ASISTA : VAWA 2005

ANALYSIS AND PRACTICE POINTERS

ASISTA promotes the security, independence and full participation of immigrant women in society

VAWA '05 Immigration Provisions[1]

This summary is organized by topic, in the following order: (1) a new DNA testing law that applies to all detained noncitizens; (2) expanding access and general provisions for self-petitioners, Us and Ts; (3) removing barriers for applicants subject to removal; (4) amendments to U and T visas; (5) new options for domestic violence survivors; (6) fixes to existing VAWA provisions; and (7) a summary of the new system for fiancée visas. Where appropriate, we provide practice pointers.

The provisions of the '05 appear after the summary. Each section cites where in the INA (or elsewhere) the new law made changes. The (sparse) legislative history, quoted in several places in this document, appears in the Congressional Record, Dec. 16, 2005, starting at S13753 (the summary, read into the record by unanimous consent).

I. Provisions that Affect All Noncitizens

A. DNA Collection

The Attorney General may now require any federal agency that arrests, detains or supervises noncitizens facing charges to collect DNA samples from noncitizens they have arrested or detained under federal authority.
Sec. 1004, amending 42 USC 14135a (DNA Analysis Backlog Elimination Act). Authorization to Conduct DNA Sample Collection From Persons Arrested or Detained Under Federal Authority.

Legislative History
"Current law allows federal authorities to collect DNA samples from individuals upon indictment. This provision would expand that authority to permit the Attorney General to collect DNA at arrest or detention of non-United States persons."

Practice Pointer: It is hard to tell how this new DNA collection authority will be implemented or used. In general, law enforcement collects DNA from certain people charged with crimes, to compare with DNA found at crime scenes. Many detained noncitizens are not charged with crimes, however, and the law provides no exception for victims of crimes eligible for immigration status or for other noncitizens released from detention.

[1] The staff of ASISTA Immigration Technical Assistance prepared this document. A special thank you to Evangeline Abriel and Susan Schreiber from CLINIC who contributed to the analysis. For more information, go to www.asistaonline.org.

B. Affirming and Encouraging Authority to Grant I-212 Waivers

Section 813(b) explicitly states that DHS continues to have discretion to consent to reapplication for admission after removal, deportation or exclusion, specifically references the regulations that allow noncitizens to apply simultaneously for adjustment and a waiver of a prior deportation, and particularly urges the agency to use this authority in VAWA, U and T cases.

Legislative History

"This section makes clear that the Secretary of Homeland Security, the Attorney General, and the Secretary of State have discretion to consent to a victim's reapplication for admission after a previous order of removal, deportation, or exclusion."

Practice Pointer: Congress rejects the BIA decision in *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006), which held that the regulations were out of date. Use this language to show that Congress wants DHS to grant I-212 waivers again, particularly, but not limited to, VAWA cases. These waivers overcome reinstatement of removal under 241(a)(5), by curing the predicate re-entry after removal element. Moreover, for adjustment applicants in the 9th circuit, at least, I-212s overcome inadmissibility under 212(a)(9)(A) and (C). Since Congress has said it expects the special VSC unit to adjudicate VAWA adjustments, we believe VSC also may grant any attendant waivers, such as I-212 advance permission to readmission after removal. Contact ASISTA for an update on pending cases and practice pointers in this area.

C. Good Moral Character Bar Technical Correction

VAWA 2005 corrects a technical correction error in IMMACT 90: the failure to change the good moral character bar inadmissibility ground references. As intended by Congress, INA § 101(f)(3) bars practicing polygamists under INA § 212(a)(10)(A) from being able to show good moral character, not persons with previous removal orders under INA § 212(a)(9)(A). This correction to the law applies to *all* persons who need to prove good moral character, such as naturalization applicants. 822(c)

Effective Date & Practice Pointer: Congress backdates this fix to IMMACT 90, so anyone who has suffered because of its previous failure to make the technical correction should now reopen or reapply for status.

II. Expanding Assistance

A. VSC VAWA Unit Authority

Legislative History, section 814

"The VAWA unit employs specially-trained adjudicators who handle petitions filed by at-risk applicants for relief under the Act, for T visas, for U visas, for adjustment of status and employment authorizations, as well as protections under the Haitian Refugee Immigrant Fairness Act and Sections 202 and 203 of

the Nicaraguan Adjustment and Central American Relief Act. The unit also deals with waivers for battered spouses, parole for their children granted VAWA cancellation, and parole for approved petitioners under the Act."

