FORCED THROUGH THE CRACKS:

Deprivation of the Violence Against Women Act’s Immigration Relief in San Francisco Bay Area Immigrant Domestic Violence Survivors’ Cases

Lauri J. Owen

INTRODUCTION

At sixteen, Isabela,¹ a Mexican national, met Miguel, a U.S. Citizen, in Mexico in 2001 when he returned to visit his family. She had been living alone in a small apartment and working full time for two years because her parents were too poor to support her. 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 so that Isabela would be able to live and work in the United States.

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. She had to sell all of her possessions in order to fund the trip. Once she arrived in California, she rented a hotel room and started searching for Miguel.

Within a week, she found Miguel and asked him whether he wanted to remain married to her. He said he did, but told Isabela that if she lived with him, she would be breaking the law and would be deported. She decided to stay in the United States anyway in order to be close to her husband. She found a job that paid her under the table and enabled her to find an apartment.

One day Miguel came over to her new home and demanded that Isabela return to Mexico. She refused; she had given up everything just to come and be with her husband. Miguel became very angry and beat Isabela until she lost consciousness, then he slapped her until she awoke. He raped her. He beat her

¹. The parties’ names and identifying details have been changed to protect their privacy.
again. She was too afraid to call the police, but the neighbor heard her screams and called 911. The police arrested Miguel, but he was never convicted.

Isabela moved, but Miguel found her. Miguel beat and raped Isabela many times over the next year. Twice the police came, and the second time, in June 2005, an officer told her that she should go and get a restraining order against Miguel, which she did. Isabela was now terrified of being deported because she believed that Miguel was going to kill her. She had nowhere to go except to her family, and Miguel knew where they lived. She also knew that in Mexico no one, including the police, would protect her.

The clinic volunteer who helped Isabela file the restraining order told her that she might be entitled to immigration relief and recommended that Isabela make an appointment with an attorney at a nonprofit immigration agency in the San Francisco Bay Area. After Isabela met with the attorney, the attorney assured her that she qualified for relief. As a result, she would be able to live and work in the United States after her petition was approved.

The attorney filed a self-petition for Isabela under the Violence Against Women Act (VAWA) of 2000. Soon after, the attorney received a request from the Immigration branch of the Department of Homeland Security asking for proof that Isabela had lived in the United States with her husband. The notice said that if she could not supply that proof, her petition would be rejected and she would be subject to deportation. Isabela was terrified. Her attorney, however, explained this was a requirement under the earlier version of VAWA, but not under VAWA 2000. The attorney also told her that after they explained this to the reviewing agency her petition would most likely be approved. Isabela was very frightened and believed that the risks to her safety and liberty were too great. She thanked the attorney for her help, and then she disappeared.

This article is a case study that investigates whether, and to what degree, the Department of Homeland Security (DHS), and the United States Citizenship and Immigration Services (USCIS) in particular, complies with federal law in their consideration of Violence Against Women Act (VAWA) self-petitions in certain cases originating in the greater San Francisco Bay Area. Rather than approaching the topic theoretically, the following sections document actual cases in which federal law has been misapplied or ignored altogether, and will show that this unlawful behavior is executed through USCIS' compliance with its own conflicting, and legally inferior, Code of Federal Regulations.

The first section describes the basic concepts of family-based immigration and explains the Violence Against Women Act (VAWA), including why VAWA 1994 was enacted, how it impacts immigration law, and what changes VAWA 2000 wrought. The second section addresses how USCIS adheres to its own outdated regulations, and not to federal law, in considering whether to approve VAWA self-petitions. This section includes a brief description of how and under what circumstances USCIS must update these regulations are updated. A detailed chart then demonstrates the conflicts between USCIS' regulations and VAWA 2000. The third section presents the results of a nonrandom survey of
nonprofit San Francisco Bay Area immigration legal service providers, revealing several cases in which VAWA petitioners have been unlawfully denied relief, thereby violating not only the law, but also the policies underlying VAWA’s enactment. The fourth section suggests several potential remedies, including petitions for new regulations, individual and class action litigation, and an appeal to Congress to order DHS to implement regulations complying with current federal law.

I. FAMILY-BASED IMMIGRATION AND VAWA

The majority of immigrants receiving visas to enter the United do so through family-based immigration categories. Predicated on the theory that family reunification is an important public policy, United States immigration law permits U.S. citizens, like Miguel, or Legal Permanent Residents (LPR) to petition for a foreign-born “immediate relative” like Isabela to immigrate to the United States. The U.S. Citizen or LPR must demonstrate adequate financial means to support the immigrant, and the proposed immigrant must meet U.S. federal admissibility guidelines. If the proposed immigrant qualifies, she may be able to immigrate immediately after her visa is approved.

Where the proposed immigrant is the spouse of a U.S. Citizen or LPR, his legal permanent residence is granted only conditionally if he and his spouse have been married for less than two years. The couple must file a joint application to remove the condition within 90 days of the second anniversary of the grant of conditional permanent residence. As part of the filing, they must provide additional documentation that their marriage was entered into in good faith.

3. Immigration and Nationality Act (INA), 8 USC § 1151 (b)(2)(A)(i ) (2000) (defining “immediate relatives” to include parents, spouses, and unmarried daughters and sons under the age of twenty-one. Under § 201(b) Legal Permanent Residents may petition for other relatives, including married and older children and siblings, but the rules differ and this type of family immigration will not be discussed here).
5. Throughout this paper, I use the pronouns “she” and “he” interchangeably, and these words are intended to simultaneously denote both genders. The pronouns “she” appears more often because women represent the largest group of battered persons, whether immigrant or not.
6. Derivative family members of U.S. Citizens do not have to wait, but a Legal Permanent Resident’s derivative family members are subject to numerical limitations and often a waiting period. INA §§ 101(a)(15)(K), (V). See also United States Citizenship and Immigration Services, Immigration Classifications and Visa Categories, March 24, 2006, available at http://uscis.gov/graphics/services/visas.htm.
7. 8 USC §§ 1186(a), 1186(b).
8. Id.
some cases, the husband and wife will be called for a second interview. If the couple is separated or the marriage has been terminated, there may be waivers available that allow the immigrant to avoid deportation. Some of these remedies are available to immigrants who have been subjected to abuse by their petitioners. The next section discusses these remedies as means of immigration relief.

A. The Violence Against Women Act

Violence against women in the United States is a problem of staggering proportions. Domestic Violence is the single greatest cause of injury to U.S. women. In 2000, nearly 25% of women and 8% of men reported that a current or former spouse, cohabitating partner, or date had victimized them at some time in their life. However, immigrant women like Isabela experience a much higher rate of victimization than the general populace. In fact, between 34% and 77% of immigrant women are physically abused by a domestic partner.

10. Grounds of inadmissibility (also called “excludability”) generally apply to both immigrant and non-immigrant visas and most have a counterpart in a ground of removal available to the Department of Homeland Security under INA § 237. Waivers to the various grounds of inadmissibility are noted in INA section 212(h).

11. L. Copel and D. Baron, Recognition and Treatment of Partner Abuse in Primary Care, 5 J. AM. OSTEOPATHIC ASS'N 7, 14 (1997); Violence Against Women: A Majority Staff Report, Committee on the Judiciary, United States Senate, 102nd Congress, p. 3 (October 1992).


