

Until Violence Do Us Part: Evaluating VAWA's Bona Fide Marriage Requirement

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The Violence Against Women Act (VAWA) allows those victims of domestic violence who are married to U.S. Citizens or Lawful Permanent Residents to "self-petition" for lawful status. To be approved under VAWA, the self-petitioner must prove, among other things, that her marriage was bona fide. This Note examines the practical difficulties that battered immigrants face in producing primary evidence of bona fide marriage and discusses the perverse incentives this requirement creates. Specifically, VAWA petitioners' abusive spouses often destroy the documentation of bona fide marriage, never include the immigrant spouse's name on the documents to begin with, or threaten further abuse if the immigrant spouse tries to obtain the documents. Because these issues are only amplified in a short-lived marriage, battered immigrants have perverse incentives to stay with their abusive partners longer, to marry their abusers, and to have children with them. As a possible solution, this Note argues that U.S. Citizenship and Immigration Services should give greater weight to affidavits as qualitative proof of bona fide marriage, which allows VAWA petitioners to explain any documentary gaps and to tell their own stories.

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I. INTRODUCTION

Jane¹ met her husband, a U.S. Citizen, while traveling to the United States on a J-1 student visa. They dated for two years, and on the second anniversary of their first date, he proposed to her over a romantic dinner. She happily said yes and looked forward to their life together. They got married in a small, informal ceremony with just a few friends present, largely because Jane's family was back in Russia, her home country.

It was only after the pair was married and moved in together that Jane's husband began to abuse her. He kicked her, choked her, pushed her down a set of stairs, called her derogatory names like "whore," accused her of sleeping with their neighbor, watched her through cameras, took her personal belongings (including her immigration documents), and forced her to pay all of their expenses. After three months, Jane decided that she could not put up with this abuse any longer — she left her husband and began filing for divorce.

Jane is eligible² for immigration relief under the Violence Against Women Act (VAWA),³ a federal law allowing victims of domestic violence who are married to U.S. Citizens (USCs) or Lawful Permanent Residents (LPRs) to "self-petition" for lawful status. Under VAWA, if the immigrant spouse meets eligibility requirements, she⁴ can file a petition with the United States Citizenship and Immigration Services (USCIS) without her abusive spouse's sanction or knowledge. In passing this law, Congress recognized that the family-petition process places significant power in the hands of a USC or LPR spouse over the immigrant spouse, and that in cases of abuse, the immigrant spouse should be able to attain legal status independently.⁵

1. This account is based on the author's work with clients at New York Legal Assistance Group in the summer of 2017. The client's name has been changed to preserve her anonymity and respect her right to confidentiality.

2. This Note uses the present tense to discuss Jane's story, but the information is current as of the summer of 2017 when the author worked on Jane's case. Her circumstances may have changed since then.

3. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18 & 42 U.S.C.) [hereinafter "VAWA"].

4. This Note uses female pronouns for victims of domestic violence and male pronouns for abusers for clarity, even though VAWA applies without distinction to gender or sex.

5. For more information on VAWA and its legislative history, see *infra* Part II.B.

Though Jane is a victim of domestic violence at the hands of her USC husband, it will be extremely difficult for her to attain relief because of how VAWA is currently administered. Immigration relief under VAWA requires proving “bona fide marriage,”⁶ and generally privileges those with marriages of longer duration⁷ and those who are able to produce primary evidence⁸ of their bona fide marriage.⁹ Jane’s case is thus weakened by the fact that her marriage was only three months old, she has no photos from her wedding ceremony and no children with her abuser, her name is not on their joint apartment lease, and only her name is on all of the bills her husband forced her to pay. Despite the abuse Jane suffered, USCIS will likely doubt that she entered her marriage in good faith and deny her the immigration relief to which she is legally entitled.

While many practitioners are troubled that their VAWA clients, like Jane, are unable to prove that their marriages are bona fide, this problem has been the topic of few academic articles. This Note addresses this gap in the literature by examining the practical difficulties that battered immigrants face in producing primary evidence and the perverse incentives this requirement creates. It argues that one potential solution lies in

6. A “bona fide marriage” is one that was not entered into for the sole purpose of evading the immigration laws. This requirement seeks to confirm that an immigrant entered the marriage for a purpose other than immigration status and intended to spend their life with their partner. VICTORIA NEILSON ET AL., AM. IMMIGR. COUNCIL, IMMIGRATION BENEFITS AND PITFALLS FOR LGBT FAMILIES IN A POST-DOMA WORLD 5 (2013), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/immigration_benefits_and_pitfalls_for_lgbt_families_in_a_post-doma_world_fin_8-5-13.pdf [<https://perma.cc/MQ99-UZ5A>].

7. GAIL PENDLETON & ANN BLOCK, APPLICATIONS FOR IMMIGRATION STATUS UNDER THE VIOLENCE AGAINST WOMEN ACT, AM. IMMIGR. LAWS. ASS’N 10 (2001), http://www.asistahelp.org/documents/filelibrary/documents/applications_for_immigration_status_28b7e6e4ef924.pdf [<https://perma.cc/2SLV-4UTT>] (“Very brief marriages, those of only a few months, or marriages entered into soon after the noncitizen entered the United States, swiftly followed by a self-petition, will raise marriage fraud concerns.”). See also Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1683 (2007) (“It makes good sense to think that immigration marriage fraud is more likely to occur in marriages commenced shortly before immigration. After all, if people have been married for a long time, it is unlikely that their long-past decision to marry was motivated by a desire to facilitate immigration benefits at some future time.”).

8. “Primary evidence” generally refers to official documents such as medical records, police records, court records, marriage certificates, birth certificates of children in common, joint tax returns, or a lease showing joint tenancy, while affidavits are considered “secondary evidence.” 8 C.F.R. § 204.2 (2019).

9. See *infra* Part II.D.

urging USCIS to use a holistic approach when evaluating VAWA self-petitions, particularly by giving greater weight to affidavits as proof of bona fide marriage.

This Note proceeds in several Parts. Part II provides background to VAWA's immigration provisions and amendments and explains the bona fide marriage requirement. Part III argues that the bona fide marriage requirement, as enforced by USCIS, does not recognize the realities of domestic violence — it makes it practically difficult for victims to meet the requirement and creates perverse incentives for victims to marry their abusers and stay in abusive relationships longer. Part IV proposes a solution, advocating for USCIS to exercise its discretion to give greater weight to affidavits as evidence of bona fide marriage in VAWA applications. Part V provides a conclusion to summarize the discussion.

II. BACKGROUND TO VAWA AND RELEVANT IMMIGRATION LAWS

This Part provides a background to the relevant immigration laws underlying VAWA's bona fide marriage requirement. Subpart A discusses the Immigrant Marriage Fraud Amendments of 1986 and the origins of concerns about fraudulent marriage. Subpart B gives an overview of VAWA itself, focusing on its immigration provisions and the legislative history of its bona fide marriage requirement. Next, Subpart C explains how VAWA has evolved since 1994, with its reauthorization in 2000 and the creation of the U-Visa, and its reauthorizations in 2005 and 2013. Finally, Subpart D lays out the requirements of the VAWA self-petition, specifically, the evidence needed to prove bona fide marriage and the standards by which USCIS evaluates that evidence.

A. IMMIGRANT MARRIAGE FRAUD AMENDMENTS OF 1986 AND FRAUDULENT MARRIAGES

In the years preceding VAWA's passage, USCIS worried over what it perceived as high levels of fraudulent marriages and this worry influenced VAWA's requirements. U.S. government agencies in the 1980s were concerned with two types of sham marriages: (1) bilateral arrangements in which both spouses

decide to marry for some immigration purpose, with the immigrant spouse typically paying the USC or LPR spouse to enter into the marriage, and (2) unilateral fraud in which the beneficiary spouse deceives the petitioner as to the beneficiary's feelings and reasons for entering the marriage.¹⁰

To reduce both kinds of marriage fraud, the Immigration Marriage Fraud Amendments (IMFA) were introduced to Congress.¹¹ IMFA is a product of its time: an era of increased criminalization of poor communities of color, expansion of the U.S. prison system, and heightened reliance on anti-immigrant legislation.¹² Against this backdrop, IMFA passed through Congress relatively quickly; the hearing on marriage fraud before the Senate Subcommittee on Immigration and Refugee Policy involved little debate, with all those who testified agreeing that marriage fraud was a serious issue that needed forceful, immediate redress.¹³ At the hearing, the Commissioner of the former Immigration and Naturalization Service (INS)¹⁴ identified marriage as the easiest and most frequently used method of gaining permanent resident status, and argued that marriage fraud thus posed a significant threat to the immigration system as a whole.¹⁵ Relying on data from INS surveys, he estimated that as many as 30% to 40% of all spousal petitions involved

10. See Joe A. Tucker, *Assimilation to the United States: A Study of the Adjustment of Status and the Immigration Marriage Fraud Statutes*, 7 YALE L. & POLICY REV. 20, 32–34 (1989).

11. The Immigration Marriage Fraud Amendments of 1986, Pub. L. 99-639, 100 Stat. 3537 [hereinafter "IMFA"].

12. Lee Ann S. Wang, "Of the Law, but Not Its Spirit": *Immigration Marriage Fraud as Legal Fiction and Violence Against Asian Immigrant Women*, 3 UC IRVINE L. REV. 1221, 1221, 1229 (2013).

13. *Id.* See generally *Immigration Marriage Fraud: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 2* (1985).

14. The INS was the U.S. agency responsible for immigration services until it was dissolved in 2003. Most of its functions were transferred to three new agencies: (1) U.S. Citizenship and Immigration Services (USCIS), (2) U.S. Immigration and Customs Enforcement (ICE), and (3) U.S. Customs and Border Protection (CBP). *Our History*, U.S.C.I.S., <https://www.uscis.gov/about-us/our-history> [<https://perma.cc/Y5FR-NZFC>] (last updated May 25, 2011).