In section 817, amending IIRIRA § 384, 8 USC 1367, Congress allows those adjudicating self-petitions, Us and Ts to communicate with non-profits when an applicant has given written consent to such communication.

Practice Pointers: The amendment to section 384 will help ASISTA and other non-profits help you and your clients resolve problems with your cases, without violating the confidentiality provisions. It should also allow VSC to refer pro se applicants to agencies that can help them.

The legislative history language demonstrates Congressional desire that the VSC VAWA unit be in charge of all affirmative applications related to VAWA, U and T cases. Shifting VAWA adjustments to the VSC unit should fix many of the problems VAWA applicants have experienced with local district offices. VSC's parole authority should help those who have been stranded abroad because the existing parole system did not work for them. The National Network to End Violence Against Immigrant Women, which worked with Congress to craft this language, will bring Congress' desire to the attention of CIS and work to ensure the VSC VAWA unit receives the support it needs to carry out these functions.

B. LSC Services

Legal Services Corporation funded agencies may now use any of their funds, including LSC funds, to provide legal services to noncitizens who have been battered or subjected to extreme cruelty, victims of sexual assault or trafficking and those who qualify for U visas. They may also provide services to the children of these noncitizens, as long as the noncitizen parent did not actively participate in the abuse or crimes against the children.
Section 104, modifying section 502 of the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (Public Law 105–119; 111 Stat. 2510)

Practice Pointer: If you receive Legal Services Corporation money, you may now use that money to help noncitizen crime survivors. If you do not, contact your local LSC agencies to find out if they know about the new law and help train them, if necessary, on how to help noncitizen crime survivors. Contact ASISTA for assistance with training materials and advocacy strategies.

C. Work Authorization, VAWA Definition & Restriction

1. Employment Authorization for Victims with Approved VAWA Self-Petitions

Once a VAWA self-petition is approved, the self-petitioner is eligible for work authorization and may be provided an EAD or other appropriate work permit incidental to such approval. This provision was created by adding a new section (K) at the end of INA § 204(a)(1). 814(b)

Effective Date & Practice Pointer: No explicit effective date, so this provision went into effect on the date of signing. This new provision means that approved VAWA self-petitioners will no longer need to rely on being found eligible under (c)(9) [pending adjustment of status] or (c)(14) [deferred action] in order to qualify for an EAD. Nonetheless, some self-petitioners who are eligible to concurrently file an I-485 may choose to file an I-765 based on their (c)(9) status as that may result in faster EAD processing.

2. Definition

Section 811 creates a uniform definition of the term "VAWA self-petitioner" to include persons who file VAWA self-petitions, conditional residents applying for a joint petition waiver (I-751) as a battered spouse, and abused spouses of HRIFA, Cuban Adjustment and NACARA applicants. The term includes both self-petitioners and their derivative children.

Practice Pointer: This new definition is used in the IIRIRA § 384 prohibition on using abuser/perpetrator information and the new exception to the consequences of failure to comply with a voluntary departure order, which references "VAWA self-petitioners." (see III.C below)

3. No Petitioning for Abusers or Perpetrators

INA § 204(a)(1) is amended with an added section (L) stating that approved VAWA Self-Petitioners, approved U Visa applicants, and approved T Visa applicants, including derivatives of such petitions, may never file a petition for permanent residence or other nonimmigrant status for the abuser upon which the petitioner based the original (VAWA, U Visa, or T Visa) petition. 814(e)

D. Implementing Regulations

Congress mandated that DHS issue implementing regulations for both VAWA 2000 and VAWA 2005 within 180 days of passage of the law, which would be July 5, 2006. The Network asked Congress to include this provision to prevent egregious failures to issue timely regulations, as happened with the U visa, created in 2000 but still awaiting implementing regulations. As in the past, implementing guidance may be issued more swiftly, and the National Network will selectively challenge the failure to issue regulations, focusing on areas where such failure prevents eligible applicants from applying or gaining benefits Congress intended them to have. 828

III. Preventing Removal of Eligible Applicants

A. Perfecting VAWA Motions to Reopen

Our attempt in VAWA 2000 to create special VAWA motions to reopen that trumped number and time limits on regular motions were less than perfect. Now Congress has made clear that the special VAWA motions trump limits on regular motions to reopen, and allows everyone to file one special VAWA motion (including those who tried and failed under the 2000 law). If you show in your motion that the applicant is a "qualified alien" (see III.A.3 discussion below), removal/deportation is stayed through exhaustion of all appeals.

1. Motions to Reopen Removal

VAWA 2000's motion referenced only in absentia removal orders. The new law states that "any limitation on deadlines for filing" motions to reopen shall not apply if the basis for the motion is relief as a self-petitioner (adjustment), VAWA cancellation or VAWA suspension: you include a copy of the relevant application; and you file within one year of the removal order, show extraordinary circumstances, or extreme hardship to the applicant's child. 825(a)

Practice Pointer: Congress amended section (A), which contains the one-motion limit, to say "except for one motion to reopen" under the new VAWA section. This language, combined with the deadline language in the VAWA motion, overcomes both the time and number limits on regular motions to reopen. You may now file a VAWA motion regardless of whether you have filed a prior regular motion to reopen or unsuccessfully attempted to file a VAWA motion to reopen under the 2000 law. Given Congress' manifest intent, asking ICE to join in a motion may prove fruitful and help educate both ICE and the immigration judge about the purpose of the law. Contact ASISTA if you plan to file a VAWA motion, so we may track EOIR and ICE compliance.

2. Motions to Reopen Deportation/Exclusion

Congress makes clear that there is no time limit on motions to reopen for VAWA suspension or adjustment on a self-petition in deportation/exclusion proceedings, explicitly adding exclusion proceedings to proceedings that may be reopened for this purpose. The contents of the motion parallel those for removal. 825(b)

Practice Pointer: These motions are for old cases, those in which your clients received Orders to Show Cause, not Notices to Appear. If you have such cases, check the ASISTA website for the full text of the new motion. Keep us posted about your attempts to file such motions, and to seek ICE agreement to joint motions to reopen, so we may track EOIR and ICE compliance with the law.

3. Qualified Alien Demonstration

Removal, deportation and exclusion are stayed until exhaustion of all appeals if the motion establishes that the applicant is a "qualified alien," a legal term of art under public benefits law.

Practice Pointers: Referencing public benefits law to show eligibility for an immigration proceedings motion is bizarre and confusing. Fortunately, those who demonstrate prima facie eligibility as self-petitioners, VAWA cancellation or VAWA suspension applicants are "qualified aliens" for public benefits purposes, so making a prima facie case to the court should satisfy the stay requirement. Supporting this interpretation, the headers for these sections say "Prima Facie Case." The standard VSC uses for prima facie decisions is: a statement of facts which, if supported, would show eligibility. Before filing a motion, please check with ASISTA for updates on this confusing proof requirement.

B. Exceptional Circumstances

VAWA 2005 amends the definition of "exceptional circumstances" at INA § 240(e)(1) for purposes of reopening in absentia removal orders. Persons removed in absentia who failed to appear for removal proceedings are ineligible for certain forms of relief, including adjustment of status and cancellation of removal, for ten years after the date of the final order of removal, unless they can show that the failure to appear was because of "exceptional circumstances." "Exceptional circumstances" now includes battery or extreme cruelty to the alien or any child or parent of the alien, as well as serious illness of the alien. 813(a)

Effective Date: This provision of VAWA 2005 applies to any failure to appear that occurs before, on, or after the enactment date of VAWA 2005.

C. Exception to Consequences for Failure to Depart

In general, persons who fail to timely depart under an order of voluntary departure are ineligible for ten years for certain forms of relief, including adjustment of status and cancellation of removal, and also may incur civil penalties. VAWA 2005 amends INA § 240B(d) so that the restrictions on relief do not apply to "VAWA self-petitioners" seeking adjustment or to VAWA cancellation or suspension applicants, if the abuse they suffered was "at least one central reason" for the overstay. 812

Legislative History

"This section exempts victims eligible for VAWA, T or U relief from the harsh consequences of failing to comply with voluntary departure orders as long as the extreme cruelty or battery is at least one of the central reasons for the overstay."

Effective Date & Practice Pointer: No explicit effective date, so this provision went into effect on the date of signing. For VAWA-eligible clients who were unable to depart after a grant of voluntary departure – and the abuse was at least one central reason for the failure to depart – applications for adjustment of status and VAWA cancellation or suspension can now be filed despite that previous failure to depart. Note that this section references the new "VAWA Self-petitioner" definition (see I.C.2 above)

Keep in mind that when a person fails to timely depart by the designated voluntary departure date, the voluntary departure order automatically converts to a removal order. Explore all possible avenues for filing a motion to reopen (including special VAWA provisions for reopening cases, IJ sua sponte reopenings and joint motions to reopen) and show how your client meets the "one central reason" test for overcoming the voluntary departure failure. Failure to comply with a voluntary departure order may not, however, serve as a per se bar to reopening. Consult ASISTA for how to frame your arguments.

D. Mandating Policies and Protocols Against Using Abuser Information

Congress extended protections under IIRIRA § 384 (8 USC 1367) to all "VAWA self-petitioners" and to trafficking victims, and applied its prohibitions to all

personnel in Department of Homeland Security, the Department of State, and the Department of Justice. Congress explicitly mandated that the Attorney General and DHS provide guidance to DOJ and DHS employees regarding this law's provisions. 817

Legislative History
"One of the goals of this section is to ensure that these government officials do not initiate contact with abusers, call abusers as witnesses, or rely on information from abusers to apprehend, detain and attempt to remove victims of domestic violence, sexual assault, trafficking, or other crimes." Note that the Congressional record cites the relevant provision as section 818, although it is actually discussing 817 (818 does not exist).

Practice Pointer: The National Network advocated strongly with Congress to include this mandate because of problems with ICE, in particular, using abusers and abuser information to attempt to remove crime survivors eligible for status. We will use this mandate and the accompanying legislative history language to insist that DHS develop policies and protocols at the national level for ICE officers in the field. We encourage you, at the same time, to initiate discussions with your local ICE offices (and CIS offices, if necessary) to ensure they comply with Congress' manifest intent that they be helping, not harming, immigrant crime survivors. You also should use the legislative history language when ICE or an immigration judge seeks abuser information or uses abuser information. Immigration judges are employees of the Department of Justice and, therefore, subject to the law's sanctions as well as its prohibitions.

E. Notice to Appear Certifications

Section 825(c) adds special requirements for Notices to Appear at INA § 239 where an enforcement action leading to a removal proceedings was initiated at a domestic violence shelter, rape crisis center, supervised visitation center, family justice center, victim services provider, community based organization or courthouse where the immigrant appears in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking or stalking in which the immigrant has been battered or subjected to extreme cruelty or if the immigrant is a victim of trafficking or certain crimes. In such cases, the NTA must include a statement that the agency has complied with § 384 requirements that immigration authorities keep information in VAWA self-petitioning, suspension, cancellation or T visa cases confidential and that the agency employees make no adverse credibility determination of admissibility or deportability regarding the immigrant using information furnished solely by an abuser/perpetrator. Agents who knowingly violate this requirement are subject to 384's penalties.

Effective Date & Practice Pointer: These new NTA certification of § 384 compliance requirements took effect 30 days after enactment of VAWA 2005 and apply to apprehensions occurring on or after that date. Advocates with clients who have received a NTA without certification of compliance should argue that

the burden of proof is on ICE to show that removal proceedings were not initiated at one of the enumerated sites included in this provision.

IV. U & T Fixes

Changing Basis for Nonimmigrant Status

No restrictions on changing nonimmigrant status apply to those seeking U or T visas. 821(c), amending INA § 248.

A. U Visas

1. Derivatives

VAWA 2005 replaces INA § 101(a)(15)(U)(ii), changing the requirements for derivatives in two ways: It eliminated the hardship or separate certification requirement and added certain siblings as a category of derivative family members. U applicants 21 and older may include spouses and children; U applicants under 21 may include spouses, children, parents and unmarried siblings under 18 on the date the U applicant files for status. 801(b)

Effective Date & Practice Pointer: No explicit effective date, so this provision went into effect on the date of signing. For U interim relief applicants this means you should now be able to apply for (a) siblings who were under 18 at the time the primary filed for U interim relief if the principal U applicant is under 21 years old and (b) any qualified derivatives who couldn't meet the extreme hardship/certification requirement before.

2. Length of Visa

U visas last 4 years, or longer if a law enforcement official certifies that the U holder's presence is required to assist in an investigation or prosecution. 821(b), adding new section to INA § 214(p)

B. Trafficking Protections

1. T derivatives & length of visas

T derivatives no longer must show extreme hardship. See effective date and practice pointer for next section. 801(a), amending 101(a)(15)(T).

T visas last for 4 years, or longer if a law enforcement official certifies the T visa holder's assistance is necessary for an investigation or prosecution. 821(a), adding new section to 214(o).

2. Cooperating with Law Enforcement

The new law codified what Congress said in VAWA 2000: Trafficking victims can qualify by working with state or local authorities, and by cooperating in the investigation of crimes ancillary to trafficking (such as sexual assault or domestic violence). It does this by explicitly adding language to 101(a)(15)(T)(i)(III)(aa) that qualifies those who:

(a) cooperate with state and local authorities investigating or prosecuting trafficking; or

(b) cooperate in *"the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime"* 801(a)

It also explicitly states that DHS (VSC) may use its discretion to determine that a law enforcement request is unreasonable if an applicant is unable to cooperate "due to psychological or physical trauma." [Adding new section (iii) at the end of 101(a)(15)(T)]

For continued presence certification, for which HHS must now consult with DHS, as well as DOJ, "investigation or prosecution" includes "responding to and cooperating with requests for evidence and information." 804, amending 22 U.S.C. 7105(b)(1)(E)

Effective Date and Practice Pointer: No explicit effective date, so went into effect on date of enactment. If you were denied because you lacked a federal LEA, because the crime certified was not explicitly trafficking, or because your client was unable to comply with law enforcement's requests due to psychological or physical trauma, file (or refile) using a certification from local or state law enforcement; explain how trafficking was one central reason for the crime certified; and/or explain why your client couldn't cooperate because of trauma (corroboration from a counselor/expert might be a good idea).

3. New Unlawful Presence Exception

Unlawful presence is excepted as an admissibility bar under 212(a)(9)(B) if a severe form of trafficking was at least one central reason for triggering inadmissibility (180 days plus departure/removal, seeking readmission within 3 years; year or more plus departure, seeking readmission within 10 years). 802

NOTE: NO exception created for 212(a)(9)(C): One year or more or ordered removed and enters or attempts to reenter without being admitted.

Effective Date: No effective date so effective on date of enactment.

Practice Pointers: (1) This is not limited to T visa applicants, so if trafficking had anything to do with an adjustment applicant's unlawful presence, examine this option. (2) One central reason should not mean the main reason or the only reason, just one reason affecting an applicant's choices (or lack of choices, in the trafficking context). (3) Make sure 212(a)(9)(C) is not a problem, since no exception for this.

4. Accelerated Adjustment

Congress amended 245(l) to add a new adjustment option for T visa recipients (1) who have been continuously present throughout the investigation or prosecution and (2) for whom DHS determines that the investigation or prosecution is complete. This is an alternative to the three-year continuous presence requirement for adjustment under 245(l). 803

NOTE: Congress referenced the Attorney General (AG) as the decision-maker for this section, but also changed all references in this section of the statute to the AG to the Secretary of Homeland Security. The final version of the statute should reference DHS, not the AG; DHS, not DOJ, should determine who is eligible to adjust under affirmative provisions of the immigration law (DOJ in the form of EOIR should only be involved in cases in proceedings).

Effective Date: None, so effective on date of enactment.

Practice Pointers: T visa holders whose investigations (or prosecutions) are done are eligible to apply for adjustment now, assuming they've been in the US throughout. How to apply for adjustment is still an open question (awaiting regulations).

V. New Options for Domestic Violence Survivors

A. Employment Authorization for Abused Spouses of Certain Non-immigrant Professionals

VAWA 2005 adds a new § 106 to the end of Title 1 of the INA to allow the abused derivative spouses of A (diplomatic visa), E(iii) (treaty-based travel), G (visa category related to officials or employees of foreign government or international organization), and H (business visa, multiple categories) visa holders who are accompanying or following to join the principal to obtain work authorization if the derivative spouse demonstrates that during the marriage he or she (or a child) has been battered or subject to extreme cruelty perpetrated by the principal. This provision does not create a route to separate visa status or adjustment of status for the abused derivative spouse. 814(c)

Legislative History

"Requests for work authorization by these abused spouses will be handled under the procedures for petitioners under the Act and the specially trained VAWA unit at the Vermont Service Center will adjudicate these requests."

Effective Date & Practice Pointer: No explicit effective date, so this provision went into effect on the date of signing. However, this provision will require time for implementation because currently there is no system in place to process these EADs. We are very pleased that Congress vested the VSC VAWA unit with authority to grant these work authorization requests. CIS has asked that advocates be patient as they create a system for the VSC VAWA unit to use. In the meantime, if you have an eligible client with urgent need, please contact ASISTA.

Also, please keep in mind that this provision under VAWA 2005 is really only a step in the door for abused derivative spouses of A, E, G and H visa holders, and does not create any separate status. This means that the derivative spouse must presumably maintain her derivative status in order to qualify for the EAD. If the abuser spouse loses his status, divorces her, or revokes her status, she will no longer be eligible for the EAD even if she has been abused. Therefore,

advocates must make sure to explore her other options, including possibly the U visa for victims of crime.

B. VAWA Eligibility for Self-Petitioning Parents of Abusive U.S. Citizen Sons and Daughters

VAWA 2005 adds a section to INA 204(a)(1)(A) to extend VAWA self-petitioning eligibility to the parents of abusive U.S. citizen sons and daughters. To be eligible, the person must qualify as a parent, be able to show good moral character, be eligible as an immediate relative, have resided with the abusive citizen son or daughter, and be able to demonstrate battery or extreme cruelty. Parents remain eligible if the abuser died within the past two years or lost or renounced citizenship status within the past 2 years related to an incident of domestic violence. 816

Effective Date & Practice Pointer: No explicit effective date, so this provision went into effect on the date of signing. Since the law includes no new legal definitions, VSC should be able to adjudicate these claims immediately, although it may need to create a new category for its computer database and application processing systems.

C. Self-petitioning Sons & Daughters

Individuals who are now over the age of 21 but were eligible to self-petition before they turned 21 but did not, can still file a VAWA self-petition up to the age of 25 if they can show that the abuse was "at least one central reason" for the filing delay. 805(c), adding a new section at the end of INA § 204(a)(1)(D).

Effective Date & Practice Pointer: No explicit effective date, so this provision went into effect on the date of signing. For those with clients who are potential VAWA self-petitioners under the age of 25 but over the age of 21, submit an I-360 as you would with any other self-petitioner, including documentation of eligibility before your client turned 21 for all of the VAWA requirements. Also, make sure to make explicit mention of the abuse as "one central reason" for the filing delay, including documentation to prove this (most importantly, through the client's own declaration). Since "one central reason" is a new term in the VAWA arena, implementation of this provision will require guidance or regulations. Contact ASISTA if you have clients in this category.

D. Cuban Adjustment Spouses within Two Years

Adds two-year cut-off dates for spouses of Cubans eligible to adjust under the Cuban Adjustment Act: two years from spouse's death or from VAWA 05, whichever is later and two years from marriage termination (or from VAWA 05, whichever is later) if there's a connection between the termination and battery/extreme cruelty. 823, amending Public Law 89– 732 (8 U.S.C. 1255 note)

Effective Date: VAWA 2000.

VI. Fixes to Existing Provisions

A. Adopted Children

VAWA 2005 amends the INA §101(b) definition of a "child' for immigration purposes by removing the two-year custody and residency requirement for abused adopted children. This means that adopted children who have been battered or subject to extreme cruelty by the adopting parent or by a family member of the adopting parent residing in the same household no longer need to reside in the legal and physical custody of the adoptive parent for two years before qualifying as a "child" under immigration law.[2] Section 805(d)

Example: Joe's mother Martha marries Donald, a LPR, when Joe is 15 years old. Donald's adoption of Joe is also completed when Joe is 15 years old. Within a year of marrying Donald, the abuse against both Martha and Joe escalates to such a degree that Donald knocks Martha unconscious. Currently she is in a coma and it is unclear whether she will regain consciousness.

Because Martha is currently unable to self-petition for herself or for Joe as a derivative, Joe would like to self-petition as the abused adopted child of an LPR. Under the new law, he can qualify as a child VAWA self-petitioner even though he hasn't yet resided for two years in the physical and legal custody of Donald for two year.

Effective Date & Practice Pointer: No explicit effective date, so this provision went into effect on the date of signing. For an abused adopted child, this means they can now self-petition even if the two year residency and/or custody requirements have not yet been met. It also appears that, in terms of regular family-based immigration, an adoptive parent might file a petition for his or her adopted child without meeting the 2 year requirements where the child has been subject to battery or extreme cruelty by the other parent or by a family member of the abusive parent in the household.

