Basic Immigration Law and Immigration Remedies for Victims of Domestic Violence and Human Trafficking

Saejung Lee, Esq.
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WISCONSIN COALITION AGAINST DOMESTIC VIOLENCE

A Brief History

No direct legal restrictions up to **1790**

Congress started enacting immigration restrictions to control the admission of certain noncitizens

1875 - convicts, prostitutes
1882 - idiots, lunatics, persons likely to become a public charge, persons from China

INA of **1952**

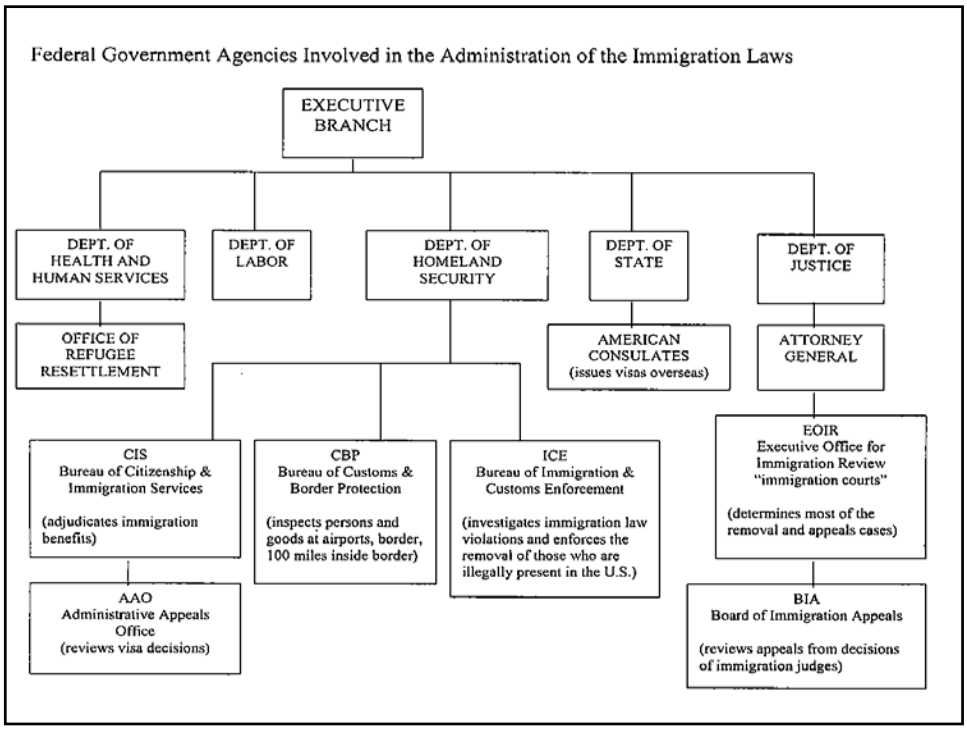
Naturalization Act of **1790** citizenship limited to "free white persons"

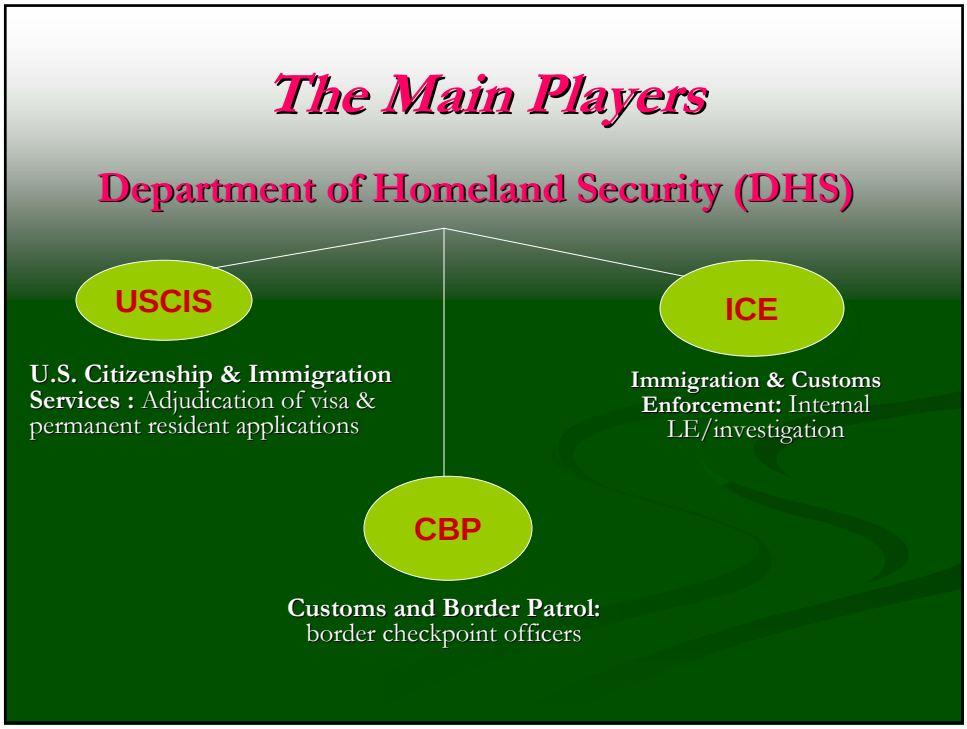
14th Amendment ratified in **1868** All persons born or naturalized in the U.S. are citizens & accorded equal protection of the laws

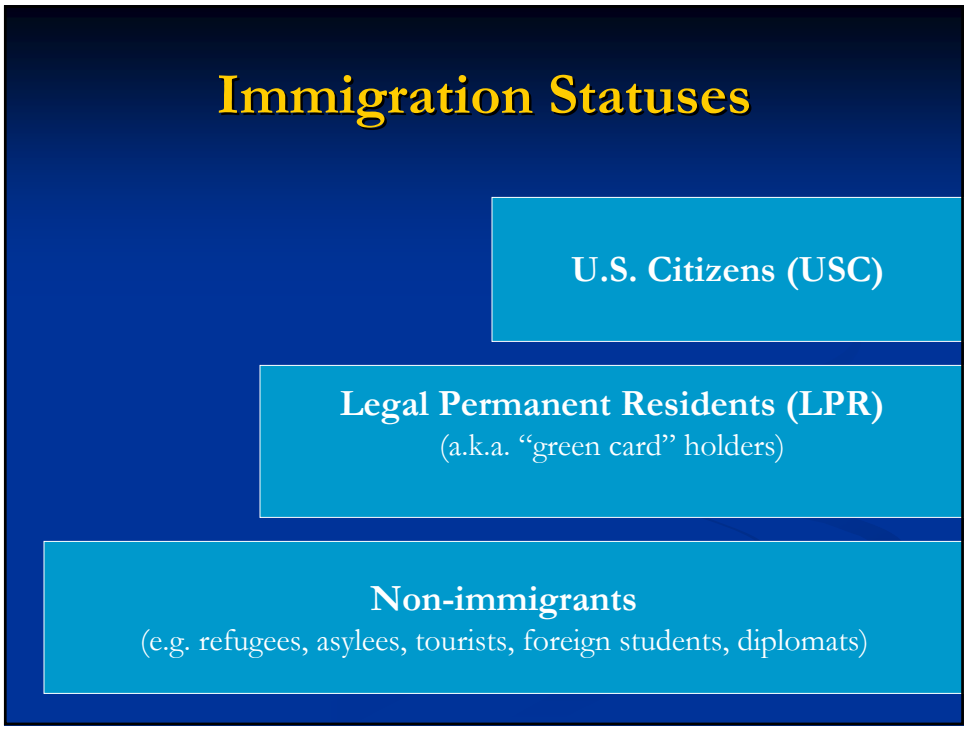
Immigration and Nationality Act of 1952 (INA)

Pub.L. No. 82-414, 101 et seq., as amended
Codified at 8 USC §§1101-1524

The primary federal statute that governs the process of immigration and treatment of noncitizens in the United States




The Main Players
Department of Homeland Security (DHS)
USCIS
U.S. Citizenship & Immigration Services : Adjudication of visa & permanent resident applications
ICE
Immigration & Customs Enforcement: Internal LE/investigation
CBP
Customs and Border Patrol: border checkpoint officers


Immigration Statuses
U.S. Citizens (USC)
Legal Permanent Residents (LPR)
(a.k.a. "green card" holders)
Non-immigrants
(e.g. refugees, asylees, tourists, foreign students, diplomats)

Immigration Restrictions

Grounds of Inadmissibility - INA §212(a), 8 USC §1182(a)

- A noncitizen seeking lawful entry ("admission") into the U.S. must overcome the grounds of inadmissibility
- Applied to noncitizens who seek a new status that is the equivalent to a request for "admission"
- Applied to noncitizens not legally admitted to the country

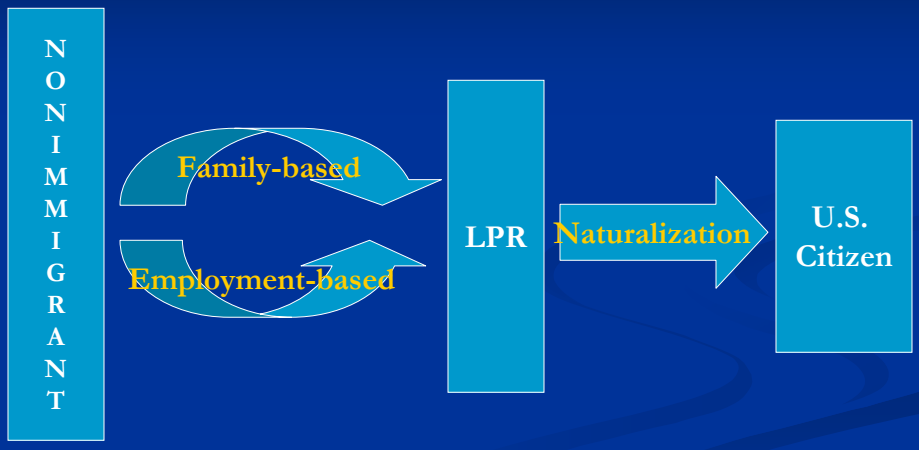
Grounds of Deportability - INA §237(a), 8 USC §1227(a))

- A noncitizen formally admitted to the U.S. is deportable if DHS can prove that s/he is within one or more of the listed classes of deportable aliens

Seven General Categories of Inadmissibility and Deportability Grounds

1. Criminal
2. Immigration violations
3. Quasi-criminal (e.g. marriage fraud)
4. Security and foreign policy
5. Health-related (e.g. drug abuser)
6. Economic (public charge)
7. Miscellaneous (e.g. false citizenship)

"Normal" Immigration Channels



"Normal" Immigration Channels

Family-based

- **Petitioner** files a visa petition on behalf of the **Beneficiary**
- Petitioner must be LPR, USC or asylee
- The Beneficiary must have a "qualifying relationship" to the Petitioner (e.g. Petitioner is a U.S. citizen and the Beneficiary is his spouse)

Employment-based

- **Petitioner** files a visa petition on behalf of the **Beneficiary**
- The Petitioner must intend to employ the Beneficiary in a job that the government deems worthy of allowing a foreign national to fill

Problems with "Normal" Immigration Channels

- System is based on the relationship between the LPR/USC Petitioner and the Beneficiary
- Presumes that the relationship between the Petitioner and Beneficiary is one of equality
  - In the domestic violence context, the victim is at the mercy of the LPR/USC abuser for immigration status
  - The abuser can use the victim's lack of status as a tool to perpetuate the power imbalance

VAWA SELF-PETITION

Domestic Violence

- Congress passed the Violence Against Women Act (VAWA) in 1994
- VAWA Self-Petition **allows battered individuals to file for a visa without the assistance of the abuser**
- **The applicant is called a Self-Petitioner (SP)**
- **Requirements**
  - **Qualifying relationship (abuser is USC or LPR)**
  - **Joint residence**
  - **Good faith marriage**
  - **Good moral character (e.g. FBI and state background checks)**
  - **Battery or "extreme cruelty" (e.g. police reports)**

VAWA SELF-PETITION

Domestic Violence

- Upon USCIS approval of the petition, the VAWA Self-Petitioner and derivatives will receive Deferred Action Status and they can apply for
  - Employment authorization
  - Social security number
  - Public benefits
- Deferred Action Status is a "quasi" status that USCIS gives to a VAWA Self-Petitioner until s/he files for Legal Permanent Resident Status

Bars to Self-Petitioning

- If SP is an **aggravated felon**, s/he cannot apply
- If SP has been **convicted of a domestic violence-related crime**, s/he cannot apply
- Other grounds of inadmissibility, which will come into play when s/he files for permanent residency, may prevent application

Problems with the VAWA Petition

- Only a small class of individuals qualify for VAWA Self-Petition
  - What if the abuser is undocumented?
  - What about victims who are not married to their abusers?
  - What about individuals who are victims of other violent crimes?
- In recognition of these problems, Congress created the U nonimmigrant Visa for victims of violent crimes

U-Visa

Violent Crimes

Requirements of the Petitioner (P)

- P has suffered substantial physical or mental abuse as a result of the criminal activity
- P possesses information concerning the criminal activity
- P has been helpful, is being helpful, or is likely to be helpful in an investigation or prosecution of the criminal activity
- The criminal activity violated the laws of the United States or occurred in the United States

U-Visa Crimes

INA 101(a)(15)(U)(iii)

- Rape
- Torture
- Trafficking
- Incest
- Domestic violence
- Sexual assault
- Abusive sexual contact
- Prostitution
- Sexual exploitation
- Female genital mutilation
- Hostage taking
- Peonage
- Involuntary servitude
- Slave trade
- Kidnapping
- Abduction
- Unlawful criminal restraint
- False imprisonment
- Blackmail
- Extortion
- Manslaughter
- Murder
- Felonious assault
- Witness tampering
- Obstruction of justice
- Perjury

… or attempt, conspiracy, or solicitation, to commit any of the above mentioned crimes

U-Visa

Violent Crimes

- There is no statute of limitations on the crime
- A child victim under the age of 16 is eligible for a U Visa application if the victim's mother, father, or guardian has info about the crime and meets the "helpfulness" requirement
- The petitioner cannot refuse to provide reasonably requested assistance through the duration of U visa status

U-Visa

Violent Crimes

Mandatory Certification Form (I-918, Supp. B)

- Must be signed by the appropriate person from the appropriate agency
  - Certifying agencies include federal, state, or local law enforcement agency, prosecutor, judge, Child Protective Services, Equal Employment Opportunity Commission, Department of Labor, and other investigative agencies
  - The certifying official must be the head of the agency or a designated supervisor
- Must verify that the petitioner has cooperated in 1 of the 3 accepted ways in the investigation or prosecution of a qualifying criminal activity

U-Visa Key Points

Violent Crimes

- Victims of a large array of crimes are eligible
- Neither the immigration status of the victim nor the perpetrator is relevant
- Standard is "any credible evidence"
- Victims accessing the criminal justice system is essential
- MUST have certification on victim's helpfulness in investigation/prosecution of criminal activity

Modern-Day Slavery

Human Trafficking

Around the world…

- 2 million people are trafficked annually
- 27 million people are in slavery – more than any other time in human history
- Fastest growing, 9 billion dollar criminal industry

In the United States…

- 14,500-17,500 foreign nationals are trafficked annually
- The number of US citizens trafficked within the country are even higher (estimated 200,000 American children are at high risk for trafficking into the sex industry each year)
- 25 states have enacted anti-human trafficking legislation

Government Partners in Combating Human Trafficking

- **U.S. Department of State**
  - Interagency Task Force
  - Office to Combat and Monitor Trafficking in Persons
- **U.S. Agency for International Development**
- **U.S. Department of Justice**
  - Human Trafficking Prosecution (HTP) Unit within the Criminal Section of the Justice Department's Civil Rights Division
  - FBI
  - US Attorneys
- **U.S. Department of Health and Human Services**
- **U.S. Department of Labor**
- **U.S. Department of Homeland Security**
- **Equal Employment Opportunity Commission**

Human Trafficking

Wisconsin

- Sen. Glenn Grothman, Rep. Fred Kessler, and Rep. Sue Jeskewitz are drafting the anti-human trafficking bill
- One domestic servitude case: U.S. v. Calimlim

Human Trafficking

Wisconsin

2007 OJA HT Survey

- Lack of familiarity with the term "human trafficking" leads to considerable underreporting of possible HT cases
- There may be as many as 200 HT cases encountered by the survey respondents

Human Trafficking

2007 OJA Survery

Victim profile

- Adult sex workers
- Sexually exploited minors
- Mail-order brides
- Domestic helpers
- Service workers
- Migrant workers
- Factory workers

Human Trafficking

2007 OJA Survery

Trafficker profile

- family members (47%)
- prostitute clients (23%)
- brothel owners/pimps (21%)
- acquaintances (19%)
- sex abusers of minors (19%)
- homeowners (12%)
- migrant worker recruiters (9%)
- sweatshop owners (2%)
- other (14%)

Trafficking Victims Protection Act of 2000

Reauthorized – 2003 & 2005

- Prosecution of the traffickers in the US
  - Defines new crimes of trafficking and forced labor
- Prevention in countries of origin
  - Publishes annual *Trafficking In Persons Report* on countries' efforts in combating trafficking
- Protection of victims in the US
  - Provides trafficked persons immigration relief and other benefits

Protection for Trafficking Victims under TVPA

1. Immigration Relief
   - Short Term – Continued Presence
     - Federal law enforcement only (VSFT)
   - Long Term – T Visa
     - Victim and victim attorney self-petition; law enforcement supplement to application (Form I-914)
2. Access to Refugee Benefits (with Continued Presence or T Visa)
   - Doesn't require successful prosecution

Protection for Trafficking Victims under TVPA

3. Alternatives to detention
   - Adequate shelter, care, protection in federal custody
4. Legal Assistance, information, translation services
5. Mandatory Restitution
   - Doesn't require indictment or successful prosecution

TVPA Definition

Human Trafficking

"severe forms of trafficking in persons" means:

- (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

(*Victims of Trafficking and Violence Prevention Act of 2000* can be found at www.ojp.usdoj.gov/vawo/laws/vawo2000/)

Three Elements Necessary to Meet Trafficking Definition

1	2	3
ACTION	**MEANS**	**PURPOSE**
Recruiting, Harboring, Transporting, Providing, OR Obtaining ***a person (or so attempts)***	**Force, Fraud, OR Coercion** *Psychological OR Physical* (not required for minors under age 18 for commercial sex)	**Involuntary Servitude OR Debt Bondage OR Slavery OR Sexual Exploitation**

"Coercion"

Human Trafficking

"Coercion" means threats of serious harm to or physical restraint against any person. It also encompasses any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person. Coercion also includes the abuse or threatened abuse of law or the legal process.

TVPA Key Points

Human Trafficking

- **TVPA definition of trafficking does not require physical restraint, bodily harm, or physical force**
- **TVPA definition of trafficking does not require transportation/movement of the victim**
- **TVPA definition of trafficking includes both USC and foreign nationals**
- **For identifying trafficked person, think "compelled service"**

Who is Eligible

T-Visa

- Is or has been victim of severe form of trafficking in persons
- Is present in U.S., American Samoa, Northern Marianas on account of trafficking
- Has complied with reasonable request for assistance in investigation or prosecution of acts of trafficking
  - Children under 18 do not need to meet this criterion
- Would suffer extreme hardship involving unusual and severe harm upon removal

Trafficking vs. Smuggling

Trafficking	Smuggling
■ Crime or violation against a person	■ Illegal crossing of an international border
■ Contains element of coercion (cannot consent to enslavement)	■ No coercion
■ Subsequent exploitation and/or forced labor	■ Illegal entry only
■ Trafficked persons seen as victims	■ Smuggled persons seen as violators of the law

Are they Victims of Trafficking?

