AMERICAN IMMIGRATION LAWYERS ASSOCIATION

AILA National Office
Suite 300
1331 G Street, NW
Washington, DC
20005-3142

Tel: 202.507.7600
Fax: 202.783.7853

www.aila.org

Crystal Williams
Executive Director

Susan D. Quarles
Deputy Executive Director

January 10, 2013

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
20 Massachusetts Avenue, NW
Washington DC, 20529-2000

Via e-mail: opefeedback@uscis.dhs.gov

RE: Draft PM-602-XXXX: Eligibility for Employment Authorization upon Approval of a Violence Against Women Act (VAWA) Self- Petition; and, Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants

Dear Director Mayorkas:

The American Immigration Lawyers Association (AILA) respectfully submits the following comments regarding the draft Policy Memorandum, PM-602-XXXX: *Eligibility for Employment Authorization upon Approval of a Violence Against Women Act (VAWA) Self-Petition; and, Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants* ("VAWA EAD Guidance" or "Guidance") for your consideration.[1]

AILA is a voluntary bar association of more than 12,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. AILA appreciates the opportunity to comment on this draft policy memorandum and believes that our members' collective expertise provides experience that makes us particularly well-qualified to offer views that will benefit the public and the government.

While these comments will address our concerns regarding the employment authorization process for approved VAWA beneficiaries, the principal focus will be on employment authorization for battered spouses of A, E (iii), G, and H nonimmigrants. The Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005) Tit. VII, Pub. L. No. 109-162, provided that an abused derivative spouse of one of these nonimmigrant visa categories could apply for employment authorization if it is demonstrated that

[1] *USCIS Draft Policy Memo on Employment Authorization Eligibility after VAWA Self-Petition Approval*, AILA Doc. No. 12121340, http://www.aila.org/content/default.aspx?docid=42469, http://www.uscis.gov/USCIS/Outreach/Feedback%20Opportunities/Draft%20Memorandum%20for%20Comment/VAWA-Authorized-EADs-PM.pdf

during the marriage the derivative spouse (or any children) has been battered or the subject of extreme cruelty perpetrated by the principal nonimmigrant .[2] As legal service providers, immigration attorneys, and victim advocates, AILA welcomes the issuance of the VAWA EAD Guidance to clarify these provisions. Indeed, for the past seven years, immigrant survivors of domestic abuse have waited for procedures to be developed to assist them in leading more secure lives.

Our comments will focus on five issues:

1) The VAWA EAD Guidance provisions regarding issuance of employment authorization documents for derivatives should be expanded to comport with VAWA statutory language in INA §101(a)(51);
2) The VAWA EAD Guidance should be amended to extend work authorization for abused derivative spouses of A, E (iii), G, and H nonimmigrants beyond the duration of the abuser's status in order to provide safety and security for survivors;
3) The employment authorization application process for derivative spouses of A, E (iii), G, and H visa holders should comply with the VAWA documentary and confidentiality requirements;
4) The VAWA EAD Guidance should address situations in which abused derivative spouses have already applied for relief under INA §106 in the absence of a prescribed process;
5) The new I-765V and instructions should be circulated for review and comments.

1. The VAWA EAD Guidance provisions regarding issuance of employment authorization documents for derivatives should be expanded to comport with VAWA statutory language and the circumstances of VAWA applicants.

A. EADs Incident to Approval

VAWA 2005, later codified in INA §204(a)(1)(K), authorized applicants to receive employment authorization incident to the approval of the VAWA self-petition. This development was of critical importance to survivors, especially those who had to wait until their priority dates became current in order to adjust status.[3] While there is no regulatory language regarding the provisions of INA §204(a)(1)(K), subsequent USCIS guidance expounded on this new category of employment authorization especially for approved VAWA self-petitioners.[4]

