

VAWA SELF-PETITIONING: SOME PRACTICE POINTERS

by Gail Pendleton*

This advisory provides practice pointers on properly preparing self-petitions under the Violence Against Women Act (VAWA) to avoid common problems, describes special confidentiality protections, and suggests that there is light at the end of the tunnel for VAWA self-petitioners facing reinstatement of removal. At the end, it provides a list of the Code of Federal Regulations (CFR) Title 8 provisions that have been superseded by later statutes, but not yet changed in the regulations.

SOME OF THE VAWA REGULATIONS ARE OBSOLETE

Most of the statutory changes to VAWA have been implemented through guidance, not regulations, so it is extremely important that you look for interpretation and support in the following order: (1) statute; (2) guidance memoranda from U.S. Citizenship and Immigration Services (USCIS); and (3) regulations, with the caveat that some of the regulations are now wrong (see below for details).

For regular updates and practice pointers, readers should join the VAWA Updates listserv, run by ASISTA and the National Immigration Project of the National Lawyers Guild, and regularly check the ASISTA website.¹

WHAT CAUSES THE BIGGEST PROBLEMS WITH SELF-PETITIONS?

As primary liaison to USCIS for VAWA and U visas, I work with practitioners and USCIS to resolve both individual case and systemic policy problems. With regard to self-petitions, the most difficult problem I encounter is adverse credibility determinations. Once in doubt, it is extremely difficult to rehabilitate your client's credibility, so here are some practice pointers on how to avoid adverse findings.

- Review prior filings anywhere in the system and acknowledge upfront discrepancies between those filings and your client's current statements. Is the abuser causing the discrepancies? Were the inconsistencies otherwise the result of being a victim of domestic violence (DV)? Explain why what you are telling them now is different than what they will find in existing files.
- Work with a DV advocate to elicit your client's full story. Immigration lawyers are not necessarily trained in working with victims of DV and often miss crucial information, such as marital rape, because they do not know how to ask questions in a way that yields full information. DV advocates are trained to do this. Moreover, they can help your clients organize their thoughts in the way most useful to an application for immigration relief. They can also provide corroborating declarations, especially regarding extreme cruelty.
- Explore non-physical forms of domestic violence, *i.e.*, extreme cruelty. The non-physical forms of abuse may be harder for victims to recognize, describe, and overcome because it alters their psyche. Extreme cruelty is any form of power and control, not just a bad marriage. DV advocates and social science literature can corroborate your client's story.
- Ensure that your client's story is in her own voice. If you include legal jargon or your own phrases, then USCIS will discount the story. The declaration should provide detail and chronology, as well as explain why certain documents are not available if they typically should exist. For example, the client sought medical treatment, but hospital personnel took no pictures. Why not? Again, DV advocates can corroborate how victims' reluctance to trust or use systems stem from the abusers' power and control.

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- Explore any possible marriage fraud issues. Abusers seem to routinely allege marriage fraud by spouses who attempt to escape their power and control. Fortunately, Congress recognized that abusers often lie to undermine their victims' credibility and created special protections (see next section). Nevertheless, local Immigration and Customs Enforcement (ICE) and USCIS officers, often uneducated or antagonistic to VAWA or DV, generally may attempt to insert the abuser's voice into the process or allege marriage fraud on their own. If you know that this has been raised, address it head-on in the application.
- Prepare a "road map" cover letter that delineates how your client meets each eligibility requirement (not just a mere assertion that she does) and refer documents in your index supporting criterion.
- Compile an index for your documentation and highlight the sections in your documents that you want the adjudicators to read. Put yourself in the place of an adjudicator with a pile of documents to review and a checklist. The applications that allow an adjudicator to navigate the checklist quickly will get approved faster.
- Cite the "any credible evidence standard"² and explain how your client's documentation meets it. Explain why you could not get system documents where that might seem relevant. In general, USCIS looks favorably on "good faith" efforts to get the best documentation. Realize, however, that the "preponderance of the evidence" is still the burden; "any credible evidence" is what you may supply to meet that burden.

If you still get a Request for Evidence, contact me for help. For more than a decade, I have worked with USCIS on resolving cases. This experience enables me to identify problems immediately and provide insight. If we think USCIS is applying the law inappropriately, we can use your case to raise the systemic problem with USCIS decision-makers, thereby addressing your issue and helping others.

SPECIAL PROTECTIONS AGAINST EVIDENCE FROM ABUSERS

Congress created and has repeatedly expanded 8 USC §1367 to ensure that abusers and other perpetrators do not influence the immigration system's deliberative processes. The most important safeguard related to proving your client's claim is the protection against using information from the abuser or his family against your client.³ However, there is a loophole. The statute says that USCIS may not rely "solely" on information provided by abusers in making admissibility and deportability determinations.⁴ While the Vermont Service Center's (VSC) VAWA unit interprets this provision to mean that derogatory information derived from abusers is inherently unreliable and will not be entertained at all unless it was provided by another source, other officers in the agency seem to find abusers credible, undermining Congress's goal and triggering the marriage fraud issues noted above. It is, therefore, vital that you challenge any attempt by abusers, as well as USCIS or ICE officers, to use information from these unreliable sources.

For immediate attention to an apparent violation, contact me so that we can work with USCIS and ICE officers to curtail and sanction violations of 8 USC §1364. You may also file formal complaints with the Department of Homeland Security's Office of Civil Rights (OCR). At this writing, however, the description of the special VAWA protections was not readily available on OCR's website. The general complaint form mentions VAWA protections in one sentence without explanation. The statistics do not list VAWA protection violations separately.⁵

OVERCOMING REINSTATEMENT OF REMOVAL

As noted in a 2009 memorandum, VAWA self-petitioners may be able to overcome reinstatement of removal under Immigration and Nationality Act (INA) §241(a)(5).⁶ Section G acknowledges that VAWA

² INA §204(a)(1)(J).