√ An under-aged girl forced into prostitution

■ A factory worker laboring in unsafe conditions

■ An agricultural worker earning slave wages

√ A prostitute working off her debt to her pimp

√ A domestic helper forced to work 14-hour days

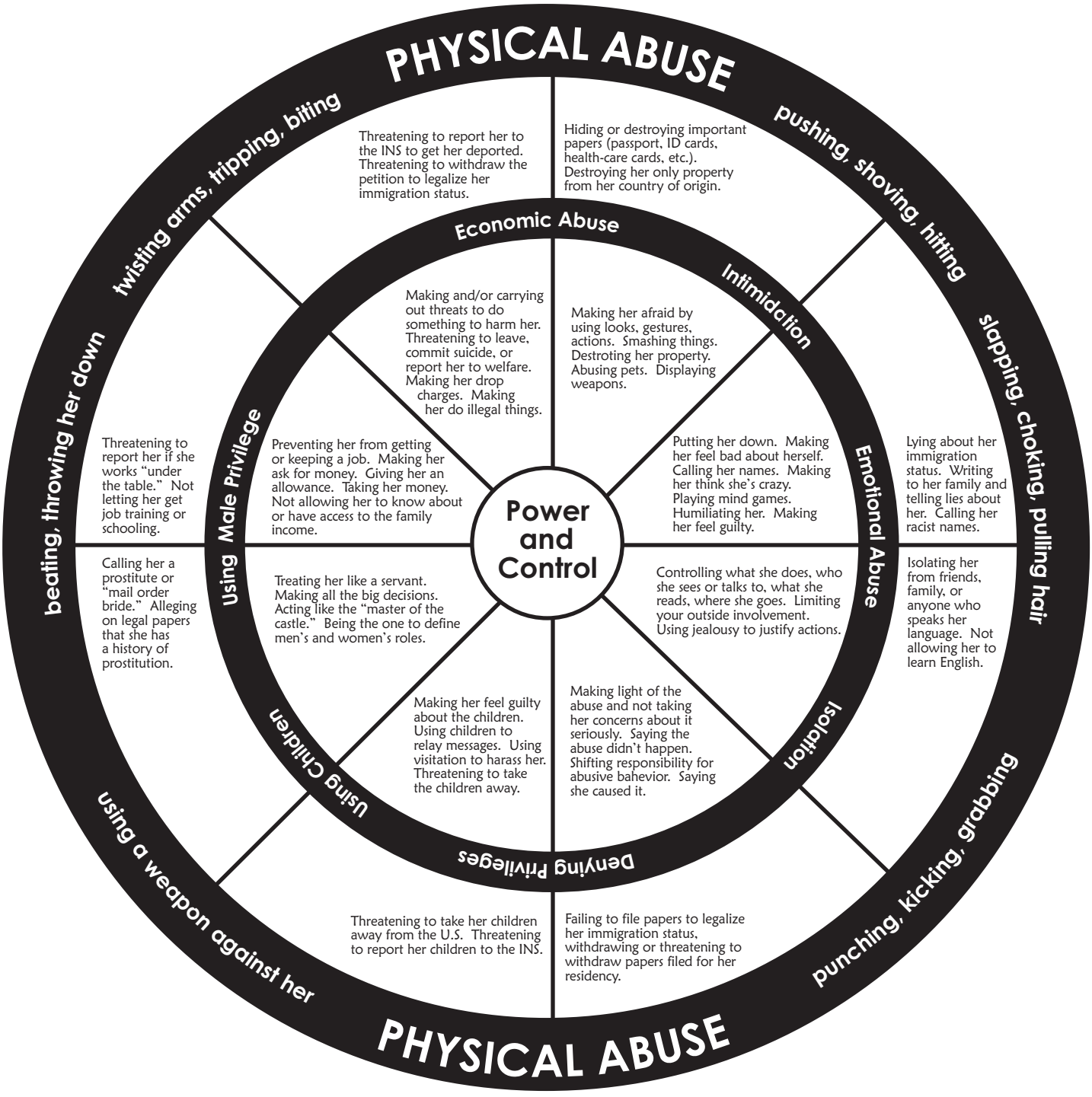
■ An illegal alien smuggled into the country

√ An individual traded by family members for goods or services

Resources

- USDOJ Trafficking Complaint Line 1-888-428-7581
- DHHS Trafficking Line: 1-888-3737-888
- DV/SA/Trafficking Resources (FVPF)
  www.endabuse.org
- DHHS Rescue & Restore
  http://www.acf.hhs.gov/trafficking/index.html
- Polaris Project www.polarisproject.org

Immigrant Power and Control Wheel



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Domestic Abuse Intervention Project
202 East Superior Street
Duluth, MN 55802
218.722.4134

Immigration Basics

By Gail Pendleton

Realities for Immigrant Populations: How They Experience the System

Lack of Knowledge and Misinformation about the Legal System

Both citizen and noncitizen abusers routinely misinform their victims about their rights in the United States. For instance, they often claim that a noncitizen cannot obtain child custody from a U.S. court and that attempting to do so will result in the noncitizen's deportation, or the child's deportation if the child is undocumented. Courts who use a noncitizen's immigration status against her when determining child custody legitimize fears that the civil system is not a source of justice for immigrants.

Many noncitizens also come from countries where women cannot receive justice. They may lack domestic violence laws, or, if laws do exist, may be unenforced. Additionally, the proof requirements for enforcement may be absurdly onerous. Foreign courts may require oral testimony or prohibit testimony from women. They may provide justice only to those who pay for it. Social mores about "a woman's place" also may discourage women from accessing civil systems in their homeland (or in the United States).

Fear of the Police and Judicial System

Similar dynamics apply to a noncitizen victim's fear of the police and the judicial system. Abusers tell victims that the police will not help them if they are undocumented, or that calling the police will result in their deportation. Noncitizens may come from countries where police are instruments of repression, respond only to bribes, or believe women should be subordinate to men. Unfortunately, some police officers in this country do discriminate against noncitizens, especially if they are people of color or do not speak English well. Reports of police helping to enforce the immigration laws by arresting, detaining, and handing noncitizens over to Department of Homeland Security (DHS) personnel undermine or eliminate trust immigrant communities might have in the police. Courts that allow or encourage DHS personnel to attend hearings (and often to arrest, and detain noncitizens) ensure that immigrants will not view them as a source of fairness or justice.

Fear of Deportation or Removal

Fear of deportation (now called "removal" by Congress and DHS) is paramount for all immigrants. Although some immigrants may travel safely back and forth between their home country and the United States, victims of domestic violence are rarely in this situation. They often will lose access to their children, be ostracized and shunned in their home country, and otherwise suffer if they are

returned to their home country. If the children remain here, they often remain in the hands of the abusers.

Abusers play on this fear in many ways, some noted above. They routinely threaten to report their victims to DHS. In many situations, they actually do control their victims' access to immigration status, and their victims' status may be revoked by DHS if the abuser calls them. Abusers very typically call DHS when a victim starts to challenge their domination, alleging that she married him only to gain immigration status. Fortunately, with the new routes to status, noncitizens in this situation may be able to gain status without the help, and despite the interference, of the abuser.

Any systems that actually do turn noncitizens over to DHS legitimize this fear and erect an insurmountable barrier to serving immigrant communities. Unfortunately, DHS may attempt to remove noncitizen victims reported to them by abusers, even though the victims have pending applications for immigration status based on domestic violence. 1

Fear the Abuser Will Be Removed

Many noncitizens who suffer abuse wish to achieve safety for themselves and their children, but they do not wish their abusers to be removed. Courts should not dismiss these concerns; they are quite legitimate. Abusers often take children with them when they leave the U.S.; once this happens it is unlikely the noncitizen parent will ever see them again. If the abuser returns to the U.S., he may be even more dangerous than when he left.

The abuser may provide vital financial support to the family, especially the children, which will end with his removal. Many immigrants, including abusers, send money back to the family in the home country; this flow will end with the abuser's removal and will cause hardship to the communities and people the victim cares about. Her family and community in the homeland may shun and blame her for causing hardship to them and to the abuser and for leaving her husband.

Many noncitizens who suffer domestic violence have an immigration status that depends on the abuser's presence in the United States. Although Congress has created special routes to status for many noncitizens, not all will qualify, they may not be aware they qualify, or the process for qualifying is onerous. When DHS removes an abuser, it rarely provides information to the victim about her eligibility to apply for status.

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1 For specific case examples, copes of stays of removal and briefs, contact ASISTA Immigration Technical Assistance Project (ckellogg@asistaonline.org). The VAWA experts at DHS are attempting to create protocols that will prevent this; in the meantime, victims of domestic violence continue to be removed at the behest of their abusers.

Language and Gender
Language barriers are especially problematic in the civil court system, which rarely requires competent interpretation and often lacks multi-lingual personnel. Victims are discouraged from accessing the court when they cannot communicate with court personnel. Courts may allow family members to serve as interpreters, or enlist immigrant community members who may have a bias against, or paternalistic approach to, the victim. Political, cultural and gender differences may inhibit a victim from speaking openly in court, and many interpreters may fail to provide phrase-by-phrase interpretation. In addition, many immigrant women may be reticent to discuss domestic violence in front of men, especially men from their community.

Cultural and Religious
As is true in some longstanding U.S. communities, cultural or religious leaders may pressure victims to submit to domestic violence. Challenging male domination or "airing dirty laundry" will be punished by isolation and social disapproval. Divorce may violate social mores and bring shame to the victim's family or community. Even when they are ready to leave their abusers, many noncitizens find that available shelters and domestic violence resources are culturally and linguistically inappropriate. Noncitizen victims may not even realize what a "shelter" is; if they are sent there without explanation, they may believe they are in a detention center.

Economic
Economic control is a common form of abuse in many cultures. Its consequences are exacerbated for noncitizen victims because they cannot legally obtain work authorization without applying for immigration status. If they can work, they often cannot find child care. If they are eligible for public benefits, they often cannot obtain them because public benefits administrators are ignorant about laws authorizing noncitizens to receive benefits or are antagonistic to noncitizens generally.

Some of the obstacles noted above are common to virtually all domestic violence victims encountered in family court; some are permutations of common problems, or severe versions of what courts regularly see. However, some are specific to immigrant women who may be suffering simultaneously from race, gender, cultural, and language barriers, and must overcome fear of removal to access the system. Thus, the immigrant women family courts see may be only the few whose desperation has overwhelmed their fears.

Overview of the Immigration System and Laws

By Gail Pendleton & Ellen Kemp

The immigration system, its laws, and its regulations are complex and change frequently. What was true today may not be true tomorrow. To ensure you have current information, develop a working relationship with a local immigration expert who can answer your questions about how to help noncitizens you may encounter. Alternatively, the ASISTA Immigration Technical Assistance Project is available to provide such advice.[1] Check our website for useful document you may download for free and for the table of contents of our comprehensive training materials, and join the VAWA Updates list serve.[2]

To avoid unwittingly jeopardizing those you wish to help, you should be familiar with basic immigration rules.

INS & DHS: Reorganization

Most people will be familiar with the former Immigration and Naturalization Service (INS), the government agency that until recently had authority over all noncitizens. After September 11, 2001, the U.S. created a new, Cabinet-level government agency, the Department of Homeland Security (DHS). DHS took over almost all of the functions of the former INS and reorganized them under three new bureaus. The new bureaus are:

Citizenship and Immigration Services (CIS), which provides immigration-related services and benefits such as lawful permanent residence, naturalization and work authorization;

Immigration and Customs Enforcement (ICE), which investigates and enforces federal immigration laws, customs laws, and air security laws; and

Customs and Border Protection (CBP), which is responsible for the borders.

The Department of Justice retained control only of the immigration judges and court system (also known as the Executive Office for Immigration Review, or EOIR).

Rights of Noncitizens

In 1996, Congress passed a law making it very easy for INS/ICE to swiftly deport (now called "remove") people from the U.S. This applies even to people who

[1] Contact Christine Kellogg at ckellogg@asistaonline.org or 515-244-2469.

[2] Our website is www.asistaonline.org. To join this list serve, send an email to Christine Kellogg at ckellogg@asistaonline.org.

have the right to be in the U.S. Noncitizens should know they have the following rights:

- The right to speak to an attorney before answering any questions or signing any documents;
- The right to a hearing with an Immigration Judge;
- The right to have an attorney represent them at that hearing and in any interview with INS (these are not government-paid attorneys, as in criminal proceedings, however); and
- The right to request release from detention, by paying a bond if necessary.

All noncitizens have these rights but will not necessarily be informed of them when detained. If they fail to assert these rights they may be deported without seeing either an attorney or an immigration judge. Leaving the U.S. in this way may have serious consequences for the noncitizen's ability to later enter or to gain legal immigration status in the U.S.

Learning the System: Basic Immigration Concepts

Noncitizen
"Noncitizen" means any person in the U.S. who is not a U.S. citizen, whether the person has legal immigration documents or not.

Undocumented
Generally, the undocumented are noncitizens who either entered the U.S. without INS permission or whose legal immigration documents have expired since they entered.

Visa
A visa is the document the U.S. gives to a noncitizen to come into the country. A person may get a visa from DHS or from a U.S. consular official in another country. Visas for people who are in the U.S. temporarily are called nonimmigrant visas. Visas for people who plan to stay in the U.S. are immigrant visas. Most people with immigrant visas will eventually get a card that identifies their immigration status.

Consular Officers
Consular officers at U.S. embassies abroad grant and deny requests for immigrant and nonimmigrant visas. They are part of the U.S. Department of State. They have an enormous amount of discretion in making their decisions and no court in the U.S. may review their decisions, except in very unusual circumstances.

Removal (Formerly Called Exclusion and Deportation)
DHS may remove any person in the United States who is not a US citizen, using two sets of rules: the grounds of inadmissibility and the grounds of deportation. DHS uses the deportation grounds against those who entered legally but are not

subject to removal (for committing crimes, for instance). DHS uses the grounds of inadmissibility against those who entered the US without permission. The grounds of inadmissibility also apply to people attempting to enter the United States or, under a legal fiction, to those within the United States seeking lawful permanent residence.

Expedited Removal

DHS may "remove" noncitizens encountered at the border or ports of entry if they lack documents or present inadequate or fraudulent documents. This "expedited removal" occurs without a hearing with an immigration judge or representation by counsel, and noncitizens are not generally apprised of their possible eligibility for immigration status, unless they express a fear of persecution in their homelands. The consequences of expedited removal are the same, however, as those flowing from full-fledged immigration proceedings, including barriers to gaining lawful permanent residence or other immigration status in the future.

Immigration Proceedings

All noncitizens inside the U.S. have the right to an immigration hearing. It is important for noncitizens arrested by DHS to assert their right to a hearing because immigration proceedings are like trials. An immigration judge presides over the hearing, a government attorney represents DHS, and the noncitizen has the right to a lawyer, although not at the government's expense. Some rules about evidence and procedure apply in immigration proceedings. The Board of Immigration Appeals (BIA) reviews all appeals from immigration judge decisions. The federal courts have some power to review BIA decisions.

Kinds of Immigration Status

Although Congress created special routes to immigration status for certain battered noncitizens in the Violence Against Women Act (VAWA), there may be other ways noncitizens you encounter could gain legal immigration status in the U.S. In addition, some may already have status and not realize it. If nothing else, this section should demonstrate that the immigration system is complicated and that determining who is or is not documented or eligible for immigration status it not simple. This information will provide you with some background, but referring noncitizens to immigration experts is the best insurance that they get the information they need.

Each immigration status has different requirements and benefits. This list includes only the major categories of status likely to apply to a noncitizen you encounter.

US Citizenship

Anyone born in the United States, its territories and certain possessions (Puerto Rico, Guam and the Virgin Islands, for instance) are US citizens. This includes people born of undocumented parents. Children of US citizens who are born while their parents are in another country also may be US citizens. Everyone

else must “naturalize” to become a citizen, usually after a required period of lawful permanent residence.

US citizens cannot be removed unless a federal court takes away their citizenship because they obtained citizenship by fraud or other illegal means. CItizens don’t need DHS authorization to work and may file petitions for lawful permanent residence for their spouses, parents, sons and daughters (both married and unmarried), and brothers and sisters. Citizens are eligible for all federal, state, and local public benefits, whether they were born in the United States or otherwise obtained citizenship. Most US citizens will either have a birth certificate showing they were born in the United States or a certificate of naturalization.

Naturalization

Only certain noncitizens, primarily those who have had lawful permanent residence for at least three years, are eligible to become US citizens. Those who seek to naturalization must demonstrate good moral character and pass several tests, notably English proficiency and knowledge of the Constitution and US political system. There are some limited exceptions to these naturalization requirements.

Lawful Permanent Residence

Lawful permanent residents are noncitizens that make the U.S. their home, have authorization to work in the U.S. and have the most stable immigration status. They may serve in the U.S. military but they cannot vote. They must follow certain guidelines when they travel or stay outside the U.S., and DHS may still remove them for certain reasons. After five years (and in some cases, three years), lawful permanent residents may become citizens (“naturalize”) by taking a test and fulfilling other requirements. Lawful permanent residents should have Permanent Residence Cards, often called “green cards.” Lawful permanent residents may file petitions for lawful permanent residence for their spouses and unmarried children. Anyone with a Permanent Resident Card can work legally in the United States.

Conditional Residence

Noncitizens who apply for lawful permanent resident status based on marriage to a U.S. citizen or lawful permanent resident are called “conditional residents” if they have been married for less than two years when they obtained lawful permanent residence. To keep their lawful permanent residence status, conditional residents must file a “joint” petition with their spouses two years after the first petition is granted. Conditional residents have all the rights of lawful permanent residents.

In some cases, a conditional resident may have to file the joint petition by herself. To do this, she must check the box on the joint petition form asking for a waiver. DHS may grant waivers to conditional residents who are divorced from their

spouses, who would suffer extreme hardship without it, or who are abused by their spouses.

Battered Spouses and Children of US Citizens and Lawful Permanent Residents and Parents of US Citizens

In the 1994 Violence Against Women Act (VAWA) Congress created two ways certain immigrant survivors of domestic violence can gain status without their abusers' help. Those who can show they were battered or subjected to extreme cruelty by a US citizen or lawful permanent resident spouse or parent may petition on their own. In 2005, Congress added parents of abusive US citizens to this special class of "self-petitioners." Those who are or have been the spouses or children of abusive US citizens or lawful permanent residents, and parents whose child has been abused by its US citizen or lawful permanent resident parent are eligible for a special "cancellation of removal."

VAWA applicants can get permission to work ("work authorization"), can receive certain federal public benefits that many noncitizens can't get, and eventually may become lawful permanent residents.

Abandoned, Neglected and Abused Children

Some children whose parents have abandoned, neglected, or abused them may be able to get lawful permanent residence through Special Immigrant Juvenile Status (SIJS) They will need findings from a family court to qualify for immigration status.

Nicaraguan, Cuban, and Haitian Adjustment to Lawful Permanent Residence (NACARA and HRIFA)

In 1997 Congress passed the Nicaraguan Adjustment and Central American Relief Act (NACARA). NACARA allows some categories of Nicaraguans and Cubans to apply for lawful permanent residence. In October 1998 Congress also created a new route to status for thousands of Haitians who fled political upheaval in their country several years ago (HRIFA).

Nicaraguans and Cubans who entered the United States before December 1, 1995 could gain lawful permanent residence if they applied before April 1, 2000. Haitians who applied by that date qualified for lawful permanent residence if they had applied for asylum or been "paroled" into the United States before December 31, 1995. In VAWA 2000, Congress added special provisions for spouses and children abused by NACARA, Cuban/Haitian, and HRIFA applicants.

Parolees

Parole is a mechanism by which DHS allows noncitizens into the United States for specific purposes, such as attending a hearing. It may also use parole to bring in the children or spouses of VAWA, U and T visa applicants. Noncitizens paroled into the United States for a year or more are eligible for some public benefits not available to other parolees.

