

AMERICAN BAR ASSOCIATION
COMMISSION ON IMMIGRATION
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, that the American Bar Association supports avenues for lawful immigration status,
2 employment authorization, and public benefits, for victims and derivative family members, of
3 human trafficking and crimes described in section 101(a)(15)(U)(iii) of the Immigration and
4 Nationality Act, which occur in the United States or its territories.

5
6 FURTHER RESOLVED, that the American Bar Association supports:

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8 (a) allowing a spouse, intended spouse as defined in section 101(a)(50) of the Immigration &
9 Nationality Act, child, or parent of a United States citizen or lawful permanent resident
10 who is abused by such United States citizen or lawful permanent resident, to self-petition
11 for lawful immigration status without the knowledge or participation of the abuser;
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13 (b) allowing child victims of abusive United States citizen or lawful permanent resident
14 parents, and derivative children of abused self-petitioners, to remain eligible for
15 immigration benefits after turning twenty-one; and
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17 (c) the use of Legal Services Corporation funding for services for victims of human
18 trafficking, domestic violence, and crimes described in section 101(a)(15)(U)(iii) of the
19 Immigration and Nationality Act that occur in the United States or its territories,
20 regardless of the victim's immigration status.

21
22 FURTHER RESOLVED, that the American Bar Association opposes:

- 23
24 (a) the apprehension of victims of human trafficking, domestic violence, or crimes described
25 in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act that occur in the
26 United States or its territories, for immigration violations, at shelters, crisis centers, or
27 courts where victims are seeking protection orders; and
28
29 (b) the placement of victims of human trafficking, domestic violence, and crimes described
30 in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act that occur in the
31 United States or its territories, in removal proceedings and immigration detention, who
32 may be eligible for immigration relief and who do not pose a danger to others or to
33 national security.

REPORT

*This is the seventh and final report in the Commission's series of resolutions and reports that addresses "Protections for Immigrant Victims of Crime," as explained at the beginning of the first report (107A).

I. Introduction: Vulnerable Immigrant Populations

The American Bar Association (ABA) has consistently recognized the need for legal protections for the most vulnerable members of our society, including immigrants and refugees. For example, in 2001, the Association adopted a policy in support of gender-based persecution as a ground for asylum under the Immigration & Nationality Act, and in 2004, the Association adopted *Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States*, to address the comprehensive psychological, legal, medical, mental health, educational and other basic needs of unaccompanied immigrant children in federal custody. The ABA Commission on Immigration has also been at the forefront of promoting access to the legal process for indigent immigration detainees through its pro bono and advocacy initiatives.

Abused non-citizen spouses and children, and non-citizen survivors of human trafficking and other crimes likewise face unique challenges as they navigate the immigration process. Fortunately, Congress created humanitarian forms of immigration relief for these individuals through the Violence Against Women Act (VAWA) in 1994, and then again in 2000, with the passage of the Victims of Trafficking and Violence Protection Act (VTVPA). Consistent with the Association's mission and goals, the present resolution supports the principles upon which these federal Acts were founded. The resolution supports an immigration system that realistically and humanely addresses the multitude of obstacles faced by survivors of human trafficking, domestic violence, and other crimes, and that seeks to prevent additional undue hurdles for these individuals.

II. Family-based Immigration to the United States and the Violence Against Women Act (VAWA) of 1994

The Immigration and Nationality Act (INA) allows individuals to apply for lawful permanent residence in the United States (US) if they can establish a qualifying family relationship to a United States citizen (USC) or a lawful permanent resident (LPR). The INA defines which family relationships qualify, depending on whether the individual is related to a USC or an LPR.¹ To apply for legal status based on a family relationship, the individual must file an application for a permanent resident card or green card,² and the USC/LPR relative must file a petition on the applicant's behalf to classify him or her as an eligible relative. The United States Citizenship and Immigration Services (CIS) then interviews both the immigrant applicant and the USC/LPR petitioner, and determines whether to grant the applicant lawful permanent residence.

¹ See INA Sections 201(b)(2)(A)(i) and Section 203(a)(1), (2), (3), and (4).

² If the individual is in the US, the application will be for "adjustment of status" to lawful permanent resident.

