

IMMIGRATION RIGHTS OF BATTERED SPOUSES AND CHILDREN

VAWA SELF-PETITIONER STATUS

Immigration law provides that an alien married to a citizen or lawful permanent resident (LPR) may self-petition for LPR status without the cooperation of the spouse if certain conditions have been met. The petition must be filed either during the marriage or, if the marriage has been terminated, other than by annulment, within two years of the termination of the marriage. Termination by annulment precludes eligibility for VAWA self-petitioner status, as it declares that the marriage never existed.

Conditions for VAWA self-petitioner status

- The abusing spouse is a citizen or lawful permanent resident;
- The petitioner resided with the batterer;
- The spouse or child has been battered or subjected to extreme cruelty;
- The act or threatened act was one of extreme cruelty, including physical violence, sexual abuse, forced detention, or psychological abuse against the petitioner or petitioner's child by the spouse during the marriage;
- The marriage is legal and in good faith;
- The petitioner is not the primary perpetrator of the violence; and
- The petitioner is of good moral character.

What can be used to prove abuse

- Reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, other social service agency personnel;
- Letters from advocates;
- Protection orders;
- Allegations in divorce petitions; or
- Reports on police calls to petitioner's home.

Evidence presented in family, juvenile, and dependency cases may support eligibility for VAWA self-petitioner status. In addition, evidence presented in criminal domestic violence or child abuse cases may support eligibility for VAWA self-petitioner status.

The requirement of good moral character can prove problematical for a VAWA applicant. Having a protection order issued against the applicant can negate good moral character, so a judge who issues mutual orders of protection can make the abused spouse ineligible for VAWA self-petitioner status.

ELIGIBILITY OF BATTERED SPOUSE OR CHILD FOR CANCELLATION OF A REMOVAL ORDER

A battered spouse or child who has been found removable by an immigration court and is not eligible for VAWA self-petitioner status may still be eligible for cancellation of the removal order and adjustment to LPR status if the following conditions are met. Note that this benefit is available after two years of the termination of the marriage.

The alien must show that he or she has been or is:

- Subject to battery or extreme cruelty by a citizen or LPR spouse, bigamist, or parent;
- Physically present in the United States for a continuous period of three years immediately preceding the filing of the petition;
- Of good moral character;
- Not inadmissible or deportable for certain enumerated crimes and offenses;
- Not inadmissible for security reasons;
- Not deportable for marriage fraud;
- Not deportable for conviction of crime;
- Not deportable for failure to register or for the falsification of documents; and
- Removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

The request for cancellation of removal must be made in a removal proceeding before an immigration judge.

The following evidentiary rules apply:

- The grant of cancellation of a removal order is discretionary with the United States Citizenship and Immigration Services (USCIS).
- In acting on applications for cancellation of a removal order, USCIS may consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence is within the sole discretion of USCIS.

U VISAS FOR BATTERED SPOUSE

The U visa is a non-immigrant visa available to individuals who are in the U.S. as undocumented aliens but meet the requirements listed below. Domestic violence is one area of criminal activity covered by the U Visa. Eligibility for a U Visa does not require that the perpetrator be a citizen or lawful permanent resident.

- The individual has suffered severe physical or mental abuse as a result of being a victim of criminal activity.
- The individual has been, is being, or is likely to be of help to a Federal, state, or local investigation of the criminal activity causing the abuse.
- The individual has certification from a Federal, state, or local judge, prosecutor, law enforcement officer, or other justice system official involved in prosecuting the criminal activity that he or she has been, is being, or is likely to be of help to a Federal, state, or local investigation of the criminal activity causing the abuse.

The rights of the U visa holder include the following.

- The U visa is a non-immigrant visa with a maximum length of stay of four years unless extended.
- The U visa holder may apply for any other immigration benefit or status for which he or she is eligible.
- The holder of a U visa is eligible to apply for lawful permanent resident status with three years of continuous residence.

BATTERED SPOUSE WAIVER OF JOINT FILING REQUIREMENT FOR CONDITIONAL PERMANENT RESIDENT

A spouse or child who is a conditional permanent resident must file jointly with the citizen or lawful permanent resident spouse for lifting of the conditional status in the 90-day period prior to the end of the second year of the conditional status. A spouse or child who was battered or subjected to extreme cruelty and whose abuser refuses to jointly file may request a waiver of the joint filing requirement.

USES OF FAMILY COURT DISCOVERY TO OBTAIN ACCESS TO RECORDS

The ability of a battered spouse to use any of the above pathways to becoming a lawful permanent resident will be dependent on proving the elements required under Federal immigration law. Some of the documentation that an applicant may need may be under the control of the abuser. As the Federal immigration process does not have discovery provisions, the discovery process available through the family court may be the only avenue for a battered spouse to compel an abuser to produce the required documents.