

Chapter 8: Violence Against Women Act (VAWA)

DISCLAIMER

This chapter is provided for informational purposes only, and does not constitute legal advice of any kind. Before proceeding with any legal matters under U.S. immigration law, please consult, as needed, both the primary source documents referenced in this chapter (statutes, regulations, cases, etc.) and your KIND pro bono coordinator.

What is the Violence Against Women Act?

The Violence Against Women Act (VAWA),¹ enacted in 1994 and later amended, protects victims of domestic violence when the domestic abuse is or was perpetrated by a U.S. citizen (USC) or a lawful permanent resident (LPR). Although KIND primarily serves children who are separated from their parents, there may be circumstances when an unaccompanied child may still qualify under VAWA, so it is important to be aware of this potential remedy.

Why is VAWA immigration status needed?

VAWA immigration provisions were created to remedy a serious flaw in family-based immigration. Normally, a U.S. citizen or LPR files a petition with the USCIS *on behalf* of the noncitizen family member (the beneficiary). Once the petition is approved, the beneficiary may file on her own for her green card (LPR status).

Normally under family-based immigration, it is the USC/LPR who controls when and if the visa petition is filed. This is extremely problematic in circumstances in which the USC or LPR petitioner is or was abusive towards the noncitizen spouse or child.

Prior to the passage of VAWA, an abusive petitioner could use her control of the immigration process to perpetuate or exacerbate domestic abuse. For example by threatening to report the victim (and/or the victim's child) to the immigration service, or by withholding the opportunity to obtain lawful status, the abuser could exercise further control over the noncitizen. Fear of losing sponsorship or being

deported could coerce abuse victims to continue living in an environment causing physical and/or psychological harm.

VAWA provides additional protection for abused spouses and children. Specifically, under VAWA, a child of a USC or LPR may self-petition for permanent status in the United States - without requiring the cooperation of the abuser. Thus, the child or the child's parent is no longer dependent on her abuser in order to obtain legal status in the United States.

What are the benefits of VAWA status?

VAWA status allows your child client to remain in the United States and if qualified, to obtain lawful permanent residency (a "green card"). In addition, your client can obtain an employment authorization document (EAD). Even if the child is too young or does not wish to work, the card serves as an important government-issued identification card. Finally, VAWA status makes your client eligible for certain public benefits.

Practice Pointer:

If you encounter a potential VAWA case, please contact your KIND pro bono coordinator for additional resources.

Who is eligible for VAWA?

Despite its name, VAWA is neither gender-specific nor age-specific; the victim may be either male or female and either an adult or a minor.

Your child client may be eligible for VAWA status under any of the following circumstances:

- An unmarried child who is abused by a USC or LPR parent or step-parent. Alternatively, if the parent is suffering abuse as well, the parent may submit the petition herself and include the abused child as a "**derivative beneficiary**."
- An unmarried child **who is not abused** may still be the derivative beneficiary of a petition filed by the child's parent, when the parent is or was the abused spouse of a USC or LPR.
- A child who is the **abused spouse or ex-spouse** of a USC or LPR may self-petition under VAWA.

How does my client apply for VAWA?

As explained above, depending on the circumstances, a child may either self-petition under VAWA or be a derivative beneficiary of a parent's VAWA petition. Only a child who was directly abused may self-petition. Otherwise, the child must be included as a derivative on a parent's petition. There may be different reasons why a parent of an abused child may want to file the petition instead of the abused child. Often, if a child is too young to articulate her claim or to testify to the abuse, a parent may want to file a VAWA petition on behalf of the child. Also, it may be extremely traumatic and intimidating for a child to self-petition. The ability of a parent to petition on behalf of the child could alleviate some of this stress.

What is a self-petition?

A self-petition is an application in which the individual is asking for relief because she has been abused. Remember, in normal circumstances, a USC or LPR has to petition as the spouse of a noncitizen for the noncitizen to obtain a green card. VAWA provides a mechanism for the noncitizen to apply for immigration status herself because the normal petitioner is abusive.

When is it appropriate for a child to self-petition under VAWA?

If a USC or LPR parent or spouse has abused your client, you should file a self-petition.

Child Practice Pointer:

Children may not realize that what they have endured constitutes abuse or extreme cruelty. Therefore, you will have to carefully draw out information from the child to determine whether she qualifies under VAWA.