Cancellation of Removal

There are several forms of cancellation of removal, including one designed specifically for certain victims of domestic violence. Those who are not domestic violence survivors may seek ten-year cancellation of removal if they show they have been continuously present in the U.S. for ten years, that removing them will cause "exceptional and extremely unusual hardship" to a U.S. citizen or lawful permanent resident spouse, child or parent, and that they have good moral character. When a judge grants cancellation of removal, the applicant also receives lawful permanent residence

Voluntary Departure and Deferred Action

DHS District Directors and immigration judges may grant "voluntary departure" to noncitizens they could remove from the United States. Noncitizens with voluntary departure must leave by the date stamped on the notice or face stiff fines and penalties, including bars to becoming lawful permanent residents. The 1996 immigration law limited voluntary departure grants to four months.

DHS also may give "deferred action" to people they could remove. There is a special deferred action system for VAWA self-petitioners and U interim relief applicants. Otherwise, deferred action is rarely granted. Those who do receive deferred action, however, don't have to leave the United States by any particular date and don't face fines and bars to status for failing to leave.

Since deferred action and voluntary departure are discretionary grants of status, DHS may revoke them any time. People granted deferred action may request work authorization and may be eligible for some public benefits.

Nonimmigrants

Nonimmigrants have their permanent home or residence in another country. There are many kinds of non-immigrants, including visitors for business or pleasure, foreign students, and temporary workers and trainees. In 2000, Congress created several new kinds of non-immigrant categories, which some victims of violence may wish to use. These include special visas for people who have had to wait a long time to get lawful permanent residence and new visas for certain victims of human trafficking or other crimes. People in these new categories may eventually gain lawful permanent residence, even though this seems contrary to the normal assumptions about nonimmigrants.

Some nonimmigrants are allowed to work with DHS permission, including the categories created in 2000. Some of these nonimmigrants may be able to get public benefits as well. Many nonimmigrants may bring in their spouses and children ("derivatives"), but their status is entirely dependent on maintaining the relationship with the primary nonimmigrant. In 2005 Congress added abused derivatives, spouses and children, of many nonimmigrants to the list of noncitizens who may obtain work authorization.

Nonimmigrants who stay longer than originally permitted, without an extension from DHS, become undocumented. Even before the dates on their visas expire, DHS may deport nonimmigrants if they work without permission or violate other conditions on their visas. The 1996 immigration law added several penalties and barriers to immigration status for people who stay beyond the expiration dates on their nonimmigrant visas.

New U & T Visas: Victims of Crimes and of Trafficking

The Victims of Trafficking and Violence Prevention Act of 2000 created the new U and T visas. The U visa is for victims of designated crimes. The T visa is for those who have been subjected to sex or labor trafficking. Both lead to lawful permanent residence and have waivers of most inadmissibility grounds, including public charge and health-related grounds such as HIV/AIDS. The T visa provides eligible immigrants with access to public benefits and employment authorization. The U visa provides eligible immigrants with authorized stay in the United States and employment authorization. For more information on T and U visas, consult the Asista website at www.asistaonline.org.

The Diversity Program or "Lottery"

Periodically, Congress creates special temporary programs that grant lawful permanent residence to people from certain countries. Those who get status this way are chosen by a lottery.

Asylum, Refugee Status, Withholding of Removal and the Convention against Torture

Asylum and refugee status are for those who show that they have a "well founded fear" of persecution in their homelands based on race, religion, nationality, political opinion or membership in a social group. Refugees applied for and got asylum before they came to the United States. Those who apply for asylum once they are in the United States are asylum applicants. If they get asylum, they become asylees. Some asylum applicants are granted "withholding of removal" (formerly withholding of deportation) instead of asylum. People who can't qualify for asylum or withholding of removal may ask for protection under the Convention against Torture (CAT).

Asylees and refugees can apply for lawful permanent residence after a year, but there is a limit on the number of asylees who can obtain lawful permanent residence each year. It may take many years for the government to issue lawful permanent residence to asylees. Those granted withholding of removal or CAT protectionare not eligible for lawful permanent residence.

Refugees, asylees and people granted withholding of removal are eligible for all public benefits (at least for five years) and can get work authorization. Asylum applicants are not eligible for many public benefits but may request work authorization 150 days after they file for asylum. Noncitizens granted CAT

protection can get work authorization and public benefits, but only if the immigration judge decides DHS may not permanently detain them.

Temporary Protected Status (TPS)
The United States may grant this status for a limited period of time to nationals of certain countries in turmoil. Most recently, TPS has been granted to nationals of Burundi, El Salvador, Honduras, Liberia, Montserrat, Nicaragua, Sierra Leone, Somalia, and Sudan, although the list of countries changes frequently. Once the designated period of protection ends, DHS sends TPS recipients a notice that they must appear in immigration court. At this point, they must either leave the United States or apply for another immigration status.

Salvadorans, Guatemalans, and Eastern Europeans
The NACARA law noted above also created special routes to immigration status for certain Salvadorans, Guatemalans, and Eastern Europeans. The rules and process are complicated.

People from former Soviet Republics or former Eastern European states may qualify if they entered the United States by January 1, 1991 and filed for asylum by January 1, 1992. Guatemalans may qualify if they entered the United States before October 1, 1990 and either applied for asylum before April 1, 1990 or signed up as part of the "American Baptist Churches" lawsuit agreement (called the "ABC class").

Salvadorans may qualify if they entered the United States before September 19, 1990 and either applied for asylum by April 1, 1990, or are in the ABC Class, or applied for Temporary Protected Status by October 31, 1991.

Registry
Registry allows people who have been in the United States for a very long time, since 1972, to gain lawful permanent residence. One great advantage of registry is that most of the grounds of inadmissibility do not apply.

Gaining Legal Immigration Status
Each immigration status has different requirements. The system for getting an immigration status is very complicated and applying for any status is risky. This section will describe various routes to lawful permanent residence. Since many lawful permanent residents may not be able to get the public benefits they need, it also will describe how these immigrants may become U.S. citizens.

Most people want to become lawful permanent residents (get a “green card”) because this status provides the most security short of citizenship. Lawful permanent residence is hard to lose and lawful permanent residents can work. Most lawful permanent residents can become citizens after five years. Up until that time, however, DHS can remove them or keep them from coming back into the United States.

People can become lawful permanent residents in many ways: through a relationship with a family member, through employment, through the “lottery,” or through another special program. Applying for lawful permanent residence through an employer is very complicated; applying for status through the lottery is very easy but most applicants don’t win. Getting lawful permanent residence through a relative can be a very lengthy process, depending on which relative "sponsors" (applies for) the noncitizen.

APPLYING FOR LAWFUL PERMANENT RESIDENCE THROUGH FAMILY MEMBERS

US citizens and lawful permanent residents can file applications for their closest family members. Only U.S. citizens can "sponsor" their parents, brothers and sisters, and married children over 21. Citizens must be at least 21 to sponsor their parents, and brothers and sisters of citizens must wait many, many years (sometimes decades) before they receive lawful permanent residence. The difference in waiting times depends on a complicated quota system involving the number of visas already used by applicants from the same country and the "preference" category the immigrant is in. For instance, spouses and children under 21 are in one category; children of U.S. citizens over 21 (called "sons and daughters") are in another.

The family immigration process requires two applications: a petition and a visa application. The petition shows that the immigrant has a family relationship with the sponsor that qualifies her or him for lawful permanent residence. The visa application is the actual application for lawful permanent residence. Applicants for lawful permanent residence must show they are not "inadmissible" as defined by the immigration statute.

Spouses and children of lawful permanent residents must file the two applications separately. When DHS approves the first application, it assigns a "priority date" to the immigrant. The immigrant must wait to file the second part, the application for lawful permanent residence, until the quota system allows all applicants in the immigrant's category with the same priority date tp file for lawful permanent residence. The quota system doesn't apply to spouses and children under 21 of US citizens, so they can file both the petition and the visa application at the same time.

DHS usually wants to interview the sponsor and the immigrant before making a decision on the application. It makes decisions on both parts of the application at the same time if the immigrant is the spouse or child of a U.S. citizen. Applicants who must wait to apply for lawful permanent residence usually have a separate interview on this application (DHS usually approves the first part without an interview). These interviews take place either at a DHS office in the United States or at a US consular office abroad.

How Long Will It Take to Get Lawful Permanent Residence?
It used to be that spouses, children, and parents of US citizens got lawful permanent residence fairly quickly. Now DHS has so many pending applications for these immigrant visas that applicants may wait for more than a year for an interview. At the same time, the waiting periods for spouses and children of lawful permanent residents have become very long. Because of these problems,

Congress passed a law in December, 2000, that allows some of these applicants to live and work in the United States with legal immigration status (a "nonimmigrant" visa) until they receive permanent residence. This only applies, however, to people who had filed applications before December 21, 2000 and who already have waited three years for their status.

DHS and Congress believe many noncitizens marry US citizens or lawful permanent residents just to get immigration status. For this reason, applicants who were married for less than two years when they get their permanent resident cards are “conditional” residents. They must file another petition in two years to keep their lawful permanent residence status.

Can the Applicant Stay Here to Get Lawful Permanent Residence?
If possible, noncitizens should try to stay in the United States for the interview on their lawful permanent residence applications. This is called “adjusting status.” If they entered the United States without government permission or worked without authorization, however, they may have to go to a US embassy abroad (usually in their home countries) to get “immigrant” visas, which will confer lawful permanent residence once they return to the United States. This is called “consular processing.” There are a number of other reasons why they may have to process their visas abroad. The most common ones are listed below.

Normally, noncitizens who entered the United States without government permission, lost their status, or worked without government approval can only get lawful permanent residence by going abroad. In 2000, Congress exempted VAWA applicants from the normal rules that apply; all VAWA applicants should now be able to stay in the United States to process their lawful permanent residence applications.

It is often harder for people to get their applications approved abroad than in the United States because they usually can’t bring their family members or legal representatives with them to the consular interview. Without this support it is much more difficult to challenge a consular officer’s decision that there are problems with an application. Unfortunately, while an applicant can appeal an adjustment denial, there is no right to appeal a consular denial.

ROUTES TO STATUS FOR DOMESTIC VIOLENCE SURVIVORS

Background

In the traditional family-based petition process noncitizens must rely on their U.S. citizen or lawful permanent resident relatives to file applications, rendering them particularly vulnerable to abusive sponsors. Congress first addressed this problem in 1990 with the battered spouse waiver for conditional residents[1] who otherwise had to rely on abusive spouses to file a "joint" petition with them. It soon became evident, however, that this remedied only part of the problem; many spouses and parents failed to file petitions for their noncitizen relatives, using their control of the immigration process as a weapon of abuse. In the 1994 VAWA, Congress added two new forms of immigration relief to help this latter population: "VAWA self-petitioning" and "VAWA suspension of deportation."

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act reframed VAWA suspension of deportation as VAWA cancellation of removal. In October 2000, President Clinton signed the Victims of Trafficking and Violence Protection Act of 2000,[2] which removed many of the problems noncitizens encounter in pursuing VAWA status. It also included new nonimmigrant visas leading to adjustment of status for other victims of crimes, including domestic violence survivors who do not qualify for VAWA relief. In 2005 Congress added protections for abused parents of US citizens and abused spouses and children of certain nonimmigrants.

The National Network to End Violence Against Immigrant Women ("the Network"), of which the author is a Co-Chair, has a nationwide network of experts, including criminal and family court judges, that works together to ensure DHS implements the will of Congress. To this end, DHS has designated several officers who have worked closely with the Network since 1996; together, we have achieved significant system improvements without resort to litigation. As noted earlier, most immigration attorneys are not familiar with these special routes to status and often fail to present adequate cases because of their inexperience with domestic violence issues. Noncitizens are most likely to profit from referrals to members of the Network, who employ a partnership model involving both domestic violence advocates and immigration attorneys.

A few caveats concerning gender-based asylum: Gender-based asylum operates in the general asylum system, which is separate from the system noted above for forms of relief specifically designed for domestic violence survivors. In

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[1] INA §216(c)(4)(C), 8 U.S.C. §1186a(c)(4)(C), created by Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

[2] Pub. L. No. 106-386, § 2002, 114 Stat. 1464 (2000).

addition, gender-based asylum is in flux as of this writing because the extent of the government's commitment to recognizing gender-based violence as a basis for asylum is unclear. Finally, applying for asylum in general requires expertise beyond that needed for the other forms of application. Nevertheless, if a noncitizen primarily fears being harmed in the homeland, she may wish to pursue this form of relief. To win such a case, she will need an attorney with experience in both asylum and domestic violence.[3]

The Special Routes to Status: Self-Petitioning, VAWA Cancellation, the Battered Spouse Waiver and the U Visa

A key aspect of the special routes to status based on domestic violence is the "any credible evidence" standard dictated by Congress.[4] This is the most liberal evidentiary standard in the immigration law, acknowledging that the "primary" evidence normally required may be unavailable to many noncitizen survivors of domestic violence.[5] Findings, judgments, and documents from family court are inherently "credible" and extremely helpful to noncitizens seeking immigration status.

There are many kinds of evidence that may be helpful to noncitizens seeking status as victims of domestic violence. This section describes those most helpful.[6]

Battery or Extreme Cruelty

A requirement for self-petitioning, VAWA cancellation, battered spouse waivers and work authorization for abused spouses and children of nonimmigrants is proof of battery or extreme cruelty. [7] U visa applicants must show they suffered "substantial physical or emotional abuse" [8] as the result of a crime (including domestic violence and sexual assault). For self-petitioning and VAWA cancellation, battery or extreme cruelty to either the applicant or the applicant's child will qualify a noncitizen for status.

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3 ASISTA Immigration Technical Assistance Project maintains a database and list serve of those specializing in domestic violence asylum cases, from which we may provide referrals to noncitizens needing assistance. Contact Christine Kellogg at Christine@asistaonline.org.

4 *See, e.g.*, Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 at § 204(a)(1)(H); (codified as amended at 8 U.S.C. §1110 *et seq.*; hereinafter INA), 8 U.S.C. §1154(a)(1)(H); INA § 240A(b)(2)(D); 8 U.S.C. § 1229b; INA § 216(c)(4)(C); 8 U.S.C. §1186a(c)(4)(C).

5 *See, e.g.*, 8 C.F.R. § 204.2(c)(2)(i).

6 For in-depth descriptions of eligibility requirements and filing procedures for the immigration applications described here, please visit www.asistaonline.org.

7 INA §101(a)(1)(A)(I)(bb), 8 U.S.C. §1154(a)(1)(A)(iii)(I)(bb).

8 INA §101(a)(15)(U)(i)(I), 8 U.S.C. §1101(a)(15)(U)(i)(I).

Extreme cruelty is a broad concept for immigration purposes, covering any kind of abuse designed to exert power and control over the victim. It is not limited to any state definition (if there is one) and includes psychological, emotional and economic abuse, coercion, threats (to anyone or anything the victim cares about), intimidation, degradation, social isolation, possessiveness, harassment of employers and other employment-related abuse, manipulating and using immigration status, and harming children, family members and pets.

VAWA Cancellation Factors

In addition to showing the requirements for self-petitioning, VAWA cancellation applicants must show extreme hardship to themselves or to their children (regardless of the children's immigration status). The factors DHS considers for VAWA cancellation (also for self-petitioning before VAWA 2000) are summarized in the following considerations:

- The need for access to courts and to the criminal justice system in this country;
- The applicant's need for and use of services or support systems in this country juxtaposed against the lack or unavailability of similar services and support in the homeland;
- The lack of laws or enforcement of laws that protect victims of domestic violence, and the likelihood the abuser will follow her back (or already is there);
- The likelihood people in the home country (including his relatives, her relatives or their community) will harm the applicant;
- The abuse the victim suffered was very severe or longstanding;
- Laws, social mores, and customs in the home country that penalize or ostracize women who challenge the subordination of women, who are divorced, or who have adopted "Western" values; and
- The application of all the above factors to the children.

Identifying Noncitizens Eligible for U and T Visas

The two new visas Congress created in 2000 are for certain victims of crimes. Neither the status of the victim nor the perpetrator is relevant for either visa. Thus, the U visa in particular should prove helpful to domestic violence survivors whose abusers are undocumented or are not their spouses or parents.

Accessing the criminal justice system is essential to both visas, but family courts may help noncitizens unaware of this option that they may wish to pursue a U or T visa, and refer them to advocates or attorneys who can help them.

The U Visa

Victims of a large array of crimes are eligible for U visas. They include victims of domestic violence, nannies subjected to abuse from their employers, trafficking victims, and victims of rape in the workplace. To qualify for a U visa, victims must show that they have suffered "substantial physical or mental abuse." The proof noted in the section on battery and extreme cruelty will, therefore, be helpful in these cases as well. In addition, judges who have authority to investigate crimes should provide certificates to noncitizens who are qualifying victims of crimes and have been, are being, or are likely to be helpful in further investigation or prosecution.[9] This will both encourage undocumented victims of crimes to report them and help the criminal justice system prosecute perpetrators who prey on immigrant communities.

The T Visa

These visas for victims of trafficking for sex or labor require the involvement of federal law enforcement.[10] If federal law enforcement is not helpful, the family court system may provide valuable "secondary" evidence. Such evidence could include findings or documents that show the noncitizen is a victim of such trafficking and that either the requests by federal law enforcement were not reasonable, or that the victim did, in fact, comply with requests.

In addition, T visa applicants must show extreme hardship involving unusual and severe harm if removed.[11] This is a higher standard than for VAWA cancellation.

Gender-Based Persecution

A victim of domestic violence seeking asylum must show that she fears persecution in her homeland because she has been or is likely to be subjected to domestic violence if returned there. In most cases, the claim is based on past abuse; fleeing to the U.S. was the victim's final desperate attempt to save herself and her children. Often, the abuser may now be in the U.S., continuing his persecution of his family. These are the cases in which the family courts may be helpful by making findings. It is virtually impossible to win an asylum claim without the help of an experienced advocate or attorney, so making helpful referrals is especially important in these cases.

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9 For a sample certificate, go to the U visa section of www.asistaonline.org.

10 "An applicant who never has had contact with an LEA [which are limited to federal agencies] regarding the acts of severe forms of trafficking in person will not be eligible for T-1 nonimmigrant status," 8 CFR §214.11(h)(2).

11 INA §101(a)(15)(T), 8 U.S.C. §1101(a)(15)(T)

Special Immigrant Juvenile Status (SIJS)

Special Immigrant Juvenile status (SIJS) is available for undocumented children who are dependents of a juvenile court. Often, county personnel are involved in the process as well. The family courts, in particular, play an integral part in these applications.

An applicant must show that he or she is:

- Under the age of 21 and unmarried;
- A dependent of a juvenile court or in the custody of the state;
- Eligible for long-term foster care;

And the court has:

- Determined that he or she is eligible for long-term foster care because of abuse, neglect, or abandonment; and
- That it is not in the best interests of the child to be returned to the home country.

In addition, the family court must retain jurisdiction of the child until DHS had made a final decision on the SIJS.[13] SIJS may be the only route to immigration status for many abandoned noncitizen children. Family courts should take care to notify children before them of this option, if it appears they may be undocumented. A child cannot win an application for SIJS without specific findings by the family court.

Summary of Findings You Must Make

- Neglected, abandoned, abused
- Eligible for long-term foster care
- Dependent of court or agency
- Not in best interests to be returned to home country
- Juvenile court must retain jurisdiction until child gains status

Avoiding Problems with DHS

Some DHS officers believe there is a lot of fraud in the SIJS system and that family courts "rubber stamp" their findings. To avoid this, judges should make clear that the reason for making these findings is because of the abuse, neglect, and abandonment suffered by the child and articulate as much as possible the reasons for these findings.

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13 INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J).

DHS also requires a high level of proof of the child's age, which is often difficult if the child is abandoned and has no access to her or his family records. The family court can help by subpoenaing production of helpful documents or by making findings of the child's age based on other documentation or testimony before it.

SIJS also often lose their applications because DHS fails to act on them until children become too old for foster care. If it is possible for the court to retain jurisdiction until the child turns 21, it should strive to do so, so that the child does not fail to get status because DHS did not act on the application in a timely fashion.