[2] INA §106; Section 814(c) of VAWA.
[3] The original Violence Against Women Act did not specifically establish that approved VAWA self-petitioners could apply for work authorization; however, subsequent guidance provided that a qualified self-petitioner may be eligible to apply for work authorization under the existing provisions of 8 CFR §274a.12, like (c)(9) [adjustment pending] or (c) (14) [deferred action] eligibility. *See* INS Interim Final Rule, "Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self Petitioning for Certain Battered or Abused Spouses and Children" 61 Fed. Reg. 13061, (Mar 26, 1996). Aleinikoff, Executive Associate Commissioner, Office of Programs, INS Mem/HQ 204-P (Apr. 16, 1996). *See also* Cronin, Acting Executive Associate Commissioner, Office of Programs, INS Mem/HQ 204-P (Dec. 22, 1998); Cronin, Acting Executive Associate Commissioner, Office of Programs, INS Mem. HQ/AND/70/6.1P (Sept. 8, 2000).
[4] While USCIS guidance indicates that employment authorization for approved VAWA self-petitioners can be found at 8 CFR §274a.12(c)(31), current versions of 8 CFR do not include this provision for who qualifies for a (c)(31) work permit. *See* Eligibility to Self-Petition as a Battered or Abused Parent of a U.S. Citizen; Revisions to Adjudicator's Field Manual (AFM) Chapter 21.15 (AFM Update AD 06-32) (8/31/2011).

The VAWA EAD Guidance states that it will become effective in advance of upcoming regulations. Assuming regulations are forthcoming, it is essential that both the guidance and the regulations comport with the existing statutory framework and follow the definition of "VAWA self-petitioner" at INA §101(a)(51), which is defined as "an alien, ***or a child of an alien,*** who qualifies for relief" under the VAWA provisions. [Emphasis added].[5] We disagree with USCIS's assertion that derivative children are not included in the statutory provision found at section 814(b) of VAWA 2005.[6] INA §204(a)(1)(K) states:

> Upon the approval of a petition as a VAWA self-petitioner, the alien (i) is eligible for work authorization; and (ii) may be provided an "employment authorized" endorsement or appropriate work permit incidental to such approval.

Nothing in this provision distinguishes between approved VAWA principals and their derivatives. Looking at this provision in light of INA §101(a)(51), a derivative child of an approved VAWA applicant should be able to apply for an employment authorization document incident to the approval of the principal's application and does not need to only rely on deferred action eligibility under 8 CFR §274a.12 (c)(14).

B. Derivative "Transformation"

AILA welcomes USCIS's guidance on derivative children who turn 21 after the filing of the VAWA self-petition. The Guidance provides that a derivative child who was included on the self-petition that was filed or approved before the date on which the child attained the age of 21; and attains the age of 21; and was not admitted or approved for lawful permanent residence by the date the child attained age 21, shall be considered his or her own VAWA self-petitioner under INA §204(a)(1)(D)(i)(III) with the same priority date as the original self-petitioner (i.e., the parent).[7]

It will be extremely beneficial for derivatives to not have to file a new self-petition. In addition, "the derivative child who converts to a VAWA self-petitioner pursuant to section 204(a)(1)(D)(i)(III) of the Act is eligible for work authorization under section 204(a)(1)(K) of the Act as a VAWA self-petitioner provided that the individual was included as a derivative beneficiary child on his or her parent's approved Form I-360. Additionally, the derivative child who converts to a VAWA self-petitioner remains eligible for work authorization under deferred action."[8]

---

[5] INA §101(a)(51) provides that "the term 'VAWA self-petitioner' means an alien, or a child of the alien, who qualifies for relief under—(A) clause (iii), (iv), or (vii) of section 204(a)(1)(A) ; (B) clause (ii) or (iii) of section 204(a)(1)(B) ; (C) section 216(c)(4)(C) ; (D) the first section of Public Law 89-732 (8 U.S.C. 1255 note) (commonly known as the Cuban Adjustment Act) as a child or spouse who has been battered or subjected to extreme cruelty; (E) section 902(d)(1)(B) of the Haitian Refugee Immigration Fairness Act of 1998 (8 U.S.C. 1255 note); (F) section 202(d)(1) of the Nicaraguan Adjustment and Central American Relief Act; or (G) section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (division C of Public Law 104-208).

