IDENTIFYING HUMANITARIAN FORMS OF RELIEF FOR DERIVATIVES

VAWA Self-Petitioners

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The Violence Against Women Act (VAWA), first enacted in 1994, was created to address a widespread problem of noncitizen victims of domestic violence or abuse remaining with their abusers out of fear of deportation because the abuser held the key role to the victim attaining lawful immigration status in the United States. Eligibility and procedure under VAWA mirrors that of the family-based immigration process but frees the victim from having to rely on the abuser's cooperation to file a family-based petition. Under VAWA, an abused spouse or child of a lawful permanent resident (LPR) or U.S. citizen (USC), or an abused parent of a USC son or daughter can submit a self-petition on their own. Individuals who qualify for VAWA, however, are able to include more family members as derivatives on their applications and both the principal and derivative are able to gain immigration benefits through the process. For many family members, being a derivative of a VAWA self-petition may be the only way they will be able to achieve legal status in the United States. Because of this, it is important to understand when a derivative can be included on a VAWA self-petition, how to screen for their eligibility, and what would make them ineligible.

This practice advisory provides information on derivatives for the VAWA self-petition process as well as considerations to keep in mind when filing an application. It will not address issues of "inadmissibility," however, and whether the derivative is otherwise eligible for adjustment of status. For more information on the VAWA self-petition process and tips for submitting applications, advocates may want to consult Immigrant Legal Resource manual, *The VAWA Manual*.[1]

I. Common Family Member Terms in Immigraiton Law:

Family unity is a longstanding concern of Congress and a motivating factor underlying many U.S. immigration law provisions. This Congressional priority of keeping families together is at the core of many immigration relief options, including humanitarian forms of relief, where immigrant survivors of crime, domestic violence or abuse, trafficking and persecution are able to petition family members or include them as derivatives in their own self-petition or application. To understand which derivatives can be included, it is important to learn who is considered family members under immigration law. For VAWA self-petition derivatives, advocates will need to know the applicable immigration law definition for the following family members.

Spouses: Individuals are considered spouses under immigration law if the marriage creating the spousal relationship was legally valid in the location where the marriage was performed and celebrated.[2] The marriage must also have been entered into in "good faith" and not simply to obtain an immigration benefit.[3]

Parents: Parent, father, and mother, are defined in relation to their child under immigration law, described below.[4]

Children: A child under immigration law is a person who is unmarried and under twenty-one years old.[5] This includes children born out of wedlock, as well as stepchildren. For stepchildren, the parent and stepparent must have married before the stepchild's eighteenth birthday.[6] It also includes adopted children where the adoption occurred before the child turned sixteen. While normally in the case of adoptive relationships, there are also requirements of two years of custody and residence together, for VAWA applicants, these requirements do not apply.[7] The natural sibling of an adopted child also meets the definition of child, if the sibling is adopted by the same adopting parents before reaching age eighteen.[8]

Sons and Daughters: Adult children over twenty-one or married. These relatives usually do not qualify as derivatives, unless they are still considered "children" due to timing of the filing of their parent's petition; they qualified as child self-petitioners before age twenty-one but delayed applying until age twenty-five, in certain circumstances; or because they remain "children" due to the protections against "aging out" found in the Child Status Protection Act (CSPA).[9]

II. Derivatives of VAWA Self-Petitioners:

A. Who is the principal applicant?

Before advocates can determine who can be included as a derivative, they must identify who the principal applicant is. When screening for VAWA eligibility, advocates will want to know two important facts from clients: who the abuser was and what status did they have. This is important because only family members of abusers with status (i.e. they are or were USCs or LRPs) can qualify for VAWA.

Individuals need to meet the following requirements in order to be eligible for VAWA:

- They are the abused spouse or child of a USC or LPR, or an abused parent of a USC son or daughter;
- The abuser was an LPR or USC;
- They were the victim of battery or extreme cruelty;
- They resided with the abuser in the United States at some point, with certain exceptions if abuser was employed abroad[10];
- They can demonstrate good moral character; and
- Self-petitioning spouses must show they entered into the marriage in good faith.

Classification of VAWA self-petitioners:

- Spouse self-petitioners—the spouse was abused, either physically, emotionally or mentally, by their LPR or USC spouse
- Children self-petitioners—the child suffered abuse at the hands of their LPR or USC parent
- Parent self-petitioners—The parent suffered abuse at the hands of their USC child, who is over twenty-one years old.

Once an advocate has identified that the principal meets the requirements to self-petition, the next step is to determine if their client can include any derivatives in the self-petition.