Filing the application and petition, which involves proving USC/LPR status and the existence of a qualifying relationship, necessarily requires cooperation between both the immigrant applicant and his or her USC/LPR relative. Both must attend the interview with CIS, and the applicant's basic eligibility for a green card depends on the family relationship and the relative's USC/LPR status. Before enactment of the VAWA, abusive USCs and LPRs were therefore able to use the immigration laws as a mechanism to further abuse and control their immigrant spouses and children. Perpetrators of domestic violence would routinely thwart or threaten to thwart the visa petitioning process. Common tactics included failing to attend the green card interview, providing false information to the government about the applicant, or withdrawing the visa petition. Although abusers continue to try to exploit the immigration laws in this manner, the VAWA renders many of these attempts unsuccessful by allowing victims to control the immigration process.³

The VAWA was enacted as part of the Violent Crime Control and Law Enforcement Act. It contained much-needed legal protections for survivors of domestic violence.⁴ In creating a special green card application process for battered spouses and children of USCs and LPRs, lawmakers recognized that many victims of domestic abuse were unwittingly victimized by the immigration system as well. The VAWA green card application process involves a "self-petition," so that the USC/LPR abuser is not involved at all in the petitioning process, and is therefore not required to attend the interview. In fact, the VAWA also contains provisions that prohibit the government from releasing information about the existence of a VAWA immigration case to the abuser or others. Furthermore, the government cannot make an adverse determination of removability or admissibility against a non-citizen based on information provided solely by an abusive spouse or parent.⁵

The VAWA defines "abuse" as physical abuse or mental cruelty, and self-petitioners typically provide reports and affidavits from police, medical personnel, and social workers to document it. In addition to establishing abuse, self-petitioners must also submit evidence of:

- the abuser's US citizenship or lawful permanent resident status;
- their legal relationship to the abuser;
- shared residence with the abuser;
- their current residence in the US;
- good-faith marriage; and

³Research has shown that between 34 and 49.5% of immigrant women (Rodriguez, R., 1995 May-June, Evaluation of the MCN Domestic Violence Assessment Form and Pilot Prevalence Study, Clinical Supplement of the Migrant Clinicians Network 1-2), and 59.5% of married immigrant women, experience domestic violence during their lifetimes. This research also showed that over 50% of married immigrant women were still living with their abusers (Dutton, Orloff, and Aguilar, Characteristics of Help Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas, Georgetown Journal on Poverty, Law, & Policy, Volume VII, 2, Summer 2000).

⁴ The immigration provisions were only one component of VAWA; the legislation also provided for more emergency shelters and hotlines, and trainings for prosecutors, court officials, and police. VAWA also resulted in better responses to domestic violence and sexual assault by the criminal justice system.

⁵ See Section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), codified at § 8 U.S.C.1367 (1996), entitled "Penalties for Disclosure of Information."

- their own good moral character.⁶

Finally, the VAWA also enables abused spouses of USCAs or LPRs to receive work authorization and public benefits.

III. VAWA 2000: Human Trafficking and Other Crimes

Congress passed the Violence Against Women Act of 2000 when authorization for the VAWA expired, and its provisions were merged with the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) and other smaller bills. The President signed the legislation into law on October 28, 2000. VAWA 2000 removed certain obstacles to self-petitioning for battered spouses and children, including the US residency and ‘extreme hardship’ requirements. The bill also lifted several restrictions on motions to reopen and adjustment of status, among others.⁷

The VTVPA created two new visa categories: a “T” visa for survivors of severe forms of human trafficking, and a “U” visa for victims of certain crimes, which may also involve human trafficking. Human trafficking is a form of slavery that affects men, women, and children of all ages worldwide. According to the US Department of State, approximately 600,000 – 800,000 people are trafficked across international borders every year. About 80 percent of trafficking victims are women and girls, and up to 50% of victims are children.⁸ Human trafficking may involve violations of labor, immigration, kidnapping, slavery, assault, battery, false imprisonment, fraud, and extortion laws.