[6] VAWA EAD Guidance at 2.

[7] VAWA EAD Guidance at 3.

[8] *Id.*

C. Continuing Eligibility for Deferred Action

It is essential that both VAWA principal applicants and their derivatives have options for employment authorization and that these options be available to everyone. AILA commends USCIS for acknowledging that VAWA applicants may receive work authorization incident to the approval of their VAWA applications and that they may apply for and receive a work permit based on deferred action.[9] Furthermore, VAWA principals may receive employment authorization based on 8 CFR§274a.12(c)(9), if they submit an application for adjustment of status.

As noted below in the section on the new employment authorization documents (EADs) for certain nonimmigrant spouses, all of these options are important to survivors and their families. Allowing all VAWA self-petitioners and their families to apply for employment authorization based on an approved VAWA petition, deferred action, or pending adjustment (if eligible) will ensure that survivors have access to employment authorization regardless of their personal situation. In some circumstances, USCIS cannot grant work authorization based on deferred action, such as a VAWA applicant or derivative in removal proceedings.[10] For this reason, we urge USCIS to permit both VAWA principals ***and their derivatives*** to apply for work authorization under INA §204(a)(1)(K), deferred action, or when appropriate based on 8 CFR §274a.12(c)(9) eligibility.

Recommendation:

The VAWA EAD Guidance should be amended to comport with INA §101(a)(51) and consider derivative children as "VAWA self-petitioners" for purposes of INA §204(a)(1)(K). These derivatives should also be considered for work authorization based on deferred action or a pending adjustment application.

2. The VAWA EAD Guidance should be amended to extend work authorization for abused derivative spouses of A, E (iii), G, and H nonimmigrants beyond the duration of the abuser's status in order to provide safety and security for survivors.

The value of employment authorization to survivors of domestic violence and their families cannot be overstated. Withholding financial resources from the victim is a classic tactic of an abuser:

> [B]y controlling resources (*e.g.*, money, employment, etc.), the batterer ensures that the victim remains dependent upon the batterer, thus reinforcing subjugation and reducing the likelihood of escape by the victim. Isolating the victim from resources or sources of emotional support is another way of controlling the victim. By separating the victim from friends and family either physically… or emotionally…, the batterer creates an atmosphere of dependence and control.[11]

[9] The VAWA EAD Guidance at p. 2 provides, "although section 204(a)(1)(K) of the Act allows for the eligibility of work authorization incident to the approval of a VAWA self-petition, the principal VAWA self-petitioner still has the option to request an EAD under deferred action if deferred action was provided."

[10] Cronin, Acting Executive Associate Commissioner, Office of Programs, INS Mem/HQ 204-P (Dec.22, 1998).

[11] Anderson, et al, *Why Doesn't She Just Leave?: A Descriptive Study of Victim Reported Impediments to Her Safety*, 18 J. Family Violence 151 (June 2003), *available at* http://www.springerlink.com/content/v433568j6918q72l/fulltext.pdf.

According to a recent study, 99% of domestic violence survivors reporting psychological abuse also reported economic abuse.[12] Additionally, "abusive men hide jointly earned money, prevent their partners from having access to joint bank accounts, lie about shared assets, and withhold information about their finances."[13]

Given the important need that was clearly recognized by Congress when it created such unusual relief, we are very concerned that the proposed guidance imposes limitations on eligibility for work authorization for abused spouses that are not mandated by INA §106 and are contrary to the spirit and purpose of VAWA. Under INA §106, employment authorization may be issued to a spouse who was

(a) admitted under the (A), (E)(iii), (G) and (H) categories accompanying or following to principal alien under (A), (E)(iii), (G), or (H) categories; and
(b) battered or subjected to extreme cruelty during the marriage, or whose child was battered or subjected to extreme cruelty by the principal alien spouse during the marriage.