B. Who are the derivatives?

In order to be included as a derivative in the VAWA self-petition, family members will need to meet the definition of a qualifying family member. That is, they will need to document how they are related to the principal applicant. Qualifying as a derivative will depend on how the principal applicant is eligible for VAWA, and just like in the family process, advocates will need to ensure they can prove the family relationship.

1. Derivative Basics:

Scenario 1: If the self-petitioner is a spouse and abused by an LPR or USC, they can include their unmarried children who are under twenty-one years of old.[11]

> **Qualifying children as derivatives—**Children can be included even if they did not suffer any abuse and even if they are not related to the abuser.[12] The children do not have to have their own petition. [13] As with self-petitioning children, a derivative child who turns twenty-one after filing or approval of the parent's self-petition will be considered a petitioner as an immediate relative, or under the first, second, or third family preference categories and is eligible for deferred action and work authorization.[14]
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> Example: Cristina is twenty and is the daughter of Marie, who was abused by her LPR husband. Marie filed a self-petition and listed Cristina as her daughter on her I-360 self-petition. Before the self-petition is approved, Cristina turned twenty-one. Cristina will not lose her status as a derivative child. Instead, she will automatically be considered as a self-petitioner herself under the 2B preference category. Marie will not need to file any petition on Cristina's behalf. Cristina will be eligible for deferred action status and employment authorization while waiting for her priority date to become current.

Scenario 2: If the child is abused by an LPR or USC parent, then the child can be the self-petitioner and include their children as derivatives.[15]

> Practice Note: Parents of abused children, even if the parents are not abused themselves, can file a self-petition under VAWA, including those parents of abused USC or LPR children. If the parent files as the self-petitioner they will be able to include other children as derivatives, even if the children are not related to the USC or LPR abuser.[16]

Scenario 3: If the self-petitioner is a parent of an abusive USC son or daughter, they will not be able to include any derivatives

> **Qualifying as a Stepparent or Adoptive Parent—**an abused stepparent or an abused adoptive parent of a USC may also benefit from VAWA. An abused stepparent must demonstrate that the relationship with the US Citizen son or daughter was created by marriage before they reached the age of eighteen, the relationship was not terminated at the time of the abuse, and the relationship existed at the time of filing.[17] An abused adoptive parent must demonstrate that the adoption occurred before the USC son or daughter turned sixteen and meets additional requirements set forth in the statute.[18]

2. At what point in the application process can derivatives be included?

For VAWA it is important to include derivatives before they age out or lose their ability to be included. Because this process is tied to the family-based system, it is important to protect children from aging out or becoming ineligible, though the CSPA will still provide additional protections to some such children.

Age out Protections for Children: A common issue in family-based immigration is a child aging out, that means a child reaching the age of twenty-one years so that they are no longer considered children under immigration law. When it is a requirement for the individual to be considered a child, the age out protections for the children of self-petitioners found both in the CSPA and VAWA can prevent "age-out" from happening.

Under the CSPA, if the abuser is a USC, then the child's age freezes at the time the I-360 is filed and the age out protection continues through admission so long as they remain unmarried. If the abuser is an LPR, the CSPA provides for a more complicated calculation of the child's "CSPA" age. In summary, the child who has "aged out" may subtract the time

between the filing of the I-360 and the petition's approval by USCIS from the child's biological age to arrive at the child's "CSPA" age.[19] If the "CSPA" age is under twenty-one as of the date the visa becomes available, then the derivative must "seek to acquire" permanent residence within one year of the priority date becoming current on the Department of State's Visa Bulletin.[20] However, under VAWA, derivative children who were under twenty-one when the self-petition was filed, have additional protections. They will not be prevented from immigrating through the petition, even after "aging out" but may have a longer wait in order to be eligible to apply for permanent residency Like in the CSPA, children who are derivatives of USC abusers will retain their immediate relative status while derivatives of LPR abusers will become petitioners in their own right so long as the petition was filed before they turned twenty-one years old. Check whether the derivative in your client's case benefits from the CSPA first, and if not, turn to the VAWA protections for aged-out children.

Under VAWA, children of LPRs who were included as derivatives before turning twenty-one years of age will retain the same priority date assigned to their parent's self-petition even if they turn twenty-one before becoming LPRs.[21] They will continue to be eligible for deferred action during the self-petition process, and will automatically convert to become a VAWA self-petitioner in their own right with the same priority date as that assigned to the petitioner.[22]

> **Example**: Harriet was abused by her lawful permanent resident husband, George. He did not abuse Harriet's daughter Ann, and Ann did not live with Harriet and George. Harriet's situation met all the requirements for VAWA, so she submitted a self-petition with 19-year-old Ann's name listed on it. Harriet and Ann both received "Deferred Action" notices and employment authorization and were put on a list to receive a second preference immigrant visa when it became available. When Ann turns 21, the USCIS will automatically move her from the second preference "A" list (for spouses and unmarried children under 21 of LPRs) to the second preference "B" list [for 'unmarried sons and daughters' (over 21)]. Although it will take Ann longer to get her immigrant visa in this new category, she will maintain her legal permission to live and work in the United States until it is available.