Trafficking victims may end up as slave workers in both licit and/or illicit industries, including the commercial sex industry, construction, the drug trade, migrant work, and domestic servitude. Victims are often subjected to threats of violence and harm to family members, as well as severe forms of violence themselves. These may include starvation, sexual abuse and exploitation, and torture. The profits of trafficking are reaped by organized crime.⁹

Smuggling is commonly conflated with trafficking, however, they are distinct. Smuggling involves an agreement to be transported, where a fee for such transport is paid up

⁶ VAWA 2000, which contained improvements to the VAWA of 1994, was incorporated into the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), as Division B, Title V – Battered Immigrant Women. *See* VTVPA, Public Law 106-386, Oct. 28, 2000.

⁷ Prior to the VAWA 2000, self-petitioners were required to prove extreme hardship if they were ordered removed. The VAWA 2000 also contained new waivers of inadmissibility for survivors of domestic violence, and allows derivatives (children of self-petitioners) who turn 21 to transform into self-petitioners and keep their priority date for adjusting their status to lawful permanent resident. Other fixes in the VAWA 2000 included allowing self-petitioners to:

- apply from abroad if there has been domestic violence in the US;
- be transferred into the immediate relative visa category automatically when an LPR abuser naturalizes;
- self-petition if the abuser died or lost his or her status within the 2 years preceding the petition if such loss of status was "related" to domestic violence; and
- self-petition for a green card if the abuser is a bigamist.

⁸ US Department of State (DOS) Trafficking in Persons Report for 2005.

⁹ The Federal Bureau of Investigations estimates that trafficking generates 9.5 billion dollars of revenue annually. *See* 2005 US DOS Trafficking in Persons Report.

front, and the relationship between the smuggler and the smuggled individual ends upon arrival at the destination. Smuggling can often become trafficking, however, where the individual loses his or her autonomy, or the smuggler is abusive or threatening.

Victims of human trafficking, by contrast, are often brought to the US against their will, and are subjected to ongoing psychological and/or physical violence. Traffickers often maintain control of victims' identity and immigration documents and threaten to contact the Department of Homeland Security (DHS) if they flee. Some are brought to the US as domestic workers, but upon arrival they are treated as slaves. These individuals must remain "employed" by their trafficker in order to maintain lawful immigration status. They risk deportation if they escape. Victims and their families back home are usually in even greater danger if they flee and return to their home country. Most victims are apprehensive about seeking assistance from law enforcement, for fear of retaliation by their traffickers. Those who serve as government witnesses may fear re-experiencing their trauma when testifying on the witness stand about the violence they endured.

In enacting the VTVPA, Congress recognized the crucial need for humanitarian relief for non-citizen trafficking survivors, in the form of the three-year "T" visa, work authorization, public benefits, and eventually lawful permanent residence. Derivative family members may also gain legal status if they can show that the applicant or the derivative would suffer extreme hardship if not permitted to remain in or immigrate to the US.¹⁰

The "T" visa offers protection for survivors of "severe forms of trafficking in persons,"¹¹ which encompass sex trafficking and trafficking for labor or services, defined respectively as:

Sex trafficking¹² in which a commercial sex act¹³ is induced by force, fraud or coercion¹⁴ or in which the person induced to perform such act is under 18; and

The recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud, or coercion, for the purpose of subjecting that person to involuntary servitude,¹⁵ peonage, debt bondage,¹⁶ or slavery.

¹⁰See INA § 101(a)(15)(T)(ii). For applicants who are under 21, eligible derivatives are spouses, children, parents, and unmarried siblings under 18 on the date of the application. If the applicant is over 21, spouses and children may apply for derivative status.

¹¹ See § 103 (8) of the VTVPA.

¹²"Sex trafficking" is the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. See § 103 (9) of the VTVPA.

¹³"Commercial sex act" is any sex act on account of which anything of value is given to or received by any person. See § 103 (3) of the VTVPA.

¹⁴"Coercion" is defined as (A) threats of serious harm to or physical restraint against any person; (B) a scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (C) abuse or threatened abuse of the legal process. See § 103 (2) of the VTVPA.

¹⁵"Involuntary servitude" includes a condition of servitude induced by means of (A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or (B) the abuse or threatened abuse of the legal process. See § 103 (5) of the VTVPA.