Resources for You

Brady & Kinoshita, Immigration Benchbook for Juvenile and Family Court Judges (Immigration Legal Resource Center, 2003). Available from www.ilrc.org.

U and T Visas: Outline of Requirements

Both new visas, created in 2000:

- For victims of certain crimes;
- Perpetrator & victim can be out of status & no familial relationship required;
- Some criminal justice system involvement required; and
- Civil courts can help document and make referrals.

The U Visa

The crimes

"Criminal activity," "any similar activity," and attempts, conspiracies and solicitation to commit:

- Rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation;
- Being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion;
- Manslaughter, murder, felonious assault; and
- Witness tampering, obstruction of justice, perjury.

Criminal system involvement

Certification required from state, local or federal

- Law enforcement official, prosecutor, judge or
- Other authority investigating the crimes listed

    Judges and other court personnel charged with investigating or prosecuting these crimes can sign certificates

That states that the applicant:

- Is/was a victim of one of the listed crimes
- "Is being, has been or is likely to be helpful" in the
- Investigation or prosecution of one or more listed crimes

Applicant also must show

- "Substantial physical or mental abuse."

    Civil court findings helpful

The T Visa
The Crimes
Trafficking (humans) for sex or labor

Criminal system involvement
To show victim of crime and "complied with reasonable requests" to help criminal system

- Federal law enforcement certification
- Local and state also accepted
- Other evidence if can't get certification

Judges and court personnel can help document

Applicant also must show
"Extreme hardship involving unusual and severe harm if removed"

Judges and court personnel can help document

Useful Protection Orders

Judges may use the catch-all provision, the "other" check box on standard forms, to require abusers to provide information their immigrant victims need to get status. The court can order the abuser to provide documentation necessary for the victim's application to DHS and sanction the abuser's attempts to manipulate the victim's immigration status by controlling her documents or interfering with her DHS application.

Helpful evidence includes (see sample provisions at the end):
Abuser's status

- Copies of the abuser's immigration documents (lawful permanent residence card or naturalization certificate), U.S. passport, or birth certificate;
- Copies of documents relating to children that might indicate his status, such as children's birth certificates, baptismal certificates, registration for school, etc.; and
- Anything relating to military service (only U.S.citizens and lawful permanent residents may serve in the U.S. military).

Legal Marriage

- Copies of the abuser's prior divorce agreements and the couple's marriage certificate and marriage license;

Family Members' Documents

- Family members' immigration documents in their control or copies of any immigration applications he has filed on their behalf;

Residence/Good Faith Marriage

- Copies or evidence of bills, mortgages, tax forms, bank accounts, leases/rent payments, mail to both parties, school records, work records,any documents that show the couple resided together (shows co-residence and good faith marriage);
- Children's documents that show co-residence, such as birth certificates;
- Wedding and vacation pictures, insurance policies listing victim as beneficiary; and
- Letters from the abuser to the noncitizen or her family demonstrating they had a real marriage.

Sanctioning Immigration Status Manipulation

- Prohibit the abuser from contacting DHS to undermine the victim's current status or application for future status;
- Require abusers to pay the fees for his victim's application for status;

- Require abusers to pay the costs for replacement identification and travel and immigration documents;

Other Creative Remedies
Judges may modify normal check boxes to meet the needs of immigrant applicants, for instance, allowing them to continue to living together but requiring that the abuser attend an intervention program (in his language) and to refrain from threatening, assaulting, or harassing her.

Sample provision:

> Respondent shall not molest, assault, harass, or in any manner threaten or physically abuse the petitioner or the minor children; respondent shall not enter the family residence during working hours (9-5, Monday to Friday); respondent shall not enter the bedroom occupied by the petitioner and the parties' children.

Track compliance
Subsequent acts could serve as basis for victim's U Visa, so it may be particularly helpful in cases involving immigrants to track and sanction abuser non-compliance.

Other Resources
Contact the Immigrant Women's Project of Legal Momentum for their latest materials. Send your query to iwp@legalmomentum.org.

Sample Provisions Helpful to Immigration Documentation

Respondent shall relinquish possession and/or use of the following personal property as of [date/time]:

Petitioner's birth certificate, passport, and any documents relating to petitioner's immigration status (i.e., lawful permanent resident card, approval notices from Citizenship and Immigration Services or the Executive Office for Immigration Review)

Children's birth certificates, passports, and any documentation relating to their immigration status (see above)

Marriage certificate issued to petitioner and respondent

Other documents demonstrating good faith marriage (leases, joint account records, utility bills, wedding pictures, joint tax filings, etc.)

Documents showing respondent's previous marriages and dissolutions thereof

Respondent's immigration documents (lawful permanent resident card, naturalization approval) or US birth certificate

Any immigration documentation filed with or received from the Department of Homeland Security (or the Immigration and Naturalization Service, for papers dating before the establishment of the Bureau of Citizenship and Immigration Services of the Department of Homeland Security).

Respondent shall not contact any agency regarding the petitioner or the petitioner's children's immigration status, including the Department of Homeland Security (Citizenship and Immigration Services, Immigration and Customs Enforcement or Customs and Border Protection), the Executive Office for Immigration Review (the immigration court system) or the Department of State.

Respondent shall pay all fees relating to petitioner's or petitioner's children's applications for immigration status.

Respondent shall not take the children out of the United States. Respondent shall turn over the passports of the parties' minor children to the court and shall refrain from applying for new passports. *(Court may notify the U.S. State Department that such an order has been issued, submit a copy to the State Department, and ask that no new passports be issued to the respondent on behalf of the minor children.)*

Mandatory Arrest Checklist: Sec. 968.075, Wis. Stats.

The following document was prepared in 1989, by the Appleton Police Department, and updated by the Wisconsin Coalition Against Domestic Violence, in 2007. This does not constitute legal advice. The Wisconsin Coalition Against Domestic Violence (WCADV) gratefully acknowledges permission to reprint this material.

When is an Arrest Mandated?

968.07 **Is the suspect 17 years of age or older?**

968.075(l)(a) **Can the "relationship" between the victim and the adult suspect be described as one of the following?**
- Spouse
- Former Spouse
- Adult with whom the person created a child
- Adult with whom the person resides or formerly resided with

968.075(l)(a) **Can the suspect's actions be described as any of the following? [These actions are the legal definitions for domestic abuse under the mandatory arrest law.]**

968.075(l)(a)(1) - Intentional infliction of physical pain, physical injury or illness
968.075(l)(a)(2) - Intentional impairment of physical condition
968.075(l)(a)(3) - A violation of 940.225 (first, second, or third degree sexual assault)
968.075(l)(a)(4) - A physical act that may cause the other person to fear imminent engagement in conduct described under subd. 1., 2. or 3. above ↑

Does the investigating officer find the following items? If so, arrest is mandated:

968.075(2)(1) **First, does the investigating officer have reasonable grounds to believe that the person is committing or has committed domestic abuse (see definitions above)?**

968.075(2)(1) **Second, does the person's actions constitute the commission of a crime?**

968.075(2)(a)2 **Third, are any of the following circumstances present?**
968.075(2)(a)2.a - The officer has a reasonable basis for believing that continued domestic abuse against the alleged victim is likely
968.075(2)(a)2.b - There is evidence of physical injury to the alleged victim

968.075(2)(b) **Was the domestic abuse reported to a law enforcement officer within 28 days of when the abuse occurred?**

Additional Statutory Requirements Under the Mandatory Arrest Law

968.075(3)(a)1.a This section emphasizes that in most circumstances, a law enforcement officer should arrest and take a person into custody if the officer has reasonable grounds to believe that the person is committing or has committed domestic abuse and that the person's actions constitute the commission of a crime.

Predominant Aggressor

968.075(1)(c) "Predominant aggressor" means the most significant, but not necessarily the first, aggressor in a domestic abuse incident.

968.075(2)(ar) In order to protect victims from continuing domestic abuse, a law enforcement officer must consider all of the following in identifying the predominant aggressor:

1. The history of domestic abuse between the parties, if it can be reasonably ascertained by the officer, and any information provided by witnesses regarding that history.

2. Statements made by witnesses.

3. The relative degree of injury inflicted on the parties.

4. The extent to which each person present appears to fear any party.

5. Whether any party is threatening or has threatened future harm against another party or another family or household member.

6. Whether either party acted in self-defense or in defense of any other person under the circumstances described in s. 939.48 (self-defense and defense of others)

Consent of victim

968.075(3)(a)l.c A statement emphasizing that a law enforcement officer's decision as to whether or not to arrest under this section may not be based on the consent of the victim to any subsequent prosecution or on the relationship of the parties.

Absence of Visible Injury

968.075(3) (a) l.d A statement emphasizing that a law enforcement officer's decision not to arrest under this section may not be based solely upon the absence of visible indications of injury or impairment.

Report Required Where No Arrest

968.075(4) If a law enforcement officer does not make an arrest when the officer has reasonable grounds to believe that a person is committing or has committed domestic abuse and that person's acts constitute the commission of a crime, the officer shall prepare a written report stating why the person was not arrested. The report shall be sent to the district attorney's office, in the county where the acts took place, immediately after investigation of the incident has been completed. The district attorney shall review the report to determine whether the person involved in the incident should be charged with the commission of a crime.

Contact Prohibition

968.075(5)(a)1 Unless there is a waiver under par. (c), during the 72 hours immediately following an arrest for a domestic abuse incident, the arrested person shall avoid the residence of the alleged victim of the domestic abuse incident and, if applicable, any premises temporarily occupied by the alleged victim, and avoid contacting or causing any person, other than law enforcement officers and attorneys for the arrested person and alleged victim, to contact the alleged victim.

Waiver of Contact Prohibition

968.075(5)(b)3.c At any time during the 72-hour period specified in par.(a), the alleged victim may sign a written waiver of the requirements in par.(a). The law enforcement agency shall have a form available.

Release of Suspect

968.075 (5)(b)1 Unless there is a waiver under par. (c), a law enforcement officer or other person who releases a person arrested for a domestic abuse incident from custody less than 72 hours after the arrest shall inform the arrested person orally and in writing of the requirements under par. (a), the consequences of violating the requirements and the provisions of section 939.621(Increased penalty for certain domestic abuse offenses). The arrested person shall sign an acknowledgment on the written notice that he or she has received notice of, and understands the requirements, the consequences of violating the requirements and the provisions of s. 939.621. If the arrested person refuses to sign the notice, he or she may not be released from custody.

Officer Immunity

968.075(6m) A law enforcement officer is immune from civil and criminal liability arising out of a decision by the officer to arrest or not

arrest an alleged offender, if the decision is made in a good faith effort to comply with s. 968.075.

Assessing The Likelihood of Continued Violence

In accordance with the Mandatory Arrest Law, the officers should evaluate the "likelihood" of continued violence when determining whether an arrest is required.

Officers should consider the following questions:

1. Does the suspect have a prior history of arrests for domestic abuse?

2. Has the suspect ever violated a restraining order?

3. Does the suspect have a **prior** history of assaultive behavior?

4. Has the suspect made statements that future abuse will occur?

5. Has the victim expressed fear that continued violence is likely if suspect is not arrested?

Predominant Aggressor/Self-Defense vs. Dual Arrest

On occasion, officers will be assigned to investigate domestic incidents and discover that both parties have sustained injuries. The mandatory arrest law does not require that both parties be arrested in these situations. A law enforcement officer is required to arrest and take a person into custody if: (a) the officer has reasonable grounds to believe that the person is committing or has committed domestic abuse and that the person's actions constitute the commission of a crime; and (b) the officer had a reasonable basis for believing that continued domestic abuse against the alleged victim is likely; there is evidence of physical injury to the alleged victim; or the person is the predominant aggressor. If a law enforcement officer identifies the predominant aggressor, it is generally not appropriate for a law enforcement officer to arrest anyone involved in the domestic abuse incident other than the predominant aggressor. This provision does **not** apply if the person is required to be arrested because the officer has probable cause to believe the person has violated a domestic abuse, child abuse, or harassment temporary restraining order or injunction; a foreign protection order; or a contact prohibition following a domestic abuse arrest. A law enforcement officer, in determining whether to arrest a party, should consider whether he or she acted in self-defense or in defense of another person. Law enforcement officers are discouraged, but not prohibited, from the arrest of more than one party.

Self-Defense

In accordance with State Statute 939.48(l), a person is privileged to threaten or intentionally use force against another person for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person.

939.48(1)	The actor may intentionally use only such force or threat as he/she reasonably believes is necessary to prevent or terminate the interference.
939.48(1)	The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless he/she reasonably believes that such force is necessary to prevent imminent death
939.48(2)(a)	A person who engages in unlawful conduct of a type likely to provoke others to attack him or her and thereby does provoke an attack is not entitled to claim the privilege of self-defense against such attack, except when the attack which ensues is of a type causing the person to reasonably believe that he/she is in imminent danger of death or great bodily harm. In such a case, the person engaging in the unlawful conduct is privileged to act in self-defense, but the person is not privileged to resort to the use of force intended or likely to cause death to the person's assailant unless the person reasonably believes he or she has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm at the hands of his or her assailant.
939.48(2)(b)	The privilege lost by provocation may be regained if the actor in good faith withdraws from the fight and gives adequate notice thereof to his assailant.
939.48(2)(c)	A person who provokes an attack, whether by lawful or unlawful conduct, with intent to use such an attack as an excuse to cause death or great bodily harm to his or her assailant is not entitled to claim the privilege of self-defense.
939.48(4)	A person is privileged to defend a third person from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which he/she is privileged to defend him/herself from real or apparent unlawful interference, provided that he/she reasonably believes the facts are such that the third person would be privileged to act in self-defense and that his/her intervention is necessary for the protection of the third person.

Commonly Asked Questions about Wisconsin's Mandatory Arrest Law

The following questions are based on a version of a document originally prepared for Wisconsin law officers by a former Assistant Attorney General. Additional questions and answers were prepared by the Appleton Police Department. The original document instructed law officers to consult with their District Attorney and follow the procedures adopted by their agency. This document, created by the Wisconsin Coalition Against Domestic Violence (WCADV) Legal Department, updated in 2007, does not constitute legal advice. WCADV gratefully acknowledges permission to use these materials.

1. **Does 1987 Act 346 the mandatory arrest law, create a new crime, i.e. "domestic abusers?**
   No. The act does not create a new crime but rather, the act contains a mandate which requires law enforcement officers to arrest a person under specified circumstances.

2. **Is the term "reasonable grounds" the same as "probable cause"? Are the probable cause standards any different under the mandatory arrest law than in general?**
   For all practical purposes, when interpreting 1987 Act 346 "reasonable grounds" means the same as "probable cause." The standards and guidelines for evaluating probable cause for belief 1987 Act 346 are no different than the standards and guidelines when evaluating probable cause for any other crime. See 968.07 for further discussion and support.

3. **Does this statute change the standard constitutional rules regarding when, where and how an arrest can be made?**
   No, this act does not change the standard constitutional rules regarding arrest procedures.

4. **If the officer has reasonable grounds to believe that a domestic abuse crime occurred, does the officer therefore automatically have a "reasonable basis for believing that there is a <u>possibility</u> of continued violence" against the victim?**
   Yes. Based upon what is known about the repetitive cycle of domestic violence, it certainly is **possible** that domestic abuse against the alleged victim will continue. When the investigating officer is evaluating whether "continued violence" is likely, the officer should consider all of the following: [See s. 968.075(2)(ar)]
   1. The history of domestic abuse between the parties, if it can be reasonably ascertained by the officer, and any information provided by witnesses regarding that history.
   2. Statements made by witnesses.
   3. The relative degree of injury inflicted on the parties.
   4. The extent to which each person present appears to fear any party.
   5. Whether any party is threatening or has threatened future harm against another party or another family or household member.
   6. Whether either party acted in self-defense or in defense of any other person under the circumstances described in Sec. 939.48 (Self-defense and defense of others).

5. **What is "evidence of physical injury"? Does it include pain where there are no visible injuries?**
   For the purpose of interpreting "physical injury" as used in state statute 968.075(2)(b)2, evidence of physical injury includes some type of actual damage to the body of the victim (i.e., bruising, swelling, abrasion). This should not be confused with the definition of "bodily harm" when evaluating the probable cause necessary for the arrest of battery. "Bodily harm," under the elements of a battery, includes injury and/or pain.

6. Can an officer exercise discretion to not arrest in a mandatory arrest situation and instead write a "no-arrest report" under 968.075 (4)?

No. If reasonable grounds exist to arrest, the law is quite clear that you shall arrest. However, 968.075(4) (no-arrest section) may best apply when the officer has made a reasonable attempt to locate the suspect but was unsuccessful. Other situations may include suspects that are incapacitated by alcohol or are mentally ill and are confined pursuant to 72-hour protective custody detentions.

7. Does failure to comply with 1987 Act 346 constitute "misconduct in public office" under State Statute 946.12?

Yes, if an officer intentionally fails to carry out a mandatory duty such as making an arrest for domestic violence, the officer may face prosecution for the criminal violation of misconduct in public office. That same officer may face civil liability penalties as well. However , in accordance with State Statute 968.075(6m), an officer is **immune from civil and criminal liability** arising out of a decision by the officer to arrest or not to arrest an alleged offender, if the decision is made in a **good faith** effort to comply with the mandatory arrest law.

8. In a mandatory arrest situation, can the officer arrest and take the suspect into custody for an ordinance violation instead of a criminal charge?

A law enforcement officer **may not issue a citation** to a person for an offense if the officer is required to arrest the person for that offense under s. 968.075(2).

9. Is there a time limitation within which a domestic disturbance must be reported before the mandatory arrest provision applies?

Yes. The mandatory arrest provision requires that an arrest be made if the violence is **reported** to a law enforcement officer within **28 days** of when the violence occurred and all other statutory requirements are met.

The intent of the statute appears to direct attention to the immediate investigation and arrest when reasonable grounds exist to believe that violence occurred. Consideration may be given to the amount of time that has elapsed between the date of occurrence and the date when the incident is reported when determining if reasonable grounds exist. Also refer to the statute of limitations for the particular crime that the suspect is believed to have committed.

10. When does the 72-hour no contact period begin?

The 72-hour time period begins when the suspect is arrested for a criminal violation by the investigating officer or his or her designee.

11. What does "no contact" mean?

The term "no contact" should be discussed with your local district attorney in situations where it is unclear if a violation has occurred. Statutory guidelines pertaining to the no contact prohibition include:

- The arrested person shall avoid the residence of the alleged victim and, if applicable, any premises temporarily occupied by the alleged victim;
- The arrested person shall avoid contacting or causing any person, other than law enforcement officers and attorneys for the arrested person and alleged victim, to contact the alleged victim.

12. **How do the "no contact" and "waiver" provisions apply if both parties are arrested?**
If both parties are arrested, both have to be informed of the "no contact" provisions and their respective rights. If one of them refuses to waive his/her rights to the 72 hour "no contact", then both must abide by the contact provisions. Both arrested parties would have to waive the contact provisions if they wanted to have contact.

13. **Does an arrest for violation of the "no contact" re-trigger the 72-hour "no contact" prohibition?**
If the act that caused the violation of the "no contact" prohibition was a domestic abuse crime, a second 72 hour "no contact" period would result. If the defendant does not commit another "domestic abuse crime" in the process of violating the "contact prohibition," the incident would not result in a second 72 hour "no contact" prohibition to be set.

14. **If the defendant has bond set in court within 72 hours of an arrest, does the 72-hour "no contact" rule apply in addition to the bond set in court? If so, can the defendant be held after his court appearance if he refuses to sign the written notice under 968.075(5)(b)(1)?**
Technically, the Judge should follow the 72-hour "no contact" prohibition. However, as a general rule, either the 72-hour no contact or the bond conditions would apply. You should follow the order of the Judge and consult your District Attorney for further direction.