Additionally, derivative children of abused spouses of USCs will retain the same age as when they filed. Therefore, if the petition was filed when they were under twenty-one years of age, their age is "frozen" and they will not age out.[23] Any child of a USC abuser who properly files a form I-360 prior the child's twenty first birthday will remain a child for immigration purposes throughout the adjudication of the form I-360 and form I-485, if they remain unmarried. The same is true for that child's derivatives, and the derivatives of an abused spouse of a US Citizen.

Marriage of Child: Derivative children must remain unmarried for the duration of the process until they are admitted.

Death of VAWA Self-petitioner*:* A child of a self-petitioner who dies, may nevertheless obtain an approval of an already pending petition or adjustment of status filed by the deceased parent before the time of death.[24] The child must demonstrate that they resided in the US at the time of the principal's death and continue to reside in the US.[25]

III. Final Notes on VAWA Self-Petioner Derivatives:

Adjustment of Status: Most VAWA self-petitioners, and their derivatives, will be able to adjust status in the United States whether they are obtaining status as a preference beneficiary[26] or as an immediate relative.[27] There are some cases where the individual will have to consular process, such as if they submitted the self-petition from abroad. The amount of time a self-petitioner and their derivatives need to wait between when they submit their I-360 (application for VAWA) and their I-485 (application for lawful permanent status) will depend on whether the abuser is an LPR or USC and when a visa will become available.

Additionally, in order for someone to be able to adjust status they will need to be found to be admissible. Inadmissibility grounds are found at INA § 212(a). Advocates should review the VAWA manual for an in-depth discussion of adjustment of status, inadmissibility grounds, and tips for applying.

Employment Authorization for Derivative Children: Because derivative children are not included with those allowed by the statute to apply for a work permit, called an "employment authorization document" (EAD),[28] children will need to obtain a grant of "deferred action" first, before they can be eligible for an EAD. That means the I-360 of the principal self-petitioner must first be approved and deferred action granted to the self-petitioner and the derivative. This is not the case, however, if the self-petitioner and derivative child are able to submit both their I-360 (self-petition for VAWA) and I-485 (application for adjustment of status for permanent residency) concurrently in "one step," since they will then be eligible for a work permit as an "adjustment applicant" under a different provision of the statute.[29] Note that VAWA derivatives who turn twenty-one, and become self-petitioners in their own right, are eligible for work authorization so long as they:

- Were included on the VAWA self-petition that was filed or approved before they turned twenty-one years old;
- Are now twenty-one years old; and
- Were not admitted or approved for lawful permanent residence by their twenty first birthday.

Derivatives under VAWA Cancellation: There are no derivative beneficiaries for purposes of VAWA cancellation of removal or suspension of deportation. This means that children cannot be included in their parent's grant of VAWA cancellation or suspension. However, immigration authorities are required to parole the VAWA cancellation grantee's children and for a child grantee, the grantee's parent into the United States. The parole status will last until adjudication of the parolee's application for adjustment of status.[30]

IV. Conclusion

This practice advisory addressed when a derivative can be included on a VAWA self-petition. Because other forms of humanitarian relief for victims also allow for derivatives, such as the U visas and T visas. the chart below summarizes and compares the derivatives allowed for each of these forms of humanitarian relief. Note that these are not the only forms of relief where derivatives can be included.

	U Visa Derivatives	T nonimmigrant Derivatives	VAWA Derivatives
Principal Applicant Over 21 years of age—	Spouse or children under 21 years of age.[31]	Spouse and children under 21 years of age.[32]	**When Abused Spouse or Child is the Self Petitioner**—unmarried children under 21.
Principal Applicant Under 21 years of age—	Spouse, children under 21 years of age, parents, and unmarried siblings under the age of 18.	Spouse, children under 21 years of age, unmarried siblings under 18 years of age, and parents.[33]	**When Abused Spouse or Child is the Self Petitioner**—unmarried children under 21.

Other Principal Applicants		**Regardless of principal applicant's age if family member shows present danger due to cooperation or retaliation—**Any parent or unmarried sibling under 18 years of age or adult or minor child of a derivative.[34]	**When Abused Parent is the Self Petitioner—**no derivatives!