INA §106 does not require that that employment authorization be limited to the period of the principal's authorized stay, nor does it require that the marriage exist at the time of submission or adjudication of an application for employment authorization under this section. Indeed, the statute's reference to abuse occurring "during the marriage" indicates that a marriage need not exist at the time employment authorization is sought or approved.

Reading the statute more narrowly than required undermines the underlying Congressional policy goal. By imposing these limitations on eligibility for employment authorization, the status of the abused derivative spouse remains tied to that of the abuser, an outcome that is completely at odds with the objectives of VAWA. If the derivative's work authorization eligibility is determined by the validity of the underlying nonimmigrant status, as is proposed in the draft guidance, the principal still retains control over the abused spouse's ability to work. For example:

- If the couple divorces due to the abuse or if the abuser seeks a divorce to ensure his or her victim is deported, the victim will no longer have qualifying derivative nonimmigrant status and will not qualify for employment authorization under the draft policy;
- If the principal decides not to extend status or changes status, again perhaps with the goal of harming the victim spouse, the derivative spouse would no longer be eligible for work authorization under this provision through no fault of his or her own;
- If the abuser spouse loses status due to criminal activity related to domestic violence, the derivative spouse automatically loses status;
- If an abused spouse with employment authorization later divorces due to abuse, USCIS will terminate the employment authorization;
- If the application for employment authorization is submitted close in time to the expiration of status of the abused spouse, any work authorization period will be too limited to have any meaningful impact on the applicant's ability to seek safety and stability.

[12] Adams et al, *Development of the Scale of Economic Abuse*, 14 Violence Against Women 563, 566 (2008), *available at* http://vaw.sagepub.com/content/14/5/563.abstract.
[13] *Id.*

As these scenarios illustrate, the draft policy imposition of a "maintenance of status" requirement for employment authorization eligibility will in many instances disqualify the very individuals the statute is designed to protect.

Recommendations:

1. At a minimum, the Guidance should contain an exception to the requirement that the victim be maintaining status as a nonimmigrant to include those abused spouses who have fallen out of status due to circumstances outside the victim's control, such as, but not limited to, divorce from the abuser, the abuser's failure to extend the derivative spouse's status, and the abuser's loss of status due to domestic violence or the abuser's death.

2. If the abuser applies to adjust his or her status but in the meantime the abused derivative spouse falls out of status, the derivative spouse should be able to extend his or her work permit until the abuser adjusts, so that the abused spouse may then avail themselves of VAWA self-petition protections.

3. Even if USCIS does not change its narrow approach to "status maintenance," it should provide a minimum period of employment authorization of at least one year, so that an abused spouse with a status that will soon expire will be afforded some meaningful protection and relief from the approval of his or her application.

Creating such exceptions would be in line with both general prosecutorial discretion mandates relating to victims of violence, as well as other VAWA related provisions that recognize that abusers can use and manipulate the immigration system as a means of control and abuse. In light of its approach to prosecutorial discretion for victims of crimes generally, USCIS should craft an approach to INA §106 that recognizes that Congress specifically targeted this population for help.

3. The employment authorization application process for derivative spouses of A, E (iii), G, and H visa holders should comply with the VAWA documentary and confidentiality requirements.

Derivative spouses who apply for work authorization pursuant to INA §106 should be afforded the same standard as in VAWA self-petition cases in terms of providing evidence of the abuse in the marriage. Similarly, the special protections for VAWA applicants at 8 USC §1367 should extend to these derivative spouse applicants.

