

Factsheet

Immigration Law Basics for Domestic Violence Victim Advocates

This factsheet provides basic information on various immigration remedies available to victims of domestic violence and/or certain other crimes, including sexual abuse, child abuse or human trafficking.[†] Immigration laws and regulations are complex and constantly changing. No factsheet, including this one, can adequately explain all the factors that can influence one's immigration status. The risks of providing incorrect information or advice, including possible detention and deportation, are great. Therefore, this information is intended only to assist in exploring options with non-citizen immigrants, and is not a substitute for individual advice from an experienced attorney.

This factsheet will cover:

- A general overview of American legal immigration concepts and definition of terms
- A general description of how people obtain legal status in the U.S. and how deportation or removal fits into the process
- How marriage and divorce are related to immigration status
- Specific protections in immigration law for victims of domestic violence, sexual assault, or stalking
- How advocates can help victims in the immigration process

1. General Definitions

United States citizens and nationals: Any person born in the United States or Puerto Rico is a United States citizen. Some individuals born abroad inherit U.S. citizenship at birth from a citizen parent. Others acquire citizenship because, before their 18th birthday, they became a lawful permanent resident and one or both parents became naturalized U.S. citizens. A lawful permanent resident who meets certain requirements can apply to become a U.S. citizen in a process called naturalization. A U.S. citizen cannot be deported ("removed") for any reason, except in some circumstances where they became a U.S. citizen fraudulently. A U.S. citizen can apply for a parent, spouse, child[‡] or sibling to immigrate, i.e., "sponsor" them to become permanent residents.

[†] Please note that, although immigrants and refugees are often conflated, the groups are not the same. Refugee law and protections are largely beyond the scope of this factsheet.

[‡] For purposes of this factsheet, a "child" is a person under the age of 21, whether married or unmarried.

Lawful permanent resident: A lawful permanent resident (LPR) has the right to live and work indefinitely in the U.S. and, with some restrictions, to travel outside the U.S. for extended periods of time. After five years (or less in some cases), a LPR over the age of 18 can apply for naturalization to U.S. citizenship. A LPR can apply to immigrate a spouse or unmarried child, i.e., petition for them to become permanent residents. A LPR can lose lawful status and be deported from the U.S. (removed) if he or she comes within a “ground of deportability.” Common grounds of deportability include conviction of certain crimes, a court finding of a violation of a domestic violence protection order, and commission of certain immigration offenses. In some cases, the person can apply for a waiver to have the ground of deportability forgiven.

Non-immigrant visa holders and other temporary status: A non-immigrant visa gives a noncitizen the right to enter and remain in the U.S. temporarily for a specific purpose. Common nonimmigrant visas are for visitors for business or pleasure (B-visas); students or scholars (F- or J-visas); professional workers (H-visas); and fiancées of U.S. citizens (K-visas). In some cases, spouses and children under the age of 21 of the principal non-immigrant visa-holder will be allowed to enter on the visa as well. These derivative beneficiaries are not necessarily authorized to work or study, even if the principal visa-holder is. Derivative beneficiary spouses will lose their status if the marriage terminates. If the principal visa-holder becomes deportable or otherwise violates the terms of the visa, he or she as well as the derivative beneficiaries will lose status.

In addition, there are some noncitizens whom immigration officials know are in the U.S. without authorization, but who have been issued deferred action status, meaning that authorities have made an administrative decision to not remove them. Depending on the terms of the deferred action, these individuals may have permission to work lawfully in the U.S.

Undocumented persons: Undocumented persons are those who have no current immigration status. The person may have crossed the border surreptitiously without inspection by an immigration official (known as “entry without inspection” or EWI). Or the person may have entered with a temporary visa such as for students or tourists, and the visa now has expired. An undocumented person does not have the right to work lawfully or remain in the U.S. The person is subject to removal if detected by immigration authorities. The fact that a person is undocumented does not mean that her or she faces imminent deportation.