15. **Who is responsible for providing forms for written notice of the "no contact prohibition" for defendants and written waiver forms for victims?**
The type of form, as well as the distribution of the forms, should be handled by law enforcement agencies at the local level. The officer responsible for the arrest of the defendant shall be responsible for notifying the victim of his/her rights under the "no contact" prohibition. The law enforcement officer or "other person" who releases a person arrested for a domestic abuse incident from custody less than 72 hours following the arrest, shall inform the person orally and in writing of the provisions of the "no contact." See 968.075(5)(b).

16. **Must a law enforcement officer notify the victim of the waiver provision, or can that be done by someone authorized by the agency to do so, such as a domestic abuse program worker? Does the arresting or releasing agency make this notification under Sec. 968.075(5)(d)?**
The law enforcement officer who arrested the defendant, or an employee of his or her law enforcement agency, must inform the victim of the "no contact prohibition" and provide the victim with a written waiver form if the victim decides to waive the no contact order. The arresting agency will always be responsible for the notification of the victim.

17. **If the defendant has already been released from custody and the victim signs a waiver form, must the officer locate the defendant and notify him/her of the waiver pursuant to 968.075(5)(b)2?**
No. The statute generally applies to the release procedure and the notification procedure. The releasing agency (Jail) is responsible for the notification of the defendant and is only able to advise the defendant based on the waiver information available at the time of the release.

18. **How does this Statute impact 969.07 which allows a defendant to be held in custody if the "defendant is not in a fit condition to care for his or her own safety or would constitute, because of his or her physical condition, a danger to the safety of others?"**
A 1986 Attorney General's opinion dealt with this issue. According to the opinion, "the danger to the safety of others" must be caused by a "physical condition" of the defendant such as intoxication. It may not solely include the defendant's "emotional condition."

19. Can an intoxicated defendant knowingly sign the notice form required in 968.075 (5)(b)(1)?
You must make a determination based upon the suspect's condition as to whether or not you feel there is a significant impairment of judgment. If there is a significant impairment of judgment, the defendant may not be able to understand the provisions of the "no contact" prohibition and thus be unable to sign the acknowledgment. You may wish to consult your District Attorney before refusing to release a suspect in this situation.

20. Where does the written waiver form signed by the victim go? How will the responding officer know whether there has been a waiver signed?
The investigating agency is responsible for the waiver form as well as being able to provide other officers with specific information contained on the form regarding the final "no contact" provision. The information should be available 24 hours a day every day.

21. Can a violation of the "no contact" provision be charged as "bail jumping" under 946.49?
No, because the "no contact" prohibition has a specific penalty ($1000.00 forfeiture) for its violation. Generally, a more specific statute applies over a general statute.

22. Can the penalty enhancer be used if there is no conviction for the first offense?
Yes, because the statute states that a prior "arrest" not "conviction" is all that is necessary for the penalty enhancer.

23. **Does this section make a misdemeanor into a felony?**
Yes. The increase in the term of imprisonment by a maximum of two years could make a misdemeanor violation a felony.

24. Does the victim of the repeat offender need to be the same as the first offense?
No. Per Sec. 939.621, the victim of the domestic abuse crime does not have to be the same as the victim of the domestic abuse incident that resulted in the first arrest.

25. Can agencies develop policies which exceed the requirements of 1987 Act 346?
Yes. The act does require a law enforcement agency to develop, adopt, and implement written policies regarding arrest procedures for domestic abuse incidents but it does not limit the authority of a law enforcement agency to establish policies that require arrests under more circumstances than set forth in the Act. See Sec. 968.075(3)(c). However, other provisions of the statute such as the no contact provision will not apply to the expanded portions of your policy.

26. Must the officer arrest only the predominant aggressor?
When the officer has reasonable grounds to believe that spouses, former spouses, or other persons, who reside together or formerly resided together, are committing or have committed domestic abuse against each other, the officer does not have to arrest both persons, but should arrest the person whom the officer believes to be the **predominant aggressor.**

["**Predominant Aggressor" means** the most significant, but not necessarily the first aggressor in a domestic abuse incident. If a law enforcement officer identifies the predominant aggressor, it is generally **not** appropriate for a law enforcement officer to arrest anyone, other than the predominant aggressor.

27. How is the "predominant aggressor" determined?

An officer should consider the intent of the Act to protect victims of domestic violence from continuing domestic abuse. "Predominant Aggressor" means the most significant, but not necessarily the first, aggressor in a domestic abuse incident. In determining and identifying who is the predominant aggressor, an officer should consider all of the following:

1. The history of domestic abuse between parties, if it can be reasonably ascertained by the officer, and any information provided by witnesses regarding that history.
2. Statements made by witnesses.
3. The relative degree of injury inflicted on the parties.
4. The extent to which each person present appears to fear any party.
5. Whether any party is threatening or has threatened future harm against another party or another family or household member.
6. Whether either party acted in self-defense or in defense of any other person under the under the circumstances described in Sec. 939.48.

28. Does the law apply to two people who are dating but do not live together and have never lived together?

The mandatory arrest law does not apply to two people who are dating but not living together. However, this does not prohibit a law enforcement agency from developing a policy that includes this group of victims and offenders. However, the no contact provisions will not apply to the expanded portion of your policy.

29. What is a "physical act" for the purposes of 968.075(1)(a)4, defining domestic abuse?

A "physical act" could include an act as simple as a raised fist if, under all the circumstances, **that** act causes the victim to reasonably fear the imminent infliction of bodily harm or sexual assault.

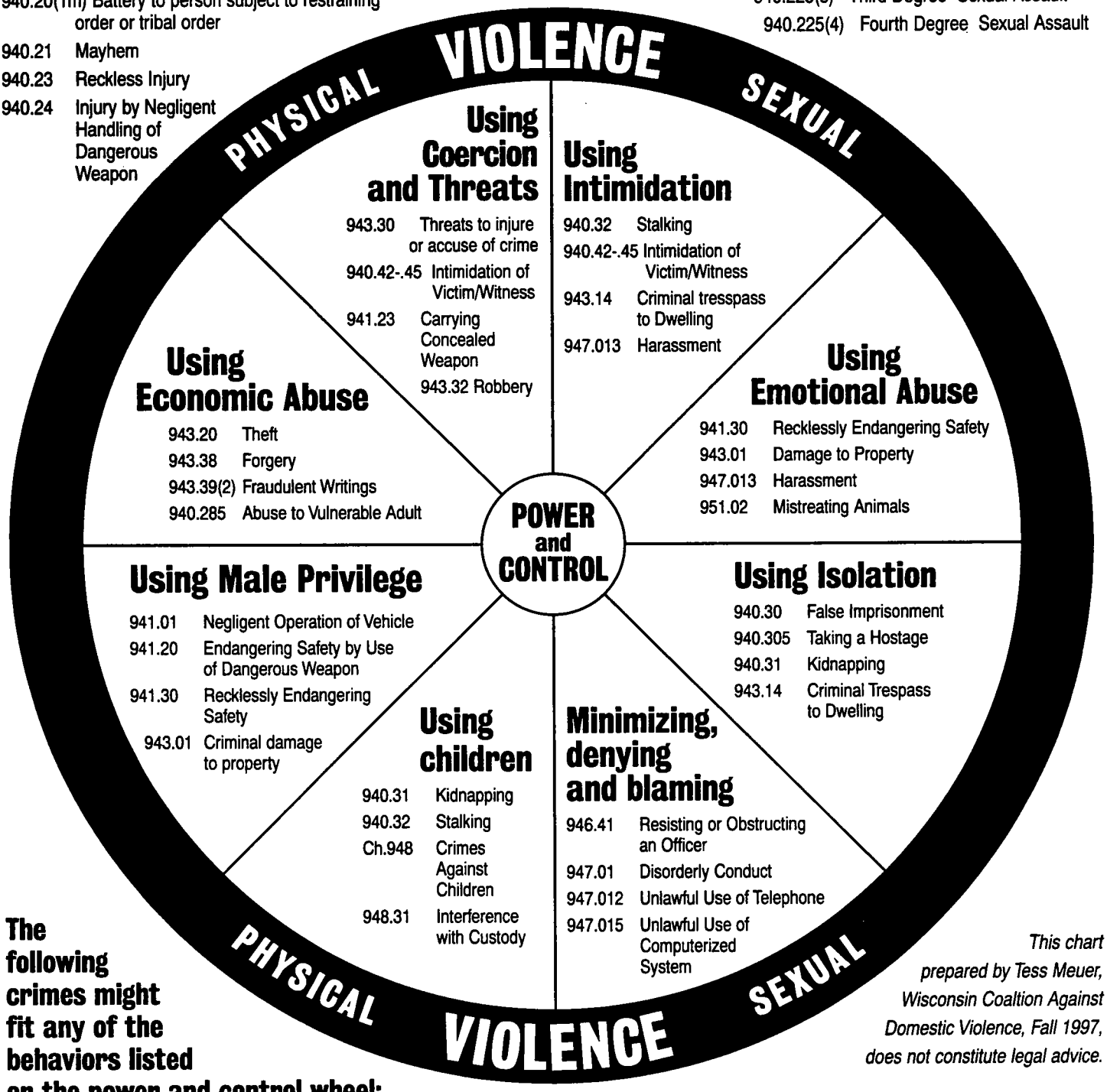
Power and Control Wheel Containing Statutes Under Which A Police Officer Might Arrest and/or a Prosecutor Might Charge

Crimes of Physical Violence

940.19(1)-(6) Battery - Simple, Substantial, Aggravated
939.32(1)&(3) Attempted battery
940.20(1m) Battery to person subject to restraining order or tribal order
940.21 Mayhem
940.23 Reckless Injury
940.24 Injury by Negligent Handling of Dangerous Weapon

Crimes of Sexual Violence

940.225(1) First Degree Sexual Assault
940.225(2) Second Degree Sexual Assault
940.225(3) Third Degree Sexual Assault
940.225(4) Fourth Degree Sexual Assault



The following crimes might fit any of the behaviors listed on the power and control wheel:

Chapter 813 - Violation of a restraining order, including foreign orders of protection
939.32 Attempted Crimes
946.49 Bail jumping
947.01 Disorderly Conduct
940.42-.45 Intimidation of Victim/Witness
940.32 Stalking
947.013 Harassment
947.012 Unlawful Use of telephone
947.015 Unlawful Use of Comperized System
940.285 Abuse of vulnerable adult
943.30 Threats to injure

This chart prepared by Tess Meuer, Wisconsin Coaltion Against Domestic Violence, Fall 1997, does not constitute legal advice.

OVERVIEW OF WISCONSIN AND FEDERAL DOMESTIC VIOLENCE LAWS

This document, created by the Wisconsin Coalition Against Domestic Violence (WCADV) Legal Department, does not constitute legal advice.

WISCONSIN CRIMINAL LAWS

I. Mandatory Arrest

A. When arrest is required
B. What constitutes domestic abuse
C. Law Enforcement Policies
D. After the arrest

II. Crimes Most Commonly Charged in Domestic Abuse Situations

III. Victim/Witness Rights

A. History of Rights of Victims and Witnesses of Crimes in Wisconsin
B. Chapter 950- Rights of Victims and Witnesses of Crimes
    1. Definitions: Victim, Witness, Crime
    2. Bill of Rights for Victim and Witnesses
C. Reimbursement; Intergovernmental cooperation; Information and Mediation
D. Crime Victims Rights Board

WISCONSIN CIVIL LAWS

I. Injunctions

A. General Procedure
B. Domestic Abuse Injunctions
    1.Parties involved
    2.Type of behavior petitioner must allege to get TRO/Injunction
    3.What relief can be granted
C. Child Abuse Injunctions
    1.Parties involved
    2.Type of behavior petitioner must allege to get TRO/Injunction
    3.What relief can be granted
D. Individuals at Risk Injunctions
    1.Parties involved
    2.Type of behavior petitioner must allege to get TRO/Injunction
    3.What relief can be granted
E. Harassment Injunctions
    1.Parties involved
    2.Type of behavior petitioner must allege to get TRO/Injunction
    3.What relief can be granted

II. Family Law Provisions

A. Mediation

B. Custody and Placement

1.Joint vs. Sole Custody

2.Domestic abuse and the best interests of the child

3.Parenting plan privacy provisions

C. Limitations on Changing Residences

III. Other Civil Laws

A. Right to Victim Service Representative

B. Nondisclosure and Privacy Laws

1.No disclosure by domestic abuse service providers

2. Domestic violence or sexual assault advocate-victim privilege

3.Voter Privacy

C. Nondiscrimination Provisions

1.Insurance

2.Unemployment compensation

3. Housing discrimination

FEDERAL CRIMINAL LAWS

I. Domestic Violence Offenses Under VAWA

A. Interstate Travel to Commit Domestic Violence

B. Interstate Stalking

C. Interstate Violation of a Protection Order

II. Firearm Offenses

A. Possession of a Firearm While Subject to a Protective Order

B. Possession of a Firearm After Conviction for a Misdemeanor Crime of Domestic Violence

FEDERAL CIVIL LAWS

I. Full Faith and Credit for Protection Orders

II. Victims Rights and Remedies

A. Right of Victim to Speak at Bail Hearing

B. Restitution

C. Federal Crime Victims' Rights

III. Immigration Provision of VAWA

A. Right to Self-Petition for Battered Immigrants

B. Cancellation of Removal

IV. Other Federal Civil Laws

A. Insurance Discrimination

B. Privacy and Safety Provisions

Wisconsin Criminal Laws

I. Mandatory Arrest § 968.075

A. When arrest is required

§ 968.075(2), Wis. Stats., requires police officers to arrest and to take a person into custody if (1) law officer has reasonable grounds to believe the person is committing or has committed domestic abuse and (2) those actions constitute a crime and (3) officer either (a) has a reasonable basis for believing continued domestic abuse against the alleged victim is likely or (b) there is evidence of physical injury to the alleged victim.[1] Any abuse must be reported within 28 days of the incident for an arrest to be mandatory.[2]

B. What constitutes domestic abuse

Under § 968.075(1), Wis. Stats., a certain relationship must exist between the alleged abuser and the victim, and the suspected abuser must engage in a certain type of conduct to constitute domestic abuse. The alleged abuser and victim must be spouses, former spouses, have a child in common, or reside or have formerly resided with each other.[3] In addition, under §§ 968.075 and 48.02(1d), the suspect must be at least 17 years old. To be considered domestic violence, the suspect's actions must fit one of these categories:

-The intentional infliction of physical pain, physical injury, or illness;

-The intentional impairment of physical condition;

-An act of 1st, 2nd, or 3rd degree sexual assault; or

[1] *See* Wis. Stat. § 968.075(2)(a)2 (2001-2002)
[2] *See id*. § 968.075(2)(b)
[3] *See id* . § 968.075(1)(a)

-A physical act that may cause the other person to fear imminent engagement in any of the above conduct. [4]

C. Law enforcement policies

§ 968.075(3)(a) requires law enforcement agencies to adopt certain policies for determining how they are going to respond to domestic violence incidents. For instance, even if an incident does not meet the mandatory arrest requirements, § 968.075(3)(a)1.a says law enforcement officers should make an arrest when they reasonably believe domestic abuse has occurred. In addition, the law officer's decision whether to make an arrest cannot be based on consent of the victim to subsequent prosecution, the relationship of the parties,[5] nor solely on the absence of visible injury or impairment.[6] Policies are to include a statement discouraging, but not prohibiting, the arrest of more than one party; and, a statement emphasizing that when determining whether to make an arrest, a law officer should consider whether the party acted in self-defense or in defense of another person. [7]

The statute also provides that, if it appears both parties have committed domestic abuse against each other, a law enforcement officer should not arrest both parties, but rather the one who appears to be the predominant aggressor.[8] In making this determination, an officer should consider the intent of the law to protect victims of

[4] *See id*.
[5] *See id*. § 968.075(3)(a)1.c
[6] *See id*. § 968.075(3)(a)1.d
[7] *See id*. § 968.075(3)(a)1.d and (3)(a)1.e
[8] *See id*. § 968.075(2)(a)2.c and (2)(am)

domestic violence from continuing domestic abuse. Predominant aggressor means the most significant, but not necessarily the first, aggressor in a domestic abuse incident. [9]

To determine the predominant aggressor, an officer is to consider all of the following: the history of domestic abuse between parties, if it can be reasonably ascertained by the officer, and any information provided by witnesses regarding that history; statements made by witnesses; the relative degree of injury inflicted on the parties; the extent to which each person present appears to fear any party; whether any party is threatening or has threatened future harm against another party or another family or household member; whether either party acted in self-defense or in defense of any other person under the under the circumstances described in Sec. 939.48.[10]

If the officer does not make an arrest when he or she has a reasonable belief to believe domestic abuse has occurred and these acts constituted a crime, the officer must file a report stating why the person was not arrested. The report has to be sent to the District Attorney's office of the county where the incident occurred.[11]

D. After the arrest

The mandatory arrest statute states the person arrested must avoid the residence of the alleged victim or any premises temporarily occupied by that person for 72 hours after the arrest. In addition, the alleged abuser must not contact the victim during this time, nor have any third party do so, except through law enforcement and attorneys for the

[9] *See id*. § 968.075(1)(c)
[10] *See id.* § 968.075 (2)(ar)
[11] *See id*. § 968.075(4)

parties.[12] If the alleged abuser is released from jail before the 72-hour period expires, the law enforcement agency is required to notify the alleged victim of the no contact provision, and the consequences of violating it.[13] The alleged abuser must also sign an agreement not to engage in any of the prohibited behavior if released before the time period has expired.[14] The victim can waive the contact prohibition[15] and the law enforcement agency must inform the victim of the possibility of waiver.[16]

II. Crimes most commonly charged in domestic abuse situations

Many of Wisconsin's criminal laws could be potentially used in prosecution of a domestic violence situation, obviously depending on the specific facts of the situation. A fairly extensive list of these possible criminal violations can be found in § 973.055, which mandates a $75 domestic abuse assessment for convictions of various crimes if the violation was against a spouse, former spouse, an adult with whom the person lives or formerly lived, or with whom the person has a child in common.[17] These offenses are:

[12] *See id.* § 968.075(5)(a)1
[13] *See* id. § 968.075(5)(b)1
[14] *See id.* § 968.075(6)
[15] *See id.* § 968.075(5)(c)
[16] *See id.* § 968.075(5)(d)
[17] *See id.* § 973.055(1)(a)2

Select Potential Crimes Under Wisconsin's Mandatory Arrest Law

Offense	Citation
Homicide Offenses	940.01-940.06
Battery, Battery by Persons Subject to Certain Injunctions, Battery/Threat to a Witness	940.19, 940.20(1m), 940.201
Mayhem	940.21
Sexual Assault	940.225
Reckless Injury	940.23
Abuse of Individuals at Risk	940.285
False Imprisonment	940.30
Taking Hostages	940.305
Kidnapping	940.31
Intimidation of Witnesses/Victims	940.42-940.45
Violation of Court Orders	940.48
Endangering Safety of Others by Use of Dangerous Weapon	941.20
Recklessly Endangering Safety	941.30
Damage to Property	943.01
Damage or Threat to Property of Witness	943.011
Criminal Trespass to Dwellings	943.14
Entry onto a Construction Site or into a Locked Building, Dwelling or Room	943.15
Bail Jumping	946.49
Disorderly Conduct	947.01
Unlawful Use of a Telephone	947.012
Unlawful Use of a Computerized Communication System	947.0125
Municipal Ordinances Conforming to:	940.201; 941.20; 941.30; 943.01; 943.011; 943.14; 943.15; 946.49; 947.01; 947.012; 947.0125

Battery and Disorderly Conduct are two of the most frequent charges brought in domestic abuse situations. The battery statute defines several types of crime, depending on the harm done to the victim and the defendant's state of mind, with penalties increasing with more injury and more specific intent. "Battery" is causing harm to another with the intent to do so and without the victim's consent, and it is a Class A

misdemeanor.[18] "Substantial Battery" is causing substantial bodily harm, and depending on intent (either intent to cause bodily harm or substantial bodily harm) can be a Class I or H Felony.[19] "Aggravated Battery" is causing great bodily harm with the intent to cause harm and is a Class H or E Felony.[20]

"Disorderly Conduct" is engaging in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance. The conduct can take place in either public or private. Violating the statute is a Class B Misdemeanor.[21]

III. Victim/Witness Rights

A. History of Rights of Victims and Witnesses of Crimes in Wisconsin

Wisconsin passed Chapter 950, Rights of Victims and Witnesses of Crime, in 1979, one of the first states to do so. In April 1993, the voters of Wisconsin ratified a state constitutional amendment to reinforce and provide additional rights and remedies for violations of these rights. The legislature intended: 1) to ensure all victims and witnesses of crimes are treated with dignity, respect, courtesy and sensitivity; 2) to ensure the rights extended in chapter 950 to victims and witnesses of crimes are honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants. See Wis. Stat. Sec. 950.01.