14. Davis at 557.

15. Under federal law, the term “domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other adult person against a victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction receiving grant monies. 42 USC § 3796gg-2. California law, the law upon which the federal law relies for further definition when the crime occurs within the state’s jurisdiction, defines “abuse” as “intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.” CAL. PEN. CODE § 13700(a) (Deering 2005). “Domestic violence” denotes § 13700(a)-defined abuse “committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship.” CAL. PEN. CODE § 13700(b); see also CAL. FAM. CODE § 6211.

16. See Bonita C. Meyersfeld, Reconceptualizing Domestic Violence in International Law, 67
Why is the incidence of domestic violence so much higher for immigrant women? The rates of abuse positively correlate to the degree to which immigrant spouses are dependent on their domestic partners for immigration relief. Under current immigration law, immigrant women cannot petition for themselves or for their immigrant children. They must rely on their U.S. citizen or LPR spouse to file the initial petition and supporting documents that will allow them to immigrate to the U.S., to gain legal permanent residence status, and to get a work permit. This situation places the immigrant under the complete control of the petitioning spouse. After the spouse petitions, if the couple has been married less than two years when the sponsor petitioned, she remains under his control for an additional two years. Without his complete cooperation in the immigration process, even if the couple divorces, she is no longer eligible for immigration status in the United States. She will then be told to return to her country of origin.

These rates of abuse for immigrants like Isabel, while shocking, are still likely to underestimate the extent of the problem. Battered immigrant women are often scared, isolated, legally and financially dependent on their sponsors, and they rarely have access to public social or health services. They are often unfamiliar with immigration law and so terrified of deportation that they will not call the police when abuse occurs. Even with the courage to seek help, immigrant women must overcome different cultural or religious norms, language barriers, and limited access to information to be understood.

The Violence Against Women Act (VAWA) of 1994 was enacted, in part, to resolve some of the problems facing abused immigrants. VAVA created a procedure whereby abused spouses and their children, or abused children and their parents, could "self-petition" to obtain LPR status without the knowledge or cooperation of the abusing relative. The new law allowed
battered immigrants to self-petition for permanent resident status for themselves and for their children, and for permission to work if they met certain requirements. The self-petitioner had to show that she was of “good moral character,” that she entered into the marriage in good faith, and that forced removal from the United States would cause her “extreme hardship.” She also had to prove that her United States Citizen/Legal Permanent Resident spouse had abused her and/or her child and that she had lived with her abuser in the United States. She also had to reside in the U.S. at the time of self-petitioning.

VAWA 1994 also lowered the evidentiary burden of an immigrant’s petition. Battered spouses were previously required to submit an “evaluation of a professional recognized as a professional in the field” who would confirm any alleged abuse. Although that provision remains in the Code of Federal Regulations, VAWA 1994 ordered the Immigration and Naturalization Service to consider “any credible evidence relevant to the application.” However, VAWA left the assignation of weight to the Attorney General’s discretion.

VAWA 1994 also created a suspension of deportation provision for abused immigrants and their children.

Congress reauthorized and amended VAWA in 2000 in response to several issues. First, the original VAWA, while well intentioned, excluded too many immigrants with strong claims. Second, VAWA 2000 sought to remedy some of the detrimental consequences of two laws enacted in 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).

VAWA 2000 stated that the “goal of immigration protections for battered

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28. Id.
29. Id.
32. VAWA 1994 40702, 8 USC 1186a(c)(4) (2000); see also Wood, supra note 30, at 146.
34. Wood, supra note 30 at 147.
37. The civil remedy portion of VAWA was held unconstitutional in 2000 (United States v. Morrison, 529 U.S. 598 (2000)), but that does not impact this discussion because this paper focuses solely on the immigration relief available to battered immigrant spouses of
immigrants included in [VAWA 1994] was to remove immigration barriers that kept battered women and children locked in abusive relationships." It also noted that the law was designed to encourage battered immigrants to cooperate with law enforcement in criminal cases brought against abusers without fear of retaliation or loss of immigration benefits that otherwise remain under the abuser's control. VAWA 2000's authors lamented that several groups of battered immigrant women

do not have access to the immigration protections of [VAWA 1994] which means that their abusers are virtually immune from prosecution because their victims can be deported as a result of action by their abusers and the Immigration and Naturalization Service cannot offer them protection no matter how compelling their case[s].

Accordingly, VAWA 2000 featured several fundamental changes from VAWA 1994. Once again, the Act directed the Attorney General to consider "any credible evidence relevant to the application." It also completely removed the “extreme hardship” provision, including the “exceptional and extremely unusual” standard. VAWA 2000 also eliminated U.S. residency as a prerequisite for a battered immigrant married to, or a child of, a citizen who is a U.S. government employee or member of the uniformed services. Although VAWA 2000 retains VAWA 1994's special requirement that self-petitioning abused spouses demonstrate good moral character, it modifies the provision to give the Attorney General authority to find good moral character if the disqualifying acts were connected to the abuse, such as criminal charges that would ordinarily bar relief to an immigrant.

Unlike VAWA 1994, VAWA 2000 allows a battered spouse to gain

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39. Id.
40. Id.
41. This discussion of VAWA 2000's changes is not exhaustive.
44. 8 USC 1101(a); see also Congress Passes Violence Against Women Act of 2000, 14 Immigrants' Rights Update, No. 6 (2000), available at http://www.nilc.org/immlawpolicy/obtainlpr/ob1pr038.htm.
45. Note that there is no similar provision for spouses and children for whom their citizen or lawful permanent resident spouse or parent petitions.
permanent residence when she unknowingly marries someone who is already married.\textsuperscript{47} It also permits her to adjust her status even though she unwittingly married someone who is a foreign national as long as she subjectively believed that her spouse was a U.S. citizen or Legal Permanent Resident.\textsuperscript{48} She can also adjust status if her spouse loses his permanent resident status for reasons related to the abusive conduct, such as if he is deported for a domestic violence conviction.\textsuperscript{49} VAWA 2000 also allows individuals to self-petition even though they have been divorced from the citizen or LPR, provided that the marriage terminated within the past two years and the divorce is related to the domestic abuse, or if their spouse died within the previous two years.\textsuperscript{50} Self-petitioners may also remarry without forfeiting VAWA approval.\textsuperscript{51}

The 2000 Act also created new waivers for previous grounds of inadmissibility and deportability for battered immigrants.\textsuperscript{52} For instance, a waiver now exists for reentering the U.S. without inspection following a one-year period of unlawful presence or after having been ordered removed if they can establish a connection between the abuse they suffered and their departure or reentry.\textsuperscript{53} Another waiver permits approval of a self-petition even if the applicant has been convicted of a crime (such as petit theft, which would otherwise cause her to fail the “good moral character” requirement), although she must also show that it was connected to the abuse in some way.\textsuperscript{54}