Immigration court and Executive Office of Immigration Review (EOIR): The EOIR is the administrative court system where removal and deportation proceedings are decided. It includes the local immigration judges and the Board of Immigration Appeals, and is part of the Department of Justice. EOIR is not part of USCIS (U.S. Customs and Immigration Service) or ICE (Immigration and Customs Enforcement) but it often has courtrooms and offices in CIS or ICE District Offices. Individuals who appear in immigration court have the right to be represented by an attorney or EOIR-accredited representative, but there is no right to a free representative or counsel.

Inadmissibility: This is the concept that describes why noncitizens are prevented from being eligible for legal status in the U.S. (often, at a point of entry before they get in, or when they are applying for an immigration benefit). Border patrol officers can exclude individuals from entering the U.S. if the latter cannot show that they are eligible to enter. Various grounds of inadmissibility include criminal history, prior immigration fraud, health reasons, or terrorism.

Removal and removal proceeding: This is the process of forcing a non-citizen to leave the U.S. or the process of keeping him or her out of the U.S. before or when trying to enter in a court process before an immigration judge.

2. Policy Framework

U.S. immigration law has four basic approaches to allowing individuals to immigrate, meaning to live permanently in the United States.

- Family reunification. The majority of individuals immigrating to the U.S. are sponsored by a family member (63.5% in FY 2014).ⁱ
- Immigration through employment, whether through sponsorship by an employer or as employment creators (almost 15% in FY 2014).
- Humanitarian reasons, including individuals fleeing persecution (refugees and asylees) or from countries facing unrest and natural disasters (13.3% in FY 2014).
- Other categories that Congress has created for individuals to be able to immigrate or maintain legal status, including diversity visas, adjustment of status for certain non-immigrant categories, such as trafficking or Crime Victim non-immigrants, certain interpreters, and cancellation of removal.

3. Family Based Immigration and Termination of Marriage

As noted previously, many applications for immigration status are based on a legal family relationship. Approximately half of family-based applications for LPR status are based on a spousal relationship. To immigrate based on the marital relationship, the marriage must be valid under the law of the state or country, and in addition, valid under immigration law. If a state court declares a marriage invalid or orders dissolution of a marriage (divorce), the immigration status of a spouse and/or children may be jeopardized. In addition, “good faith marriage” is important, because for a non-citizen to obtain lawful permanent residence through his or her spouse, immigration law requires that the marriage not be entered into for the purpose of evading immigration law.ⁱⁱ

Petitions for declarations of invalidity, or annulments, generally have the same legal effect on immigration status as dissolutions of marriage or divorce. However, an annulment based on fraud might be problematic for a survivor who must prove a “good faith marriage.” It is not unusual for abusive spouses to seek annulments of marriage based on fraud, alleging that a non-citizen fraudulently induced them into marriage for immigration purposes.

4. VAWA Protections

(a) VAWA self-petitioning immigration relief for those who have been subjected to spousal abuse or abuse by a parent

This process applies to abused immigrants who are married to, or who are children of abusive U.S. citizens or lawful permanent residents. It allows immigrant victims of domestic violence to file their own petitions for lawful permanent residency without the cooperation of their abusive spouse, parent, or child. VAWA self-petitioning allows immigrant parents to file petitions for themselves and for their children if the children are abused.

Victims must show the following:

- Victim of domestic violence or child abuse
- Relationship with U.S. citizen or lawful permanent resident
- Where they reside and where the abuse takes place
- Good faith marriage (in cases where application is based on marriage, i.e., they did not marry for the sole purpose of obtaining permanent resident status.)
- Good moral character

It is not necessary for a U.S. citizen or lawful permanent resident spouse or parent to have filed any paperwork previously. Immigrant parents of an abused child can also file for themselves and their children.

(b) Elements to be proven

Domestic violence/abuse: The Department of Homeland Security (DHS) has interpreted abuse broadly, and has recognized sexual abuse, sexual assault, physical abuse, emotional abuse, mental abuse, financial abuse, or cruelty to constitute abuse.ⁱⁱⁱ

There is no requirement that evidence of abuse must be in the form of police reports, medical records, court records, or child welfare intervention. However, while the abused spouse’s or child’s declaration attesting to the abuse is generally the primary form of evidence, other corroborating declarations would strengthen the self-petition.