Eligibility requirements for a child abused by a USC or LPR parent:

- The abuser is a U.S. citizen or LPR, or has lost USC or LPR status within the two years prior to the filing of the self-petition.
- The child was subjected to either physical battery or "extreme cruelty." Such extreme cruelty might include, for example, threats of violence, psychological abuse, denigration, sexual abuse,

stalking, or harm to other persons or things if intended to cause harm to the victim.

- The child lives or lived with the U.S. citizen or LPR parent or step-parent.
- The child must qualify as the abuser's "child" under 8 U.S.C. § 1101(b)(1) - i.e., the child must be unmarried, under the age of 21,² and fall into one of the specified categories, which include the following:
 - Children born in wedlock
 - Stepchildren, in which the marriage creating the step-relationship occurred before the child's 18th birthday
 - Adopted children in which the adoption was finalized before the child's 16th birthday, and the child has been in the adoptive parent's physical and legal custody for two years, or
 - Children born out of wedlock where the child has been legitimated by the father or can show a bona fide parent-child relationship.
- The self-petitioning child must be a person of "good moral character."

Child Practice Pointer:

Children under 14 presumptively meet the requirement of good moral character, while those over 14 must submit evidence.³

Can a parent file for her child?

Yes. In certain circumstances, a parent may file the petition and include the child as a derivative beneficiary. A child can be the beneficiary of a VAWA self-petition filed by the child's non-abusive parent, on either of the following bases:

A child's parent files a petition because a USC or LPR spouse is abusing the parent

Eligibility requirements:

- The abused self-petitioner is the spouse or former spouse (provided that the divorce occurred within the two years immediately prior to the filing of the VAWA petition) of a USC or LPR (or a person who has lost USC or LPR status within the two years prior to the filing of the self-petition).

- The marriage between the VAWA petitioner and the abuser must be valid and legal under the laws of the jurisdiction of the marriage.
- The marriage must have been entered into in good faith.
- During the marriage, the spouse was subjected to either physical battery or "extreme cruelty," as discussed above. Because the child is the beneficiary of a parent's VAWA petition, no evidence of the child having suffered abuse is required.
- The self-petitioner parent lived with her USC or LPR spouse.
- The self-petitioner parent is residing in the United States.

A child's parent files a petition because her USC or LPR spouse is abusing her child

Eligibility requirements:

- The self-petitioner is the spouse or former spouse (provided that the divorce occurred within the two years immediately prior to the filing of the VAWA petition) of a USC or LPR (or a person who has lost USC or LPR status within the two years prior to the filing of the self-petition).
- Generally, the marriage between the VAWA petitioner and the abuser must be valid and legal under the laws of the jurisdiction of the marriage.
- The marriage must have been entered into in good faith.
- During the marriage, the child was subjected to either physical battery, or "extreme cruelty."
- The petitioner lived with the USC or LPR spouse.
- The petitioner is a person of good moral character.
- The petitioner is residing in the United States.

Practice Pointer:

The self-petitioning parent may also obtain immigration status under VAWA, even though she is not

being abused.

How do I file a VAWA self-petition for my client?

Self-petitions by spouses and children of abusive citizens or lawful permanent residents are filed using Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant. This form is used for a number of immigration purposes, not just VAWA self-petitions. All VAWA self-petitions are filed at the USCIS Vermont Service Center, which has been designated to handle all petitions filed by self-petitioning battered aliens.

Each self-petition submitted is assigned a "priority date" which is the date on which the petition is properly filed. The priority date takes on special meaning when the applicant subsequently files for adjustment of status (see below).

After a few weeks or even months after the date of filing, the self-petitioner should receive from the VAWA Unit a "Notice of Action." Provided that the petition was complete and properly filed, the Notice of Action should indicate that the petition has been found to establish a prima facie case.

The notice of a prima facie case will have an expiration date and will need to be renewed periodically until the petition is finally approved. Alternatively, USCIS may send a "Request for Further Evidence" (RFE) or a "Notice of Intent to Deny" (NOID). There is a deadline for responding, in either case.

While the VAWA petition is pending with USCIS, the self-petitioner is allowed to remain in the United States and may apply for an employment authorization document (EAD) using form I-765.