\textbf{II. CONFLICTS BETWEEN AGENCY REGULATIONS AND FEDERAL STATUTE}

Since March 11, 2003, the new United States Customs and Immigration Services (USCIS), a division of the Department of Homeland Security (DHS), processes all in-country adjustment of status petitions.\textsuperscript{55} While Congress has plenary power over immigration deriving its statutory powers from the Immigration and Naturalization Act, Section 8 of the United States Code,\textsuperscript{56} agencies of the executive branch do not. However, the Attorney General of the United States, the head of USCIS, does promulgate regulations under Section 8

\begin{itemize}
\item \textsuperscript{48} 8 USC § 1154(a)(1)(A).
\item \textsuperscript{49} INA § 204(a)(1).
\item \textsuperscript{50} Id.
\item \textsuperscript{51} Id.
\item \textsuperscript{52} Id. See also Yates, supra note 46; National Immigration Law Center, supra note 46.
\item \textsuperscript{53} INA § 204(a)(1).
\item \textsuperscript{54} Id.
\item \textsuperscript{56} See, e.g., Chae Chan Ping v. United States, 130 U.S. 581 (1889); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).
\end{itemize}
of the Code of Federal Regulations. And USCIS, like all federal agencies, has a set of their own official rules that describe how the agency will implement the applicable law. Although both laws and regulations are enforceable, federal regulations (as well as Executive Orders and Proclamations) are ancillary or subordinate to federal laws and cannot conflict with them. The question arises, then, whether an agency head of USCIS has a responsibility to issue updated regulations if the law changes. The answer is a definite "maybe." New regulations must certainly be issued if a statute imposes such a duty. If an agency is statutorily required to promulgate regulations, it must do so less than four years after the new law is enacted or risk a finding of abuse of discretion. If a statute does not mandate promulgation of regulations, however, courts have held that "an administrative agency is not required to promulgate detailed rules interpreting every statutory provision that may be relevant to its action." It may be true that failure to promulgate new regulations violates an agency's duties under federal law when the old regulations conflict with the law they were intended to implement. It is certainly true that if it does not, the regulations are no longer valid. The Supreme Court held that

The power of an administrative [agency] to administer a federal statute and to prescribe rules and regulations . . . [is] the power to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

While no court has squarely addressed the problem of an agency's failure to update regulations per se, by logical inference it seems clear that if conflicting regulations are "a mere nullity," and that if an agency has a responsibility to promulgate at least some regulations (within four years of a law's enactment), USCIS is long overdue to correct its regulations' inadequacies implementing VAWA 2000's changes to the 1994 Act providing relief to battered immigrants and their children.

57. Providing of course that these regulations comply with the law. See Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984).
59. See, e.g., Pulido v. Heckler, 758 F.2d 503 (10th Cir. 1985); 8 USC § 1642(a)(3).
60. Id. at 507 (quoting Rios v. Butz, 427 F. Supp. 534, 537 (N.D. Cal. 1976) (holding that it is an abuse of discretion to delay in promulgating regulations that implement the Food Stamp Act)).
61. Id. at 506.
63. Under the Administrative Procedures Act, 5 USC §§ 551-559, 701-706, a court may "hold unlawful and set aside agency actions, findings and conclusions found to be . . . an abuse of discretion or otherwise not in accordance with the law." 5 USC § 706(2).
64. Dixon v. United States, 381 U.S. 68, 74 (1965) (internal quotations omitted).
Since its creation, USCIS has not updated any of its VAWA-related regulations.65 Sadly, it seems to be following tradition of the prior agency charged with bestowing legal status on battered immigrants. The old Immigration and Nationality Service, which USCIS superseded, had not updated its regulations since 1996.66 It is not true, however, that USCIS has not updated any of its regulations; USCIS immediately implemented the U.S. PATRIOT Act of 2001, for instance, into Title 8 of the regulations.67

Since VAWA 2000 changed several of VAWA 1994’s provisions, the regulations relating to VAWA legislation have conflicted with federal law since 2000.68 The table which follows details several of these differences, each one a potential ground by which VAWA self-applicants may be unlawfully denied immigration relief.

A. Notable Differences Between the Regulations and VAWA 2000 Legislation69

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<th>Practical Effect72</th>
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<tr>
<td>1. RELATIONSHIP TO THE ABUSER:</td>
<td>1. RELATIONSHIP TO THE ABUSER:</td>
<td>1. USCIS DENIED JUANA, WHO DIVORCED HER ABUSIVE U.S. CITIZEN (USC) HUSBAND SIX MONTHS AGO, ON THE GROUND THAT SHE IS NO LONGER MARRIED (EVEN THOUGH SHE IS ELIGIBLE UNDER VAWA 2000).</td>
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</table>
| AN APPLICANT MUST BE ONE OF THE FOLLOWING: | AN APPLICANT MUST BE: | 2. USCIS DENIED ELAKEH, WHO CAME TO THE UNITED STATES TO MARRY HASSIM, A LEGAL PERMANENT RESIDENT AND |}
| 1. MARRIED TO, WIDOWED (WITHIN THE LAST TWO YEARS) BY, OR DIVORCED (WITHIN THE LAST TWO YEARS) FROM, A UNITED STATES CITIZEN OR LEGAL PERMANENT RESIDENT AND LIVES IN THE UNITED STATES; OR | • MARRIED TO A UNITED STATES CITIZEN OR LEGAL PERMANENT RESIDENT AND LIVES IN THE UNITED STATES; OR | |
| 2. A CHILD OF A UNITED STATES CITIZEN OR LEGAL PERMANENT RESIDENT | • A CHILD OF A UNITED STATES CITIZEN OR LEGAL PERMANENT RESIDENT | |

66. Id.
67. The PATRIOT Act of 2001 is implemented into the regulations at 31 CFR § 103.177 and 31 CFR § 103.185, and a regulation implementing Section 314 of the Act can be found at 31 CFR § 103.100 and 31 CFR § 103.110.
68. VAWA 2000 is codified at 8 USC Section 1154.
69. Note that this table is not exhaustive. For instance, I have not included provisions relating to deferred/suspended removal or removal of conditional status.
70. VAWA 2000 is codified at INA § 204.
71. VAWA 1996 is codified in the Code of Federal Regulations at 8 CFR § 204. See also USCIS, Prima Facie Review of Form I-360 When Filed by Self-Petitioning Battered Spouse/Child, Document Number FR 74-97 (November 13, 1997), available at http://uscis.gov/lpbin/lpext.dll/inserts/fr/fr-30971/fr-36149/fr-40300?f=templates&fn=document-frame.htm (summarizing the criteria USCIS uses to evaluate a battered spouse/child’s initial self-petition to determine its prima facie eligibility, and it, too, contains criteria that conflict with VAWA 2000 since it reflects the regulations); but see USCIS, How Do I Apply for Immigration Benefits as a Battered Spouse or Child? (October 31, 2003), available at http://uscis.gov/graphics/howdib/battered.htm. This document, which is designed for the public, contains quite a bit more correct information than the Prima Facie Review document which is designed to be used by USCIS employees.
72. In each of these cases where a client is denied even though she is eligible for relief under VAWA, a legal services advocate can appeal and win their client’s case, but, as I will show later, many of the clients disappear after their initial denial, thereby losing any chance they have to a full life in the United States.
73. 8 USC § 1101(a).
74. 8 CFR § 204.2(c)(1)(i)(A).
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<th>VAWA 2000</th>
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<td>• In a relationship intended by the applicant to be a legal marriage to a United States citizen or legal permanent resident and lives in the United States; or</td>
<td>lives in the United States.</td>
<td>Permanent resident (&quot;LPR&quot;) who physically abused her, on the ground that they were never married (even though she is eligible under VAWA 2000).</td>
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<tr>
<td>• A child of a United States citizen or legal permanent resident and lives in the United States; or</td>
<td></td>
<td>3. USCIS denied Alexandra, who currently lives on a military base abroad, and whose USC husband abused her while they lived together on that base on the grounds that she does not live in the United States and that the abuse did not occur in the United States (even though she is eligible under VAWA 2000).</td>
</tr>
<tr>
<td>• Married to, an intended spouse of, or a child of, a United States citizen who is an employee of the United States government or is a member of the uniformed services and lives abroad; or</td>
<td></td>
<td>4. USCIS denied Tonia, who lives in the U.S., and whose LPR husband was stripped of his immigration status and deported after he was convicted of abusing her and their children, on the ground that her husband was not a legal permanent resident at the time of her application for relief (even though she is eligible under VAWA 2000).</td>
</tr>
<tr>
<td>• Married to a United States citizen who has lost or renounced citizenship within the past two years and which renunciation is related to the abuse and lives in the United States; or</td>
<td></td>
<td></td>
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<tr>
<td>• Married to a legal permanent resident whose immigration status has been revoked within the last two years and which revocation is related to the abuse and lives in the United States.</td>
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2. Bona Fide Marriage:

• If applicable, the applicant must have believed that he or she had married a citizen of the United States and with whom a marriage ceremony was actually performed and who otherwise meets any applicable requirements to establish the existence of and bona fide of a marriage, but

• The applicant's petition will not be denied if her marriage to a United States citizen is not legitimate solely because of the bigamy her spouse.

3. Good Faith Relationship:

• The applicant's marriage or romantic relationship must have been "in good faith."

4. Subjected to Abuse:

• The applicant was battered or subjected to extreme cruelty by a spouse or parent, or by a member of the spouse's or parent's

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76. 8 CFR 204.2(c)(2)(ii).

77. The relationship must not have been established or primarily used to gain immigration benefits. See 8 USC §§ 1154(a)(1)(A)(ii)(I)(aa), 1186a(b).

78. Again, the relationship must not have been established or primarily used to gain immigration benefits. See 8 CFR § 204.2(c)(2)(vii).
<table>
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<tr>
<td>FAMILY RESIDING IN THE SAME HOUSEHOLD AS THE ALIEN, AND THE SPOUSE OR PARENT CONSENTED OR ACCUSED TO SUCH BATTERY OR CRUELTY, OR THE ALIEN'S CHILD HAS BEEN BATTERED OR SUBJECTED TO EXTREME CRUELTY BY A SPOUSE OR PARENT OF THE ALIEN (WITHOUT THE ACTIVE PARTICIPATION OF THE ALIEN IN THE BATTERY OR CRUELTY) OR BY A MEMBER OF THE SPOUSE'S OR PARENT'S FAMILY RESIDING IN THE SAME HOUSEHOLD AS THE ALIEN WHEN THE SPOUSE OR PARENT CONSENTED TO OR ACCUSED IN SUCH BATTERY OR CRUELTY AND THE ALIEN DID NOT ACTIVELY PARTICIPATE IN SUCH BATTERY OR CRUELTY.</td>
</tr>
<tr>
<td>Regulations</td>
</tr>
<tr>
<td>PERMANENT RESIDENT DURING THE MARRIAGE; OR IS THE PARENT OF A CHILD WHO HAS BEEN BATTERED BY, OR HAS BEEN THE SUBJECT OF EXTREME CRUELTY PERPETRATED BY, THE CITIZEN OR LAWFUL PERMANENT RESIDENT DURING THE MARRIAGE; THE ABUSE MUST HAVE OCCURRED IN THE UNITED STATES.</td>
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<tr>
<td>Practical Effect</td>
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<tr>
<td>DID NOT INTERVENE TO PROTECT HER FROM HIS FAMILY'S ABUSE OF HER, ON THE GROUND THAT HER HUSBAND DID NOT BATTER HER (EVEN THOUGH SHE IS ELIGIBLE UNDER VAWA 2000).</td>
</tr>
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5. APPLICANT'S CURRENT RESIDENCE: APPLICANT LIVES IN THE UNITED STATES OR: APPLICANT IS MARRIED TO, OR IS AN INTENDED SPOUSE OF, OR IS A CHILD OF, A UNITED STATES CITIZEN WHO IS AN EMPLOYEE OF THE UNITED STATES |

5. APPLICANT'S CURRENT RESIDENCE: APPLICANT LIVES IN THE UNITED STATES OR: APPLICANT IS MARRIED TO, OR IS AN INTENDED SPOUSE OF, OR IS A CHILD OF, A UNITED STATES CITIZEN WHO IS AN EMPLOYEE OF THE UNITED STATES |

5. APPLICANT'S CURRENT RESIDENCE: APPLICANT LIVES IN THE UNITED STATES |

1. USCIS DENIED ALEJANDRA, WHO CURRENTLY LIVES ON A MILITARY BASE ABROAD, AND WHOSE HUSBAND ABUSED HER WHILE THEY LIVED TOGETHER ON THAT BASE ON THE GROUNDS THAT SHE DOES NOT LIVE IN THE UNITED STATES AND THAT THE ABUSE DID NOT OCCUR IN |