15. *Immigration Marriage Fraud: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 2* (1985) (statement of Sen. Alan K. Simpson).

marital fraud.¹⁶ IMFA was passed in 1986 to address what was then perceived as a significant problem of marriage fraud.¹⁷

One of IMFA's main contributions was the idea of "conditional permanent residence."¹⁸ The original Immigration and Nationality Act (INA) of 1952 had previously granted immediate LPR status to foreign nationals who married USCs and LPRs.¹⁹ Under IMFA's new conditional residence framework, however, any immigrants who adjusted their status through a family petition on the basis of a marriage less than two years old could still enjoy LPR status, subject to certain conditions.²⁰ A conditional permanent resident receives a green card valid for two years. In the ninety days before the second anniversary as a conditional resident, the conditional resident and their spouse have an affirmative duty to jointly petition and interview to remove the condition in order to maintain permanent residency.²¹ Through the petition and interview processes, the immigrant must establish that the marriage was bona fide. If they satisfy this burden of proof, the condition is removed and they enjoy regular permanent resident status. If they don't, then their permanent resident status is terminated.²² If the joint petition is not filed on time, or if either spouse fails to appear at the interview without good cause, then permanent residence is terminated.²³ Further, if at any time during the first two years of conditional permanent residence the Secretary of Homeland Security finds that the marriage was entered into for immigration purposes or that the marriage was terminated, permanent resident status is also terminated.²⁴

Importantly, IMFA set the groundwork for the VAWA self-petition framework through its provision of a discretionary waiver for victims of abuse. This waiver grants an exception to

16. WILLIAM A. KANDEL, CONGRESSIONAL RESEARCH SERVICE, IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT (VAWA) 7 (2012), <https://fas.org/sgp/crs/misc/R42477.pdf> [<https://perma.cc/5653-TETH>].

17. These concerns about marriage fraud turned out to be overblown and based on flawed evidence. *See infra* notes 133–134.

18. IMFA § 2.

19. KANDEL, *supra* note 16, at 20.

20. *See* Tucker, *supra* note 10 (citing IMFA).

21. Immigration and Nationality Act of 1965 § 216(c), 8 U.S.C. 1186a (2012) [hereinafter "INA"].

22. INA § 216(c)(3).

23. INA § 216(c)(2)(A).

24. INA § 216(b)(1).

the joint filing requirement for conditional residence where spouses or children were battered or otherwise suffered extreme cruelty.²⁵ In those cases, an immigrant petitioner may file to remove conditions on residence without their spouse.²⁶ IMFA thus provides an important foundation for the idea of self-petitioning in the context of domestic violence, and highlights the level of Congressional concern with marriage fraud at the time VAWA was passed.

B. 1994 VIOLENCE AGAINST WOMEN ACT

From the outset of the drafting of VAWA, Congress viewed domestic violence as a complicated problem that required responding with a variety of federal and state tools. VAWA sought to address domestic violence through a number of approaches, including by increasing the sentences of repeat federal sex offenders, requiring that victims of federal sex offenses receive restitution, and providing grants for state agencies to investigate domestic violence crimes.²⁷ Importantly, VAWA's protections extend to all genders, even though VAWA was driven by concerns about violence against women, as its name suggests.²⁸

Congress further recognized the particular vulnerability of immigrant women and included specific protections for immigrant spouses suffering from domestic violence.²⁹ In the legislative history of VAWA, the House Committee on the

25. INA § 216(c)(4)(C).

26. *Id.*

27. VAWA, *supra* note 3; LISA N. SACCO, CONGRESSIONAL RESEARCH SERVICE, THE VIOLENCE AGAINST WOMEN ACT: OVERVIEW, LEGISLATION, AND FEDERAL FUNDING 1 (2015), <https://fas.org/spp/crs/misc/R42499.pdf> [<https://perma.cc/LWY2-V4A5>].

28. Senator Joe Biden, the author of the 1994 VAWA, explained: "The reality is that the vast majority of victims of domestic violence are women and children, and most outreach organizations take those demographics into consideration when providing services . . . The bottom line is — violence is violence no matter what gender the victim. Because of that, the Violence Against Women Act applies to all victims of domestic violence, irrespective of their gender. Nothing in the act denies services, programs, funding or assistance to male victims of violence." NATIONAL TASK FORCE TO END SEXUAL AND DOMESTIC VIOLENCE AGAINST WOMEN, FREQUENTLY ASKED QUESTIONS ABOUT VAWA AND GENDER 1 (2006), http://www.ncdsv.org/images/FAQ_VAWA%20and%20Gender.pdf [<https://perma.cc/WW8R-QBRK>].

29. Leslye E. Orloff & Brittany Roberts, *Good Faith Marriage in VAWA Self-Petitioning Cases*, NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, 1 (Feb. 17, 2013), <http://library.niwap.org/wp-content/uploads/2015/Immigration-Law-and-VAWA-Good-faith-marriage-2.17.13.pdf> [<https://perma.cc/XRG4-77TF>] (citing H.R. REP. NO. 103-395 (1993)).

Judiciary stated in a report: “Many immigrant women live trapped and isolated in violent homes . . . they fear both continued abuse if they stay with their batterers and deportation if they attempt to leave.”³⁰ Specifically, Congress focused on the battered immigrant women who were fully dependent on their USC or LPR spouse for legal status.³¹ The Immigration and Nationality Act provides for naturalization on the basis of an applicant’s marriage to a USC or LPR, but requires the non-immigrant spouse of such an applicant to submit a petition (called a “family petition”) for the applicant.³² This provision placed great power in the hands of spouses. The USC or LPR spouse can revoke their backing for the immigration petition at any time, exposing the immigrant spouse to deportation.³³ Abusers aware of their power often threaten to withdraw paperwork or skip immigration interviews in response to disobedience.³⁴ Indeed, some scholars have argued that immigrant women are more likely to suffer from spousal abuse than other women precisely because of the power that immigration law gives to USC spouses over applications for relief.³⁵

To remove what some scholars have termed a “tool of psychological oppression,”³⁶ Congress created the VAWA “self-petition” process, which enables abused noncitizen spouses to apply for LPR status without assistance from their sponsoring

30. *Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. 58, 60 (2000) (statement of Leslye Orloff, Director, Immigrant Women Program, NOW Legal Defense and Education Fund).

31. KANDEL, *supra* note 16, at 1.

32. INA § 204(a)(1)(A)(i); Orloff & Roberts, *supra* note 29.

33. Mariela Olivares, *A Final Obstacle: Barriers to Divorce for Immigrant Victims of Domestic Violence in the United States*, 34 *HAMLIN L. REV.* 149, 169 (2011).

34. *Id.* at 173.

35. Abrams, *supra* note 7, at 1696. Battered immigrants are often threatened with deportation by their abusive spouses if they report the abuse or seek to prosecute them for it, highlighting the control that abusive spouses wield over immigration status. *Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. 58, 60 (2000) (statement of Leslye Orloff, Director, Immigrant Women Program, NOW Legal Defense and Education Fund). In this way, the battered immigrant is less able to get help and get out of the abusive relationship than other domestic violence victims, while the abuser is more immune to prosecution than other perpetrators. *Id.*

36. Imogene Mankin, *Abuse-in(g) the System: How Accusations of U Visa Fraud and Brady Disclosures Perpetrate Further Violence against Undocumented Victims of Domestic Abuse*, 27 *BERKELEY LA RAZA L.J.* 40, 43 (2017).

citizen or LPR spouses.³⁷ Congress reasoned that the battered immigrant spouse should face no greater obstacles in applying for permanent legal status on the basis of marriage to a USC or LPR than she would had there been a marriage-based family petition.³⁸ VAWA's proponents argued that the existence of violence in a marriage makes it highly unlikely for the USC or LPR spouse to support the petition, a central component of the marriage-based family petition process,³⁹ which then necessitates the ability for a self-petition process. By giving the battered spouse⁴⁰ greater control over the petition process, VAWA sought to mitigate power imbalance in marriages between immigrants and LPRs or USCs.⁴¹

C. SUBSEQUENT VAWA AMENDMENTS

In 2000, Congress reauthorized VAWA, amending it to address further obstacles facing battered immigrant spouses.⁴² This 2000 Reauthorization allows survivors of domestic violence to apply for relief if the couple divorced, if the abuser was a bigamist, or if the abuser loses his status.⁴³ It also allows domestic violence victims to file for relief within two years of an abusive spouse's death or to file if a marriage was not legally valid due to an abusive spouse's bigamy of which the victim was unaware.⁴⁴ Thus, VAWA's 2000 Amendment granted a greater

37. KANDEL, *supra* note 16, at 1.

38. Olivares, *supra* note 33, at 180. A marriage-based family petition describes a USC applying for his or her spouse to become an LPR on the basis of their marriage.

39. H.R. REP. NO. 103-395, at 38–39 (1993). *See also* Olivares, *supra* note 33, at 179–180.

40. A battered spouse is someone who suffers repeated violence such as beatings, choking, sexual assault, verbal abuse or a combination of violent acts at the hands of a spouse or partner.

41. Abrams, *supra* note 7.

42. 146 Cong. Rec. S10,188, S10,195 (Oct. 11, 2000) (Section-by-Section Summary) (“VAWA 2000 addresses residual immigration law obstacles standing in the path of battered immigrant spouses and children seeking to free themselves from abusive relationships that either had not come to the attention of the drafters of VAWA 1994 or have arisen since as a result of [other bills that amended] immigration law.”).