B. VAWA Derivative Transformation and Adjustment

INA § 204(a)(1)(D) covers child self-petitioners of both USCs and LPRs, who transform into petitioners in the relevant preference classification when they age out. Derivatives who age out are transformed into self-petitioners with the same priority date as the principal applicant. All applicants who transform under this provision are eligible to adjust under the special VAWA 245(a) and (c) provisions. Section 805(a).

C. VAWA and the Child Status Protection Act

VAWA 2005 clarifies the application of the Child Status Protection Act (CSPA) to VAWA self-petitioners and their derivatives by amending INA §§ 204(a)(1)(D), 201(f) and 204(a)(1)(D). This was a technical correction to the law to clarify that the CSPA immediate relative provisions and second family preference provisions apply in VAWA cases. This does not affect the VAWA eligibility of children at the self-petitioning stage, but instead affects determinations of priority date at the adjustment phase. 805(b)

[2] However, the adoption still must occur before the child turns 16 (or before the child turns 18, if the child is a sibling of an adopted child who is adopted by the same parents).

Effective Date & Practice Pointer: No explicit effective date, so this provision went into effect on the date of signing. Remember that CSPA is fairly complicated and not all age-outs will qualify. However, VAWA self-petitioning children and derivatives that do not qualify under CSPA will not age-out and lose their ability to adjust status because they can still qualify to adjust under VAWA via the VAWA transformation provisions created in VAWA 2000.

D. GMC & Physical Presence References

Congress corrected the inadequate cross-references in the VAWA cancellation law to the good moral character and physical presence exceptions. 822(a) & (b), amending INA § 240A(b)(2).

E. Domestic Violence Waiver for Deportation Grounds

This is a technical correction to INA § 240A(b). Applicants for VAWA suspension of deportation or cancellation of removal must show, among other requirements, that they are of good moral character and that they do not fall under the criminal deportation grounds. The criminal deportation grounds include conviction of certain crimes of domestic violence and stalking and violation of certain protection orders, but INA § 237(a)(7) waives those deportation grounds for persons acting in self-defense. VAWA 2005 clarifies that this waiver may be used in applications for VAWA suspension and cancellation to waive failure to meet the requirements of good moral character and to overcome criminal ineligibility grounds. 813(c)

Effective Date & Practice Pointer: No explicit effective date, so this provision went into effect on the date of signing. This section of VAWA does not expand availability for persons eligible for VAWA cancellation, but simply clarifies that waivers for convictions of certain crimes of domestic violence and stalking are available to overcome both the criminal deportation bars and the good moral character bars to eligibility for VAWA cancellation.

F. HRIFA, NACARA and Cuban Adjustment

1. Motions to Reopen

Congress attempted to overcome restrictions on motions to reopen for spouses and children of abusive HRIFA and Cuban Adjustment applicants by adding them to the list of noncitizens eligible to file VAWA motions to reopen deportation/exclusion proceedings. The amendment is inartfully crafted, however, amending a provision entirely replaced by the new VAWA motions described above (see III.A). 814(a)

2. HRIFA Adjustment

Congress did effectively allow spouses and children of HRIFA adjustment eligible abusers to now adjust whether they've actually adjusted or not (under VAWA 2000, only those whose spouses actually adjusted were eligible). 824, amending section 902 of of the Haitian Refugee Immigration Fairness Act of 1998.

Effective Date: VAWA 2000.

3. NACARA Adjustment

Spouses and children of NACARA adjustment eligible abusers are eligible to adjust themselves (prior to this, only those whose abusers actually adjusted were eligible). They must file within 18 months of VAWA 2005's enactment. 815

Effective date: VAWA 2000.

VII. Protections for Potential K Visa Beneficiaries

VAWA 2005 made several changes to the way fiancée petitions are handled by amending INA § 214(d). The law now requires persons who wish to submit a K visa petition to disclose criminal convictions to DHS/CIS for K nonimmigrant petitions. DHS/CIS is then required to transmit to the foreign fiancée or spouse information about any criminal disclosures, previous fiancée visas sponsored, and resources regarding domestic violence and sexual assault. VAWA 2005 also limits to two the number of fiancées a petitioner can sponsor unless more than two years have elapsed since the filing of the last petition. There are some waivers to this limit, including if the petitioner has no record of violent criminal offenses. 832

Effective Date & Practice Pointer: These provisions take effect 60 days after the enactment of VAWA 2005. Unfortunately, they do not create any new remedies for K visa beneficiaries to adjust status as VAWA self-petitioners if they never married their petitioning fiancée.