79. INA § 244(a)(3).  
80. Hernandez v. Ashcroft, 345 F.3d 824, 840 (9th Cir. 2003); note that while this definition is not contained in the VAWA 1994 or 2000 legislation, this represents the Ninth Circuit's interpretation of the term "extreme cruelty" in both 8 CFR § 204.2(c)(1)(vi) and both of the federal VAWA statutes. It is also the first of only two cases in which a federal court has addressed VAWA's immigrant provisions; see also Perales-Compean v. Gonzales, 2005 U.S. App. LEXIS 25569 (10th Cir.) (holding that it lacked subject matter jurisdiction to consider whether verbal abuse constituted "extreme cruelty" because the Board of Immigration Appeals' decisions were discretionary and not subject to judicial review).  
81. Hernandez at 828.  
82. 8 CFR § 204.2(c)(1)(i)(E).  
84. 8 USC 1101(a).
<table>
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<th>VAWA 2000</th>
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<tr>
<td>6. RESIDENCE WITH ABUSER:</td>
<td>6. RESIDENCE WITH ABUSER:</td>
<td>1. USCIS denied Santa, who lived with her LPR husband in Mexico but has never lived with him in the U.S. (even though she is eligible under VAWA 2000).</td>
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<tr>
<td>• APPLICANT HAS RESIDED WITH THE ALIEN'S SPOUSE OR INTENDED SPOUSE.</td>
<td>APPLICANT MUST HAVE RESIDED IN THE UNITED STATES WITH THE CITIZEN OR LAWFUL PERMANENT RESIDENT SPOUSE.</td>
<td></td>
</tr>
<tr>
<td>7. GOOD MORAL CHARACTER:</td>
<td>7. GOOD MORAL CHARACTER:</td>
<td>1. USCIS denied Anna, who was married to a USC who abused her and her children, and whom she had struck with a lamp on one occasion to try and make him stop abusing their six-year-old daughter. Her husband called the police and Anna was arrested and later convicted of domestic battery. USCIS denied Anna’s petition on the ground that she had been convicted of crime (even though she is eligible under VAWA 2000).</td>
</tr>
<tr>
<td>IS A PERSON OF GOOD MORAL CHARACTER, BUT</td>
<td>IS A PERSON OF GOOD MORAL CHARACTER.</td>
<td></td>
</tr>
<tr>
<td>• CERTAIN OTHERWISE BARRING ACTS OR CONVICTIONS ARE WAIVABLE IF THE ATTORNEY GENERAL FINDS THAT THE ACT OR CONVICTION WAS CONNECTED TO THE ALIEN’S HAVING BEEN BATTERED OR SUBJECT TO EXTREME CRUELTY.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8. EXTREME HARDSHIP:</td>
<td>8. EXTREME HARDSHIP:</td>
<td>1. USCIS denied Nancy, who did not marry her abusive USC one year prior to, and was remarried a few weeks before, she petitioned for VAWA relief, on the ground that she was not married to her abusive USC spouse and had remarried (even though she is eligible under VAWA 2000).</td>
</tr>
<tr>
<td>NO SUCH REQUIREMENT IN THE STATUTE.</td>
<td>APPLICANT IS A PERSON WHOSE DEPORTATION WOULD RESULT IN EXTREME HARDSHIP TO HERSELF, HIMSELF, OR HIS OR HER CHILD.</td>
<td></td>
</tr>
<tr>
<td>9. APPLICANT’S REMARRIAGE</td>
<td>9. APPLICANT’S REMARRIAGE</td>
<td>1. USCIS denied Maria, Roya, Heather, Juana, Santa, Fatmeh, Elaheh and Ranie on the ground that they did not show that their deportation would result in extreme hardship to themselves or their children (even though they are all eligible under VAWA 2000).</td>
</tr>
<tr>
<td>NO SUCH REQUIREMENT IN THE STATUTE.</td>
<td>THE APPLICANT’S REMARRIAGE WILL BE A BASIS FOR THE DENIAL OF A PENDING SELF-PETITION.</td>
<td></td>
</tr>
<tr>
<td>10. EXTREME HARDSHIP IF APPLICANT IS DEPORTED:</td>
<td>10. EXTREME HARDSHIP IF APPLICANT IS DEPORTED:</td>
<td>1. USCIS denied Maria, Roya, Heather, Juana, Santa, Fatmeh, Elaheh and Ranie on the ground that they did not show that their deportation would result in extreme hardship (even though they are all eligible under VAWA 2000).</td>
</tr>
<tr>
<td>NO SUCH REQUIREMENT IN THE STATUTE.</td>
<td>APPLICANT MUST SUBMIT CREDIBLE EVIDENCE OF EXTREME HARDSHIP WITH HER A SELF-PETITION, INCLUDING EVIDENCE OF HARDSHIP ARISING FROM CIRCUMSTANCES SURROUNDING THE ABUSE. THE EXTREME HARDSHIP CLAIM WILL BE EVALUATED ON A CASE-BY-CASE BASIS AFTER A REVIEW OF THE EVIDENCE IN THE CASE. SELF-PETITIONERS ARE ENCOURAGED TO CITE AND DOCUMENT ALL APPLICABLE FACTORS SINCE THERE IS NO GUARANTEE THAT A PARTICULAR REASON OR REASONS WILL RESULT IN A FINDING THAT DEPORTATION WOULD CAUSE EXTREME HARDSHIP. HARDSHIP TO PERSONS OTHER THAN THE SELF-PETITIONER’S CHILD CANNOT BE</td>
<td></td>
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</table>

85. 8 CFR § 204.2(c)(1)(i)(C).  
86. 8 CFR § 204.2(c)(1)(vi).  
87. 8 USC § 1154(a)(1)(A).  
88. 8 CFR § 204.2(c)(1)(i)(D), (c)(1)(vi).  
89. 8 USC § 1154.  
90. INA § 204(a)(1).  
91. 8 CFR § 204.2(c)(1)(i)(F).  
92. 8 CFR § 204.2(c)(1)(ii)(G).  
93. 8 CFR § 204.2(c)(1)(ii).
III. THE PRACTICAL IMPLICATIONS OF CONFLICTING AGENCY REGULATIONS

Because USCIS uses the regulations and not the statute to adjudicate VAWA self-petitions, many VAWA self-applicants, like Isabela, are being illegally denied relief. The following section details the effects of the conflicts between USCIS regulations and federal statute by analyzing case studies of several VAWA self-petitioners and their legal advocates in the San Francisco Bay Area. In most cases, advocates report that USCIS officers have improperly requested additional information to support a VAWA self-petition and/or have improperly denied statutorily valid VAWA self-petitions. A significant percentage of those improperly denied applicants disappeared after learning of their initial denial.

I began to investigate the impact of the discrepancies between VAWA and USCIS regulations to determine if other San Francisco Bay Area immigrant legal service providers were experiencing problems similar to the ones that I had observed early in 2005 as a law clerk at a nonprofit immigration legal service provider agency. Several legal service providers with whom I spoke revealed that applicants who are eligible for relief under VAWA 2000, but whose petitions do not conform to the outmoded Code of Federal Regulations, are being denied the relief to which they are statutorily entitled. Reports from legal service providers advocating for battered immigrants suggest a tentative generalization that this problem is grossly underreported and is likely to be far more extensive than previously suspected.

I called and visited several immigrant legal services offices, where I spoke with one or more attorneys at each office. Legal advocates were asked to discuss their work assisting immigrants filing for VAWA relief; awareness of the differences between the Code of Federal Regulations and VAWA 2000;

94. 8 CFR § 204.2(c)(1)(viii).
95. I attempted to expand this study by contacting immigrant legal service providers in other areas, including other regions of California as well as in other states. In all, I contacted over one hundred agencies. No one agreed to speak with me about this problem, and most would not tell me why not.
96. Note that USCIS has the power to deny applications if (1) their approval is discretionary, or (2) they do not conform to the statute, but applications that do conform to statutes that make particular relief mandatory are entitled to relief (such as in VAWA).
97. If anything, this survey is likely to reflect serious under-representation of the problem. In this study, every case in which an applicant was eligible for relief under VAWA 2000—but failed to meet the outdated requirements in the Code of Federal Regulations—USCIS preliminarily denied the application improperly and/or USCIS improperly requested further supporting evidence. In no instance did USCIS immediately approve a client in this situation. Logic dictates that it is quite likely that this is happening all over the United States, as the same agency processes all VAWA applications.
involvement in cases where USCIS had improperly issued a Request for Further Evidence (RFE), a Preliminary Denial of Relief (NOID, or Notice of Intent to Deny) or an outright Denial to a client who was eligible for relief under VAWA 2000, but does not meet the provisions in the Code of Federal Regulations. We discussed the impact of denials of self-petitions on clients, the outcome of each case, and the interviewees' assessments of the gap between USCIS' regulations and the intended scope of relief under VAWA 2000. I also sent email messages to some legal service providers requesting information on VAWA-related Internet listservs to which employees of these agencies subscribe. Finally, I asked service providers whether any of their clients who were eligible for relief under VAWA 2000 had ever been denied or approved for relief upon her initial application under the Code of Federal Regulations.

All but two of the service providers with whom I spoke were very reluctant to discuss these occurrences, and most only agreed to talk off the record. Many explained that because their clients are so vulnerable and because USCIS decisions are heavily discretionary, openly critiquing USCIS' practices would risk engendering resentment and anger in the few USCIS personnel who are assigned to adjudicate VAWA cases. Several attorneys politely refused to tell me anything at all. Despite these limitations, many legal service providers reported that they had received one or more improper Requests for Further Evidence, and/or Intents to Deny the VAWA petition, and/or had one or more VAWA cases that had been improperly denied.

A. Wrongfully Denied: USCIS' Reluctance to Provide Battered Immigrants Relief

It is important to highlight the fact that every legal advocate reported that USCIS initially approved none of the cases in which a client who was eligible for relief under VAWA 2000 but not the 1996 Code of Federal Regulations. Interviewees discussed several clients' stories where USCIS had requested additional evidence and/or had denied relief to clients in this situation during the previous eighteen months. Advocates reported several instances of this problem; six separate incidents are described below. Most cases involved Mexican nationals. No two cases arose from the same agency or office, but were spread across the Bay Area. Four cases involved only improper Requests for Further Evidence, while two others involved both improper Requests for Further Evidence.

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98. Immigration legal service providers tend to be extremely reluctant to disclose clients' information, even in the most general terms. If discovered by authorities before their petition is approved, immigrants face loss of sources of income as well as deportation. This is not surprising in light of the pending legislation which, if passed, would make it a felony for an alien to simply be in this country illegally. These legal service providers, too, fear potential backlash from USCIS. One service provider told me, "I'm sorry; I can't risk pissing [USCIS] off. Too much of this stuff is discretionary."

99. In order to protect the privacy of the clients as well as to avoid any potential backlash from USCIS, I do not use names or any identifying information in this paper.

100. Under 8 CFR § 103.2(b)(8) a USCIS adjudicator may request additional evidence from an
Evidence and an improper denial of the VAWA self-petition. In all cases, the petitions conformed to VAWA 2000 but contained facts that conflicted with the Regulations and/or did not contain documentation demanded by Regulations. In three of the cases, the applicant disappeared before her case was finally adjudicated.

In four cases, USCIS requested further information because the client had not lived with her abuser in the United States. In three cases, USCIS improperly denied the application or requested further information because the applicant did not demonstrate that she would experience “extreme hardship” if she were removed.\(^\text{101}\) In the two VAWA denial cases, the legal service provider contacted USCIS directly, sent a legal memo or other documentation showing that the client was VAWA 2000-eligible, and the decision was later reversed.\(^\text{102}\) In each incident where USCIS issued improper Requests for Further Evidence, the advocate sent a responsive legal memo (or similar report) to USCIS explaining that the case complied with VAWA 2000. In a few cases, USCIS dropped the matter and the application for relief was eventually approved.\(^\text{103}\)

In some cases, however, the agency received threatening letters from USCIS declaring that if the immigrant did not provide the “required” proof within the allotted time, her petition would be denied and she would be subject to removal.\(^\text{104}\) In one case, the agency telephoned the USCIS officer who authored the letter and attempted to discuss the matter with him.\(^\text{105}\) The officer was argumentative and hostile, holding up the matter for several days; after subsequent faxes and telephone calls, the handling attorney finally was able to contact another officer who anonymously agreed to “take care” of the matter. The agency received a notice of approval shortly thereafter. In other cases in which the agency received a threatening letter, the attorney sent a second legal memo to USCIS outlining the client’s statutory eligibility. In these cases, the

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\(^{101}\) Because some cases involve more than one issue, the total cases are fewer than the issues discussed.

\(^{102}\) Note that while the case is pending, the immigrant does not have a Notice of Deferred Action (which makes them vulnerable to removal) and does not have permission to work.

\(^{103}\) In one case, the client disappeared before the application was approved and never learned that she had gained legal status and permission to work.

\(^{104}\) In two cases, the client disappeared after learning this.

\(^{105}\) I witnessed, but did not participate in, this conversation.
petitions were eventually granted.

The documentation of this phenomenon begs the question: *How many immigrants in the United States are improperly denied relief?* In the Bay Area, almost all nonprofit immigration legal service providers are staffed by attorneys, but not all are, and a significant percentage of employees of these agencies across the United States are not bar-certified. If USCIS improperly requests information that does not exist, and the legal service provider does not know that the regulations conflict with federal law (and that federal law trumps agency regulations), *battered immigrants are improperly denied relief by the agency charged with administering that relief.* If USCIS improperly denies VAWA self-petitions and the non-lawyer service provider does not understand that they can appeal or how to argue their case successfully, *battered immigrants are improperly denied relief by the agency charged with administering that relief.*

Even in cases where attorneys do handle the cases, clients frequently disappear when faced with the potential rejection of their applications, most likely because they fear the threat of deportation and/or because they are afraid that their abusers may regain control of them if their petitions fail. In the cases I surveyed, a full fifty percent of the affected clients—clients like Isabela—disappeared after learning that USCIS had not immediately approved their applications.

There are many reasons why battered immigrant clients vanish. Many, because of their home country’s conditions, do not trust government officials. Most have no money and no knowledge of their rights under the law. Many are fearful of deportation for several reasons, not the least of which includes the fact that their abuser can find them outside the United States and harm or kill them without fear of repercussion.

In sum, despite their advocate’s assurances, many improperly denied immigrants are too frightened to take what they see as a significant chance that their claim will fail. There is no viable relief for the immigrants like Isabela who disappear. This means that any subsequent abuse will most likely go unreported and that abused immigrants are highly unlikely to report any crime against them, whether perpetrated by the batterer or not. This means that battered immigrants will be forced to work under the table, that their children will go hungry, and that the entire family will not have medical care or qualify for other social services. It also means that similarly situated immigrants—battered spouses and children who know the improperly denied former client—will be far less likely to come forward on their case, and therefore that abusers can batter with impunity.

### IV. POTENTIAL REMEDIES

There is no viable relief for improperly denied self-petitioners like Isabela who disappear. There are, however, a few avenues of recourse available to improperly denied self-petitioners and their legal advocates. If an improperly denied VAWA self-petitioner is not eventually approved by the USCIS division
that adjudicates VAWA petitions, the applicant can appeal the decision to the Administrative Appeals Office of the USCIS. It seems very likely that the petition would be approved at that level, as agency supervisors are more likely to be aware of the full scope of VAWA 2000's provisions than front line officials.

If the Administrative Appeals Office does not approve the appeal, however, the self-petitioner can file suit against USCIS using 5 USC § 706(1), (2)(A) as the basis for the claim:

Under the [Administrative Procedures Act], the Court must compel agency action unlawfully withheld, and hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law.106

Improperly denied battered immigrant plaintiffs would face no questions of standing, subject matter jurisdiction, deference or injury; the courts have already addressed these issues with regard to DHS in particular.107 There would be no doubt of the outcome either since USCIS' VAWA-related regulations clearly contravene the statute.108 Alternatively, the improperly denied immigrant might ask the Department of Homeland Security itself for assistance. DHS has created an Office for Civil Rights and Civil Liberties, which presumably has authority to investigate violations within their own department.109 Aggrieved persons can file complaints via email, U.S. postal mail, or by telephone.110

The real issue that remains, however, is that as long as USCIS fails to update its regulations, and as long as it continues engaging in the practice of illegally denying VAWA applications, some immigrants—the ones like Isabela—are going to be forced through the cracks. This is perhaps the most frustrating part of this problem. Even though all of the initially rejected applications in my study were eventually approved after persistent advocacy, there is no relief for the immigrants who, like Isabela, are too terrified to risk deportation and therefore disappear before their claims can be fully adjudicated.

This is the crux of the issue because it is questionable whether persons like Isabela (even if they could be found again111) sustain compensable "injuries" when they are initially denied relief. The improper denial of relief to self-petitioners who subsequently disappear raises a host of complex legal issues, implicating questions of agencies' mandate to conform their practices to current

110. Id.
111. Which makes it quite difficult to use persons like her to form a class, for instance.
FORCED THROUGH THE CRACKS

law; the forms of improper requests and denials that constitute unlawful withholding of agency action; and the scope of procedural due process protections afforded VAWA self-petitioners. Despite the fact that a poignant complaint could easily be drafted, it remains unclear how courts would assess such claims—not because it is necessarily fatal that she did not exhaust administrative remedies, but because the agency's administrative remedies would have undoubtedly provide relief.\(^1\)

It is for this reason, and for the sake of vanished immigrants like Isabela, that this problem must not be addresses on a case-by-case basis. USCIS must be forced to update its regulations so that its unlawful behavior stops scaring immigrants into disappearing before they can be endowed with the relief to which they are entitled. I examine some of the possible means to accomplish this goal below.

A. POTENTIAL AVENUES OF RECOUSE FOR IMPROPERLY DENIED VAWA SELF-APPLICANTS AND THEIR ADVOCATES\(^113\)

1. Requesting that Congress Order the Promulgation of New Regulations

Congress sometimes directs agencies to update regulations via a commanding clause of an enacted statute.\(^114\) Although Congress did not specifically order INS/USCIS to update its regulations, it seems clear that it wanted them to. For instance, section 1503 of VAWA 2000 is entitled "Improved Access to Immigration Protections of the Violence Against Women Act of 1994 for Battered Immigrant Women."\(^115\) This provision's title seems to clearly convey Congressional intent.

Unfortunately, however, there is no formal means by which individuals, groups or agencies can petition Congress. That does not mean that a zealous group could not create its own petition and gather signatures that it would then

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112. But see Campos v. INS, 32 F. Supp. 2d 1337, 1342 (S.D. Fla. 1998) (finding that “Where the nature of plaintiff's *constitutional challenge of INS procedures* is such that relief at the administrative level is unlikely and the chances are remote that the INS would respond positively to an individual's *constitutional challenges to its procedures*, the exhaustion doctrine is not a bar to the district court's assertion of jurisdiction” (emphasis added) (citing Haitian Refugee Center, Inc. v. Nelson, 872 F.2d 1155 (11th Cir. 1989))).

113. The Vice President meets with agency heads once per year to discuss their regulations: “Early in each year's planning cycle, the Vice President shall convene a meeting of the Advisors and the heads of agencies to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year.” Executive Order 12,866 (September 30, 1993)). Note, however, that according to 6 FR 4073, “It has been determined that [DHS’s] *rulemaking is not a significant regulatory action* for the purposes of Executive Order 12866. Accordingly, a regulatory impact analysis is not required.” (emphasis added) Predictably, this Executive Order is not incorporated into DHS' regulations and therefore does not appear to present a possible venue for regulatory change.

114. See, e.g., 8 USC § 1642(a)(3).

present to one or more Congressional members, particularly including those who had sponsored VAWA 2000 and/or 2005. The petition might request that Congress draft legislation that compels DHS to promulgate new regulations. Even if well received, however, it must be noted that there is no statute or administrative rule detailing the means by which Congress can strike an agency’s existing regulations or order new ones to be created and promulgated.¹¹⁶ A second option for relief, then, includes class-action litigation.

2. Class-Action Litigation

Class action cases are perhaps the best known of all immigration caselaw. They become extremely influential if won and endow litigators with a permanent place in history. However, they are very costly, very difficult to prepare and litigate, and they are notoriously difficult to win.¹¹⁷ As mentioned earlier, there is one further difficulty that must be considered in planning to litigate a case involving USCIS’ initial rejections of VAWA self-petitions, namely, that the most critically injured parties have disappeared.

Potentially, however, a class could be constructed out of the initially denied applicants who were later approved, perhaps by galvanizing legal service providers to coordinate appeals for relief and document evidence of improper denials on a national scale.¹¹⁸ Although the issue this paper presents has never been squarely answered by a court, once a class is certified, cases such as McNary v. Haitain Refugee Center, Inc.¹¹⁹ and its progeny pave the way for a class-based suit with some chance of success. The McNary Court held that a court may hear challenges to the INS (and therefore DHS) policies and procedures used to process applications despite a statute that could be read to foreclose such review.¹²⁰

Another case, however, narrowed the field of potential plaintiffs against DHS.¹²¹ In a challenge to INS regulations as inconsistent with law, the Supreme Court held in Reno v. Catholic Social Services¹²² that relief is appropriate when a

¹¹⁶ Very unfortunately, the Congressional procedure for disapproving of regulations that is described in 8 USC § 802 only applies to newly promulgated regulations.
¹¹⁷ Indeed; they are often dismissed on other grounds such as lack of subject matter jurisdiction before the merits of the case are ever reached.
¹¹⁸ Those who disappeared might also be certified as members of the class if the class is labeled something akin to “and all those injured by these agency actions in which relief was unlawfully withheld and whose findings were not in accordance with the law.”
¹²⁰ 498 U.S. at 492.
¹²¹ Although not fatally to the claim this paper presents.
¹²² 509 U.S. 43 (1993), remanded to 996 F.2d 221 (9th Cir. 1993), remanded to 999 F.2d 1362 (9th Cir. 1993), remanded to 113 F.3d 922 (9th Cir. Cal. 1997), rehearing en banc denied by 134 F.3d 921 (9th Cir. Cal. 1998), remanded to 182 F.3d 1053 (9th Cir. Cal. 1999), rehearing en banc granted by 197 F.3d 1041 (9th Cir. 1999), different results reached at rehearing en banc at 232 F.3d 1139 (9th Cir. Cal. 2000), motion denied by, partial summary
controversy is “ripe for judicial resolution,” and explained that “a class member’s claim would ripen only once s/he took the affirmative steps that s/he could take before the INS blocked his path by applying the regulation to him.”

The Court further narrowed *McNary* by holding that plaintiffs must be able to show “but for” causation: that the plaintiffs would have been “eligible for adjustment of status but for the challenged regulations.” Under this standard, VAWA self-petitioners would most likely also have to show that they had been denied, or would have to demonstrate that knowing that their claim was likely to fail was a “substantial cause of their failure to apply” for relief (or perhaps even to abandon their claim to relief).

In the same case, the Ninth Circuit later held that Plaintiffs had to have the regulations applied to them in a “concrete manner” in order to satisfy the “ripeness” requirement.

In another case, Plaintiffs claimed that INS had violated its “statutory duty to disseminate accurate eligibility information” and thereby violated the Due Process Clause. The court found that IRCA requirements of broad dissemination “coupled with the legislative goal of reaching an uneducated and fearful alien population sets a more stringent standard than the general due process notice requirements for potential recipients of government benefits.” It also noted that publishing rules in the Federal Register constitutes an “adequate means of informing the public of agency action” that satisfies due process. This offers another potential means of relief since several inaccurate VAWA-related regulations have existed in the FR and Code of Federal Regulations since 2000.

One final option for relief exists, however – and one far less expensive and difficult than class-action litigation. It is to petition the offending agency itself.

**3. Petitioning an Agency to Change Its Regulations**

If Congress refuses or fails to order USCIS to promulgate new regulations, another feasible option exists. Interested persons, groups, or agencies can comment in writing on a federal agency’s regulations if the agency is preparing to change the regulations or to enact new ones. The agency must publish a notice in the Federal Register indicating the period in which they will accept

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123. *Id.* at 59.
124. *Id.*
125. *Id.* at 61-62. The Court leaves open the issue of whether the denial must be a final denial, however.
126. *Id.* at 67.
129. *Id.* at 1313.
130. *Id.* at 1316.
131. See section III, *infra*.
132. 5 USC § 553(b)-(c).
comments. However, another option is available at any time. Persons, groups or agencies may petition the federal agency to request that they modify the old or create new regulations.

Although it seems likely that DHS/USICS would deny the petition, this act provides a stepping stone with which immigration legal service providers could join together, network with sympathetic policymakers, and prepare a case requesting judicial review of the agency’s decision to refuse. If won, such a case can provides for relief such as an order to promulgate new, statutorily-compliant regulations. This is akin to exhausting the available administrative remedies, and is perhaps the best option for forcing USCIS to change its regulations because it involves so few plaintiffs and processes and it highly likely to succeed because the law is clear and USCIS has no legitimate defense.

A court can even establish a timetable for completion and publication of the new regulations, which would mean that this problem would be dealt with much more quickly than continuing to wait for Congress, or for USCIS to decide on its own to update the regulations, and it would be far less costly and complicated than some other methods of relief, such as class-action litigation. It seems to be the best all around solution—and one that anyone can participate in.

IV. CONCLUSION

These avenues of recourse may indeed offer improperly denied immigrants a chance for a court, for USCIS, or for someone to make things right. However, the fact is that each of these suggested solutions are difficult, time-consuming, expensive and frightening for battered immigrants. Most improperly denied VAWA self-petitioners simply disappear if they believe that their petition is going to be denied, a sad fact given that battered immigrants represent the most vulnerable groups of persons in the U.S. Moreover, these people are entitled to immigration relief under VAWA that would provide them with legal status, welfare benefits, and permission to work. In short, their chance for a normal life—their pursuit of happiness—is denied when their self-petitions, which take a considerable amount of work and emotional energy to prepare, are rejected and, like Isabela, they become too frightened to pursue their cases.

In January 2006, and after I wrote this paper, Congress passed VAWA
2005 which, among other things, mandated that the Department of Homeland Security update its VAWA-related regulations within 180 days of passage to reflect the changes wrought by both VAWA 2000 and 2005, so perhaps—perhaps—this new Act will remedy the particular problem I outline in this paper. But, as my conversations with attorneys and advocates imply, it remains vitally important that every immigration legal services provider strive to understand not only the full contours of the law, but also the means by which USCIS makes its decisions about every type of immigration relief, so that we can ensure that we catch every instance in which USCIS manifests an illegal denial or request for further information/intent to deny. We will also need to make sure that the new VAWA regulations USCIS produces and implements actually comply with the law and fulfill its purposes and objectives. DHS should also be mandated to audit USCIS, and to ensure that USCIS employees are trained in, and remain in compliance with, the law, since that is what they administer.

All else being equal, the results of this paper are not truly surprising. The phenomena I identified as well as the pending immigration “reforms” suggest that neither immigrants nor their issues are popular, no matter how compelling their needs. Indeed, the extent of the unjust and unlawful denial of relief reported by Bay Area legal service providers suggests that this practice may well be occurring in cases across the immigration spectrum.

In my own cases with the cooperation of my client, we were eventually able to obtain approvals for every one of the contra-statutory denials. But, as in all the other agencies I surveyed, some of these clients had disappeared and were therefore unable to claim their relief. The ones who disappeared were clients with the most heartbreaking cases—women who had experienced the most profound abuse and who had retained a very well-founded fear of serious injury or death at the hands of their husbands. Prior to filing their applications, we had explained to these women that this might happen, and tried to help them understand that this did not mean they would not eventually obtain relief, but their fear of retribution and the risk of potential deportation, no matter how small, was severe enough that holding fast to their frail hope of assistance was no longer an option.

The fact that USCIS regularly denies statutorily compliant VAWA cases like these is nothing short of a human rights violation precisely because it so profoundly affects such a vulnerable population in such a significant way. For example, Human Rights Watch, an international, independent, non-governmental organization that monitors human rights violations reported that

139. We can do this by forming VAWA-related coalitions, listservs, and developing other means by which VAWA-related information can be shared. The Bay Area has such listservs including “VAWA Experts” and “VAWA Taskforce.”
140. Note that if USCIS were a law firm or an individual attorney, it could be sued for malpractice.
[We have] investigated abuses by [USCIS] personnel and found that these abuses persist because agents are not held accountable for violations of law and policy and because of structural flaws in the investigative and disciplinary process. Based on those findings, Human Rights Watch had urged lawmakers to ensure the homeland security bill would include strong mechanisms to prevent, investigate and punish such abuses. In particular, Human Rights Watch called for a designated official in the Inspector General’s Office with sufficient expertise and stature to carry out investigations of civil rights complaints and ensure effective civil rights enforcement.141

Other organizations have also noted DHS’ civil rights abuses. In 2003, internal investigators at the U.S. Justice Department found “dozens” of cases in which DHS members violated immigrants’ civil rights.142 In response, DHS established Office for Civil Rights and Civil Liberties in April 2003.143 Despite this baby step, it is quite obvious that something needs to be done that will permanently correct this problem. Congress (particularly sponsors of VAWA), aggrieved individuals, or advocacy groups should take whatever steps necessary to ensure that (1) USCIS immediately updates its regulations when new laws are enacted, and (2) that this never happens again.

It is certain that there are no easy answers for this problem, but that does not mean that we can throw up our hands. How many immigrants like Isabela are being forced through the cracks, and how many more will be before this issue is resolved?

143. But see Daniel W. Sutherland, The Heritage Foundation Homeland Security Office for Civil Rights and Civil Liberties: A One-Year Review, available at http://www.heritage.org/Research/HomelandDefense/hl849.cfm. In this letter, Mr. Sutherland only once mentions immigrants, and it is to say that “We have created an Office for Citizenship, which promotes among new immigrants an understanding of the civic principles upon which this nation was founded.” Well, if the deprivation of legal entitlements is the foundation upon which this nation was founded, I would agree that the immigrants definitely understand.
"The 2004-5 freshman class at UC Berkeley had only 40 African American males out of 1600 students."

"Since Prop 209, anti-affirmative action initiatives have spread to other states, making it imperative that we learn the lessons of 209.

I consider it to be a mirror of the civil rights movement — it will really start when students organize and mobilize."

"As we criminalize African American men and as we criminalize Latino men, we have to think about the correlation between higher education and enrollment decisions in graduate schools, like med schools and law schools."

"The year after Prop 209 passed, there was only one African American in Boalt's incoming class...down from twenty in the previous year."

"Proposition 209 ended affirmative action."

Today, 10 years later.

California is in a state of crisis.

OVERTURNING 209
A JOINT SYMPOSIUM & MOVEMENT

PANELS