43. Brief for ASISTA as Amicus Curiae Supporting Applicant at 5, *Matter of S-E*, Dkt. No. Redacted (2012), http://www.asistahelp.org/documents/resources/ASISTA_Amicus_Brief_on_VAWA_GFM_RE_75FE4D8A5E1CF.pdf [https://perma.cc/RA9J-64UC] [hereinafter “ASISTA”].

44. Adam B. Horowitz, Note, *Giving Battered Immigrant Fiancées A Way Out of Abusive Relationships: Proposed Amendments to the Immigration and Nationality Act*, 78 BROOK. L. REV. 123, 140 (2012).

number of domestic violence victims eligibility to self-petition for relief.

The 2000 VAWA Reauthorization also created a new form of relief, known as the U-Visa, which addressed the problem faced by some domestic violence victims in non-traditional family arrangements.⁴⁵ The U-Visa offers domestic violence survivors a path to legal status that does not require victims to have been married to their abusers.⁴⁶ However, the U-Visa program includes certain conditions and limitations that the VAWA self-petition does not. For example, a U-Visa applicant must aid in the prosecution or investigation of the crime and must obtain certification from a law enforcement agency to prove that he or she was helpful.⁴⁷ Further, U-Visas are limited to 10,000 per year,⁴⁸ and USCIS has reached this statutory cap each year between 2009 and 2017. If the cap is reached before all U-Visa petitions have been decided, USCIS creates a waiting list for any eligible petitioners that are awaiting a final decision, and these petitioners will be granted deferred action or parole and may apply for work authorization while waiting for additional U visas to become available.⁴⁹ Once additional visas become available, petitioners on the waiting list receive visas in the order in which their petition was received.⁵⁰ As such, the U-Visa application process is substantially backlogged, leading to longer processing times than that of VAWA self-petitions.⁵¹ Because of these

45. ASISTA, *supra* note 43. See also Emira Habiby Browne et al., *Issues in Representing Immigrant Victims*, 29 FORDHAM URB. L.J. 71, 95 (2001) (discussing the introduction of the U-Visa as a possible source of relief for domestic violence victims who are not in marriages, as defined by USCIS, or whose partners are not USCs or LPRs).

46. Mankin, *supra* note 36.

47. *Id.* at 43.

48. 8 U.S.C. § 1184(p)(2)(A) (2012). As a comparison, in fiscal year 2017, USCIS received 28,820 I-360 petitions, and approved 18,610 of them. U.S. CITIZENSHIP & IMMIGR. SERVS., NUMBER OF SERVICE-WIDE FORMS BY FISCAL YEAR TO-DATE, QUARTER, AND FORM STATUS (2017), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY17Q3.pdf [https://perma.cc/K843-XMTB].

49. *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status#Qualifying%20Criminal%20Activities> [https://perma.cc/7E2G-PFCB] (last updated June 12, 2018).

50. *Id.*

51. Mankin, *supra* note 36, at 48 (arguing that “the U visa just might be the slowest existing path to citizenship — currently over fifteen years long”). See *USCIS Approves 10,000 U Visas for 7th Straight Fiscal Year*, U.S. CITIZENSHIP & IMMIGR. SERVS., (Dec. 29, 2015), <https://www.uscis.gov/news/uscis-approves-10000-u-visas-7th-straight-fiscal-year>

various difficulties, many domestic violence victims continue to use the VAWA self-petition instead of the U-Visa to apply for lawful immigration status in the United States.

VAWA's 2005 reauthorization further expanded protections to domestic violence victims by focusing on access to services for communities of color and tribal and Native communities.⁵² The latest VAWA reauthorization, in 2013, expanded protections to gay, lesbian, and transgender individuals.⁵³ Each reauthorization of VAWA established more robust protections for battered immigrant spouses.⁵⁴

D. REQUIREMENTS OF THE VAWA SELF-PETITION

USCIS regulations define specific requirements that the VAWA self-petitioner must meet. In order for USCIS to formally classify a VAWA petitioner as an abused spouse of a USC or LPR, the petitioner must file an I-360 application.⁵⁵ USCIS may approve the I-360 only if self-petitioners show: (1) a qualifying spousal relationship,⁵⁶ (2) extreme cruelty or battery committed by USC or LPR spouse,⁵⁷ (3) good faith/bona fide marriage, (4)

[<https://perma.cc/33ZK-UHXK>] (stating that the statutorily limit has been reached for U-visas for the past seven years, meaning that applicants end up on a wait list and have very long processing times).

52. *History of the Violence Against Women Act*, LEGAL MOMENTUM, <https://www.legalmomentum.org/history-vawa> [<https://perma.cc/VQ2U-63FH>] (last visited Feb. 05, 2018); Pub. L. No. 109-162, 119 Stat. 2960 (2005).

53. Pub. L. No. 113-4, 127 Stat. 110, 111–118, 140, 144, 156–159 (2013).

54. ASISTA, *supra* note 43, at 6.

55. *I-360, Petition for Amerasian, Widow(er), or Special Immigrant*, U.S. CITIZENSHIP & IMMIGR. SERVS. <https://www.uscis.gov/i-360> [<https://perma.cc/P3WK-HH99>] (last updated Jan. 7, 2019).

56. This refers to the underlying marital relationship that qualifies a petitioner for VAWA relief. The following qualify: (1) Marriage to a U.S. citizen or permanent resident abuser, or (2) marriage to the abuser was terminated by death or a divorce (related to the abuse) within the two years prior to filing the petition, or (3) spouse lost or renounced citizenship or permanent resident status within the two years prior to filing the petition due to an incident of domestic violence, or (4) petitioner believed that she were legally married to her abusive U.S. citizen or permanent resident spouse but the marriage was not legitimate solely because of the bigamy of her abusive spouse. *Battered Spouse, Children & Parents*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/battered-spouse-children-parents#spouse> [<https://perma.cc/9N7V-PNYC>] (last updated Feb. 16, 2016).

57. USCIS suggests that battery or extreme cruelty can be shown through police reports, court records, medical records, or reports from social service agencies. If there is a protective order in place, USCIS asks that a copy be submitted. U.S. CITIZENSHIP & IMMIGR. SERVS., PM-602-0046, ELIGIBILITY TO SELF-PETITION AS A BATTERED OR ABUSED PARENT OF A U.S. CITIZEN; REVISIONS TO ADJUDICATOR'S FIELD MANUAL (AFM) CHAPTER

shared residence with the spouse, and (5) good moral character^{58, 59}. A successful VAWA petition that meets all of these requirements does not immediately yield permanent status, only work authorization, deferred action status,⁶⁰ and the opportunity to separately petition for LPR status.⁶¹ If a survivor's LPR application is approved, she becomes eligible to apply for naturalization after a certain number of years, with the number of years depending on her abuser's legal status. If the petitioner's spouse is a USC, she must live continuously in the United States for three years before applying for naturalization.⁶² If the spouse is an LPR, the battered immigrant must wait until her priority date becomes "current"⁶³ and continuously live in the United States for five years.⁶⁴ In this way, the approved VAWA self-petition can serve as a stepping stone towards U.S. citizenship.

1. *Evidence of Bona Fide Marriage*

One of the more difficult requirements that the VAWA self-petitioner must provide is proof of bona fide marriage. USCIS states generally that, "a spousal self-petition cannot be approved if the self-petitioner entered into the marriage to the abuser for

21.15 (AFM UPDATE AD 06-32) (2011), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/August/VAWA-Elder-Abuse.pdf> [<https://perma.cc/WK64-WHV4>].

58. USCIS provides: "Such evidence should be in the form of an affidavit and should be supported by a local police clearance, state issued criminal background check or similar report from each locality or state in which the self-petitioner has resided for at least six months during the three years prior to filing the self-petition." *Id.*

59. *Id.*

60. *Chapter 8: Violence Against Women Act (VAWA)*, KIND, 6–7, <https://supportkind.org/wp-content/uploads/2015/04/Chapter-8-Violence-Against-Women-Act-VAWA.pdf> [<https://perma.cc/AU7X-DXR3>] (last visited Jan. 18, 2019).

61. *Id.* at 7. See also Moira Fisher Preda et al., *Preparing the VAWA Self-Petition and Applying for Residence*, NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, 23 (July 1, 2013), <https://www.lsc.gov/sites/default/files/LSC/pdfs/11.%20Appendix%20X%20%20BB%20CHP%20Self-Petitioning.pdf> [<https://perma.cc/NRR5-UU75>].

62. INA § 319(a).

63. Immigrant visas that are family-sponsored (non-immediate relatives) and employment-based are numerically limited, so they are not always immediately available. To distribute the visas, the visas are allocated according to a prospective immigrant's preference category, country of chargeability, and priority date. The priority date is used to determine an immigrant's place in the line for a visa, determined by the date that the applicant files the first relevant document. When the priority date becomes available, or is "current," immigrants are able to apply for adjustment of status to obtain lawful permanent resident status. *Visa Availability and Priority Dates*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/greencard/visa-availability-priority-dates> [<https://perma.cc/39C2-779Q>] (last updated Nov. 05, 2015).