A. Evidence Considered in INA §106 Applications

Because abusers often control documents central to proving VAWA eligibility requirements, Congress created a special "any credible evidence" standard for all VAWA cases.[14] To address this concern, the VAWA EAD Guidance allows an INA §106 applicant to show the abuser's status through secondary evidence (such as name, date of birth, date of entry into the United States, I-94 number, employer, etc.) and suggests USCIS may check electronic systems to attempt to verify the qualifying nonimmigrant status of the spouse. AILA welcomes USCIS's recognition that abused derivative spouses may not be

[14] INA §204(a)(1)(J), 8 CFR §204.2(c)(2)(i).

able to provide primary documentary evidence of her/his spouse's nonimmigrant status, as it may be unsafe or otherwise difficult for them to do so.[15] Unfortunately, this recognition does not seem to extend to proving abuse.

The VAWA EAD Guidance lists only primary evidence related to proving abuse: police reports, court records, medical records, or reports from social service agencies. The Guidance also provides that if there is a protective order in place, a copy should be submitted.[16] To comport with the "any credible evidence" standard of VAWA, however, the VAWA EAD Guidance must clarify that "any credible evidence" may be supplied, including affidavits by the applicant and others.

The importance of having the credible evidence standard in VAWA cases, including INA §106 employment authorization applications, cannot be stressed enough. Immigrant survivors of domestic violence face a variety of barriers that impede access to the social and legal services designed to protect them. Across the general population, approximately 57% of abused women have never told anyone about the abuse.[17] Even when abuse is disclosed, immigrant women are often deterred from accessing key medical and legal services because of a general lack of trust in the system and specific fears, including "fear of deportation, fear of retribution by abusers, fear of being the one arrested and separated from children, and fear of future economic, social and/or employability repercussions."[18]

Recommendations:

1. To comport with the "any credible evidence" standard, the VAWA EAD Guidance should be amended to clarify that this standard applies to the evidence of abuse for an INA §106 application. Adjudicators should consider any credible evidence of the abuse including but not limited to affidavits from the applicant or from third parties attesting to the battery or extreme mental cruelty.

2. Training of adjudicators on the proper standard of proof in these cases is essential. Adjudicators should be aware of the particular problems immigrant survivors face in obtaining documentation and should evaluate the evidence submitted in that light.[19] Therefore, an INA §106 application should not be denied on evidentiary grounds solely because the petitioner has not submitted a specific document requested by the adjudicator. Rather, as in the VAWA self-petition context, an INA §106 application "should only be denied on evidentiary grounds if the evidence that was submitted is not credible or otherwise fails to establish eligibility."[20]

---

[15] The former Immigration and Naturalization Service acknowledged these safety concerns in its instruction 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." Memorandum from T. Alexander Aleinikoff, Exec. Assoc. Comm'r, Immigration and Naturalization Service (Apr. 16, 1996) at 5.
[16] VAWA EAD Guidance at 6.
[17] *Medical Providers' Guide to Managing the Care of Domestic Violence Patients Within a Cultural Context*. Second Ed. Michael R. Bloomberg, City of New York (July 2004) p. 10.
[18] Leslye E. Orloff, Mary Ann Dutton, Giselle Aguilar Hass and Nawal Ammar. *Recent Development: Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA Women's L.J. 43, 55 (Fall/Winter 2003).
[19] Memorandum from Paul W. Virtue, Office of the General Counsel, Immigration and Naturalization Service to Terrance M. O'Reilley, Director, Administrative Appeals Office (Oct. 16, 1998), 2001 WL 1047693.
[20] *Id.*

B. Confidentiality Requirements

The VAWA EAD Guidance should include specific language that INA §106 applications will be handled under the procedures that apply to abused spouses under 8 USC §1367. Under 8 USC §1367(a)(1), DHS is prohibited from using information from a spouse or parent who has battered the applicant or subjected him or her to extreme cruelty, including any live-in family members of the alleged abuser, in making an adverse finding of inadmissibility or deportability.[21] INA §106 is designed specifically for spouses who suffer domestic violence so this part of 8 USC §1367 clearly applies to these cases: USCIS should use no information from abusers or their families in making decisions on §106 cases.