On December 1, 1998, 1997 Wisconsin Act 181 went into effect. Act 181 sets forth the rights of crime victims and identifies the criminal justice system's responsibility

[18] *See id.* § 940.19(1)
[19] *See id.* § 940.19(2), (4)
[20] *See id.* § 940.19(5), (6)
[21] *See id.* § 947.01

to provide crime victims with information about their rights and how to exercise them. These three items, Chapter 950, the constitutional amendment, and Act 181 [implementing the amendment], outline the rights of victims and witnesses in Wisconsin.

B. Chapter 950 - Definitions and Rights of Victims and Witnesses of Crime

1. Definitions of Victim, Witness and Crime:

Per Wis. Stat. § 950.02(4)(a), a victim is a person against whom a crime has been committed. "Person" includes natural persons as well as businesses and governments. Sec. 990.01(26). "Victim" does not include a person charged with or alleged to have committed the crime. If the victim is a child, a parent, guardian or legal custodian of the child can bring an action on behalf of the child and receive the benefits of a victim from Chapter 950. A "child" is a person less than 18 years of age. Sec. 950.02(1).

Another person can be designated to bring an action on the victim's behalf. If the victim is physically or emotionally unable to exercise his or her rights, a person can be designated by the victim or a family member to bring an action. If the victim is deceased, a family member of the deceased or a person who resided with the person who is deceased can be designated to bring the action. If the victim is incompetent under ch. 54, the guardian of the person would be the designated person to bring an action.

Per Wis. Stat. § 950.02(5), a witness is defined as any person who has been or is expected to be summoned to testify for the prosecution, or who by reason of having relevant information is subject to call or likely to be called as a witness for the prosecution, whether or not any action or proceeding has yet been commenced.

Per Wis. Stat. § 950.02(1m), a crime is an act committed in this state which, if committed by a competent adult, would constitute a crime, as defined in s. 939.12.

2. Wisconsin Bill of Rights for Victims and Witnesses: Chapter 950

establishes a bill of rights for victims and witnesses, including, but not limited to:

Rights of Victims	Rights of Witnesses
- To have his or her interest considered when the court is deciding whether to grant a continuance in the case, as provided under ss. 938.315(2) and 971.10(3)(b)3. **950.04(1v)(a)** - To attend court proceedings in the case, subject to ss. 906.15 and 938.299(1). The court may require the victim to exercise his or her rights under this paragraph using telephone or live audiovisual means. **950.04(1v)(b)** - To be accompanied by a service representative, as provided under s. 895.45. **950.04(1v)(c)** - To have reasonable attempts made to notify the victim of hearings or court proceedings, as provided under ss. 938.27(4m) and (6), 938.273(2), 971.095(3) and 972.14(3)(b). **950.04(1v)(g)** - To have the court provided with information pertaining to the economic, physical and psychological effect of the crime upon the victim and have the information considered by the court. **950.04(1v)(pm)** - To have the department of health and family services make a reasonable attempt to notify the victim under s. 980.11 regarding supervised release under s. 980.08 and discharge under s. 980.09 or 980.10. **950.04(1v)(xm)**	- To request information from the district attorney about the final deposition of the case. **950.04(2w)(a)** - To receive protection from harm and threats of harm arising out of their cooperation with law enforcement and prosecution efforts, and to be provided with information as to the level of protection available. **950.04(2w)(c)** - To be informed of financial assistance and other social services available as a result of being a witness of a crime, including information on how to apply for assistance and services. **950.04(2w)(d)** - To be informed of the procedure to be followed in order to apply for and receive any witness fee to which they are entitled. **950.04(2w)(e)** - To be provided a waiting area under ss. 938.2965 and 967.10. **950.04(2w)(f)** - To be provided with appropriate intercession services to ensure that employers of witnesses will cooperate with the criminal justice process and the juvenile justice process in order to minimize an employee's loss of pay and other benefits resulting from court appearances. **950.04(2w)(g)** - To be entitled to a speedy deposition of the case. **950.04(2w)(h)**

C. Reimbursement for services; Intergovernmental cooperation; and Information and Mediation services

In addition to the Bill of Rights for victims and witnesses of crimes, Chapter 950 contains an extensive list of mandated services; a summary follows. Both victims and witnesses are eligible for reimbursement for services under ch. 950. To be eligible for the reimbursement under this section, a county shall provide, but is not limited to, the following services, for victims and witnesses:

1. Court appearance notification services, including cancellation of appearances;
2. Victim compensation and social services referral, including witness fee collection, case-by-case referrals and public information;
3. Escort and other transportation services related to the investigation or prosecution of the case, if necessary or advisable;
4. Family support services, including child and other dependent care services.

Wis. Stat. § 950.06(1m)(a) – (i)

The county board, district attorney, local law enforcement agencies, local social service agencies, victim and witness offices and courts shall all cooperate with each other to ensure that victims and witnesses of crimes receive the rights and services to which they are entitled under this chapter. Wis. Stat. § 950.07.

Chapter 950 also outlines the information and mediation services that must be available to victims and witnesses of crimes. Different agencies have different obligations to victims and witnesses. These include, but are not limited to:

Obligations of State Agencies to Victims

Department of Justice	Law Enforcement	District Attorney
-The Department of Justice shall provide toll-free telephone numbers for: (a) Information and referral to available services. (b) Crisis counseling and emotional support. (c) Assistance in securing resources and protection. **950.08 (1)(a)-(c)** - Inform crime victims, the general public, criminal justice officials and related professionals about crime victim rights and services. **950.08(2)** - Mediation: The department may receive complaints and with the consent of the involved parties, actually mediate complaints regarding the treatment of crime victims and witnesses. **950.08(3).**	- No later than 24 hours after a law enforcement agency has initial contact with a victim of a crime, the law enforcement agency shall provide the victim: (a) A list of the rights of victims; (b) Information about availability of compensation under ch. 949; (c) The address and telephone numbers of: 1) intake worker, corporation counsel or district attorney, and 2) custodial agency so the victim can obtain information regarding court procedures and suspect apprehension and release; (d) Suggested procedures for the victim to follow if threats or intimidation arise out of his or her cooperation with law enforcement and prosecution efforts; (e) The address and telephone number at which the victim may contact the department or any local agency that provides victim assistance in order to obtain further information about services available for victims, including medical services. **950.08 (2g)(a)-(g).**	- A district attorney shall make a reasonable attempt to provide to each victim of the crime written information on all of the following: (a) A brief statement of the procedure for prosecuting a crime. (b) A list of the rights of victims under s. 950.04 (1v) and information about how to exercise those rights. (c) The person or agency to notify if the victim changes his or her address and wants to continue to receive notices and services under s. 950.04 or 971.095(3). (d) The availability of compensation under ch. 949, including information concerning eligibility for compensation and the procedure for applying for compensation. (e) The person to contact for further information about a case involving the prosecution of a crime of which he or she is a victim. **950.08 (2r) (a)-(e).**

D. Crime Victims Rights Board

Chapter 950 establishes the Crime Victims Rights Board. Certain circumstances are required before a violation or complaint can be processed. Section 950.09(2) states: "At the request of one of the involved parties, the board may review a complaint made to the department under s. 950.08(3) regarding a violation of the rights of a crime victim. A party may not request the board to review a complaint under this subsection until the department has completed its action on the complaint under s. 950.08(3). In reviewing a complaint under this subsection, the board may not begin any investigation or take any action specified in pars. (a) to (d) until the board first determines that there is probable cause to believe that the subject of the complaint violated the rights of a crime victim."

After review of a complaint, the board may, but not limited to, these actions:

(a) Issue private and public reprimands of public officials, employees or agencies that violate the rights of crime victims;

(b) Refer to the judicial commission a violation or alleged violation by a judge of the rights of crime victims;

(c) Seek appropriate equitable relief on behalf of a victim if such relief is necessary to protect the rights of the victim. The board may not seek to appeal, reverse or modify a judgment of conviction or a sentence in a criminal case;

(d) Bring civil actions to assess a forfeiture under s. 950.11;

(e) Issue reports and recommendations concerning the securing and provision of crime victim rights and services.

(f) The board shall promulgate rules establishing procedures for the exercise of its powers under this section.

Wis. Stats. § 950.09(2)(a)-(d), (3) and (5).

Wisconsin's Civil Laws

I. Injunctions (Restraining Orders)

Wisconsin Statutes Chapter 813 allows courts to issue four kinds of injunctions which might apply to domestic abuse situations: Domestic Abuse, Child Abuse, Individuals at Risk, and Harassment. The procedure for obtaining all four orders is generally the same, but each is only available in certain circumstances, mostly relating to the parties involved and the behavior sought to be enjoined.

A. General Procedure

All four of Wisconsin's injunctions follow a two-step procedure in being issued.[22] Anyone seeking an injunction must file a petition that sufficiently alleges the conduct sought to be enjoined.[23] If the petition is sufficient, the court may issue a temporary restraining order (TRO) if the petitioner requests one.[24] This is an ex parte procedure; that is, the respondent does not need to be notified before the temporary order is entered.[25] The hearing must be scheduled within seven days of the issuance of the temporary order for an individuals at risk restraining order and within 14 days for a domestic abuse, harassment, or child abuse restraining order. The respondent named in

[22] *See id.* § 813.12(2m). The next several citations refer to the Domestic Abuse procedure, but, as noted, the procedure is the same under 813.122 (Child Abuse), 813.123 (Individuals at Risk), and 813.125 (Harassment).
[23] *See id.* § 813.12(5)
[24] *See id.* § 813.12(3)(a)

the petition must be given notice of the order and hearing once it is entered.[26] The time between the temporary order and the hearing can be extended.

At the hearing, a judge or court commissioner decides whether the evidence is sufficient to enter the injunction sought. The judge makes her/his decision based on the petition and takes testimony if the respondent contests the petition. Certain rules in certain types of injunctions limit the scope of the hearing. Injunctions may only be entered against the respondents; no "mutual orders" may be entered.[27] If the judge orders a domestic abuse injunction, the petitioner's requests must be granted, including the length of the injunction, so long as they are within the statutory provisions.[28]

Injunctions can generally be extended if the petitioner shows there is a basis to do so. Notice does not usually need to be given to the respondent before the extension.[29] However, an injunction cannot be extended beyond a total of two years for a child abuse, or individuals at risk restraining order or beyond a total of four years for a domestic abuse or harassment restraining order.

B. Domestic Abuse Injunctions § 813.12

1. *Parties involved*- The parties to a domestic abuse injunction must be adult family members; adult members of the same household; former spouses; an adult with whom the other party has a child in common; persons in a dating relationship; an adult caregiver with whom the petitioner is under the caregiver's care or the guardian for an incompetent person.[30] A family member is defined as a spouse, parent, or child related

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[25] *See id.* § 813.12(3)(b)
[26] *See id.* § 813.12(3)(c)
[27] *See id.* § 812.12(4)(b)
[28] *See id.* § 813.12(4)(a), (c)
[29] *See id.* § 813.12(4)(c)4
[30] *See id.* § 813.12(1)(am)

by blood or adoption.[31] "Household member" includes persons either currently or formerly residing in a place of abode with another person.[32] An "adult" for the purposes of an injunction is someone over the age of 18.[33] The petitioner must file on his or her own behalf and allege they are the victim, with the exception of the guardian for the incompetent adult.[34]

2. *Type of behavior petitioner must allege to get the TRO/injunction*-The statute lists five possible types of behavior that can serve as the basis for an injunction:

- The intentional infliction of physical pain, injury, or illness
- The intentional impairment of physical condition
- 1st, 2nd, or 3rd degree sexual assault
- Damage to property belonging to the petitioner
- A threat to engage in any of the above conduct.[35]

In order for the court to enter either the TRO or injunction, it must find the respondent has engaged or may engage in domestic abuse of the petitioner.[36] For issuance of a TRO, the court must also find the petitioner is in imminent danger of harm.[37] In determining whether to issue the injunction, the court must consider the potential danger to the petitioner and any pattern of abuse by the respondent. The court may not deny the petition solely on the length of time since the relationship ended.[38]

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[31] *See id.* § 813.12(1)(b)
[32] *See id.* § 813.12(1)(c)
[33] *See id.* § 48.02(2)
[34] *See id.* § 813.12(5)(a)1 and (d)
[35] *See id.* § 813.12(1)(am)
[36] *See id.* § 813.12(4)(a)
[37] *See Blazel v. Bradley*, 698 F. Supp 756 (W.D. Wisc. 1988).
[38] *See id.* § 813.12(5)(a)(3)

3. *What relief can be granted*- If the court grants either the TRO or injunction, it must grant what the petitioner demands, which can include ordering the respondent to:

- refrain from committing acts of domestic violence against the petitioner

- avoid the petitioner's residence

- avoid contacting or causing any 3rd party (except attorneys or law enforcement) from contacting the petitioner

- any combination of these remedies or

- any other appropriate remedy not inconsistent with the remedies requested in the petition.[39]

In addition, the statute requires the respondent to surrender any firearms in his or her possession to either the county sheriff or another person approved by the court.[40] Peace officers required to possess firearms as a condition of employment and members of the armed forces are not required to surrender firearms they possess while on the job or in the line of duty.[41] Also, if the petitioner does not have any legal interest in a residence shared with the respondent, the court can order the respondent to avoid the residence for reasonable time until the petitioner relocates.[42]

C. Child Abuse Injunctions § 813.122

[39] *See id.* § 813.12(4)(a)
[40] *See id.* § 813.12(4m)
[41] *See id.* § 813.12(4m)(ag), 941.29(10)(b)
[42] *See id.* § 813.12(4)(am)

1. *Parties Involved*- A child victim, her/his parent, stepparent, or guardian may all petition for a child abuse injunction.[43] In the case of a child in need of protective services (CHIPS) petition, a guardian ad litem, party to the case, or governmental or social agency involved with the proceeding may also petition.[44] The petition may be brought against any adult or child who is abusing the petitioner[45], unless it is a CHIPS claim for emotional damage for failure to take care of the child, in which case the respondent can only be a parent, guardian or legal custodian.[46]

2. *Type of behavior petitioner must allege to get TRO/Injunction*- The statute lists several types of behavior that would allow the court to issue an injunction:

-Non-accidental physical injury to a child

-1st, 2nd, 3rd, or 4th degree sexual assault, or repeated sexual assault of the child

-Sexual exploitation of the child

-Permitting, allowing, or encouraging child to engage in prostitution

-Causing child to view or listen to sexual activity

-Causing child to expose, or exposing genitals or pubic area to child

-Emotional damage

-Threat to engage in any of the above.[47]

To grant the TRO or injunction, the court must determine the respondent has engaged in or, based on the victim's and respondent's prior conduct, may engage in these behaviors.[48]

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[43]*See id.* § 813.122(2)
[44]*See id.* § 48.235(4)(a)6, 48.25(6)
[45]*See id.* § 48.14(10), 757.69(1)(g)
[46]*See id.* § 48.02(1)(gm)
[47]*See id.* § 813.122(1)(a), based on the definition of abuse in § 48.02(1)

3. *What relief can be granted*-If the court issues the TRO or injunction, it can order the respondent to avoid any residence temporarily occupied by the victim and to avoid contacting or causing any person to contact the victim. This can be waived if the petitioner agrees to the contact and a court finds contact would be in the victim's best interest.[49] § 813.122 also has a mandatory firearm surrender if the injunction is ordered.[50] The provisions are the same as those under § 813.12.

D. Individuals at Risk § 813.123[51]

1. *Parties Involved*-A petition can be filed by the individual at risk, any person acting on behalf of an individual at risk, an elder-adult-at-risk agency, or an adult-at-risk agency.[52] An individual at risk means an elder adult at risk or an adult at risk.[53] An adult at risk is any adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her needs who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, or financial exploitation. An elder adult at risk is a person age 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.

The petition can be filed against any adult who allegedly engages in any of the behaviors listed in (2) below.

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[48]*See id.* § 813.122(4)(a), (5)(a)
[49]*See id.* § 813.122(5)(a)
[50]*See id.* § 813.122(5m)
[51]*See id.* § 813.123
[52]*See id.* § 813.123(2)(a)
[52]*See id.* § 813.123(1)(ep)

2. *Type of behavior petitioner must allege to get TRO/Injunction* - In order for the court to grant a TRO or an injunction, the petition must allege any the following:

-The respondent either interfered with, or based on prior conduct of the person may interfere with:

-an investigation of the individual at risk, the delivery of protective services to the individual at risk under s. 55.05;

-the delivery of protective placement under s. 55.06, or

-the delivery of services to an elder adult at risk under s. 46.90(5m);

-The interference complaint of, if continued, would make it difficult to determine whether abuse, financial exploitation, neglect, or self-neglect has occurred, is occurring, or may recur; or

-Physical abuse, emotional abuse, sexual abuse, treatment without consent, unreasonable confinement or restraint, financial exploitation, neglect, harassment, or stalking of an individual at risk or the mistreatment of an animal.

3. *Relief that may be granted*- If the court issues the TRO or injunction, it can order the respondent to:

-Avoid interference with:

-an investigation of the elder adult at risk under s. 46.90; or

-an investigation of the adult at risk under s. 55.043; or

-the delivery of protective services to the individual at risk under s.55.05;

or

-a protective placement of the individual at risk under s. 55.06; or

-Cease engaging in or threatening to engage in the abuse, financial exploitation, neglect, harassment, or stalking of an individual at risk or mistreatment of an animal; or

-Avoid the residence of the individual at risk or any other location temporarily occupied by the individual at risk, or both; or

-Avoid contacting or causing any person other than a party's attorney or a law enforcement officer to contact the individual at risk.

E. Harassment Injunctions § 813.125

1. *Parties Involved*- Any "person" may file a petition for a harassment injunction.[53] Although a child may be the petitioner, a guardian ad litem may need to file on the child's behalf; a parent can file on behalf of their child, and in a CHIPS proceeding, so can a guardian ad litem, an involved party, or any governmental or social agency.[54] The petition may be brought against any adult or child who engages in harassment.[55]

2. *Type of Behavior*- The statute defines harassment as the following:

> -Striking, shoving, kicking, or otherwise subjecting another person to physical contact or attempting or threatening to do the same; or
>
> -An act which is defined as child abuse under Sec. 48.02; or
>
> -Stalking, as defined in Sec. 940.32; or
>
> -A single incident of 1st, 2nd, 3rd or 4th degree sexual assault; or
>
> -Attempting or threatening to do any of the above behaviors; [56] or
>
> -Engaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose. [57]

[53] *See id.* § 813.125(4)(a)
[54] *See id.* § 48.235(4)(a)6, 48.25(6)
[55] *See id.* § 813.125(4)(a)3, § 48.14(10)
[56] *See id.* § 813.125(1)(a)
[57] *See id.* § 813.125(1)(b)

If the court finds reasonable grounds to believe the respondent engaged in harassment with intent to harass or intimidate, it may grant the injunction.[58]

3. *Relief that may be granted*- If the court grants an injunction or TRO, it may order the respondent to cease and/or avoid harassing another person, [59] or to avoid the petitioner's residence or any other premises occupied by the petitioner.[60] In Bachowski v. Salamone, the Wisconsin Supreme Court stated a court may only order the respondent to cease or avoid the acts which formed the basis for the finding of harassment.[61] If the parties are not married, and the respondent owns the premises where the petitioner resides, and the petitioner has no legal interest in the premises, the court may order the respondent to avoid the residence for a reasonable time to allow the petitioner to relocate.

In addition, the court may prohibit the respondent from possessing firearms and surrender any currently in his or her possession, although it is not mandatory. The firearm restriction may only be granted if the court determines the respondent "may use a firearm to cause physical harm to another or to endanger public safety."[62] If a firearm restriction is ordered, there is an exemption for peace officers.[63] There is no similar firearm exemption for harassment orders against members of the armed forces in the line of duty as there is for domestic and child abuse injunctions.[64]

[58] *See id.* § 813.125(3)(a)2, (4)(a)3, (5)(a)3
[59] *See id.* § 813.125(4)(a)
[60] *See id.* § 813.125(3)(am) and (4)(a)
[61] *See* 139 Wis. 2d 397,414 (1987).
[62] *Id.* § 813.125(4m)(a)
[63] *See id.* § 813.125(4m)(cg)
[64] *See id.* § 941.29(10)(b)

II. Wisconsin Family Law Provisions

Wisconsin law allows courts to consider evidence of domestic abuse in several areas of family law, mostly involving divorce and custody/placement disputes. It also prevents the disclosure of a victim's personal information in family law documents.

A. Divorce Mediation § 767.405

Wisconsin law requires mediation in any proceeding affecting the family when legal custody or physical placement is contested.[65] Generally, the parties are required to attend at least one initial session, where the mediator determines if further mediation is appropriate to resolve the dispute.[66] Evidence of domestic violence can come into play in two ways in the mediation decision. First, the court may waive mediation all together and begin the trial or hearing in the dispute if it determines attendance at mediation would cause "undue hardship or would endanger the safety of one of the parties." In making this determination, the court must consider any evidence that either party has engaged in domestic abuse or child abuse, that either party has a drug or alcohol problem, or any other evidence which would show a party's health or safety would be endangered by attendance.[67] Second, if the initial session of mediation is ordered, the mediator must consider the same factors in determining whether the process should go further.[68] The initial mediation session must also include screening for domestic abuse,[69] and every court appointed mediator must have training on the dynamics and effects of domestic violence.[70]

B. Custody and Placement § 767.41

1. *Joint vs. Sole Custody*

In Wisconsin, domestic violence can serve as a basis for a court granting a parent sole custody of his or her child. When making decisions regarding child custody,

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[65] *See id.* § 767.405(5)(a)
[66] *See id.* § 767.405(8)(c)
[67] *See id.* § 767.405(8)(b)
[68] *See id.* § 767.405(10)(e)
[69] *See id.* §767.405(8)(c)
[70] *See id.* §767.405(4)

Wisconsin courts are bound by a statutory presumption that joint custody is in the best interests of the child.[71] **However, if the court finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of domestic abuse or interspousal battery, the presumption for joint custody does not apply.** Instead, there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to the abusive party. This presumption can be rebutted only by a preponderance of the evidence that 1) the abuser has completed a certified batterers treatment program and is not abusing alcohol or drugs; and 2) it is in the best interest of the child to award joint or sole legal custody to the abuser.[72] If the court finds that both parents have engaged in domestic abuse, the court must determine which parent was the primary physical aggressor by looking at factors outlined in the statute.[73]

A court may also grant sole custody if one party requests it and the parties agree to it. If the parties do not agree to sole custody (or if the court does not find by a preponderance of the evidence that there was domestic abuse) the court must further find one of three conditions to grant sole custody. One of these conditions is the "parties will not be able to cooperate in the future decision making required under joint custody."[74] The statute creates a rebuttable presumption against cooperation if evidence can be shown that either party engaged in abuse, domestic abuse, child abuse, or interspousal

[71] *See id.* § 767.41(2)(am)
[72] *See id.* §767.41 (2)(d)
[73] *See id.* §767.41(2)(d)b.2.
[74] *Id.* § 767.41(2)(b)2.c

battery.[75] A court making a custody decision must consider this and any other reasons offered by the party opposing joint custody.[76]

2. *Domestic abuse and the best interests of the child §767.41(5): Custody and Placement*

Wisconsin courts are required to consider any evidence of abuse in making decisions regarding the physical placement and custody of children. If the courts find a parent has engaged in a pattern or serious incident of domestic abuse, the safety and well-being of the child and safety of the parent who was the victim of the abuse are required to be paramount concerns in determining legal custody and periods of physical placement of the child.[77] Section 767.41(5)(am) lists several factors the court must consider when determining the best interests of the child. Two of these factors deal directly with abuse. Subsections (12) and (13) require the court to consider evidence of abuse, child abuse, domestic abuse, and interspousal battery in making its decision. Other considerations the court must make may also be relevant in a domestic abuse context such as alcohol or drug abuse by either of the parties, their ability and willingness to cooperate and communicate, and whether each party can support the other's relationship with the child.[78] In addition, the court is to consider whether a person with whom a parent of the child has a dating relationship, or a person who resides, has resided, or will reside regularly or intermittently in a proposed custodial household has a criminal record and whether there is evidence of abuse or neglect of the child or any other child. [79]

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[75] *See id.*
[76] *See id.*
[77] *See id.* §767.41(5)(bm)
[78] *See id.* § 767.41(5)(am)
[79] *See id.* § 767.41(5)(am)12m

If the court finds a party has engaged in domestic abuse or interspousal battery and awards periods of physical placement to both parties, the court must provide for the safety and well-being of both the children and the parent who was the victim of the abuse. The court may do this in one or more of the ways listed in the statute including: requiring exchange of the children be supervised by a third party; requiring the abusive party go to a certified batterers treatment program; or requiring the abusive party pay the cost of supervised physical placement.[80]

3. *Parenting plan privacy provisions § 767.41(1m)*

The statutes also contain disclosure exemptions for victims of abuse. Generally, in an action involving custody and placement, both parties must submit proposed "parenting plans" to the court to propose the details of any future arrangements, such as schooling, medical treatment, and religious upbringing. The parties must also say where they are currently living and working, and where they plan to live in the next two years.[81] Victims of domestic abuse are not required to disclose the specifics of their living and working situations; the statute prevents abusers from discovering the schedules of their victims through court proceedings. Although they need not specifically disclose their arrangements, the statute requires "general" descriptions of where the victim lives and works.[82]

C. Limitations on changing residences

Some provisions of Wisconsin's family law may make it difficult for a victim and his or her children to flee the abuser if the need arises. During a pending divorce, for

[80] *See id.* §767.41(6)(g)
[81] *See id.* § 767.41(1m)(b)-(c)
[82] *See id.*

instance, a party is not allowed to establish a residence outside the state with his or her minor child, nor may they move more than 150 miles within the state from the other party's residence if they live with the minor child.[83] The statute also prohibits taking the minor child out of state for more than 90 days and concealing the child from the other party.[84] A party committing one of these acts is in contempt of court, although the offender can show he or she removed or concealed the child to protect either the party or the child from abuse and did not have time to get a court order.[85]

After a final order has been granted, a party who has custody or placement rights with a child and wishes to move their residence either out of state or more than 150 miles from the other party must notify the other party and get their approval for the move.[86] This notice must give the dates involved and the new address of the party.[87] There is no privacy provision for victims of abuse. If the other party objects, the party seeking to move is prevented from moving until the dispute is resolved, although a court may issue a temporary order allowing the move.[88] The notification requirement may allow abusers to prevent victims from fleeing and also gives abusers access to information the victim may not want him or her to know.

There are also criminal laws regarding interference with a person's rights of placement and custody, which are a felony.[89] Interference is: intentionally causing a child to leave; taking a child away; or withholding the child for more than 12 hours

[83] *See id.* § 767.117(1)(c)
[84] *See id.*
[85] *See id.* § 767.117(3)(b)
[86] *See id.* § 767.117(1)(a)
[87] *See id.* § 767.1127(1)(b)
[88] *See id.* § 767.117(2)(b)
[89] *See id.* § 948.31(1)

beyond a placement or visitation period.[90] It is, however, an affirmative defense for a parent to withhold or otherwise protect the child if the parent reasonably believes the child or the parent faces the threat of physical harm or sexual assault.[91]

III. Other Wisconsin Civil Laws

A. Right to Victim Service Representative § 895.45

Victims of abuse may choose to have a victim service representative of their choice accompany them to all hearings, depositions, and court proceedings – civil or criminal - the victim is required to attend.[92] However, the victim service representative must be a person from a victim service organization who does not charge for this service. The representative may sit next to the victim and confer orally and in writing with him or her during these proceedings, except when the victim is testifying or represented by private counsel.[93] This privilege does not extend to jury trials, where the representative may not sit at the counsel table. Representatives are allowed to address the court in the judge's discretion.[94] The failure to exercise the right to a service representative is not grounds for appeal.[95]

[90] *See id.* § 948.31(1)(b)
[91] *See id.* § 948.31(4)(a)1,2
[92] *See id.* § 895.45(2)
[93] *See id.*
[94] *See id.*
[95] *See id.* § 895.45(3)

B. Nondisclosure, privilege and privacy laws

1. *No disclosure by domestic abuse service providers § 995.67*

Section 995.67(2)(a) prevents employees and agents of domestic abuse service providers from intentionally disclosing to any person the location of a service recipient and his or her minor child. The child need not be in the custody of the recipient nor need accompany him or her to get domestic abuse services.[96]

2. *Domestic Violence or sexual assault advocate-victim privilege § 905.045*

Communications between a domestic violence or sexual assault advocate and an advocate are confidential. A victim has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated among the victim, the advocate acting in the scope of his or her duties and persons who are participating in providing counseling, assistance or support services under the direction of the advocate.

3. *Voter Privacy § 6.47*

A provision in Wisconsin's voter registration laws allows municipal clerks to withhold from public view the names and addresses of domestic abuse, stalking or sexual assault victims currently on the registration rolls.[97] In order for a victim's name to be withheld, the victim must make a request to the municipal clerk and submit either (1) a valid protective order or (2) an affidavit from a shelter operator (domestic abuse or sexual assault) or their agent stating the person making the request is residing in the shelter. The

[96] *See id.* § 995.67(2)(a)1,2,3,4

affidavit must be dated within 30 days of the request.[98] The name is withheld from the public view until the protective order expires, the victim leaves the shelter, there is no longer a pending charge, or the end of 24 months, whichever is sooner.[99] Municipal clerks are authorized to cancel the confidentiality if the victim changes his or her name, changes his or her address without notifying the clerk, or provides false information in obtaining the exemption.[100] The confidential registration can be renewed so long as the victim meets requirements for initial eligibility.[101] Clerks can release the name to police officers, government agents, or pursuant to a court order.[102]

C. Nondiscrimination provisions

1. *Insurance § 631.95*

Wisconsin law generally prohibits insurance companies from discriminating against victims of domestic abuse and their relatives. Essentially, insurers may not refuse to cover, cancel coverage, adjust their rates, or deny claims because they believe a covered person or a family member of a covered person is or was a victim of domestic abuse.[103] This applies to group or individual coverage in disability, life, and property insurance.[104] Actuaries are not prohibited from considering medical conditions resulting from domestic abuse in determining premiums.[105] Insurers are prohibited from

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[97] *See id.* § 6.47(2)
[98] *See id.*
[99] *See id.* § 6.47(4)
[100] *See id.* § 6.47(5)(a)
[101] *See id.* § 6.47(5)(b)
[102] *See id.* § 6.47(8)
[103] *See id.* § 631.95(2) generally
[104] *See id.*
[105] *See id.* § 631.95(3)(a)

disclosing any information that they discover about domestic abuse of those that they insure.[106]

Insurance companies are allowed to discriminate against persons they believe to be perpetrators of domestic violence. In a disability or life insurance context, an insurance company can refuse to insure, deny or limit benefits, or allow as a beneficiary anyone who has engaged in domestic abuse. The company's basis for determining the person is an abuser can be medical or legal records or the applicant's own statements. Again, this applies to both group and individual coverage plans.[107]

Section 609.90 subjects limited service health organizations, preferred provider plans and managed care plans to this section.

2. *Unemployment compensation § 108.04(7)(s)*

Unemployment benefits may not be withheld from victims of domestic abuse in Wisconsin under certain circumstances. If the victim quits work because of domestic abuse, or regarding concerns to his or her safety or harassment, or the safety or harassment of any of the victim's family or household members, the victim remains eligible for unemployment.[108] In addition, if the victim gets a temporary restraining order or an injunction under 813.12, 813.122, 813.123, 813.125 or 813.127, or has a foreign protection order before quitting work, he or she is still eligible for benefits.[109]

[106] *See id.* § 631.95(5)
[107] *See id.* § 631.95(3)(b), (c)
[108] *See id.* § 108.04(7)(s)2.a
[109] *See id.* § 108.04(7)(s)2.b

3. *Housing Discrimination § 106.50*

Under Wisconsin Housing Law, landlords may refuse to rent to a person whose tenancy would constitute a direct threat to the safety of other tenants, persons employed on the property, or whose tenancy would result in substantial physical damage to the property of others. A landlord may not, however, base this claim on the fact the potential tenant has been or may be a victim of domestic abuse.[110]

Federal Criminal Laws

The Violence Against Women Act (VAWA), passed in 1994 and modified in 2000 and again in 2005, created a number of new Federal crimes related to domestic violence and firearm possession, as well as several civil and immigration provisions to assist victims of abuse.

I. Domestic Violence Offenses under VAWA

A. Interstate Travel to Commit Domestic Violence 18 U.S.C. § 2261

18 U.S.C. § 2261(a)(1) makes it a crime for a person to cross state lines or to enter or leave Indian country or within maritime and territorial jurisdiction of the United States with the intent to injure, harass, or intimidate that person's spouse, intimate partner or dating partner, if in the course of that travel, the person intentionally commits a violent crime and causes bodily injury as a result. Under this law, "spouse or intimate partner" includes a spouse, a former spouse, a person who has a child in common with the abuser, a person who cohabits or has cohabited with the abuser as a spouse; or a person who has

[110] *See id.* § 106.50(5m)(d)

been in a social relationship of a romantic or intimate nature with the abuser as determined by the length and type of the relationship and the frequency of interaction between the persons involved in the relationship. It also includes any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or Tribal jurisdiction in which the injury occurred or where the victim resides.[111]

The same statute makes it a crime to cause a spouse or intimate partner to cross state lines or to enter or leave Indian country by force, coercion, duress or fraud during the course of which there is bodily harm to the victim.[112] For both sections (a)(1) and (a)(2), the penalty depends on the extent of the injury suffered by the victim.[113]

B. Interstate Stalking 18 U.S.C. § 2261A

Under this section, it is a federal crime to travel across a state line or within the maritime or territorial jurisdictions of the United States or enter or leave Indian country with the intent to kill, injure, harass or place under surveillance with intent to kill, injure, harass or intimidate another person, if in the course of, or as a result of such travel, the actions place that person or a member of their immediate family in reasonable fear of serious bodily injury or death, or causes substantial emotional distress to that person or a member of the immediate family of that person or the spouse or intimate partner of that person.[114] Stalking also includes the use of the mail, any interactive computer service, or any facility. "Immediate family" for this statute means a spouse, parent, sibling, child or

[111] *See id.* § 2266 (2005)
[112] *See id.* § 2261(a)(2)
[113] *See id.* § 2261(b)
[114] See *id.* § 2261A

any other person living in the same household and related by blood or marriage.[115] Spouse or intimate partner includes a spouse, a former spouse, a person who has a child in common with the abuser, a person who cohabits or has cohabited with the abuser as a spouse; or a person who has been in a social relationship of a romantic or intimate nature with the abuser as determined by the length and type of the relationship and the frequency of interaction between the persons involved in the relationship. It also includes any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or Tribal jurisdiction in which the injury occurred or where the victim resides.[116] The punishments are the same as § 2261.[117]

C. Interstate Violation of a Protective Order 18 U.S.C. § 2262

Section 2262(a)(1) makes it a federal crime to travel interstate or in and out of Indian country with the intent to engage in conduct that: would violate a portion of a protective order that forbids credible threats of violence, repeated harassment, or bodily injury; or other actions that would violate the order if the conduct occurred in the jurisdiction in which it was issued; and that person engages in that conduct.[118] There is no requirement of an intimate relationship under § 2262(a)(1). Section 2262 also makes it a crime to cause a spouse or intimate partner to cross state lines or enter or leave Indian country by force, coercion, duress, or fraud during which or as a result of, that person intentionally commits an act which injures the spouse or intimate partner in violation of a

[115] *See id.* at § 115
[116] *See id.* § 2266 (2005)
[117] *See id.* § 2261A
[118] *See id.* § 2262(a)(1)

protective order.[119] The punishments under this section are the same as those under § 2261.[120]

II. Firearm Offenses under VAWA

A. Possession of a firearm while subject to a protective order 18 U.S.C. § 922(g)(8)

Under this section, a person may not possess a firearm while subject to a restraining order preventing the harassment, stalking, or threatening of a spouse, intimate partner or the child or spouse or intimate partner.[121] The law only applies to final orders of protection that find the person represents a credible threat to the safety of the victim and enjoins the use of force against the victim. The person subject to the order must have had notice and an opportunity to appear before the order was entered. [122] Section 922(g)(8) also makes it a crime to transfer a firearm to a person subject to a protection order.[123]

Law enforcement officials and military personnel on duty are exempt from this ban. This exemption only applies to firearms issued by the government as part of the person's official duties.[124]

B. Possession of a Firearm after Conviction for a Misdemeanor Crime of Domestic Violence 18 U.S.C. § 922(g)(9)

This statute makes it a crime for a person to possess a firearm after September 30, 1996 if that person has been convicted of a qualifying crime of domestic violence on any

[119] *See id.* § 2262(a)(2)
[120] *See id.* § 2262(b)
[121] *See id.* § 992(g)(8)
[122] *See id.*
[123] *See id.*
[124] *See id.* § 925

date.[125] For the crime to qualify under this section, the defendant must have had the rights to counsel and a jury trial, and the crime's elements must include attempted use or use of force or a deadly weapon. It is also a crime to transfer a weapon to a person convicted of a qualifying misdemeanor crime of domestic violence. [126]

The § 925 official use exemption does not apply to this section, which suggests law enforcement officers and military personnel convicted of a misdemeanor crime of domestic violence would not be able to possess weapons even in the line of duty.[127]

Federal Civil Laws

I. Full Faith and Credit for Protection Orders 18 U.S.C. § 2265

Protection orders issued by a State, Indian tribe, United States Territory of the District of Columbia are generally to be accorded full faith and credit by other States, Indian tribes, United States Territories or the District of Columbia under § 2265, and the orders must be enforced as if it was the order of the enforcing state or tribe.[128] The issuing court must have proper jurisdiction over the parties and the due process rights of the person against whom the order is entered must be protected for the order to be subject to full faith and credit.[129] Any "mutual protection order," that is, an order entered against the person seeking the order at the same proceeding when only one petition is filed and there is no stipulation to a mutual order, is not subject to full faith and credit under this

[125] *See id.* § 922(g)(9)
[126] *See id.*
[127] *See id.* § 925
[128] *See id.* § 2265(a)
[129] *See id.* § 2265(b)

section.[130] In addition, the person protected by the order cannot be required to register the order upon arriving in the foreign jurisdiction to have it accorded full faith and credit by the authorities in that jurisdiction.[131]

II. Victim Rights and Remedies

A. Right of Victim to Speak at Bail Hearing 18 U.S.C. § 2263

This statute gives the alleged victims of VAWA crimes to speak at bail hearings to inform the court of what he or she believes are the dangers posed by the defendant.