To be eligible for the “T” visa, one has to:

- be, or have been, the victim of a severe form of human trafficking;
- comply with reasonable requests from federal, state, or local law enforcement for assistance in the investigation or prosecution of the trafficking, unless the victim is under the age of 18;
- be in the US on account of trafficking; and
- demonstrate that one would suffer extreme hardship involving unusual and severe harm upon removal.¹⁷

There is an annual cap of 5,000 “T” visas per year.¹⁸ The “T” visa offers incentives for victims to report trafficking to law enforcement, and offers protection from further harm by allowing victims to remain in the US and to become economically self-sufficient.

As noted, a wider variety of crime victims is covered by the “U” visa. To be eligible for the “U” visa, applicants must suffer "substantial physical or mental abuse" as the result of certain criminal activity that violates US laws or occurs in the United States or its territories. Qualifying crimes, as set out in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act, are as follows:

rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.¹⁹

In addition, the applicant must have information about the crime, and must have “been helpful,” be "helpful" or be "likely to be helpful" to a federal, state or local law enforcement official, prosecutor, judge, or other authority or to Immigration & Customs Enforcement (ICE) in investigating or prosecuting the crime. A certification to that effect from the official investigating or prosecuting the crime is required. If the victim is under the age of sixteen, his or her parent, guardian, or “next friend” can assist law enforcement in the place of the applicant.²⁰ Derivatives of the applicant may also be eligible for legal status, if the applicant shows that the derivative will endure extreme hardship otherwise.²¹

¹⁶“Debt bondage” is the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined. See § 103 (4) of the VTVPA.

¹⁷ INA § 101(a)(15)(T)(i).

¹⁸ VTVPA § 107(e)(2)(B)(3).

¹⁹ INA § 101(a)(15)(U)(iii).

²⁰ VTVPA § 1513 (b)(3)(II) and (III); INA § 101(a)(15)(U).

²¹ VTVPA § 1513 (b)(3)(IV)(ii) and (iii).

The VTVPA allows 10,000 individuals to receive “U” visas per year.²² Visa holders are permitted to work and to apply for a green card after three years of continuous presence in the US. An applicant must show that he or she merits a green card because of family unity, the public interest, or humanitarian considerations; that he or she is not a terrorist; and that he or she has not “unreasonably refused to provide assistance” in the criminal investigation or prosecution of the crime which gave rise to his or her “U” visa eligibility.²³

Despite enactment of the VTVPA, there have yet to be implementing regulations promulgated for the “U” visa. The visa is therefore unavailable to applicants, although interim relief and work authorization are available to those who establish prima facie eligibility for the “U” visa.²⁴

IV. Proposed Legislation: 2005 VAWA Reauthorization

Negotiations on the terms of a VAWA 2005, comprised of H.R. 2876 and S. 1197, are currently underway.²⁵ S. 1197 was introduced by Senator Joseph Biden (D-DE), Senator Arlen Specter (R-PA), and Senator Orrin Hatch (R-UT). H.R. 2876 was introduced by Representative Mark Green (R-WI) and Representative John Conyers, Jr. (D-MI). The proposed legislation contains several provisions relating to immigration relief for survivors of domestic violence, human trafficking, and the qualifying “U” visa crimes listed above.

Among other things, the VAWA 2005 would allow parents who have been battered or subjected to extreme cruelty by adult USC sons or daughters to self-petition for immigration status.²⁶ The VAWA 2005 also clarifies that child victims of abusive LPRs, and derivatives of self-petitioners abused by LPRs, should remain eligible for immigration benefits after turning 21. Another provision allows an individual under 25, who qualified as a self-petitioner the day before he or she turned 21, to self-petition for immigration status if he or she demonstrates a connection between the abuse and the delay in filing the self-petition. The VAWA 2005 would also remove a requirement that a non-citizen adopted child must reside with his or her adoptive family for two years before receiving lawful residence, where the adoptive parent or family member in the same household is abusive.²⁷ In addition, the VAWA 2005 would allow Legal Services Corporation (LSC) funding to be used to serve victims of crimes who are eligible for a “U” visa.²⁸ Currently, LSC funding may be used only for services for a narrower class of non-citizens.

A proposed provision in the VAWA 2005 would also prohibit DHS from apprehending undocumented victims of human trafficking, domestic violence, and “U”-visa crimes, for

²² VTVPA § 1513 (c)(2)(A) and (B). This number does not include derivatives.

