Outline from Kristina Rost for "Adjustment Of Status In Immigration Practice Today" session 2

APRIL 20, 2006 - Family-Based Adjustment Issues

1. VAWA Adjustments (10 min)



A. Governing regulations: INA § 204(A)(b)(2), 204 8 U.S.C. § 1229b (b)(2) created by VAWA and by amendments VAWA II - Victims of Violence & Trafficking Protection Act of 2000, was created.

> Self Petition authority and background - INA § 204 (a)(1)(iii) and 204 (a)(B)(ii).

Relief is available regardless of gender. In lieu of the I-130, one will file I-360 petition. Purpose is to protect those who are married to abusive USC/LPRs, but cannot obtain residence via spousal petition, because spouse will not cooperate to file, or threatens to withdraw petition which was already filed; or refuses to attend I-485 interview.

- Allows beneficiary to petition for status independently;
- The self-petition process is completely confidential (IIRAIRA § 384 prohibits releases of information to abuser or anyone).
- Primary benefit is that if I-360 is granted, the individual obtains <u>permanent</u> resident status **not** conditional resident status.

B. Statutory requirements to file:

- Spouse of US Citizen or LPR.
- Entered into a good faith marriage.
- Applicant has resided with USC or LPR, including time living together in the U.S.
- Must have good moral character.
- Was battered or subject to extreme mental cruelty by spouse, OR is the parent of child abused by USC or LPR spouse.
- Vermont Service Center adjudicates I-360s
- Can be pursued affirmatively or while in removal proceeding.
- Evidentiary standard: any "credible" evidence.

Note: Extreme hardship requirement was removed by VAWA II.

C. How to prove if one is a spouse of US Citizen or LPR

- Must show legally valid marriage (submit proof of termination of prior marriages by both parties, if applicable). If there is bigamy, can still file if individual can show good faith marriage but for the bigamy by abuser (VAWA II exception).
- Can apply within 2 years of divorce if applicable, provided there is a connection between divorce and the domestic violence (*VAWA II exception*).
- Death can file within 2 years of death where abuser is US Citizen only. (VAWA II exception).

D. Must prove status of Abuser:

■ Abuser must be LPR or USC.

VAWA II provides:

- 1. Can request electronic verification of abuser's status if unable to present primary or secondary evidence.
- 2. Automatic upgrade if you have an approved self petition, and abuser naturalizes.

There must be a good faith marriage.

♦ Submit financial co-mingling and cohabitation evidence (i.e., bank accounts, rent receipts, etc.).

Residence in U.S. - Self petitioner must be here. (there are some exceptions).

Joint Residence - For no particular amount of time.

Good moral character of self petitioner - if there is an act that relates to domestic violence it can be exception (VAWA II).

■ Establish by obtaining criminal history clearance from the state of residence.

(Note: In Mass. get a CORI report).

E. Battering or Extreme Cruelty

- Being a victim of any act or threatened act of violence, which results or threatens to result in physical or mental injury. Includes actions which may not appear violent in and of themselves, but are part of an "overall pattern" of violence. This includes insults, financial control, threats related to kids, destruction of documents and belongings, immigration threats, etc. ...document "totality of circumstances".
- Must show abuse occurred during the marriage (or intended marriage).

- Establish abuse with detailed affidavits from applicant, friends, family or neighbors. Also obtain criminal court records, protection orders, police reports, medical records, letters from shelters, advocates, and/or other service providers when applicable.
- Applicant need not obtain police/legal protection to establish claim.
- Self petitioner can include derivative children applicants. This requires proof of relationship, i.e., birth certificate.
- Self petitioner can transfer priority date of I-130, filed by abuser, to her I-360 self petition, even if I-130 withdrawn by abuser.

F. Filing Of Petition:

■ File with **Vermont Service Center** – VSC will hold I-485 until I-360 is decided, then would forward the entire case for AOS interview

(Contact the VAWA Hotline: (802) 527-4888 for problem issues on I-360 and I-751's.)

Notice of Approval includes grant of deferred action status, which provides protection from removal. With this status, client can apply for work permit under 8 CFR 274.12 (c)(14). Must show economic necessity. Client can renew deferred action status and EAD annually at Vermont Service Center. Derivatives should be listed on the approval (make sure of this).

• File with **Chicago Lockbox** - <u>disadvantage</u> in that Chicago may forward the case for interview without I-360 being decided (similar to regular marriage cases);

G. Adjustment of Status:

- Approved I-360 self petitioners can adjust *regardless* of manner of entry under § 245(a). <u>Note</u>: do not need 245(i)) even if EWI
- No requirement of affidavit of support; however, <u>must</u> overcome public charge grounds.

H. Adjustment - expanded eligibility

212(i): Fraud/misrepresentation waiver expanded - approved applicant may qualify by showing extreme hardship to alien as well as to USC or LPR parent or child.

212(g): HIV waiver also expanded - no need for qualifying relative standard.

212(h): Waiver expanded - no need for proof of hardship to, or existence of, a qualifying relative.

I. Motion to re-open - INA § 240 (c)(6)(c)

♦ After an in absentia order has entered, instead of the usual 6 months, have one year to reopen under VAWA II to pursue VAWA relief; under certain circumstances even the one-year limit may be waived.

J. Naturalization

• Can naturalize within 3 years.

Waiver of INA § 237(a)(2)(E). Ground of removal for domestic crimes, waivable if:

- 1. Alien was a victim of battering/extreme cruelty
- 2. Action was self defense

K. VAWA 2005 Immigration Provisions (Final As passed by US House or Reps & US Senate) Dec. 17, 2005

- Implements VAWA's original intent by stopping deportation of immigrant victims of domestic violence, sexual assaults, or trafficking;
- Extends immigration relief to larger group of family violence victims;
- Provides economic stability and security for trafficking victims;
- Protects safety of victims of domestic abuse, stalking, sexual assaults, trafficking;
- Guarantees economic security for immigrant victims and their children;
- Improvements in processing VAWA cases and technical amendments;
- International Marriage Broker Regs (important!!)
 - o requires US citizens filing K petitions to disclose criminal background information);
 - o Prevents abusive USCs from sponsoring multiple foreign fiancées and/or spouses;
 - o Government tracking of K visas;
 - o Domestic abuse pamphlet to be distributed to a;; foreign fiancées and spouses;
 - o International marriage broker (IMB) duties defined

L. Technical assistance and questions on VAWA Immigration 2005: contact person is Joanne Lin, Senior Staff Attorney, Legal Momentum, 202-326-0040; jlin@legalmomentum.org

2. DV: Procedures & Issues (5 min)

A. Governing regulations: INA 203(c); 8 USC 1153(c)

<u>Essense:</u> 55,000 annual limit. DV participanst are nationals of "underrepresented" countries (less represented in employment and family-based preference categories). Nationals of "high admission" countries are precluded from participation.

B. Requirements

Birth/chargeability in/to low-admission foreign states;

- Having at least high school education OR within 5 years preceding DV application 2 years of work experience in an occupation requiring at least 2 years of experience / training (derivative benes do not have to meet this req't). GED (General Eductaion Diploma) or its foreign equivalent will NOT satisfy this req-t
- Has to obtain visa within the fiscal year of application
- Has to demonstrate financial /employment-finding ability to overcome public charge grounds

C. Procedures

- DOS accepts only electronically filed applications Electronic Diversity Visa (EDV) Entry Forms - at www.dvlottery.state.gov
- Expect issues with the website during the last week of the program;
- Strict adherence to the rules of filing or else application is automatically disqualified'
- If EDV is accepted, applicant receives an e-confirmation notice;
- Fraud issues are huge: even a typo may create a presumption of fraud as DOS concluded that most errors in spelling of the names indicate filing of duplicate petitions

D. Adjustment Issues

- AOS or consular interview MUST be successfully completed prior to September 30 of the fiscal year;
- Most USCIS district offices have developed a "special handling" procedures for DV cases
 - Even if a visa numbers currently available, a DV applicant can only file I-485 after
 Oct. 1, the first day of the fiscal year:
 - Michael Pearson 1999 Memo instructing DO to accept I-485 filed under DV program any time during the 90-day period preceding the cut-off date as indicated in Visa Bulletin:
 - o AOS interviews should be scheduled shortly to allow enough time to adjust;
- "Packet Three: should be filed by a winner with KCC (Kentucky Consular Center) before October 1st:
- When the case number becomes current, NVC sends a winner the "Packet Four" that includes the appointment notices for visa interviews at the US consular posts. This is an advantage of the consular processing over the adjustment as many local offices do not expeditiously obtain the visa numbers (they order visa numbers when case is completed) and DOS orders these numbers when setting up the appointment;
- Security Checks:
 - PATRIOT Act and Border Security Act intensified security measures for nationals of the 26 (extended to 33?) Muslim countries which resulted in major delays in FP clearance – this resulting in losing DV benefits;

- USCIS claims that nothing can be done to speed up this process as this is the FBI jurisdiction
- 2-year home residency residence requirement no special waiver for 212(e)(iii)
 - O Practice pointer if a winning applicant is subject to the 2-year home residency requirement, the waiver must be obtained as expeditiously as possible as in majority of cases waivers take such a long time that by the time they are granted, visa numbers become unavailable

Visa fraud

- o Material misrepresentation on a visa application or upon entry to the US can result in a permanent bar from visa benefits;
- Out-of-status applicants have to proceed with caution because of many issues affecting their presence / entry to the US

E. Conclusion – proceed with caution

- Entering into DV lottery is demonstrating an immigrant intent (attention non-immigrant visa holders);
- DOS no longer shreds or destroys unselected DV applications. On Sep. 12, 2002, Rep. George Gekas (R-PA), Chairman of the House Judiciary Committee's Subcommittee On Immigration, Border Security, and Claims announced that upon his suggestion, 10 to 13 mil DV applications will have been shared with the US law enforcement and intelligence agencies. This in itself is a security trap. Having the names, addresses, date and country of birth of the 10-13 mil applicants may be used by the agencies searching for the coordinates of the hundreds of thousands of people ordered removed.