B. Restitution for VAWA crimes 18 U.S.C § 2264

In any VAWA criminal case, the court is required to order restitution for the victim. The court is allowed to award losses for medical care, psychological treatment, physical therapy, transportation, housing, child care, lost income, attorney's fees, court costs, and any other losses the victim has suffered as a result of the crime.[132]

C. Federal Crimes Victim's Rights 42 U.S.C. § 10606(b)

All victims of federal crimes, including domestic violence crimes, have rights:

-The right to be treated with fairness and with respect to the victim's dignity and privacy;

-The right to be reasonably protected from the accused;

-The right to be notified of all court proceedings;

-The right to be present at all public proceedings related to the offense;

-The right to confer with the government attorney in the case;

-The right to restitution;

-The right to information about the defendant's conviction, sentencing,

[130] *See id.* § 2265(c)
[131] *See id.* § 2265(d)
[132] *See id.* § 2264

imprisonment, and release.[133]

III. Immigration Provisions of VAWA

A. Right to Self-Petition for Battered Immigrants 8 U.S.C. § 1154

VAWA modified U.S. immigration law to allow certain abused immigrants to self-petition for their own permanent residency without their abusers' cooperation or knowledge.[134] Normally, an immigrant petitioning for residency needs a sponsor, who is often a relative. Abusive citizens or legal permanent residents can withhold this sponsorship in an effort to control their spouses, children, or elderly parents. VAWA helps immigrant victims to overcome this barrier.

The petitioner must demonstrate several things to qualify. Besides showing that the petitioner is a spouse, child, or parent of a citizen or a legal permanent resident, the petitioner must prove that he or she: 1) resided or is residing with the abusive citizen or legal permanent resident; 2) is subjected to abuse or extreme mental cruelty by the citizen or legal permanent resident in the United States (except if the abuser is an employee of the United States government or member of uniformed services); and 3) is a person of good moral character.[135] Any disqualifying acts related to domestic violence does not bar the Attorney General from finding the petitioner to be of good moral character.[136] The petitioner need not be married to the abuser if the marriage ended as a result of domestic abuse,[137] nor need the petitioner be residing in the United States, although the abuse must have occurred there.[138]

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[133] *See* 42 U.S.C. § 10606(b)
[134] VAWA self-petition immigration relief is available for spouses or children of citizens and lawful permanent residents or abused parents of citizens. *See* 8 U.S.C § 1154(a)(1)(A)(iii),(iv) and Sec. 816, Violence Against Women and Department of Justice Reauthorization Act of 2005
[135] "Good moral character" is defined in 8 U.S.C § 1101(f).
[136] 8 U.S.C § 1154 (a)(1)(c)
[137] *See id.* § 1154 (a)(1)(iii)(II)(aa)(CC)(ccc)

B. Cancellation of Removal 8 U.S.C. § 1229b

Abused alien spouse, child, or parent who are in the process of being of removed from the United States can petition immigration courts to waive the grounds offered by the government for removal.[139] If the court grants cancellation, the petitioner becomes a lawful permanent resident. The petitioner must show removal would cause extreme hardship, that he or she has good moral character, and that he or she was subjected to battery or extreme cruelty in the United States by his or her spouse, parent, or adult child who is a citizen or a legal permanent resident.[140] In addition, the petitioner must have continuously lived in the United States for three years, not including any time since the removal proceedings have begun.[141]

C. Immigration Remedies for Victims of Trafficking and Victims of Crime

Victims of certain serious crimes and trafficking in persons, especially related to slavery, the sex trade, and involuntary servitude, may petition for "T" or "U" visas for immigration relief.[142] The "T" provides up to 5,000 visas per year for victims of a severe form of trafficking in persons, and the "U" visa provides up to 10,000 visas per year for victims who can be helpful to the investigation or prosecution of certain crimes, including domestic violence and sexual assault.[143] "U" and "T" visa recipients may apply for Employment Authorization Document to work in the United States, and they may be able to adjust to legal permanent resident status after three years of continuous presence

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[138] *See id.* § 1154 (a)(1)(A)(v)(I)(cc)
[139] *See id.* § 1229b(b)(1)
[140] *See id.* § 1229b(b)(2)(A)(i), (iii), (v)
[141] *See id.* § 1229b(b)(2)(A)(ii)
[142] These two nonimmigrant visas were created by the Trafficking Victims Protection Act of 2000 which was subsequently combined with the Violence Against Women Act of 2000 to form the Victims of Trafficking and Violence Protection Act of 2000 (P.L. 106-386).

in the United States. Certain immediate family members of T and U visa recipients may gain legal status in the United States, and these derivative beneficiaries are not subject to an annual numerical limit.

IV. Other Federal Laws

A. Insurance Discrimination 12 U.S.C. § 1831x(e)

Under this section, a life or health insurance company may not consider an applicant's status as a victim of domestic abuse or an abuse service provider with regard to underwriting, pricing, renewal, or scope of coverage of insurance policies, or claim payment, except as allowed by state law.[144] The Wisconsin state law regarding insurance discrimination against abuse victims is § 631.95.

B. Privacy and Safety Provisions

Federal laws such as the Driver's Privacy Act, although applicable to all residents of the United States, can be helpful to victims of abuse. The Driver's Privacy Act prevents any state employee from knowingly disclosing any information contained in a motor vehicle record, except to specific authorities, such as police officers.[145] This provision prevents abusers from easily finding out the whereabouts of their victims. However, the statute also allows disclosure of the records for use in any court proceeding.[146] If a victim is trying to avoid his or her abuser, the abuser might use court proceedings to find the victim's whereabouts under this law.

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[143] Victims qualify for a U visa only if they have been a victim of a crime enumerated in 8 U.S.C. 1101(a)(15)(U)(iii).
[144] *See* 12 U.S.C. § 1831x(e)(1), (2)
[145] *See* 18 U.S.C. § 2721(a)
[146] *See id.* § 2721(b)

The Social Security Administration also allows victims of abuse and children in their custody to obtain a new Social Security Number. Although there does not seem to be any statutory or regulatory authority directly related to this, the SSA's website (http://www.ssa.gov/) says it will give new numbers to abuse victims provided they apply at the local office, present proper identification, and document their abuse. The SSA recommended using third parties, such as doctors and police officers, to offer proof, as well as any relevant court documents and correspondence with shelters.

Another website with useful information regarding both the procedure for changing a Social Security Number and the potential impact upon a victim can be found at www.ncadv.org/publicpolicy/ssnumber.htm/, the site for the National Coalition Against Domestic Violence.

OVERVIEW OF LEGAL REMEDIES FOR BATTERED IMMIGRANTS AND NONCITIZENS

This document, created by the Wisconsin Coalition Against Domestic Violence (WCADV) Legal Department, does not constitute legal advice.

This grid contains information on legal remedies for a battered noncitizen. The remedies include:

1. Violence Against Women Act (VAWA)*
    a. Self Petition
    b. Cancellation of Removal

2. Victims of Trafficking and Violence Protection Act (Trafficking Act) [These remedies are available for non-immigrants]
    a. Crime Victim Visa - "U" Visa
    b. Trafficking Visa - "T" Visa

Another remedy available to both immigrants and non-immigrants is employment authorization. It is available for

a. victim with approved VAWA petition (VAWA III, Sec. 814(b))
b. U visa recipient
c. T visa recipient
d. Derivative spouse of non-immigrant visa professional admitted under subparagraph (A), (E)(iii), (G), or (H) of INA section 101(a)(15) who are accompanying or following to join the principal if the derivative spouse demonstrates that during the marriage s/he (or a child) has been battered or subjected to extreme cruelty perpetrated by the principal (VAWA III, Sec.814(c)) [See NOTE from page 4]

* VAWA also contains remedies for abused spouses of principal applicants under the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA), the Cuban Adjustment Act, and section 202 of the Nicaraguan Adjustment and Central American Relief Act (NACARA).

Victims of Trafficking and Violence Protection Act of 2000 (VAWA II) and The Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA III) can be accessed from the Office on Violence Against Women's website: http://www.usdoj.gov/ovw/regulations.htm

Title 8 of the Code of Federal Regulations which deals with "Aliens and Nationality" can be accessed from the CIS website: http://uscis.gov/graphics/lawsregs/index.htm

The information in this grid is not an exhaustive list of potential remedies a battered immigrant may pursue. Other legal remedies may be applicable depending on fact specific situations such as gender asylum and special juvenile immigrant status. If interested, please contact an immigration expert to obtain further information.

Please note the following: VAWA II changes are in *italic;* VAWA III changes are in ***bold italics.***

TYPES OF RELIEF

Elements	VAWA Self-Petition Form I-360	VAWA Cancellation of Removal Form I-881	Crime Victim Visa - U Nonimmigrant Visa Form is not available	Trafficking Visa - T Nonimmigrant Visa Form I-914
Who is eligible?	**Conditional Resident, Immigrant, or undocumented person** ➢ Spouse, intended spouse (in case of bigamy), or *former spouse (if divorced within 2 years)* subjected to battery or extreme cruelty by USC or LPR, *without having to show "extreme hardship" if forced to leave the U.S.* ➢ *battered widow of USC within 2 years of death* ➢ Abused spouse's unmarried children under 21 years of age receive derivative status regardless of their residence ➢ ***Child abuse and incest victims of USC under 25 years of age (Sec. 805(c))*** ➢ ***Adopted child subjected to battery or extreme cruelty by USC adoptive parent or family member of USC adoptive parent, even if the 2-year custody and residency requirement has not been met (Sec. 805(d))*** ➢ ***Child VAWA self-petitioner or derivative of self-petitioner who turned 21 years of age (Sec. 805 (a)&(b))*** ➢ Parent of abused child of USC or LPR while in the US (the abuser need not be the biological parent of the abused child) ➢ ***Parent subjected to battery or extreme cruelty by adult USC son or daughter (Sec. 816)***	**Conditional Resident, Immigrant, or undocumented person** ➢ spouse, intended spouse (in case of bigamy), or child subjected to battery or extreme cruelty by USC/LPR while in US ➢ abused spouse of USC/LPR divorced more than 2 years before filing for VAWA protection ➢ abused spouse or child of LPR who died before the self petition was filed or approved ➢ parent of abused child of USC or LPR	**Non-citizen, non-immigrant, or undocumented person** ➢ victim who suffered "substantial physical or mental abuse" as a result of certain criminal activity* perpetrated by someone other than his/her spouse or parent (i.e. boyfriend, girlfriend, employer) ➢ person abused by boyfriend, spouse or parent who is a student, non-immigrant visa holder, a diplomat or undocumented immigrant ➢examples of eligible applicants include (but not limited to) victim of sexual assault; nanny abused by employer; and victim held hostage by family member/employer ➢ ***victim's family members, including family members living abroad, without having to show that the derivative visas are necessary to avoid "extreme hardship"(Sec. 801(b))***	**Non-citizen, non-immigrant, or undocumented person** ➢ victim of severe trafficking in persons ➢ ***victim's family members, including family members living abroad, without having to show that the derivative visas are necessary to avoid "extreme hardship"(Sec. 801(a))***

	VAWA **Self-Petition**	**VAWA** **Cancellation of Removal**	**Crime Victim Visa -** **U Nonimmigrant Visa**	**Trafficking Visa -** **T Nonimmigrant Visa**
Proof Require-ments	➢ good faith marriage (eligible if petitioner entered into "good faith" marriage but for abuser's bigamy) AND ➢ spouse is a USC or LPR AND ➢ residence in the US (except if spouse is an employee of the US gov't or member of uniformed services) AND ➢ resides or once resided with the abuser AND ➢ battery or extreme cruelty AND ➢ good moral character	➢ applicant is currently deportable/removable (undocumented or out of status) AND ➢ continuous presence in the US for 3 years immediately preceding filing the request AND ➢ battery or extreme cruelty while in the US by USC/LPR spouse, parent, ***or adult child*** AND ➢ good moral character AND ➢ applicant, child, or parent would suffer extreme hardship if deported/removed Note: This remedy is not available for battered immigrant who in status (i.e. has current non-immigrant visa such as tourist or student). Applicant must not be deportable for marriage fraud, certain criminal convictions, or because s/he is a threat to US national security.	➢ Substantial physical or mental abuse from criminal activity, such as: rape, torture, trafficking, incest, domestic violence, sexual assault, sexual exploitation, involuntary servitude, kidnapping, false imprisonment, blackmail, extortion, manslaughter, murder felonious assault, witness tampering, etc. (VAWA 2000, Sec. 1513) AND ➢ Crime occurred in the US or its territories or otherwise violated US law AND ➢ Demonstrate that victim possesses information about criminal activity AND ➢ Provide certification* that victim has been, is likely to be or is being helpful to an investigation or prosecution of criminal activity. * Certification can be provided by law enforcement officer, prosecutor, Judge, CIS officer, State or Federal Agency Employee	➢ victim must be or have been victim of severe trafficking; AND ➢ must have been physically present in the US or at a US port of entry on account of such trafficking; AND ➢ have 'complied with any reasonable request for assistance in the investigation or prosecution of' trafficking act (except if under 18 years of age); AND ➢ show s/he would 'suffer extreme hardship involving unusual and severe harm' if deported/removed Note: Applicant needs letter of certification from law enforcement personnel stating that applicant has been a victim or has information regarding the criminal activity. There need not be a prosecution of trafficking case in order for victim to be certified for benefits.
Standard of proof	"Preponderance of the evidence." Petitioner can submit "any credible evidence" to meet this standard of proof. However, if the marriage took place during the self-petitioner's exclusion, deportation, or removal proceeding or any appeals from that proceeding, the self-petitioner must meet a higher "clear and convincing" standard of proof to rebut the presumption of a prior fraudulent marriage, pursuant to section 245(e)(3).	"Preponderance of the evidence." Petitioner can submit "any credible evidence" to meet this standard of proof. However, if the marriage took place during the self-petitioner's exclusion, deportation, or removal proceeding or any appeals from that proceeding, the self-petitioner must meet a higher "clear and convincing" standard of proof to rebut the presumption of a prior fraudulent marriage, pursuant to section 245(e)(3).	"Preponderance of the evidence." Petitioner can submit "any credible evidence" to meet this standard of proof.	"Preponderance of the evidence." Petitioner can submit "any credible evidence" to meet this standard of proof.

Elements	VAWA Self-Petition	VAWA Cancellation of Removal	Crime Victim Visa - U Nonimmigrant Visa	Trafficking Visa - T Nonimmigrant Visa
Access to LPR status	Yes. ➢ must prove not likely to become public charge; *receipt of public benefits for qualified aliens is specifically excluded from consideration*	Yes.	Yes. ➢ adjustment available on humanitarian or family unity grounds; derivatives also to avoid extreme hardship ➢ Must reside 3 years continuously in the U.S. before adjusting status (absences 'connected' to DV do not count)	Yes. ➢***Some trafficking victims can access LPR earlier by counting continued presence towards the 3 year residence requirement and by DHS having the discretion to reduce 3 year wait upon receipt of certification that law enforcement officials do not object (Sec. 803(a))***
Access to EAD Form I-765 NOTE: ***Abused derivative spouses of certain non-immigrant visa professionals are also eligible. See page 1 of this chart.***	➢ ***Victim with approved VAWA petition can receive EAD (Sec. 814(b))*** ➢ EAD can be filed with I-360	➢ ***Victims with approved VAWA petition can receive EAD (Sec. 814(b))*** ➢ EAD available once application has been filed	➢ U visa recipient can receive EAD	➢ T visa recipient can receive EAD
Access to Public Benefits	Yes	Yes	No (except in certain states like CA and NY)	Yes, applicant can obtain public benefits after certification
Other Considerations NOTE: this is not an exhaustive list	➢ immigration attorney is not necessary ➢ spouse and child of LPR must wait their turn for visa allocation ➢ *still eligible if loss of status within the past 2 years is "related" to DV; automatic change to Immediate Relative if abuser naturalizes* ➢ *remarriage is not a bar to obtaining relief* ➢ *divorce is not a bar if it is 'connected' to DV* ➢ *if leave US before becoming LPR, must show 'substantial connection' between abuse and Entry without Inspection after 4/1/97* ➢ ***adjudicated at Vermont Service Center's VAWA unit (Sec. 811)***	➢ immigration attorney is necessary ➢ must be represented by immigration attorney or BIA-accredited representative at removal proceedings ➢ loss of status by abuser is not a bar ➢ ***adjudicated at Vermont Service Center's VAWA unit (Sec. 811)***	➢ cap of 10,000 visas annually ➢U-visa derivative beneficiaries are not subject to an annual numerical limit ➢ If the victim is under 16 years old, the parent, guardian, or 'next friend' can provide information about the crime instead of child ➢ application goes to Vermont Service Center, not local CIS district office ➢ non-qualifying children CAN be included if exclusion would cause extreme hardship (example: abuser has been or will be deported back to the same country) ➢ ***status is good for maximum 4 years, but may be extended with certification (Sec. 821(b))***	➢ cap of 5,000 visas annually ➢ application process is similar to self petition; but immigration attorney should be consulted because of complex legal issues ➢ every application goes to Vermont Service Center, not local CIS district office ➢ ***status is good for maximum 4 years, but may be extended with certification (Sec. 821(a))***

TERMS/ ABBREVIATIONS	DEFINITIONS	WHERE DEFINITION IS FOUND
Cancellation of Removal	A discretionary benefit adjusting an alien's status from that of deportable alien to one lawfully admitted for permanent residence. Application for cancellation of removal is made during the course of a hearing before an immigration judge.	USCIS website http://uscis.gov/graphics/glossary.htm
Derivative beneficiary	person, a minor child or spouse, who will gain legal status in the U.S. as a result of an approved visa petition filed by a parent or spouse.	Title 8, CFR, 204.2
Employment Authorization Document **(EAD)**	I-765 card that the USCIS issues to a person granted permission to work in the U.S. The EAD is a plastic, wallet-sized card.	USCIS website http://uscis.gov/graphics/howdoi/ead.htm
Legal Permanent Resident **(LPR)**	person who has received a "green card" [I-551] and whom the USCIS has decided may live permanently in the U.S. LPRs eventually may become U.S. citizens. If they do not, they could be deported from the U.S. for certain activities, such as drug convictions or certain other crimes.	Title 26, USC §7701
preponderance of evidence	The standard of proof applied in most administrative immigration proceedings is the "preponderance of the evidence" standard. The petitioner satisfies this standard of proof if he or she submits "any credible evidence" that leads the USCIS officer to believe that the claim is "probably true" or "more likely than not." *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the USCIS officer can articulate a material doubt, it is appropriate for the USCIS officer to either request additional evidence.	USCIS Adjudicator's Field Manual Ch. 11.1 and App. 74-14. *See* USCIS website http://uscis.gov/graphics/lawsregs/index.htm
severe forms of trafficking in persons	sex trafficking in which a commercial sex act is induced by force, fraud, coercion, or in which the person induced to perform such act has not reached 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery	VAWA II, Div. A, Sec. 103 (8)
sex trafficking	the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act	VAWA II, Div. A, Sec. 103 (9)
United States Citizen **(USC)**	any person born in the 50 U.S. states, Guam, Puerto Rico, or the U.S. Virgin Islands; or a person who has naturalized to become a U.S. citizen. Some people born abroad are also citizens if their parents were citizens.	Title 8, CFR, 301, et seq., and IRC 26 §7701(a)(30)
United States Citizenship & Immigration Services **(USCIS or CIS)**	Formerly known as the U.S. Immigration and Naturalization Service (INS), the branch of the federal Department of Homeland Security charged with enforcing immigration laws.	Title 8, CFR, 1.1
VAWA petitioner	VAWA self-petitions created in VAWA 2000 including all VAWA self-petitioners, VAWA Cuban adjustment, VAWA HRIFA, VAWA NACARA (202 & 203) applicants and battered spouse waivers. Includes both petitioners and their derivative children	VAWA III, Sec. 811