²³ VTVPA §1513 (f)(1).

²⁴ Pursuant to DHS policies, such individuals may request “deferred action” from CIS, so that they can remain in the US and work while waiting for the regulations to be implemented. Granting deferred action is the exercise of prosecutorial discretion in favor of these individuals so that they are not subject to removal if they are “U” visa eligible.

²⁵ On October 4th, 2005, the Senate passed S. 1197 by unanimous consent.

²⁶ See S. 1197 §817, “Self-Petitioning Parents.”

²⁷ See S. 1197 §805, “Protecting Victims of Child Abuse.”

²⁸ See S. 1197 §104, “Ensuring Crime Victim Access To Legal Services.”

immigration violations only, at shelters, crisis centers, or courts where victims are seeking protection orders. Finally, the VAWA 2005 would prevent victims of human trafficking, domestic violence, and “U”-visa crimes who are eligible for relief from being put into removal proceedings and immigration detention unless they pose a danger to others or to national security.

V. Resolution

This resolution supports paths, created by the VAWA and the VTVPA, to lawful immigration status, employment authorization, and public benefits, for non-citizen battered spouses,²⁹ children, and parents, and for survivors of human trafficking and other crimes. Without these protections, victims of trafficking and other crimes would be forced to return home, to face grave threats to their life, safety, and freedom. In addition, mental health and other services desperately needed by victims as a result of the trauma they have suffered are often unavailable in their home countries. Access to employment authorization is crucial for victims’ basic survival, eventual economic independence, and contribution to our society. Through this resolution, the ABA can promote the fair and humane application of existing laws, as well as the promulgation of regulations to implement the “U” visa.

This resolution also supports allowing continued eligibility for immigration status and benefits after turning 21, for child victims of abusive USC or LPR parents, and for derivative children of abused self-petitioners. Current age cut-offs are arbitrary and unnecessary and create undue burdens and penalties for child victims of domestic abuse. Often, a self-petitioning child or derivative of an adult self-petitioner faces difficulty filing a petition as a result of abuse.

The resolution also supports Legal Services Corporation (LSC) funding for “U”- visa eligible individuals, because most non-citizen crime victims have little or no resources to pay for representation. Like survivors of domestic violence and trafficking, these individuals must rely on low-cost or pro bono services if they are to have any hope of accessing the legal system. The present distinction between applicants for the “U” visa and other crime victims is simply arbitrary.

The resolution opposes the apprehension of domestic violence, trafficking, and crime victims for immigration violations at shelters, crisis centers, or courts where they are seeking protection orders, as reflected in the proposed VAWA 2005. Victims are deterred from seeking urgent and long-term assistance, including basic legal protections against domestic violence, when they are aware that immigration consequences may be involved. A forced choice between deportation or safety from an abusive spouse or trafficker, is the precise evil that the original self-petitioning provisions of the VAWA were intended to eliminate.

As further reflected in the proposed VAWA 2005, the resolution also opposes putting victims who may be eligible for relief into removal proceedings and immigration detention,

²⁹The resolution supports the right of an “intended spouse” of a USC or LPR to self-petition for immigration status. “Intended spouse” refers to the situation where a self-petitioner enters into a marriage in good faith, but the marriage is not valid because unbeknownst to the self-petitioner, the USC or LPR spouse is a bigamist. *See* Section 101(a)(50) of the Immigration & Nationality Act.

unless they pose a danger to others or to national security. Victims of domestic violence, trafficking, and other crimes, have been severely traumatized and they typically have acute physical and mental health needs. Not only will these individuals be unable to access services in detention that are crucial for their recovery, but detention itself will likely cause further trauma. Finally, if survivors of these crimes are eligible for legal relief, DHS and the immigration courts should not have to expend resources putting them into removal proceedings that may ultimately be terminated once relief is granted.

VI. Conclusion

Non-citizen survivors of domestic violence, human trafficking, and other crimes are a particularly vulnerable population and as such, they merit humanitarian legal protections. This resolution allows the ABA to support such protections, which also promote more efficient access to the legal system, and more humane application of existing laws.

Respectfully Submitted,

Richard Peña
Chair
Commission on Immigration
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