Good faith marriage: To make this showing, the individual must provide evidence showing he or she lived in the same household as the abusive spouse, shared expenses or income, and/or shared family connections.

In addition, children who were not directly abused may qualify to be included in their parents' self-petition. If the child has a parent who was abused by the child's other parent (including stepparents) and the abusive parent is a U.S. citizen or permanent resident, then the abused parent can self-petition under VAWA, and the child derives the same immigration benefit and can also become a VAWA self-petitioner. In order to be included in an abused parent's VAWA self-petition, the child must be under age 21 at the time the abused parent submits a self-petition.

As a general rule, VAWA self-petitioners must currently reside in the U.S. However, several important exceptions exist for self-petitioners residing outside the U.S. A spouse or child living outside the U.S. can self-petition if the abusive U.S. citizen parent is a U.S. government employee, a member of the uniformed services, or abused the child in the U.S. Thus, for example, a spouse who was abused by his or her U.S. citizen spouse who is stationed on a U.S. military base abroad would be eligible to self-petition.

Good moral character: The final eligibility requirement is that the person must be of "good moral character." All applicants 14 years of age or older must submit a local police clearance or state-issued criminal background check for every area in which they have lived for six or more months during the three years immediately preceding the filing of the self-petition. While there is no statutory definition of good moral character, there are actions that definitively bar someone from showing good moral character. When an abused spouse is involved in criminal proceedings, it is imperative that his or her attorney consults with an immigration expert immediately. Without appropriate counsel, the victim could admit to allegations that will make him or her ineligible for VAWA and lead to his or her deportation.

The approval of the VAWA self-petition is the first step for the individual to attain permanent residency. If the abusive spouse or parent is a U.S. citizen or was a U.S. citizen and lost citizenship due to a domestic abuse incident, then the individual can immediately apply for permanent residency. If the abusive spouse or parent is a permanent resident or was a permanent resident and was deported due to a domestic abuse incident, then the individual has to wait (sometimes many years because there is a cap on the number of people who can obtain permanent residence from each country), before applying for permanent residency. Permanent residency allows the child to remain in the U.S. indefinitely unless he or she commits acts that render him or her deportable or abandons his or her residency.

(c) VAWA cancellation of removal or suspension of deportation (cases pre-1997)

Spouse and children of abusive U.S. citizens or permanent residents who are placed in immigration removal or immigration deportation proceedings may be able to apply for a defense to deportation: VAWA cancellation of

removal (formerly known as suspension of deportation). VAWA cancellation of removal is only available to those people on whom the DHS has already initiated removal proceedings.

In order to qualify for VAWA cancellation of removal, the petitioner must demonstrate that: (1) he or she has been abused by a U.S. citizen or permanent resident spouse or parent; (2) he or she has been physically present in the U.S. for a continuous period of at least three years immediately preceding the date of the cancellation application; he or she has been a person of good moral character during the three-year period; and (4) removal would result in extreme hardship to his or her children or his or her parent(s). In addition, the petitioner must not be inadmissible or deportable for various criminal reasons listed in INA §240A(b)(2)(A)(iv), 8 U.S.C. §1229B(b)(2)(A)(iv).^{iv}

Once a victim is granted VAWA cancellation of removal or suspension of deportation, he or she becomes a permanent resident.

5. U-Visa: Battered Spouse Waivers | Humanitarian Protections

The battered spouse waiver is an immigration protection available for immigrant victims who have already obtained conditional residency (a conditional temporary 2-year green card), obtained through an application filed by their abusive citizen or legal resident spouse or parent. Normally, at the end of the two years that the individual has the conditional residence, the sponsoring spouse or parent must file a joint application to have the “condition” removed from the permanent resident status. In cases of abuse, a battered spouse can petition to have the conditions removed and have his or her conditional residency changed to permanent residency without his or her abuser’s knowledge or participation in the process.