³ 8 USC §1367(a)(1).

⁴ *Id.*

⁵ See Department of Homeland Security, www.dhs.gov (search for "complaints").

⁶ USCIS Memorandum, M. Aytes, "Adjudicating Forms I-212 for Aliens Inadmissible Under Section 212(a)(9)(C) or Subject to Reinstatement Under Section 241(a)(5) of the Immigration and Nationality Act in light of *Gonzalez v. DHS*, 508 F.3d. 1227 (9th Cir. 2007)" (May 19, 2009), published on AILA InfoNet at Doc. No. 10012674 (posted Jan. 26, 2010).

self-petitioners may be able to overcome unlawful presence INA §212(a)(9)(C) through a waiver application.⁷ That, along with a Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, should “cure” reinstatement for VAWA self-petitioners. The memorandum is a little muddled, however, and many practitioners are wary of using their clients as guinea pigs to test whether local offices understand that their clients may overcome reinstatement. To avoid confusion, USCIS General Counsel’s Office VAWA officers have offered to help educate local offices about the memorandum’s implications for VAWA self-petitioners. I am also available to provide clarification.

INCOMPLETE OR INACCURATE 8 CFR PROVISIONS ON VAWA SELF-PETITIONS

No longer current relationship

- 8 CFR §§204.2(c)(1)(i)(A) and (c)(2)(ii)—(spouses);
- 8 CFR §204.2(e)(1)(i)(A) (child)—incomplete;
- 8 CFR §204.2(c)(1)(ii) (legal status of the marriage)—No need to have to be married at time of filing and termination of marriage does not vitiate self-petition.
- INA §§204(a)(1)(A)(iii)(II)(aa) and 204(a)(1)(B)(ii)(II)(aa)—current spouse, bigamous spouse, died within two years or lost status within two years. *None of these changes are reflected in 8 CFR.*
- INA §§204(a)(1)(A)(iv) and 204(a)(1)(B)(iii)—child is or was the child of a lawful permanent resident but abuser died or lost status within two years.

No U.S. Residence Required

8 CFR §§204.2(c)(1)(i)(C) and 204.2(e)(1)(i)(C)—wrong, requiring residence in United States.

INA §§204(a)(1)(A)(v) and 204(a)(1)(B)(iv)—residing in the United States or residing abroad if: (1) some abuse took place in the United States; or (2) abuser is member of the U.S. uniformed services; or (3) employed by the U.S. government.

No Residence in the United States with Abuser Required

- 8 CFR §§204.2(c)(1)(i)(D), (c)(1)(v) and (c)(2)(iii) (spouses);
- 8 CFR §§204.2(c)(1)(i)(D) and 204.1(e)(1)(i)(D) (child)—completely wrong (though evidence list presumably still helpful, just apply abroad as well as in the United States).
- INA §§204(a)(1)(A)(iii)(II)(dd) and 204(a)(1)(B)(ii)(II)(dd)—has resided anywhere with spouse;
- INA §§204(a)(1)(A)(iv) and 204(a)(1)(B)(iii)—is or has resided and includes visitation.

No Extreme Hardship Required

- 8 CFR §§204.2(c)(1)(i)(G), (c)(1)(viii) and (c)(2)(vi) (spouses);
- 8 CFR §§204.2(e)(1)(i)(G), (e)(1)(viii) and (e)(2)(vi) (child) —eliminated by Congress in 2000.

Abuser Need Not Be in Status and Upgrades Automatically Apply

- 8 CFR §204.2(c)(1)(iii)—completely wrong, except that negative changes in abusers status do not affect the self-petitioner.
- INA §§204(a)(1)(A)(iii)(II)(aa)(CC) and (vi);
- INA §§204(a)(1)(B)(ii)(II)(aa)(CC) and (v)(II)—(automatic upgrade to immediate relative if LPR becomes USC).

Good Moral Character Exception

- 8 CFR §§204.2(c)(1)(vii) and 204.2(e)(1)(vii)—lacks good moral character exception in statute.

⁷ *Id.* at 6.

- INA §§204(a)(1)(C)—Finding GMC is not barred if act is waivable or connected to the abuse or extreme cruelty.

Revocation Not Automatic

- 8 CFR §205.1(a)(3)(i)(E)—remarriage = auto revocation (no longer true).
- INA §204(h)—remarriage is not basis for revocation.

Derivative Transformation

- 8 CFR §204.2(c)(4)—Last sentence incorrect (derivatives can't age out).
- INA §204(a)(1)(D)—as long as filed before age out, transformed into self-petitioner under relevant category.

Derivatives of Child Self-Petitioners

- 8 CFR §204.2(e)(4)—completely wrong.
- INA §§204(a)(1)(A)(iv) and 204(a)(1)(B)(iii)—child applicants may include their children.

Children Between 21–25

- 8 CFR §204.2(e)(1)(ii)—completely wrong (no age-out allowed before approval)
- 8 CFR §204(a)(1)(D)(v)—individuals between 21–25 can file as if children, measured on day before 21, if DV = one central reason for failure to timely file.

Elder Abuse Not Included

- INA §204(a)(1)(A)(vii)
- **Instead:** See draft USCIS memorandum on elder abuse provision (reading in any credible evidence standard and other provisions parallel to spouse and child self-petitions.⁸

⁸ USCIS Draft Memorandum, “Eligibility to Self-Petition as a Battered or Abused Parent of a U.S. Citizen; Revisions to Adjudicator’s Field Manual (AFM) ch. 21.15 (AFM Update AD 06-32),” published on AILA InfoNet at Doc. No. 11010731 (posted Jan.7, 2011).