64. *Chapter 8, supra* note 60.

the primary purpose of circumventing the immigration laws.”⁶⁵ The U.S. government would not consider a marriage legitimate or “bona fide” if the spouses married mainly to secure immigration benefits. The INA provides a non-exhaustive list of documents that applicants may submit as proof of the bona fides of a marriage⁶⁶:

- (1) proof that one spouse has been listed as the other’s spouse on insurance policies, property leases, income tax forms, or bank accounts;
- (2) testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences;
- (3) birth certificates of children born to the abuser and the spouse;
- (4) police, medical, or court documents providing information about the relationship; and
- (5) affidavits of persons with personal knowledge of the relationship.⁶⁷

2. *Standards for Evaluating Evidence of Bona Fide Marriage*

Following the enactment of the IMFA, the former INS⁶⁸ issued regulations describing how couples may prove bona fide marriage.⁶⁹ Under these regulations, a couple must attach evidence that the marriage was not “entered into for the purpose of evading the immigration laws of the United States.”⁷⁰ Case law has established a separate but related standard for bona fide marriage, centering on “whether the petitioner and his or her spouse intended to establish a life together at the time of their marriage.”⁷¹ As that more positive standard suggests, courts

65. INA § 204.2(c)(1)(ix).

66. INA § 204.2 (c)(2)(vii).

67. Each affidavit must contain the full name and address, date and place of birth of the person making the affidavit; his or her relationship, if any, to the petitioner, beneficiary or prior spouse; and complete information and details explaining how the person acquired his or her knowledge of the prior marriage. The affiant may be required to testify before an immigration officer about the information contained in the affidavit. Affidavits should be supported, if possible, by one or more types of documentary evidence listed in this paragraph. *Id.*

68. *See supra* note 14.

69. Abrams, *supra* note 7, at 1684.

70. *Id.*

71. Bark v. INS, 511 F.2d 1200 (9th Cir. 1975). *See also* Matter of Laureano, 19 I. & N. Dec. 1 (B.I.A 1983).

have recognized that securing an immigration benefit may be *one* of the factors that led the petitioner to marry the USC or LPR, as long as the petitioner also intended at the time of the marriage to establish a life with the spouse.⁷² This standard encourages applicants to produce evidence of a joint life together, as discussed above.⁷³

To determine intent at the time of marriage, USCIS examines the parties' conduct both before and during the marriage, as well as the circumstances surrounding the marriage.⁷⁴ Important factors that USCIS considers include the duration of the relationship,⁷⁵ whether the couple has shared a home during the marriage,⁷⁶ and whether the couple has children together. Even when parties live together for some time and have a child together, USCIS may still determine that a marriage is not bona fide, since the central question is the parties' subjective state of mind at the time the marriage took place and this finding is discretionary.⁷⁷ Parties' decision to separate does not, without more, support a finding that their marriage was not bona fide when entered into — in such cases, officials will consider the time and extent of the separation, as well as other circumstances.⁷⁸

In evaluating the bona fides of the marriage between the alien and the USC or LPR, USCIS directs officers not to focus on the marriage's "viability" (i.e., the probability that the parties remain married for a long time),⁷⁹ and must "refrain from imposing their

72. *Cho v. Gonzales*, 404 F.3d 96, 102 (1st Cir. 2005).

73. *See supra* Part 1(D)(1).

74. For cases examining the parties' intent before and during the marriage, *see, e.g.*, *Lutwak v. U.S.*, 344 U.S. 604 (1953); *Bu Roe v. INS*, 771 F.2d 1328 (9th Cir. 1985); *McLat v. Longo*, 412 F. Supp. 1021 (D.V.I. 1976); *Matter of Soriano*, 19 I. & N. Dec. 764 (B.I.A. 1988). *See also* *U.S. v. Dedhia*, 134 F.3d 802 (6th Cir. 1998) (finding false statements regarding continued viability of marriage were material to issue of parties' intent at time of marriage, and could be considered in criminal prosecution for marriage fraud and for making false statements in an application to the INS).

75. *Ibrahimi v. Holder*, 566 F.3d 758 (8th Cir. 2009) (heavily considering the short length of the parties' courtship, among other factors, in finding lack of bona fide marriage).

76. *Matter of Phillis*, 15 I. & N. Dec. 385, 387 (B.I.A. 1975).

77. *Nikrodhanondha v. Reno*, 202 F.3d 922 (7th Cir. 2000) (upholding termination of conditional residence where couple's marriage was found to be fraudulent even though they had two children together). *See* *Hassan v. INS*, 110 F.3d 490 (7th Cir. 1997) (the former INS denied visa petition even though the parties had lived together and had had a child together shortly before their marriage).

78. *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975).

79. U.S. CITIZENSHIP & IMMIGR. SERVS., ADJUDICATOR'S FIELD MANUAL 21.3(a)(2)(H), <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-3481/0-0-0-4484.html#0-0-0-389> [<https://perma.cc/6J99-F7MD>] (last visited Jan. 18, 2019). *See also* *Matter of*

own norms and subjective standards on the determination.”⁸⁰ For instance, USCIS may not consider subjective notions of the degree of love or companionship when evaluating the marriage.⁸¹ Officials may not regulate the parties’ lifestyles or try to determine the most appropriate marriage for them — both the Ninth Circuit and the Board of Immigration Appeals have determined that it would raise “serious constitutional questions” if judges prescribed the length of time the parties should spend together or how they should spend this time.⁸² Further, as *Bark v. INS* makes clear, “[a]liens cannot be required to have more conventional or more successful marriages than citizens.”⁸³

Though some of the requirements are similar, self-petitions have lower evidentiary burdens. Both types of petitions can be based on marriage to a USC. Both self-petitioners and family petitioners bear the burden of proof to establish eligibility by a preponderance of the evidence.⁸⁴ In meeting this burden of proof, either type of petitioner must rebut the negative presumption that she married her USC spouse solely to gain an immigration benefit.⁸⁵ The list of accepted forms of evidence for bona fide marriage is similar in VAWA and family-based petitions.⁸⁶

However, petitioners’ burden in self-petitioning applications is to produce “any credible evidence,” of bona fides — a less demanding standard than family petitions must meet.⁸⁷ Under the “any credible evidence” standard, a self-petition may not be denied simply because particular pieces of evidence were *not*

McKee, 17 I. & N. Dec. 332 (B.I.A. 1980) (stating that if spouses are no longer living together and marriage is no longer ‘viable,’ the separation of the spouses is not on its own a valid reason for denying the petition, though it may be a relevant factor). *But cf.* U.S. v. Dedhia, 134 F.3d 802 (6th Cir. 1998) (lies about viability are relevant).

80. *Damon v. Ashcroft*, 360 F.3d 1084, 1088 (9th Cir. 2004).

81. *Id.*; U.S. v. Orellana-Blanco, 294 F.3d 1143, 1151 (9th Cir. 2002).

82. *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975). *See* *Matter of Peterson*, 12 I. & N. Dec. 663, 665 (B.I.A. 1968) (BIA found marriage bona fide where petitioner admitted that the couple did not sleep or have sex together, and that he mainly married because he needed a caretaker/housekeeper, and the beneficiary admitted that she liked and felt sorry for the petitioner and needed a place to live. BIA noted that while the marriage was not traditional, the “reasons for the marriage appear to be far sounder than exist for most marriages.”).

83. *Bark*, 511 F.2d 1200. *But see* Olivares, *supra* note 33, at 178 (stating that in reality, practitioners advise that the more the client’s experience differs from the theoretical American’s, the more explanations are needed in the application process).

84. *In re* Petitioner, 2011 WL 7789867 (Aug. 9, 2011).

85. Olga Grosh, *Foreign Wives, Domestic Violence: U.S. Law Stigmatizes and Fails to Protect “Mail-Order Brides,”* 22 HASTINGS WOMEN’S L.J. 81, 98–99 (2011).

86. ASISTA, *supra* note 43, at 7.

87. *Id.* at 8.

submitted.⁸⁸ Thus, while similar evidence is used in VAWA and family petitions to prove bona fide marriage, VAWA applicants face lower evidentiary burdens.

In passing VAWA, Congress recognized the need to provide the battered immigrant with a route to legal status that did not require or expect the support of an abusive USC or LPR spouse. To address this, Congress created a process through which the abused immigrant spouse may self-petition for immigration benefits based on marriage to her USC or LPR abuser. Given Congress' concerns about the risks of immigration fraud-by-marriage, Congress felt it necessary to include a requirement to prove bona fide marriage. Since Congress recognized that domestic violence victims may find it difficult to prove bona fide marriage, it established the lessened "any credible evidence" standard. The next Part discusses how, despite this more lenient standard, USCIS still insists on a particular sort of evidence — primary evidence⁸⁹ — for showing bona fides, leading VAWA self-petitioners to continue to face evidentiary challenges and perverse incentives.

III. THE PROBLEM: EVIDENTIARY CHALLENGES AND PERVERSE INCENTIVES FOR DOMESTIC VIOLENCE VICTIMS

This Part lays out the problems created by VAWA's bona fide marriage requirement and USCIS' insistence that applicants satisfy it with primary evidence. First, Subpart A presents the stories of three VAWA self-petitioners to illustrate how the requirement, as interpreted, affects those domestic violence victims who have short marriages and difficulty locating documentation of joint habitation. Subpart B then demonstrates that in practice, USCIS still insists on requiring primary evidence to prove bona fide marriage. Namely, when applicants respond to Requests for Evidence (RFEs) and application denials, which occur at high rates, the pressure to produce primary evidence is substantial. Subpart C argues that domestic violence

88. INA § 204(a)(1)(J). See Memorandum from Paul W. Virtue, Office of the General Counsel, Immigration and Naturalization Service to Terrance M. O'Reilly, Dir., Admin. Appeals Office at 5 (Oct. 16, 1998) ("[The petition] may only be denied on evidentiary grounds if the evidence that was submitted is not credible or otherwise fails to establish eligibility."). See also Horowitz, *supra* note 44, at 139.

89. See *supra* note 8.

victims routinely face extraordinary challenges in producing primary documentation, largely due to the very spousal abuse that drives them to apply via self-petition. This Part concludes with a discussion in Subpart D about the perverse incentives these pressures create for applicants.

A. INTRODUCING THE SELF-PETITIONERS MOST AFFECTED BY THE CURRENT PRESSURES TO PRODUCE PRIMARY EVIDENCE

Before discussing the evidentiary challenges and perverse incentives in further detail, it is helpful to learn more about those who are most severely affected by the USCIS' insistence on primary evidence. The excerpts provided below illustrate the great burden placed on domestic violence victims like Jane⁹⁰: women who have been married for a short time, and whose abusive spouses have exercised control over relevant documents or subjected them to financial exploitation. One of these anecdotes also highlights how, even after receiving detailed affidavits describing patterns of spousal abuse, USCIS routinely deem such evidence insufficient and demand primary evidence.

1. Renato, a USC, married Janice in January 2011. He filed a petition for immigrant visa and adjustment of status on behalf of Janice at the U.S. Citizenship and Immigration Service (USCIS). After only three months from [the] date of filing of the petition, Renato began showing signs of a violent nature — he started beating Janice when they argue[d], he would throw things at Janice when angry. . . . [S]he tolerated the abuse in silence and she thought this was her only option. During one of Renato's fits, the couple's neighbor decided to call the police and reported the violence on Janice. The police arrived and arrested Renato. Janice left their marital home in haste. . . . [Some time later] she mustered enough courage to go back and get the personal belongings she left behind . . . to her surprise, all her belongings were nowhere to be found. Renato . . . spitefully told Janice that he destroyed all their photographs, letters and any document he could get his hands on that is in any way connected with their

90. See *supra* Part I.

marriage. . . . [In filing for VAWA], Janice’s difficulty is that her marriage was not only short-lived, whatever limited documentary evidence she possessed to evidence her marriage had already been maliciously destroyed by her former spouse.⁹¹

2. Blanca submitted a “self-petition” under the Violence Against Women Act, after she separated from her USC husband, who beat her for objecting to his bagging cocaine on the kitchen table while her children were in the house. . . . [USCIS] sent her [an] RFE by form I-797, this time saying, “The documentation submitted is insufficient.” . . . Blanca replied with a detailed affidavit of her own, in which she said she loved her husband but no longer could tolerate the abuse. Additionally, she provided the affidavits of a son and daughter, and a letter from another son; and affidavits of friends and neighbors who had seen her all bruised after beatings, and one of whom had called the police while the husband was beating Blanca. The [USCIS] officer said it was not “‘satisfactory evidence.’ . . . There is no indication in your record which suggests that you married for the purpose of sharing a life together.”⁹²

3. Isabela, a Mexican national, met Miguel, a USC, in Mexico in 2001 when he returned to visit his family. . . . Isabela and Miguel fell in love and were married in 2002. Miguel moved in with Isabela in her apartment. About a week after the wedding, Isabela and Miguel had a fight, and Miguel punched Isabela in the face and broke her nose. He was very sorry, and they made up. Six months after the wedding, Miguel left, promising to file an immigration petition. . . . Isabela and Miguel stayed in close contact, and Miguel visited often, but he never filed the petition. In 2004, Isabela obtained a visitor’s visa and traveled to San Mateo, California, intending to find out whether her marriage was worth saving. . . . Within a week, she found

91. *When Abusive Spouse Destroys Evidence of Marriage*, TANCINCO LAW OFFICES, (Sept. 7, 2012), <http://www.tancinco.com/when-abusive-spouse-destroys-evidence-of-marriage/> [<https://perma.cc/TFJ2-2Z53>] (emphasis added).

92. John Wheat Gibson, *What Has Happened to VAWA?*, IMMIGR. DAILY, <https://www.ilw.com/articles/2009,0803-gibson.shtm> [<https://perma.cc/4RW7-JUAS>] (last visited Jan. 18, 2019).

Miguel and asked him whether he wanted to remain married to her. He said he did. . . . One day Miguel came over to her new home and demanded that Isabela return to Mexico. She refused. . . . Miguel became very angry and beat Isabela until she lost consciousness, then he slapped her until she awoke. He raped her. . . . [An] attorney filed a self-petition for Isabela under the Violence Against Women Act (VAWA). . . . Soon after, the attorney received a request from the Immigration branch of the Department of Homeland Security asking for [further] proof.⁹³

These examples illustrate the challenges that VAWA petitioners face in applying for relief. USCIS is concerned with the intent of the applicant at the time of marriage, but spousal abuse often leaves the battered petitioner unable to provide the necessary evidence of bona fide marriage, thus leaving her forced to explain her suffering through affidavits. Nevertheless, USCIS continues to insist on primary evidence of the intent at marriage. As Blanca's story in the second example shows, the Department of Homeland Security (DHS) and the USCIS are suspicious of affidavits, frequently responding with demands for further proof through RFEs. Isabella's story in the third example suggests that these evidentiary challenges are heightened where the couple lived jointly for only a short period of time, prompting USCIS to issue RFEs often in these cases. Similarly, as the first example demonstrates, short marriages weaken a VAWA case, particularly where the abusive spouse destroys all relevant documents. By questioning affidavits, U.S. government agencies signal to VAWA petitioners that primary evidence of good faith marriage is necessary, or at least preferred, for attaining immigration relief. Ultimately, these vignettes show the difficulty and danger of requiring battered spouses to prove bona fide marriage in VAWA petitions, a problem noted by scholars.^{94,95} The rest of this Part discusses in greater depth the

93. Lauri J. Owen, *Forced Through the Cracks: Deprivation of the Violence Against Women Act's Immigration Relief in San Francisco Bay Area Immigrant Domestic Violence Survivors' Cases*, 21 BERKELEY J. GENDER, L. & JUST. 13, 13–14 (2006).

94. Elizabeth Shor, *Domestic Abuse and Alien Women in Immigration Law: Response and Responsibility*, 9 CORNELL J.L. & PUB. POL'Y 697, 709 (2000) ("The good faith requirement [is] unworkable in a domestic abuse situation.")

95. Interestingly, the standard of proof for "extreme cruelty" in a VAWA case parallels the proof of abuse required in family court for divorce, alimony, support and

reasons why the requirement is unworkable as currently enforced.

B. USCIS CONTINUES TO GIVE GREAT WEIGHT TO PRIMARY EVIDENCE IN VAWA APPLICATIONS

Despite the relative laxity of the “any credible evidence” standard, VAWA applicants still face great pressure to produce primary evidence of bona fide marriage. Along with Congress’ recognition of the evidentiary hurdles faced by VAWA applicants, the former INS has also continually advised that “adjudicators should give due consideration to the difficulties some self-petitioners may experience in acquiring documentation, particularly documentation that cannot be obtained without the abuser’s knowledge or consent.”⁹⁶ However, the INA still states that VAWA applicants must “submit primary evidence whenever possible.”⁹⁷ Further, it has been argued that USCIS continues to insist on particular pieces of primary evidence as proof of bona fide marriage, while often rejecting personal affidavits as “insufficient.”⁹⁸ In the face of Congress’ clear contrary intent, VAWA applicants still face a high evidentiary burden to prove bona fides with primary evidence.

custody proceedings. LESLYE E. ORLOFF ET AL., BATTERING AND EXTREME CRUELTY: DRAWING EXAMPLES FROM CIVIL PROTECTION ORDER AND FAMILY LAW CASES, NIWAP 2 (2013), <https://www.lsc.gov/sites/default/files/LSC/pdfs/4.%20%20Appendix%20III%20%20Battering%20or%20Extreme%20Cruelty%20SJI%2010%2014%2013.pdf> [https://perma.cc/7L3G-5ZX9].

Some scholars have discussed the difficulties that domestic violence victims face in proving abuse in family court, for instance, when trying to receive an order of protection. See, e.g., Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L.Q. 43, 44 (2000) (noting that the difficulty of proving domestic violence in court is a major barrier to the effectiveness of civil protection orders because survivors are often the only witnesses). However, these family court proceedings are not concerned with findings of good faith marriage as their main goal is ensuring the safety of the victim, whereas this is a key focus in the immigration context in VAWA petitions. Thus, the challenges of proving abuse may be similar for VAWA petitioners as for domestic violence victims in family court, but battered immigrants in the VAWA context have the additional burden of demonstrating good faith marriage.

96. Memorandum from T. Alexander Aleinikoff, Exec. Assoc. Comm’r, Immigration and Naturalization Service (Apr. 16, 1996) at 5.

97. INA § 204.2 (c)(2)(i).

98. ASISTA, *supra* note 43, at 10, 17.

USCIS has issued growing numbers of RFEs seeking further primary evidence of bona fide marriage in response to petitions.⁹⁹ From 2007 to 2011, DHS' VAWA unit issued RFEs at a four-times-greater rate in VAWA self-petitioning cases (74%) than in family based visa petition cases (18.3%).¹⁰⁰ When USCIS answers applications with RFEs, many VAWA petitioners drop their cases, or disappear out of fear that their claim will fail and they will be deported, even though these applicants are legally entitled to immigration relief.¹⁰¹ The high rate of VAWA denials and RFEs demonstrate USCIS's improper insistence on primary evidence of bona fide marriage.

C. VAWA APPLICANTS FACE EVIDENTIARY CHALLENGES IN PRODUCING PRIMARY EVIDENCE

As Congress itself recognized in embracing the “any credible evidence” standard and as evidenced above, VAWA self-petitioners face many challenges in providing primary evidence of bona fide marriage. Advocates for immigrant victims of domestic violence have argued that the VAWA requirements deter qualified applicants from petitioning and deny relief to those who are eligible.¹⁰² Specifically, they are concerned that battered immigrants do not have the necessary documentation of bona fide marriage to include with their petitions.¹⁰³ The abusers, as another way of controlling VAWA applicants, often do not include their spouses on documentation, particularly on any document that implies that the spouse is an equal.¹⁰⁴ Yet another common manifestation of the abusive spouse's manipulation and control, is their destruction of any documents that may be helpful in securing relief.¹⁰⁵ Even if joint documentation exists and the abuser does not destroy it, attempting to get a copy of the document could cause the abuser to react violently and put the

99. TRACIE L. KLINKE ET AL., CURRENT TRENDS AND ADVANCED PRACTICE STRATEGIES IN VAWA CASES, AM. IMMIGR. LAWS. ASS'N. 715, 718 (2013), <https://www.tals.org/files/2013%20EJU%20VAWA%20Article%20.pdf> [<https://perma.cc/ZWV5-HQXK>].

100. *Supra* Orloff & Roberts, note 29 at 3–4.

101. Lauri J. Owen, *Forced Through the Cracks: Deprivation of the Violence Against Women Act's Immigration Relief in San Francisco Bay Area Immigrant Domestic Violence Survivors' Cases*, 21 BERKELEY J. OF GENDER, L. & JUST. 13, 14 (2006).

102. KANDEL, *supra* note 16, at 6.

103. *Id.*

104. ASISTA, *supra* note 43, at 10–11.

105. *Id.* at 9.

victim, and any children, in mortal danger.¹⁰⁶ Further, domestic violence victims are often forced to quickly escape their homes and abusers, leaving behind their possessions, including documents.¹⁰⁷ By the time the couple separates and one or both parties move out of the shared residence, primary evidence of bona fide marriage — if such joint documents ever existed — is at this point often lost, discarded, or destroyed.¹⁰⁸

Studies of domestic violence confirm that perpetrators often try to control and trap their victims by destroying their ability to abandon the marriage or enjoy independence.¹⁰⁹ For instance, one report found that, of the domestic violence victims studied, “94% had experienced physical abuse in the past 12 months and 95% had experienced psychological abuse. In addition, 94% reported experiencing economic abuse in their relationship; 92% had experienced behaviors of economic control, 88% had experienced employment sabotage, and 79% experienced economic exploitation.”¹¹⁰ Economic abuse can manifest in abusers controlling victims’ resources, like money and employment, to ensure dependence and reduce the likelihood of escape.¹¹¹ Abusers accomplish this control via a range of methods, including giving victims a strict allowance, hiding joint-finances, stealing money from victims, and refusing to pay rent or utilities, thus forcing the victim to cover those costs entirely in her own name.¹¹² Crucially, beyond the detrimental effects that extensive economic control and manipulation have on victims’ mental and physical health,¹¹³ there are also drastic

106. *Id.* at 12.

107. *Id.* at 9.

108. Katerina Shaw, Note, *Barriers to Freedom: Continued Failure of U.S. Immigration Laws to Offer Equal Protection to Immigrant Battered Women*, 15 *CARDOZO J.L. & GENDER* 663, 675 (2009).

109. ASISTA, *supra* note 43, at 11.

110. Judy L. Postmus et al., *Measuring Economic Abuse in the Lives of Survivors: Revising the Scale of Economic Abuse*, 22 *VIOLENCE AGAINST WOMEN* 692, 701 (2016). In domestic violence literature, economic control is defined as blocking the acquisition of assets, controlling how resources are distributed, and monitoring how they are used. Employment sabotage refers to difficulties abused spouses face securing and maintaining jobs, as it relates to the abuse they suffer. Economic exploitation means depleting the abused spouse’s resources. See generally LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE* (2018).

111. Michael A. Anderson et al., “*Why Doesn’t She Just Leave?*”: A Descriptive Study of Victim Reported Impediments to Her Safety, 18 *J. FAM. VIOLENCE* 151, 154 (2003).

112. Adrienne E. Adams et al., *Development of the Scale of Economic Abuse*, 14 *VIOLENCE AGAINST WOMEN* 563, 566–67 (2008).

113. *Id.* at 568.

consequences for VAWA applicants who try to gather joint documents as evidence of bona fide marriage, because of the risk that abusive spouses will respond with even more severe abuse to the attempt to gather joint documents..

Although USCIS claims that it considers affidavits as alternative evidence of bona fide marriage, affidavits that are unsupported by primary evidence are often treated as inadequate.¹¹⁴ As the eligible battered immigrant applies for VAWA relief, one scholar argues that the immigrant's "abusive marriage, dependent economic status, and language and cultural barriers combine to keep her powerless and uninformed,"¹¹⁵ often resulting in a denial of her application.

D. THE EMPHASIS ON PRIMARY EVIDENCE OF BONA FIDE MARRIAGE CREATES PERVERSE INCENTIVES

VAWA's bona fide marriage requirement, as enforced by USCIS, creates perverse incentives for petitioners. For one, because immigration relief under VAWA requires marriage, battered immigrants are encouraged to marry the very person abusing them to be eligible for the relief.¹¹⁶ Further, since VAWA requires proof of a bona fide marriage, victims may view staying in the marriage with that abuser for a longer length of time as necessary to develop evidence of joint living, joint finances, and a joint life. This issue has been analyzed in the context of abused fiancées who are excluded from VAWA self-petitions and lack other immigration relief alternatives, therefore incentivizing them to stay with and marry their abuser.¹¹⁷ VAWA also incentivizes battered immigrants to have children with their abusive spouses, since USCIS views joint children as evidence of bona fide marriage.¹¹⁸ In this way, the practical requirement of primary evidence perversely pressures immigrant victims of domestic violence to make themselves more vulnerable to abuse, and for longer periods of time.

114. Shaw, *supra* note 108, at 675.

115. Grosh, *supra* note 85, at 99.

116. Mankin, *supra* note 36, at 43.

117. Horowitz, *supra* note 44, at 126.

118. 8 C.F.R. § 204.2(c)(H)(ix)(2)(vii) (2019) ("Other types of readily available evidence [of bona fide marriage] might include the birth certificates of children born to the abuser and the spouse.").

Further, the bona fide marriage requirement incentivizes the abuser to continue the financial abuse and to hold back marriage. As one amicus curiae brief by an organization that specializes in immigration-related domestic violence argues, “denial [of VAWA applications] based on lack of evidence in the abuser’s control provides abusers with an easy tool for controlling their victims. Keep your victim out of household and financial records and USCIS will deny her status.”¹¹⁹ Further, abusers who know about self-petition criteria could refuse to get married as another way to control their partners and prevent their ability to secure lawful status.¹²⁰ Current enforcement of VAWA’s bona fide marriage requirement gives abusive spouses more power over the immigrant spouse — the exact purpose VAWA was aimed at preventing.

The following Part proposes one way of addressing these issues — urging USCIS to grant greater weight to affidavits as evidence of good faith marriage.

IV. USCIS SHOULD PLACE GREATER WEIGHT ON AFFIDAVITS AS PRIMARY PROOF OF BONA FIDE MARRIAGE

This Part discusses a potential solution to relieve VAWA self-petitioners from the pressure to produce primary evidence of bona fide marriage: a holistic approach that gives greater weight to affidavits as proof of bona fide marriage. Subpart A argues that affidavits are invaluable pieces of evidence in VAWA applications and should be given greater consideration by USCIS. Subpart B addresses why the U-Visa is inadequate as an alternative solution to this problem.

A. USCIS SHOULD GIVE GREATER WEIGHT TO AFFIDAVITS IN VAWA APPLICATIONS

1. *Benefits of Affidavits*

USCIS should give greater weight to affidavits in VAWA applications by valuing the qualitative evidence they provide. One scholar, focusing on VAWA self-petitioners who seek to

119. ASISTA, *supra* note 43, at 21.

120. Mankin, *supra* note 36, at 43.

divorce their abusers briefly lists giving greater weight to affidavits as one of many possible legislative reforms. She writes: “[C]ompelling and credible evidence through, for example, affidavits in which the immigrant and any other friends, family, or advocates can vouch for her marriage or the abuse she suffered should amount to sufficient proof.”¹²¹ If given their due weight, affidavits would allow VAWA applicants to fill in any documentary gaps in their applications.

In the asylum context, affidavits have been used very successfully as sources of evidence to support grants of asylum for those who need them and are not applying fraudulently. For example, one scholar describes an asylum case in which an immigration judge allowed an applicant to pursue his claim based on an affidavit submitted by an academic with expert knowledge of persecution that indigenous Guatemalans suffer.¹²² Further, affidavits from medical and psychological professionals have helped document asylum applicants’ physical wounds and emotional trauma.¹²³ In one study, all seventeen of the interviewed asylum practitioners stated that the vast majority of their asylum cases would benefit from a medical affidavit, and that affidavits often make the difference between successful and unsuccessful applications.¹²⁴ This study also found that a specific benefit of the medical or psychological affidavit is its ability to elicit from applicants new information about their trauma, which often becomes a central component of the asylum claim.¹²⁵ Along with professional affidavits, immigration lawyers also consider

121. Olivares, *supra* note 33, at 196.

122. Sabrineh Ardalán, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J.L. REFORM 1001, 1037–38 (2015). See also Tien-Li Loke, Note, *Trapped in Domestic Violence: The Impact of United States Immigration Laws on Battered Immigrant Women*, 6 B.U. PUB. INT. L.J. 589, 598–9 (1997) (arguing that the former INS requirements that required expert affidavits and banned personal affidavits were unnecessarily burdensome on battered women applicants).

123. Ardalán, *supra* note 122, at 1035–36. See generally ADJUDICATING REFUGEE AND ASYLUM STATUS: THE ROLE OF WITNESS, EXPERTISE, AND TESTIMONY (Benjamin N. Lawrance & Galya Ruffer, eds. 2015) (examining the role of expert witnesses and expert testimony in the asylum application process).

124. Elizabeth Scruggs et al., “An Absolutely Necessary Piece”: A Qualitative Study of Legal Perspectives on Medical Affidavits in the Asylum Process, 44 J. FORENSIC LEG. MED. 1, 5–6 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5121032/pdf/nihms817657.pdf> [<https://perma.cc/3SGP-TEPZ>].

125. *Id.* at 6.

personal affidavits from applicants to be essential to a good outcome in asylum cases.¹²⁶

Affidavits provide numerous benefits in the VAWA context as well. As in asylum cases, a personal affidavit allows a VAWA petitioner to tell her story in a logical, coherent way.¹²⁷ Specifically, the VAWA applicant can use the affidavit to provide details about the courtship stage of the relationship prior to marriage, the love that she felt for her spouse, and the excitement she felt to marry and start a life with them — all evidence of a bona fide marriage that is particularly useful in the absence of documentary proof. Although such subjective factors like love and excitement in a marriage are not necessary to show bona fide marriage,¹²⁸ at the dating/pre-marriage stage, they could still be indicative of the intent to establish a life together. The affidavit would not only be able to speak to bona fide marriage in more qualitative terms, but it would also provide space for the applicants to explain that a lack of primary evidence may be directly tied to the abuse they suffered from their spouses.¹²⁹ Affidavits provided by witnesses (i.e., neighbors, family members, and other persons besides the applicant herself) attesting to both this abuse and the courtship or early marriage can also be incredibly helpful to affirm that the marriage was based on sentimental or cultural ties.¹³⁰ Further, just as in the asylum context, professional affidavits from medical and psychological experts who have treated or counseled the domestic violence victim provide invaluable details related to the bona fides of the marriage and the effects of abuse.¹³¹ Thus, affidavits by the applicant, witnesses, and professionals are extremely

126. *Pro Bono Representation Manual: An Overview of Asylum Law and Procedure*, THE ADVOCATES FOR HUMAN RIGHTS 24 (2010), http://www.theadvocatesforhumanrights.org/uploads/ahr_pro_bono_asylum_manual.pdf [<https://perma.cc/7AZW-CXST>].

127. AYODELE GANSALLO & JUDITH BERNSTEIN-BAKER, UNDERSTANDING IMMIGRATION LAW AND PRACTICE 633 (2016).

128. See *Damon v. Ashcroft*, 360 F.3d 1084, 1088 (9th Cir. 2004). See also *U.S. v. Orellana-Blanco*, 294 F.3d 1143, 1151 (9th Cir. 2002).

129. KLINKE ET AL., *supra* note 99, at 718.

130. FILING A FORM I-360 SELF-PETITION UNDER THE VIOLENCE AGAINST WOMEN ACT, NW. IMMIGRANT RIGHTS PROJECT 4 (2006), <https://www.nwirp.org/Documents/FilingAnI-360Self-Petition.pdf> [<https://perma.cc/8UWQ-TAJX>].

131. Christine Grant, *The Forgotten Victim: Men and Domestic Violence — Issues for the I-360 Petition*, 4 PENN ST. J.L. & INT'L AFF. 608, 613 (2016). See also Cecelia Friedman Levin, *Self-petitioning Under The Violence Against Women Act*, ASISTA, 7, http://www.asistahelp.org/documents/resources/chapter_8_final_bf060a4f3042e.pdf [<https://perma.cc/V4EK-ABYJ>] (last visited Feb. 6, 2018).

helpful evidence in VAWA cases, and they should give them greater weight accordingly by USCIS.

2. *Addressing Concerns with, and Criticisms of, Affidavits*

Heavier reliance on affidavits may raise certain concerns that should be addressed. The first concern is that affidavits may be too subjective or otherwise ineffective at identifying and preventing marriage fraud. Similarly, some may worry that attorneys working with applicants will get too involved and change clients' stories to bolster their cases or help them lie about their marriages. Another related, general concern may be that giving greater weight to affidavits in VAWA applications will not only increase fraud but also lead to a slippery slope in which a wider range of evidence is accepted in applications for other forms of immigration relief, leading to increased numbers of fraudulent claims in those contexts as well.

Though immigration law has sought to address Congress' historical concern with marriage fraud,¹³² evolving scholarship has gradually eroded the legitimacy of that concern, particularly in VAWA cases. Importantly, during debates over IMFA, one scholar's estimate that thirty percent of immigrant marriages were fraudulent generated extreme worry among members of Congress about the threat of increased marriage fraud.¹³³ However, this estimate was later discredited, as the former INS conceded, and a more accurate estimate was located instead at one to two percent.¹³⁴ An INS study of the prevalence of "mail-order marriages"¹³⁵ reviewed all self-petitions filed in 1997 and 1998 and all removal of conditions cases filed in 1994, ultimately finding no single instance of fraud in cases featuring abuse.¹³⁶ Similarly, a 2012 Congressional Report concluded that there was

132. See Tucker, *supra* note 10.

133. See KANDEL, *supra* note 16.

134. *Id.* at 7. See also Horowitz, *supra* note 44, at 159 (describing that the survey used to reach the thirty percent estimate was flawed in that it only considered cases where officials suspected marriage fraud, rather than cases of actual fraud).

135. Mail-order marriages are ones in which agencies market women from developing countries for financial gain. See Christine S.Y. Chen, *The Mail-Order Bride Industry: The Perpetuation of Transnational Economic Inequalities and Stereotypes*, 17 U. PA. J. INT'L ECON. L. 1155, 1160 (1996). Men may buy the addresses of the marketed women for a fee and correspond with them. *Id.* at 1163.

136. U.S. CITIZENSHIP & IMMIGR. SERVS., INTERNATIONAL MATCHMAKING ORGANIZATIONS: A REPORT TO CONGRESS 15–17 (Feb. 1999).

a lack of reliable, empirical support for concerns that VAWA unintentionally facilitates marriage fraud.¹³⁷ Experts explain these results by arguing that “domestic violence, battering or extreme cruelty, power, and coercive control provide strong evidence that the marriage is a good faith marriage,” likely because such extreme abuse would severely reduce any incentive to marry for immigration benefits.¹³⁸ Further, the very rigor with which VAWA requires applicants to prove abuse protects against marriage fraud.¹³⁹ DHS also uses a higher degree of vigilance and diligence in evaluating VAWA cases than other applications for immigration relief, which can help eliminate attempts at fraud.¹⁴⁰ Marriage fraud concerns are historically fraught with issues, and VAWA itself is effective at dealing with any such attempted fraud.

In addition to VAWA’s built-in fraud prevention measures, affidavits themselves can also act as checks against such fraud. Giving greater weight to affidavits will encourage more applicants to submit one or more affidavits, when at the margin. With more affidavits, USCIS will often have an additional, and valuable source of evidence. USCIS can read affidavits with an eye to both internal consistency and consistency with other sources of evidence, including other affidavits, to corroborate an applicant’s statements as a check on fraud.

A second concern about giving greater weight to affidavits may be that pro se applicants will not be able to adequately convey their stories in writing without legal assistance; thus, this proposal could place a high burden on immigrant applicants and discourage pro se filings. This burden may be heightened by the fact that many immigrant victims find it difficult to express themselves in English and affidavits may presume language

137. Orloff & Roberts, *supra* note 29, at 2.

138. *Id.* See also Shor, *supra* note 94, at 709 (“Evidence of domestic abuse should satisfy the good faith marriage requirement. The psychology of abusive relationships can have much more to do with why women remain in a dangerous situation than their desire for a green card.”).

139. Olivares, *supra* note 33, at 199. See also Orloff & Roberts, *supra* note 29, at 3 (arguing that not only is the abuse standard really high, but also that the VAWA self-petition requires way more of applicants than a regular family petition in that it mandates all elements to be proven.); Mankin, *supra* note 36, at 57 (describing the remarkable steps an immigrant would have to take to fraudulently report domestic violence in order to obtain a U-Visa, further highlighting that the extensive procedures created by these immigration laws themselves deter fraud).

140. Orloff & Roberts, *supra* note 29, at 3.

proficiency.¹⁴¹ UCSIS could address this concern by providing free translations of non-English evidentiary submissions for applicants who show that they need, but cannot afford, translation services.¹⁴² In any event, it is not clear that giving greater weight to affidavits would increase significantly the language barriers faced by certain battered immigrants. For one, knowing which pieces of primary evidence to submit already requires immigrants to have some understanding of English. Furthermore, obtaining this evidence could require applicants to navigate relationships that also implicate language access, such as those with the landlord of jointly leased or owned property or the bank where the couple has joint accounts. The problems of language barriers and pro se representation faced by battered immigrants span far beyond affidavit-production and should be addressed separately.¹⁴³

A third concern is that applicants will have a hard time producing witness affidavits from family or friends because abusers often socially isolate their spouses. The relationship between domestic violence and social isolation has been found in countries around the world.¹⁴⁴ Battered immigrants are most vulnerable to isolation, since they leave behind families and enter a foreign environment in which they often know no one and are unfamiliar with the language or customs.¹⁴⁵ Abusive spouses often use such social isolation to more easily control the immigrant's life and to gain sole control over resources.¹⁴⁶

Given such widespread social isolation of battered immigrants, some advocates may worry that VAWA applicants do not have access to third party witness affidavits. However, this Note proposes placing greater weight on affidavits generally, without requiring affidavits from third parties or professionals, and without demanding multiple affidavits. Socially-isolated battered immigrants should have the opportunity to tell their stories in their own affidavits and may actually be the very

141. See Deborah A. Morgan, *Access Denied: Barriers to Remedies Under the Violence Against Women Act for Limited English Proficient Battered Immigrant Women*, 54 AM. U.L. REV. 485, 493 (2004) (discussing language barriers to relief throughout the VAWA petitioning process).

142. *Id.* at 534–35.

143. See generally *id.*

144. Cecilia Menjivar & Olivia Salcido, *Immigrant Women and Domestic Violence: Common Experiences in Different Countries*, 16 GENDER & SOC'Y 898, 904 (2002).

145. *Id.*

146. *Id.*

applicants most able to benefit from more serious consideration of affidavits. Since their social isolation likely includes restricted access to their financial documents and joint expenses, their access to primary evidence is ever more diminished. Social isolation is not a reason to further deprive VAWA applicants of a voice in telling their stories to USCIS.

Greater weight given to affidavits as evidence of bona fide marriage also raises the concern of pro se applicants lacking the sophistication to present their stories effectively. One scholar, who collected anecdotal evidence from an immigration attorney working with battered Latina women, notes that these women often focus only on the negative aspects of their relationship with their spouse in drafting their affidavits.¹⁴⁷ Accordingly, their affidavits often elicit skepticism from immigration officials, who find it hard to believe that someone would stay in a relationship in which their spouse frequently beat them and never let them leave the house.¹⁴⁸ For VAWA, such a trend could be incredibly detrimental, with applicants focusing on the abuse they suffered without giving adequate attention to the bona fides of their marriage — the love they may have felt for their spouse when they entered the relationship and the hopes they had for a shared life together. To address this concern, it is important to train immigration attorneys and USCIS officials in the psychology of domestic violence, so that they understand that affidavits written by battered women may not conform to their expectations of love and marriage. These attorneys and officials will then be less likely to incorrectly judge the women's actions or expressions as insincere or improbable and can recognize the potential long-standing effects of trauma on this population. Though this Note specifically proposes adopting a holistic affidavit-based approach, a necessary next step is to borrow the psychological understandings of domestic violence that are more common in family law and family courts.¹⁴⁹

147. SHONNA L. TRINCH, *LATINAS' NARRATIVES OF DOMESTIC ABUSE: DISCREPANT VERSIONS OF VIOLENCE* 111 (2003). Note that it is possible that this exclusively negative focus may reflect that victims of domestic violence want immigration relief and independence from their spouses as soon as possible, and so their affidavits may reflect, in part, their perceptions about what the government "wants to hear." This effect does not mean that the affidavits are in any way inaccurate or dishonest.

148. *Id.*

149. For information on understanding the psychology of domestic violence victims, see Lisa Firestone, *Why Domestic Violence Occurs and How to Stop It*, *PSYCHOL. TODAY* (2012), <https://www.psychologytoday.com/us/blog/compassion-matters/201210/why-dome>

For the reasons discussed above, USCIS should give greater weight to affidavits in VAWA applications.

B. THE U-VISA IS AN INADEQUATE ALTERNATIVE TO VAWA

The availability of the U-Visa does not render this Note's proposal unnecessary. Some may argue that this Note's proposed solution is unnecessary because would-be VAWA self-petitioners could use the U-Visa instead of VAWA to obtain immigration relief, avoiding the problem of producing evidence of bona fide marriage. It is true that domestic violence is a qualifying crime under the U-Visa, making battered immigrants eligible for its relief.¹⁵⁰ The U-Visa also does not require a marriage and is open to all those who suffered substantially from domestic violence in the United States and helped in the investigation or prosecution of their abusers, which solves the perverse incentive in VAWA to marry the abuser.¹⁵¹ Thus, some might suppose that this Note's proposal to grant greater weight to VAWA affidavits is a solution to a problem that U-Visa has already solved.

But while the U-Visa aimed to fill in some of VAWA's gaps, it is inadequate as a solution to the problem of proving bona fide marriage in VAWA petitions. As one scholar notes in the context of battered immigrant fiancées, "certain pitfalls of the U-Visa process make it an unenviable or even unobtainable form of immigration relief."¹⁵² For one, whereas VAWA self-petitioners can obtain LPR status once a visa becomes available, U-Visa applicants face serious administrative obstacles even after a visa is available.¹⁵³ The U-Visa is a non-immigrant visa, meaning that even if a battered immigrant is lucky enough to get one of

stic-violence-occurs-and-how-stop-it [https://perma.cc/7QKV-G823]; Anderson, *supra* note 111, at 54; Adams et al., *supra* note 112, at 566–67 (2008). For arguments about the expertise of family law and family courts on issues of domestic violence, and how that understanding should be applied to the immigration context, see Abrams, *supra* note 7, at 1708; Veronica T. Thronson, *Domestic Violence and Immigrants in Family Court*, 63 *JUV. & FAM. CT. J.* 63, 67–8 (2012).

150. *Victims of Criminal Activity*, *supra* note 49.

151. See *supra* Part I.C, III.D. See also *Victims of Criminal Activity*, *supra* note 49 ("The legislation was intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other crimes, while also protecting victims of crimes who have suffered substantial mental or physical abuse due to the crime and are willing to help law enforcement authorities in the investigation or prosecution of the criminal activity.").

152. Horowitz, *supra* note 44, at 140.

153. *Id.* at 149.

these visas, she would still have to wait three years before applying for a green card.¹⁵⁴ Also, U-Visas are limited in number and entail a much longer processing time than that of VAWA self-petitions.¹⁵⁵ Furthermore, the U-Visa requires law enforcement certification that the victim has been helpful in investigating or prosecuting the crime.¹⁵⁶ This requirement is problematic in practice. Many domestic violence victims do not wish to participate in the prosecutions of their abusers for a variety of reasons, including complicated emotions of love, financial dependence on their abusers, concerns about re-traumatizing themselves, and fears of their spouses' retaliation through further and more severe abuse.¹⁵⁷ Many battered immigrants are also afraid of reporting domestic abuse to the police, fearing that the authorities will deport them — a threat often used by their own spouses to exercise further control over them.¹⁵⁸

Thus, the U-Visa is not best suited to providing immigration relief for victims of domestic violence victims and is not an adequate answer to VAWA's burdensome evidentiary requirements. Instead, affidavits provide a better solution.

V. CONCLUSION

Underlying the VAWA process are key tensions — between recognizing abuse and yet requiring proof of a healthy relationship before that abuse began, and between granting domestic violence victims the autonomy to gain immigration relief on their own and yet tying the acquisition of this relief to marriage. These tensions are apparent in the hurdles that

154. *Green Card for a Victim of a Crime (U Nonimmigrant)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/other-ways-get-green-card/green-card-victim-crime-u-nonimmigrant> [<https://perma.cc/W2ZK-3CND>] (last updated May. 23, 2018).

155. *See supra* note 48–51.

156. Horowitz, *supra* note 44, at 149.

157. Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 392 (2001).

158. Deanna Kwong, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections under VAWA I & II*, 17 BERKELEY J. GENDER L. & JUST. 137, 143 (2002); Pamela Constable, *For Battered Immigrant Women, Fear of Deportation Becomes Abusers' Weapon*, WASH. POST (Feb. 8, 2012), https://www.washingtonpost.com/local/for-battered-immigrant-women-fear-of-deportation-becomes-abusers-weapon/2012/01/30/gIQAZCx3zQ_story.html?utm_term=.165d3085fefd [<https://perma.cc/FF4E-ZD33>].

battered immigrants face when applying for immigration relief through VAWA. Specifically, VAWA self-petitioners face great pressure from USCIS to produce primary evidence of bona fide marriage but are often unable to produce such documentation due to the very domestic abuse they are trying to escape. Their abusive spouses frequently destroy the documentation, never include the immigrant spouse's name on the documents to begin with, or threaten further abuse if the immigrant spouse tries to obtain the documents. Because these issues are amplified in a short-lived marriage, battered immigrants have perverse incentives to stay with their abusive partners longer, to marry their abusers, and to have children with them.

In order to address these harmful ramifications, USCIS should give greater weight to affidavits as proof of bona fide marriage. A holistic approach that is more open to qualitative evidence about domestic relationships, recognizing the practical limitations on many applicants' access to other evidence, would allow both USCIS to gain a broader understanding of the marriage at issue and the battered immigrant would be better able to tell her story in a logical, coherent way by explaining both the courtship stage of the relationship and the reason for any documentary gaps in her application.

By requiring primary evidence of bona fide marriage in a VAWA petition, perhaps USCIS is focusing on the wrong intent: the problematic intent could be not an intent to evade immigration rules but rather the abusive spouse's intent to dominate their spouse. Abusive partners may wish to marry the partner that they abuse in order to exert even more power over them. Thus, USCIS is overly concerned with the intent to evade immigration laws, not concerned with the fact that the intent to control the immigrant spouse could be far more dangerous, and refuses to acknowledge the realities regarding the challenges of producing primary evidence under these conditions.

In late 2018, a new bill was introduced to reauthorize VAWA, sparking a partisan debate but ultimately expiring with a government shutdown and leaving VAWA's reauthorization uncertain.¹⁵⁹ As Senator Patrick Leahy stated during the debate

159. Elise Viebeck, *Violence Against Women Act Expires with Government Shutdown*, WASH. POST (Dec. 22, 2018), <https://www.washingtonpost.com/powerpost/violence-against-women-act-to-expire-with-government-shutdown/2018/12/21/b66f600a-0557-11e9-b5df-5d>

over VAWA's 2011 reauthorization, "[o]ur country still has a long way to go. . . . As we look toward reauthorization, we have to continue to ensure that the law evolves to fill unmet needs."¹⁶⁰ As Congress pushes for a new long-term authorization in 2019, one such unmet need to consider is relief for battered immigrants like Jane, who are in short-lived, abusive marriages to USCs or LPRs, and who cannot access primary documentation to prove the bona fides of those relationships. USCIS must give greater weight to their stories and pay greater attention to their voices.

3874f1ac36_story.html?noredirect=on&utm_term=.57f842775fa1 [https://perma.cc/M9KFKDYV].

160. *The Violence Against Women Act: Building on Seventeen Years of Accomplishments: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 112-132 (2011) (statement of Sen. Leahy, Chairman, S. Comm. on the Judiciary), <https://www.gpo.gov/fdsys/pkg/CHRG-112shrg70894/html/CHRG-112shrg70894.htm> [https://perma.cc/3YFP-28CN].