The U-visa is a non-immigrant visa available to crime victims, including domestic violence, sexual assault, stalking, child abuse, and other crime victims who are willing to help law enforcement in a criminal investigation or prosecution. The U-visa is valid for three years, after which the U-visa holder can apply to become a LPR. To obtain the initial U-visa, there must be an investigation or prosecution conducted by a federal, state, or local law enforcement official, but there is no requirement that the investigation or prosecution result in a conviction. The law enforcement official must complete a form certifying that the individual was helpful in the investigation or prosecution of the criminal activity, to be submitted with the individual’s application. On the individual’s application, he or she needs to show that he or she suffered substantial physical or mental abuse as a result of having been a crime victim and that he or she possesses information concerning the criminal activity. If the victim is less than 16 years old, the latter requirement can be met by the victim’s parent, guardian, or other representative.

The individual must show that he or she was the victim of one of the following crimes, or of attempt, conspiracy, or solicitation to commit one of the following crimes:

Abduction	Murder
Abusive sexual contact	Obstruction of justice
Being held hostage	Peonage
Blackmail	Perjury
Domestic violence	Prostitution
Extortion	Rape
False imprisonment	Sexual assault
Felonious assault	Sexual exploitation
Female genital mutilation	Slave trade
Fraud in Foreign Labor Contracting	Stalking
Incest	Torture
Involuntary servitude	Trafficking
Kidnapping	Unlawful criminal restraint
Manslaughter	Witness tampering

The crime must have occurred in the U.S. (including Indian country and military installations), territories, or possessions, or the crime must violate U.S. federal, state, or local law. This means that the crime must be one that a U.S. court has authority to prosecute. For example, under federal law a U.S. tourist who violates a federal sex tourism statute by sexually abusing a child abroad can be prosecuted in U.S. federal courts and, therefore, if there is a victim of that crime, the victim, even if abroad, may be eligible for a U-visa.

Unlike in VAWA self-petition or cancellation of removal cases, the U-visa is not limited to victims who are abused by family members who have U.S. citizenship or LPR status. The U-visa is available to all victims, regardless of whether they were harmed by their spouses, in-laws, other relatives, boyfriends, girlfriends, or strangers, so long as the crime occurred in the U.S. or violated U.S. law. For many victims, the biggest hurdle to overcome in the U-visa application process is obtaining a certification from a law enforcement official, prosecutor, judge, immigration official, or other federal or state authority attesting that the individual is being, has been, or is likely to be helpful to a federal, state, or local criminal investigation or prosecution.

Once a victim is granted a U-visa, the victim's spouse and children, and if the victim is a minor, his or her parents and unmarried siblings under 18 can join him or her in the U.S., and after three years of U-visa non-immigrant status, the victim can apply for LPR status.

6. T-Visa

Similar to the U-visa, the T-visa is designed to advance two goals: (1) to provide protection to victims of serious crime; and (2) to assist U.S. law enforcement in investigating and prosecuting such crime. The T-visa is available to victims of a severe form of human trafficking, which is defined to cover victims who have been trafficked into the U.S. for labor or commercial sex purposes through force, fraud or coercion. In cases of individuals under age 18 who were involved in commercial sex acts, there is no requirement to show force, fraud, or coercion.

Victims must be willing to cooperate with the investigation or prosecution of the crime. Applicants less than 18 years old do not have to meet this cooperation requirement. The T-visa applicant must also show that he or she is physically present in the U.S., American Samoa, or the Commonwealth of the Northern Mariana Islands on account of human trafficking. Likewise, the child must show that he or she would suffer extreme hardship involving unusual and severe harm if deported from the U.S.

If granted, the immigrant victim will receive a legal immigration visa, access to public benefits, and work authorization, which may lead to lawful permanent residence. Once a victim is granted a T-visa, the victim's spouse and children, or if the victim is a minor, his or her parents and unmarried siblings younger than 18 can join him or her in the U.S.

