioner is also encouraged to bring the issue to ASISTA’s attention.

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<sup>255</sup> See 3 USCIS-PM D.6(A)(2).

<sup>256</sup> *Id.*

<sup>257</sup> See *id.*

<sup>258</sup> *Cf. id.*