Child Practice Pointer:

Even for a child who is not of age to work, it may be advisable to apply for an EAD in order to obtain a government-issued identification document that can be used to obtain a social security number. This is particularly true in situations in which an abuse victim does not have other means of obtaining an identity document.

If the self-petition is approved by USCIS, the child will then apply to adjust her status (I-485). If the petition is not approved, the self-petitioner will be provided with written notice of this fact and offered an opportunity to present additional information or arguments before a final decision is rendered.

The self-petitioner has the right to appeal the denial of an I-360. If USCIS approves the VAWA self-petition, in most cases it will automatically grant the self-petitioner deferred action status for

petitioners and their derivatives. While this temporary legal status does provide work authorization, it is not a guarantee against removal. Deferred action is granted for a certain time period and is renewable.

How does my client adjust from VAWA to permanent lawful resident status?

Like other avenues to LPR status, obtaining LPR status through VAWA is a two-step process. First, the self-petition is filed with USCIS, using Form I-360. Regardless of whether the child was a self-petitioner or a derivative beneficiary, if the VAWA petition is approved, the child may take the second step: applying for LPR status based on the approved petition. This will entail filing Form I-485, Application to Adjust Status to That of Lawful Permanent Resident, and attending an adjustment of status interview with a USCIS adjudicating officer.

When will my client be eligible to file for adjustment of status?

It depends on the immigration status of the abuser.

If the abuser is a U.S. citizen, the self-petitioner can file for adjustment immediately after the initial petition is approved. That is because there are no numerical caps on the number of green cards available to spouses and children of U.S. citizens. They are considered immediate relatives.

If the abusive spouse or parent is an LPR, the abused victim must wait until her priority date becomes "current" before filing to adjust her status. This may take months, if not years.⁴

Practice Pointer:

This is a very complicated area in immigration law, so please consult your KIND pro bono coordinator for further information.

What if my child client entered the United States without inspection?

USCIS issued guidance on April 11, 2008⁵ for approved VAWA self-petitioners who are applying to adjust their status and who entered the United States without having been inspected and admitted or

paroled. According to the memo, an approved VAWA self-petitioner will still be eligible to adjust status, despite having entered without inspection or parole.⁶ In addition, the VAWA self-petitioner will not need to show that her illegal entry into the United States had a substantial connection to the domestic violence, battery, or extreme cruelty.

What if my client is a public charge?

VAWA self-petitioners are not subject to "public charge" grounds of inadmissibility under INA 212a(4)(C). When the I-485 is filed, you will also need to file an I-864W "exemption from affidavit of support."

Are there any activities or conditions that could result in my client's application being denied?

Yes. Although an applicant may qualify for VAWA relief because she has suffered abuse from a USC or LPR spouse or parent, this does not necessarily mean that the I-360 petition will be approved or the adjustment of status application granted. There are additional factors that may present serious problems. If your client qualifies under any of the circumstances below, please note that further investigation must be undertaken regarding her qualifications for VAWA relief. An affirmative VAWA self-petition should not be filed if, depending on the factors below, the end result is certain to be the commencement of removal proceedings and if no relief is available to the child. Please consult your KIND pro bono coordinator for further guidance if any of these circumstances apply to your child client.

- Previous deportation or removal may be a bar to both petition approval and adjustment of status. An exception may be available.
- Removal order has already been issued. The order must be rescinded before adjustment of status can take place.
- A felony conviction may be a bar to both petition approval and adjustment of status.
- Any criminal conviction⁷ may be a bar to both petition approval and adjustment of status.

Practice Pointer:

You should not assume that just because a child has a criminal conviction (juvenile or adult) that she

is automatically barred from gaining residence through the self-petitioning process. Relevant factors include the type of conviction, whether the child was charged as an adult, the sentence imposed, and when it occurred. Also, a VAWA self-petitioner may still be approved for residency if it can be shown that the criminal conduct was related to the abuse (for example, shoplifting because the abuser threatened her if she refused to engage in the activity).

What if my client is already in removal proceedings when I determine VAWA eligibility?

If your client is in removal proceedings, but has an approved 1-360 petition (application for VAWA status), the immigration judge can adjust your client's status.