7. Special Immigrant Juvenile Status (SIJS)

SIJ status is an option for certain children who have been abused or neglected by their parents, whether inside or outside the U.S. SIJ status applicants must be under the jurisdiction of a juvenile court (for example, in child welfare proceedings or other juvenile court matters). For a child to be eligible for SIJ status, a juvenile court must have found that child to be a dependent of the court, and that it would be in the child's best interest to receive long-term foster care due to abuse, neglect or abandonment. The jurisdiction of juvenile courts varies from state to state, but many states limit jurisdiction to children less than 18 years of age.

In cases of children who have already been placed in immigration removal proceedings and are in the custody of the Office of Refugee Resettlement, the child's attorney must obtain advance consent from DHS to bring his or her case to juvenile court.

In addition, a SIJ status applicant must have been the subject of administrative or judicial proceedings in which it has been determined that it would not be in the child's best interest to be returned to his or her parents' previous country of nationality or country of last habitual residence. Once a child is granted SIJ status, he or she can immediately apply for permanent resident status. The child will not ever be able to file a family visa petition on behalf of his or her parents.

8. Asylum

For an individual who suffered domestic abuse or sexual assault in his or her country of origin, asylum or withholding of removal may be an option for immigration status. Asylum law has similar origins to protections for refugees under international treaties. Applicants for asylum must show that they are unable or unwilling to return to their country of origin due to a well-founded fear of persecution on account of one of five grounds: race/ethnicity, religion, nationality, membership in a political social group, or political opinion. Many U.S. federal courts have recognized that domestic violence or sexual abuse constitutes persecution.

As a general rule, all asylum applicants need to file their applications within one year of first entering the U.S. Failure to meet this deadline will result in an automatic denial of the asylum claim, unless there have been (1) “extraordinary circumstances related to the delay in filing,” or (2) “changed circumstances” (e.g. in the applicant’s home country or in his or her membership in a particular social group) that materially affected the application for asylum.

Unlike VAWA relief and SIJ status, which are available only to those who are abused by family members, asylum is an immigration option available to those who have been assaulted by non-family members. Examples of asylum cases include women or children raped by the police, gay or lesbian victims raped by homophobic individuals, ethnic minorities raped by gangs, and indigenous children raped by the military.

It is not enough for a victim to show that he or she was sexually assaulted in his or her country of origin. In order to prevail in an asylum case, the individual must show that he or she was persecuted either by the government of his or her country of origin or by others whom the government was unable or unwilling to control. If the individual did not suffer persecution in the past, then he or she will need to show that he or she has a well-founded fear of being persecuted in the future if forced to return to his or her country of birth. Examples of persecution involving government officials include police, security forces, or military members. Examples of persecution where the state fails to control the persecutors include incidents where gangs, guerillas, militia members, or even spouses commit domestic violence or sexual assault.

In addition to the state action requirement, the asylum applicant must show that past persecution or well-founded fear of future persecution is on account of his or her race/ethnicity, religion, nationality, political opinion, or membership in a particular social group. It is not enough for someone to show that he or she was sexually assaulted by the police or military; she or he must also prove that he or she was targeted for persecution because of one of those five grounds. Proving the nexus element (“on account of”) can be difficult for many survivors as they may not know or understand why they were persecuted. In addition, the state action requirement and the nexus requirement may make asylum a difficult option for survivors of

domestic violence by spouses or intimate partners. Many of these cases never come to the attention of state authorities, and thus the individual would have difficulty proving that the state failed to protect him or her from persecution.



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ⁱ 2014 Yearbook of Immigration Statistics, found at https://www.dhs.gov/sites/default/files/publications/ois_yb_2014.pdf

ⁱⁱ INA §204(c); 8 U.S.C. §1154(c)

ⁱⁱⁱ 8 C.F.R. §204.2(c)(vi).

^{iv} INA 212(a)(2) or 212(a)(3); 237(a)(1)(G), 237(a)(2), 237(a)(3), or 237(a)(4), 237(a)(7)