There are other requirements and nuances that advocates should know before they submit a self-petition for VAWA, including a derivative, and it is important to review all such issues before moving forward. This in an introduction to help individuals understand who can be included as a VAWA derivative so that all possible avenues for relief are explored for a client, and any family members they may wish to include.

End Notes

[1] ILRC, *The VAWA Manual: Immigration Relief for Abused Immigrants*, (7th Ed. 2017) available for purchase at https://www.ilrc.org/vawa-manual.
[2] *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982).
[3] *Lutwak v. United States*, 344 U.S. 604 (1955).
[4] INA § 101(b)(2).
[5] INA § 101(b)(1)(A).
[6] INA § 101(b)(1)(B).
[7] INA §§ 101(b)(1)(E)(i), (F)(i), (G)(i); USCIS *Policy Memorandum, Exception to the Two-Year Custody and Two-Year Residency Requirement for Abused Adopted Children* available, September 12, 2013, available at https://www.uscis.gov/sites/default/files/USCIS/Outreach/Interim%20Guidance%20for%20Comment/VAWAAdoptionExceptionPM.pdf.
[8] INA §§ 101(b)(1)(E)(ii), (F)(ii), (G)(iii).
[9] VAWA 2005, § 805(b), amending INA § 201(f) (for immediate relatives of USCs and their derivatives) and § 203(h) (for self-petitioners in the second preference and their derivatives).
[10] INA § 204(a)(1)(A)(v) [spouses, intended spouses, and children of U.S. citizens]; INA § 204(a)(1)(B)(iv) [spouses, intended spouses, and children of lawful permanent residents] (A self-petitioner is eligible if abusive spouse is an employee of the U.S. Government or U.S. Armed forces.)
[11] 8 CFR 204.2(c)(4).
[12] INA § 204(a)(1)(A)(iii).
[13] 8 CFR 204.2(c)(4)
[14] INA § 204(a)(1)(D)(i)(III).
[15] INA § 204(a)(1)(A)(iii)(I) [children abused by U.S. citizens]; INA § 204(b)(1)(B)(ii)(I) [children abused by lawful permanent residents].

[17] USCIS Policy Memorandum, *Eligibility of Self-Petition as a Battered or Abused Parent of a US Citizen; Revision to Adjudicator's Field Manual (AFM) Chapter 21.15 (AFM update AD 06-32)* August 30, 2011.
[18] INA § 101(b)(2). Advocates should note that the definition for stepchild, adoptive child, and orphan vary and they need to look at the definition closely to ensure they meet the requirements.
[19] For more information on the CSPA for children of USCs and LPRs *see* ILRC's *Application on the Child Status Protection Act to the Children of U.S. Citizen Petitioners* (December 2018) available at https://www.ilrc.org/sites/default/files/resources/appli_chld_stat_prtcnt_act_chldrn_usc-20181221.pdf and *ILRCs CSPA and Children of Permanent Residents and Other Derivative Beneficiaries* (May 2018) available at https://www.ilrc.org/sites/default/files/resources/cspa_children_of_lpr_other_deriv_bene-20180629.pdf
[20] INA § 201(f).
[21] INA 204 (a)(1)(D)(i)(II)-(III)
[22] *Id*.
[23] USCIS Policy Memorandum, *Revised Guidance for the Child Status Protection Act (CSPA) AFM Update: Chapter 21.2(e) The Child Status Protection Act of 2002 (CSPA)* (AD07-04). INA § 201(f).
[24] INA 204(l)(2)(F)
[25] INA 204(l).
[26] Preference categories are for beneficiaries of petitions who must wait for a visa to be available before they can apply for lawful permanent residency status. For family-based immigration, this includes certain family members of LPRs (minor, unmarried children, spouses, adult sons and daughters) and siblings, adult sons and daughters, and married sons and daughters of US Citizens. There are only a certain number of visas available each year and the wait time for each family member will depend on when the visa petition is filed.
[27] Immediate relatives are minor unmarried children, spouses and parents of US Citizens. There are always visas available for immediate relatives and these relatives can submit their application for adjustment of status to lawful permanent status at the same time as their visa petition, if otherwise eligible for adjustment.
[28] INA § 204(a)(1)(k).
[29] 8 CFR 274.12(c)(9).
[30] INA § 240A(b)(4).

[31] 8 CFR 214.14(a)(10).
[32] 8 CFR 214.11(a)(1).
[33] 8 CFR 214.11(a)(2).
[34] 8 CFR 214.11(a)(3).

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