If the petition is not yet approved, you should request a continuance or administrative closure so that the child may wait for her petition to be adjudicated by USCIS.

What is VAWA cancellation of removal?

In addition to the VAWA self-petition that is filed with the USCIS, there is a parallel remedy exclusively for aliens in removal proceedings referred to as VAWA cancellation of removal (VAWA cancellation).⁸ This relief is sought only before an immigration judge in immigration court. VAWA cancellation should not be confused with the remedy known as "cancellation of removal for non-LPRs" (described in a different section of this manual).

Practice Pointer:

In the context of removal proceedings, the child must file her own application for VAWA cancellation; there is no process analogous to being a derivative beneficiary of a parent's petition.

What are the advantages of applying for cancellation instead of a self-petition?

If granted VAWA cancellation, the child will be granted automatic lawful permanent residency status. This is a faster route to permanent status than the self-petition route which requires that the applicant first apply for VAWA status, get approval, and then file for adjustment.

What if my client qualifies for cancellation but is not in removal proceedings?

You can request that the local ICE office issue a Notice to Appear (NTA) to put your client into removal proceedings so that the child may apply for VAWA cancellation. However, this is a very risky strategy and you should proceed with the greatest of caution. Should the child's application for cancellation be denied, and no other form of relief is available, the child could be removed from the United States.

What are the eligibility requirements for cancellation of removal?

The petitioner:

- Must have lived in the United States continuously for three years (This is a different requirement than for a VAWA self-petition).
- Was subject to battery or extreme cruelty by the U.S. citizen or LPR parent while in the United States.
- Has demonstrated "good moral character" for the three years prior to the application.
- Is removable either on grounds of inadmissibility or deportability.
- Must prove that she would suffer extreme hardship if removed (This is also a different requirement than for a VAWA self-petition). Extreme hardship means more than just the general hardships due to removal from the United States.⁹ A list of extreme hardship factors to be considered are listed at 8 CFR § 1240.58(C). Qualifying factors of extreme hardship may include the following:¹⁰
 - Lack of access to legal proceedings and protections in home country
 - Lack of medical and social services necessary as a result of the abuse

- Likelihood of harm by the abuser or her family in home country
- Medical or educational needs of children that could not be provided for in home country

Practice Pointer:

Time stops accruing from the date the cancellation application has been filed, not the date of issuance of the NTA.¹¹

Citations

¹ VAWA was passed as part of the Violent Crime and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40701, 40702, 40703, 108 Stat. 1796 (Sept. 13, 1994). Since the original enactment, the VAWA immigration provisions have undergone several amendments, and are codified principally at INA 204(a), 8 USC 1154(a).

² VAWA 2005 provides that someone who was the victim of incest when she was the child of a USC or LPR may file a self-petition up until the age of 25, as long as the abuse was a reason for the filing delay. See VAWA 2005 Pub. L. No. 109-162 Title VIII Subtitle A Sec. 805(c).

³ William R. Yates, "Determinations of Good Moral Character in VAWA-Based Self Petitions," (Jan. 19, 2005), USCIS Memo: HQOPRD 70/8.1/8.2.

⁴ In some cases in which the abuser previously agreed to sponsor the child, the abuser may have already taken the step of filing a relative petition (Form I-130) on the child's behalf. In other words - there may be two different petitions at play: an immediate relative petition (I-130) and a self-petition (I-360) - both submitted at different times. Always ascertain whether this has happened, because if an I-130 was previously filed (does not need to be approved), the child may use or "capture" the priority date derived from I-130 petition and assign it to her current VAWA self-petition, thus allowing the child to apply for adjustment of status much faster.

⁵ See Memo, Michael L. Aytes, USCIS, HQDOMO 70/23.1 AFM Update AD08-16 (April 11, 2008).

⁶ Effectively waiving inadmissibility under section 212(a)(6)(A)(i) (present without inspection).

⁷ Immigration Law Service 2D, "Relatives as Immigrants," 2005 Thomson/West, 2/2005, § 7168.

⁸ INA 240A(b)(2).

⁹ Id.

¹⁰ Id.

¹¹ AYUDA, Inc. VAWA Manual: Assisting Battered Immigrants and Their Children to File Immigration

Claims under the Violence Against Women Act, Section 6.3a. (5TH ED. 2006).