Moreover, AILA believes that INA §106 employment authorization applications should also be protected by the VAWA confidentiality protections of 8 USC §1367(a)(2), which provide that DHS is prohibited from disclosing ANY information about a VAWA applicant to a third-party (with certain, very limited exceptions).[22] This provision applies most commonly when an abusive spouse is seeking to get information about the victim.

Even though INA §106 applicants are not specifically listed as beneficiaries of these protections, AILA believes the language of INA §106 indicates that Congress intended that §106 applicants be protected.[23] INA §106 states that "requests for relief under this section shall be handled *under the procedures that apply to aliens seeking relief under section 204(a)(1)(A)(iii)*" or VAWA self-petitioners (emphasis added). Given that the nondisclosure protections of 8 USC §1367(a)(2) apply specifically to VAWA self-petitioners, the language of INA §106 indicates that the protections should also apply to abused (A), (E)(iii), (G) and (H) derivative spouse applicants.

Recommendation:

The VAWA confidentiality provisions of 8 USC §§1367(a)(1) and (a)(2) should apply to INA §106 applicants as the confidentiality is crucial in providing protection and security for immigrant survivors, including those who are derivatives on an abusive spouse's visa. AILA recommends that the VAWA EAD Guidance be amended to specifically state that these protections apply to INA §106 applications for employment authorization.

[21] *See* Section 384(a)(1) of IIRIRA and 8 USC §1367(a)(1).
[22] *See* 8 USC §§1367 (a)(2) & (b).
[23] 8 USC §1367(a)(2) provides that in no case may the Attorney General, or any other official or employee of the Department of Justice, the Secretary of Homeland Security, the Secretary of State, or any other official or employee of the Department of Homeland Security or Department of State (including any bureau or agency of either of such Departments) "permit use by or disclosure to anyone (other than a sworn officer or employee of the Department, or bureau or agency thereof, for legitimate Department, bureau, or agency purposes) of any information which relates to an alien who is the beneficiary of an application for relief under paragraph (15)(T), (15)(U), or (51) of section 101(a) of the Immigration and Nationality Act [8 USC 1101 (a)(15)(T), (U), (51)] or section 240A(b)(2) of such Act [8 USC 1229b (b)(2)]."

4. **The VAWA EAD Guidance should address situations in which abused derivative spouses that have already applied for relief under INA §106 in the absence of a prescribed process.**

Despite the lengthy delay in implementing this 2005 law, some qualified nonimmigrant domestic violence survivors applied by sending in a Form I-765: Application for Employment Authorization and other forms or letters. USCIS should consider these requests for EADs as if they were properly filed on the date USCIS received any indicia of intent to apply. Given the ameliorative purpose of the law and the lengthy delay in implementing it, it behooves USCIS to help as many eligible victims of domestic violence as possible.

Recommendation:

The Guidance should clarify what will happen with the I-765s that were filed by abused derivative spouses of nonimmigrant visa holders in advance of this guidance and in the absence of regulations.

USCIS should adjudicate these I-765s or issue requests for evidence promptly in light of this new guidance.

5. **The new I-765V and instructions should be circulated for review and comment**

The draft guidance references a new Battered Nonimmigrant Spouse Supplement Form I-765V that must be submitted by applicants for employment authorization under INA §106, in addition to the Form I-765.

Recommendation:

The new I-765V form and related instructions should be published and distributed for review and comment before any guidance on this issue is finalized.

Conclusion

For the reasons above, AILA urges USCIS to issue final guidance that comports with VAWA statutory language in INA §101(a)(51); that complies with VAWA documentary and confidentiality requirements; that extends work authorization for abused derivative spouses of A, E (iii), G, and H visa holders beyond the duration of the abuser's status in order to provide safety and security for survivors; and that address situations in which abused derivative spouses who have already applied for immigration relief under INA §106. In addition, AILA requests that the new I-765V form be circulated to stakeholders for review and comment. AILA appreciates the work USCIS has done in promulgating this Guidance and promises to work with USCIS to move toward policies that protect victims and their families.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION