



**PRACTICE ADVISORY<sup>1</sup>**  
***Violence Against Women Act Cancellation of Removal***

July 25, 2023

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## I. Introduction

Cancellation of removal under the Violence Against Women Act (VAWA)<sup>2</sup> is an often overlooked form of relief for noncitizen survivors of abuse who are faced with removal proceedings. Compared with cancellation of removal for nonpermanent residents (non-LPR cancellation),<sup>3</sup> VAWA cancellation is usually a more generous, lenient option for many survivors. And although VAWA self-petitions generally have even fewer requirements, VAWA cancellation often remains possible even when VAWA self-petitioning and adjustment of status are not options, such as when child survivors “age out,” or the noncitizen survivor spouse has already been divorced from their abuser for more than two years.<sup>4</sup> However, compared to non-LPR cancellation, more grounds of inadmissibility and deportability are applicable that bar VAWA cancellation relief. Accordingly, a thorough evaluation of potential eligibility for all relief, together with submission of applications for all forms of relief which are possible, is always the best practice in representing survivors in removal proceedings.<sup>5</sup>

Similar to non-LPR cancellation, VAWA cancellation is a benefit or form of relief only available in removal proceedings; affirmative applications are not possible. And despite the gender exclusive title of the Violence Against Women Act, VAWA immigration benefits and relief are available to all noncitizen survivors of abuse who are otherwise eligible, regardless of their gender identity. Overall, VAWA “was a generous enactment, intended to ameliorate the impact of harsh provisions of immigration law on abused [survivors],” and its provisions should therefore be “interpreted and applied in an ameliorative fashion.”<sup>6</sup>

This practice advisory introduces and provides an overview of the eligibility requirements for VAWA cancellation.<sup>7</sup> **Part II** begins the overview with a discussion of what qualifying relationships are required and how abuse is defined. It continues with the hardship, continuous physical presence, and good moral character requirements, which differ from non-LPR cancellation, and sets out the statutory bars to VAWA cancellation. This part concludes with a brief review of how immigration judges (IJs) exercise discretion in these cases. **Part III** discusses the evidentiary standard for VAWA cancellation cases, considerations for presenting evidence to meet the applicant’s burden of proof in immigration court, and some procedural issues that may arise. Procedural issues and strategies in immigration court are examined in **Part IV**. Finally, **Part V** considers issues arising after an IJ issues a decision, either granting or denying a noncitizen’s VAWA cancellation application. Included in this practice advisory is an appendix with a side-by-side comparison of three forms of immigration relief often available to survivors in removal

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<sup>2</sup> INA § 240A(b)(2), also referred to as “special rule” cancellation.

<sup>3</sup> INA § 240A(b)(1).

<sup>4</sup> To qualify for a VAWA self-petition based on an abusive U.S. citizen or LPR spouse, the survivor spouse must file a self-petition during the marriage or within two years of the termination of the marriage or the loss of immigration status of the abuser. INA § 204(a)(1)(A)(iii)(II)(aa)(CC)(bbb), (ccc) (spouses of U.S. citizens); INA § 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa), (bbb) (spouses of LPRs).

<sup>5</sup> For a comprehensive analysis of all things VAWA, including VAWA self-petitions, adjustment of status, cancellation of removal, suspension of deportation, and practice tips, see ILRC, *VAWA Manual*, 8th edition (June 2020).

<sup>6</sup> *Lopez-Birrueta v. Holder*, 633 F.3d 1211, 1215–16 (9th Cir. 2011).

<sup>7</sup> No regulations have yet been issued interpreting the VAWA cancellation statute, and little published case law exists.

proceedings: VAWA cancellation, VAWA self-petitioning and adjustment of status, and non-LPR cancellation.

## II. Eligibility Requirements

The VAWA cancellation provisions in the statute, similar to the VAWA self-petitioning provisions, have been amended several times since first enacted in 1996. Because VAWA funding provisions are subject to regular reauthorization, amendments to the VAWA statute most often occur when funding is reauthorized. Consequently, checking for the most current version of the statute and regulations is always a good idea.<sup>8</sup>

In summary, an applicant for VAWA cancellation must establish that they:

- Have been battered by or suffered extreme cruelty from their U.S. citizen or lawful permanent resident (LPR) abuser spouse, former spouse, or parent; or are the parent of a child who has suffered such abuse;
- Have been continuously physically present in the United States for three years before applying;
- Would suffer extreme hardship, or that their child or parent would suffer extreme hardship, if the applicant were removed;
- Have been a person of good moral character during the period of required physical presence;
- Are not inadmissible under INA § 212(a)(2) (crimes) or (a)(3) (security and terrorism grounds) or deportable under INA § 237(a)(1)(G) (marriage fraud), (2) (crimes), (3) (failure to register, falsification of documents, and false claim to U.S. citizenship), or (4) (security and terrorism grounds);
- Have not been convicted of an aggravated felony under INA § 101(a)(43); and
- Merit a favorable exercise of discretion.<sup>9</sup>

### A. Qualifying relationships: the relationships that “count”

VAWA cancellation of removal, like VAWA self-petitions, requires a qualifying relationship to a U.S. citizen or LPR abuser. VAWA cancellation, however, is more expansive in certain aspects, as those previously married to an abusive spouse are eligible no matter when the marriage was terminated. In addition, parents of an abused child, who were not necessarily abused themselves nor married to the child’s abuser, are eligible for VAWA cancellation.

For VAWA cancellation, qualifying relationships with a U.S. citizen or LPR abuser include: abused spouses and former spouses; abused “intended spouses”; abused sons and daughters; and non-abused parents of an abused child of any status, even if the parent is not married to the U.S.

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<sup>8</sup> The last VAWA funding reauthorization and amendments occurred in 2013. Funding under VAWA legislation officially expired in 2018, though Congress has continued to fund many VAWA programs. See Congressional Research Service, *The Violence Against Women Act (VAWA) Reauthorization: Issues for Congress* (Mar. 31, 2021), <https://crsreports.congress.gov/product/pdf/R/R46742>.

<sup>9</sup> INA § 240A(b)(2)(A)(i)-(v).

citizen or LPR abuser. Abused parents of U.S. citizens are not eligible, however, for VAWA cancellation.

### 1. Abused spouse, former spouse, or intended spouse

There is no statutory definition of “marriage” or “spouse” in the Immigration and Nationality Act (INA), with the sole exception of the provision negating the legality of unconsummated proxy marriages for immigration purposes.<sup>10</sup> Through the development of case law, a “marriage” for immigration purposes is generally required to be “valid” and “bona fide.” A “valid” marriage for immigration purposes is generally one that is legally valid in the location where it occurred.<sup>11</sup> The noncitizen must prove that any prior marriages were legally terminated, and that the marriage is not void under the laws of the place where it was celebrated. A bona fide marriage is one that was entered into with the intent to make a life together and not solely for immigration purposes.<sup>12</sup> Similarly, the VAWA self-petitioning provisions explicitly require the applicant to establish a “good faith” marriage.<sup>13</sup>

However, the VAWA cancellation provisions do not include any requirement relating to evidence of the bona fides of the marriage or “good faith” of the cancellation applicant. The Department of Homeland Security (DHS) and the Board of Immigration Appeals (BIA) have taken the position, citing VAWA self-petitioning regulations, that a spouse is required to meet the requirements developed generally through case law for providing evidence of a bona fide marriage, but at least one circuit court and a subsequent panel of the BIA has called this into question.<sup>14</sup> Practitioners should argue, however, that because the VAWA cancellation provisions do not in fact include a “bona fide” or “good faith” marriage requirement, no such evidence is required. Nevertheless, a formal finding of marriage fraud would lead to a bar to eligibility for VAWA cancellation if the applicant is subject to the grounds of deportability. (See discussion on VAWA cancellation bars in **Section E** below). As a practical matter, if evidence of a bona fide or good faith marriage is available, it should be submitted.

An important VAWA exception to the requirement of a legally *valid* marriage is that if the U.S. citizen or LPR abuser was already married, unbeknownst to the VAWA cancellation applicant, the abused spouse qualifies as an “intended spouse” for VAWA purposes, despite the abuser’s bigamy.<sup>15</sup> This exception helps the applicant if the abuser’s bigamy invalidated the marriage to the abused spouse, but not if the applicant did not properly terminate their own prior marriage. The

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<sup>10</sup> INA § 101(a)(35).

<sup>11</sup> See *Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005); *Matter of Hosseinian*, 19 I&N Dec. 453, 455 (BIA 1987).

<sup>12</sup> *Lutwak v. United States*, 344 U.S. 604 (1954); *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975); *Matter of McKee*, 17 I&N Dec. 332 (BIA 1980).

<sup>13</sup> INA § 204(a)(1)(A)(iii)(I)(aa) (spouses of U.S. citizens); INA § 204(a)(1)(B)(ii)(I)(aa) (spouses of LPRs).

<sup>14</sup> *Tillery v. Lynch*, 821 F.3d 182 (1st Cir. 2016) (remanding to the BIA due to the lack of explanation or provision of authority for basing denial on respondent’s failure to prove a bona fide marriage); See E-V-M-, AXXX XXX 419 (BIA Jan. 12, 2016) (unpublished), available for purchase at <http://www.irac.net/unpublished/index> (holding the cancellation statute does not require proof of a bona fide marriage for cancellation eligibility: “[w]hile a determination regarding the bona fides of the qualifying marriage may be an element to consider in a discretionary analysis, it may not form the basis of a denial on statutory grounds.”).

<sup>15</sup> INA §§ 204(a)(1)(A)(iii)(II)(aa)(BB), 204(a)(1)(B)(ii)(II)(aa)(BB), 240A(b)(2)(A)(i)(III).

abuser's bigamy must also have been unknown to the VAWA cancellation applicant at the time of their marriage, as the definition of "intended spouse" in the statute requires that the applicant entered the marriage in good faith.<sup>16</sup>

USCIS has recently announced that for VAWA self-petitions, residence with the abuser during the marriage itself is no longer required, just residence with the abuser at some point in time, including before or after the marriage.<sup>17</sup> By contrast, the VAWA cancellation statute does not include any requirement of residence with the abuser spouse. However, the BIA has held that for VAWA cancellation eligibility, the abuse must occur during the relationship and the abuser must already be an LPR or U.S. citizen at the time of the abuse.<sup>18</sup>

VAWA cancellation, unlike VAWA self-petitions, has no requirement that the marriage to the abusive LPR or U.S. citizen spouse was terminated no more than two years prior to the application for VAWA. A VAWA cancellation applicant is eligible regardless of the date of divorce or annulment from the abuser spouse.<sup>19</sup> Also, the abuser's loss of residency or U.S. citizenship subsequent to the marriage does not affect VAWA cancellation eligibility.

**EXAMPLE:** Thi came to the United States to visit family and married Jacob, an LPR who became abusive. Thi filed for divorce, and Jacob was deported for abusing a child. Thi did not learn about VAWA until three years after both their divorce was final and Jacob was deported. Though no longer eligible for a VAWA self-petition, Thi is still eligible for VAWA cancellation if placed in removal proceedings.

## 2. Abused child, son, or daughter

The definition of "child" found in INA § 101(b) is also applicable to VAWA generally and VAWA cancellation specifically with certain exceptions. A "child" for immigration purposes is under twenty-one years of age and unmarried. If married or age twenty-one or older, the person is deemed a "son or daughter."<sup>20</sup> For VAWA self-petitions, "children," but not sons or daughters, are eligible applicants.

By contrast, for VAWA cancellation, the statute refers to eligible applicants as those who have been abused by a U.S. citizen or LPR "spouse or parent."<sup>21</sup> Because the statute does not include a reference to the applicant's status as a "child," this omission means that "sons and daughters" of abusive LPR or U.S. citizen parents should qualify for VAWA cancellation, regardless of their age or

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<sup>16</sup> INA § 101(a)(50).

<sup>17</sup> 3 U.S. Citizenship and Immigration Services Policy Manual (USCIS-PM) D.2(F).

<sup>18</sup> *Matter of L-L-P-*, 28 I&N Dec. 241 (BIA 2021).

<sup>19</sup> Virtue, *INS Memorandum: Supplemental Guidance on Battered Alien Self-Petitioning and Related Issues* (May 6, 1997), <https://asistahelp.org/wp-content/uploads/2018/10/DOJ-MemorandumSupplemental-Guidance-on-Battered-Alien-Self-Petitioning-Process-and-Related-Issues.pdf> ("It is important to note, however, that some individuals who are ineligible for status pursuant to the self-petitioning provisions will be eligible for cancellation (e.g., where the marriage has been terminated.") [hereinafter *INS Memorandum, Virtue, P, May 6, 1997*].

<sup>20</sup> INA § 101(b)(1).

<sup>21</sup> INA § 240A(b)(2)(A)(i).

marital status at the time of the abuse or at the time of application or cancellation grant.<sup>22</sup> The term “sons and daughters” encompasses those both over age twenty-one, and those not yet age twenty-one who are also defined as “children” by the INA. As a result, abused sons and daughters of U.S. citizens or LPRs who are ineligible to file a VAWA self-petition because they did not file before turning twenty-one (or twenty-five, if the abuse was at least one central reason for the delay in filing) should still be eligible for VAWA cancellation, due to the plain language of the statute.

Abused sons and daughters born “out of wedlock” to an abusive father, have additional requirements to prove their qualifying relationship.<sup>23</sup> They must establish, at minimum, that there existed a bona fide father-child relationship before they turned twenty-one years of age.<sup>24</sup> It is also sufficient to prove that “legitimation” occurred before the individual’s eighteenth birthday, pursuant to the laws of the child’s or the father’s place of residence, if the child was in the father’s legal or joint custody at the time of legitimation.<sup>25</sup>

Abused step-children qualify as “children” or “sons and daughters” of a step-parent, if the step-parent married their biological parent before the step-child turned eighteen years old.<sup>26</sup> For self-petitioning step-children, the abuse had to occur prior to their eighteenth birthday, though the relationship does not need to be “continuing,” as it does in other family immigration contexts, according to USCIS policy.<sup>27</sup> Since “sons and daughters” of abusive parents are eligible for VAWA cancellation, no age limit on when the abuse occurred should apply for step-children in VAWA cancellation cases. Practitioners should also advocate that, similarly to VAWA self-petitions, the abusive step-relationship should not need to “continue” for VAWA cancellation, especially as that would be potentially dangerous for the applicant.

An adopted child must have been adopted under the age of sixteen years, unless adopted under the age of eighteen together with a sibling who was under sixteen years of age at the time. In addition, though generally an adopted child must have resided with their adoptive parent(s) for two years, plus the adoptive parent must have had legal custody of the child for two years, in order to meet the statutory definition of “child,” an *abused* adopted child is exempt from the two years of residence and legal custody requirements in order to qualify for VAWA.<sup>28</sup> And the abuser could be either the adoptive parent or a family member of the adoptive parent living in the same household.<sup>29</sup>

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<sup>22</sup> INA § 240A(b)(2)(A).

<sup>23</sup> INA § 101(b)(1)(D)

<sup>24</sup> *Id.*

<sup>25</sup> INA § 101(b)(1)(C).

<sup>26</sup> INA § 101(b)(1)(B).

<sup>27</sup> 3 USCIS-PM D.3(A)(2). For the requirement that the step-relationship is “continuing” after termination of the marriage of a child’s biological parent and step-parent in most family immigration contexts, see *Matter of Mowrer*, 17 I&N Dec. 613 (BIA 1981).

<sup>28</sup> INA § 101(b)(1)(E)(i).

<sup>29</sup> *Id.*

An “orphan” adopted from abroad qualifying under the “orphan” provisions of the INA must have been under the age of sixteen when the orphan petition was filed, or under age eighteen if petitioned together with a sibling under the age of sixteen.<sup>30</sup>

Residence with the abuser parent at some point in time, while required for VAWA self-petitions, is not a statutory requirement for VAWA cancellation.

**EXAMPLE:** Martha was legally adopted by her LPR parents at the age of thirteen. However, Child Protective Services removed her from her adoptive parents’ home only six months later, when they became abusive. At that point, Martha had lived with her adoptive parents not quite two years, and they had legal custody of her through guardianship and then adoption for only one year altogether. Martha was placed in removal proceedings at age twenty-six, and should qualify for VAWA cancellation as the abused adopted daughter of a permanent resident.

### 3. Parent of an abused child

Noncitizen parents who have been abused by their LPR or U.S. citizen adult son or daughter are not eligible for VAWA cancellation, though they do qualify for VAWA self-petitioning. However, a noncitizen *parent of an abused child* is eligible for VAWA cancellation, even if the noncitizen parent never married the abuser and has suffered no abuse themselves. Because the statute refers to non-abused parents of a “child” of a U.S. citizen or LPR abuser, a non-abused parent would likely only qualify if the abused child is under twenty-one and remains unmarried.<sup>31</sup>

The statutory definition of “parent” tracks the definition of “child.”<sup>32</sup> If the abused “child” falls within the definition of child in the statute, with regard to the relationship formed with each “parent,” then the noncitizen parent may also qualify for VAWA cancellation under this provision. This is true both for parents whose children are also without immigration status and could themselves apply for cancellation if in removal proceedings, and for parents of children who already have status as U.S. citizens or LPRs.

**Example:** Gabriela, who is undocumented, and Herman, who is an LPR, are unmarried but together have a twelve-year-old U.S. citizen child, Benjamin. Herman has abused Benjamin but not Gabriela. Due to Herman’s abuse of Benjamin, Gabriela qualifies for VAWA cancellation, if placed in removal proceedings, even though she is not married to Herman and has not suffered abuse herself. But if Benjamin turns twenty-one or marries before Gabriela is granted VAWA cancellation, Gabriela will no longer be eligible.<sup>33</sup>

<sup>30</sup> INA § 101(b)(1)(F).

<sup>31</sup> INA § 240A(b)(2)(A)(i).

<sup>32</sup> INA § 101(b)(2).

<sup>33</sup> However, if a qualifying relative child ages out due to undue delays caused by the IJ, at least one circuit court has held that the statute may be interpreted to have “fixed” the qualifying relative’s age at the time of filing. *Martinez-Perez v. Barr*, 947 F.3d 1273 (10th Cir. 2020). *But see Martinez-Tapia v. Garland*, 2021 WL 4813413 (10th Cir. 2021) (unpublished) (concluding that the agency “may” interpret the statute to fix the qualifying relative’s age at an earlier point in time, but is not required to do so, in a case where the BIA had found that the petitioner contributed to the delay and where the agency delays were due to the cap and backlog).



**Example:** Sai is the undocumented mother of Van, a U.S. citizen. Van abused Sai for two years beginning when Van was eighteen years old. Sai will not qualify for VAWA cancellation based on the abuse by their U.S. citizen child, but they could still qualify for a VAWA self-petition and adjustment of status.

## **B. “Battery or extreme cruelty” should be broadly defined**

As there are no regulations implementing VAWA cancellation at present, the regulatory definition of “battery or extreme cruelty” for purposes of VAWA self-petitioning should be equally relevant to VAWA cancellation, and is a good starting point.<sup>34</sup> However, the regulatory definition suffers from a lack of breadth as to the full scope of domestic abuse. This definition includes, *but is not limited to*, “being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury.”<sup>35</sup> The self-petitioning regulations also expressly include “[p]sychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution.”<sup>36</sup> The Ninth Circuit has further noted that the term “battery” does not necessarily require a level of violence that “results or threatens to result in physical or mental injury.”<sup>37</sup> Other abusive acts that may not initially appear violent but are part of an overall pattern of violence are also part of the regulatory definition.<sup>38</sup> Several legacy Immigration and Naturalization Service (INS) memoranda provide further guidance on the term “battery or extreme cruelty.” These memoranda, along with the current USCIS Policy Manual, emphasize that there is no exhaustive list of acts that constitute “battery or extreme cruelty,” and the definition of battery provided in the regulations is a flexible one that should be applied to claims of extreme cruelty as well as to claims of physical abuse.<sup>39</sup>

Domestic abuse covers a broad range of activity and behaviors by the abuser, including physical, sexual, verbal, and emotional abuse, as well as economic coercion. Utilizing the domestic abuse “power and control” wheel developed by experts is a helpful tool, both to use in connection with evidence of the types of past abuse suffered by the applicant, and to explain the broad scope of domestic abuse to the immigration court.<sup>40</sup>

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<sup>34</sup> See *Lopez-Birrueta v. Holder*, 633 F.3d 1211 (9th Cir. 2011) (though the court found that “the BIA permissibly extended the use of the definitions” of battery or extreme cruelty which had been utilized by both the parties in *Lopez-Birrueta*’s VAWA cancellation application, the court also noted that those “definitions on their face do not apply”).

<sup>35</sup> 8 C.F.R. § 204.2(c)(1)(vi) (abused spouses), 204.2(e)(1)(vi) (abused children). See also *Ruiz v. Atty. Gen.*, No. 22-10445 (11th Cir. 2023) (holding that the term “extreme cruelty” does not require showing that one suffered physical abuse in order to qualify for discretionary cancellation of removal; proof of mental or emotional abuse is sufficient).

<sup>36</sup> *Id.*

<sup>37</sup> *Lopez-Birrueta v. Holder*, 633 F.3d 1211, 1215–17 (9th Cir. 2011) (citing the regulations at 8 C.F.R. § 204.2(c)(1)(vi), (e)(1)(vi)).

<sup>38</sup> *Id.*

<sup>39</sup> 3 USCIS-PM D.2(E); INS, *Aleinikoff Memorandum: Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents* (Apr. 16, 1996), [http://niwaplibrary.wcl.american.edu/wp-content/uploads/Aleinikoff\\_\\_41696\\_1B42EBEED3605.pdf](http://niwaplibrary.wcl.american.edu/wp-content/uploads/Aleinikoff__41696_1B42EBEED3605.pdf).

<sup>40</sup> Domestic Abuse Intervention Programs, *The Duluth Model: Wheel Information Center*, <https://www.theduluthmodel.org/wheels/>.

Due to the VAWA 2000 statutory amendments for self-petitioners, the abuse does not have to have occurred within the United States,<sup>41</sup> though USCIS policy is that the abuse does have to occur at some point during the qualifying relationship.<sup>42</sup> The VAWA cancellation provisions are silent in both regards. However, the BIA has interpreted the cancellation statute to require that the abuse had to occur during the qualifying relationship and when the abuser was in fact already a U.S. citizen or LPR.<sup>43</sup>

### 1. “Extreme cruelty” may take many forms

The abuse must rise to a certain level of severity to constitute battery or “extreme cruelty.” But physical abuse is not required, if the person can establish “extreme cruelty.” Examples of abuse that may constitute extreme cruelty include the social isolation of the victim; humiliation; degradation, use of guilt, minimizing, or blaming; economic control; coercion; threats of violence against the applicant or the applicant’s children; acts intended to create fear, compliance, or submission; controlling what the applicant does, and who they can see and talk to; denying access to food, family, or medical treatment; threats of deportation; and threats of removing children from the custody of the applicant.<sup>44</sup> Additionally, accusations of infidelity; incessantly calling, writing, or contacting the victim; stalking the victim; interrogating friends and family members; threats; economic abuse; not allowing the victim to have a job; controlling all money in the family; and hiding or destroying important papers could also constitute extreme cruelty. Manipulative tactics aimed at ensuring the batterer’s dominance and control have been found to constitute extreme cruelty.<sup>45</sup> A spouse’s adultery may form a part of extreme cruelty.<sup>46</sup> For children, the psychological harm of witnessing the abuse of a parent can constitute abuse or extreme cruelty.<sup>47</sup>

Notably, USCIS now recognizes that acts by an abuser “aimed at some other person or thing may be considered abuse if the acts were deliberately used to perpetrate extreme cruelty against the self-petitioner or the self-petitioner’s child” and acts “by a third party when the abusive U.S.

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<sup>41</sup> *But see* EOIR Form 42B instructions, <https://www.justice.gov/eoir/page/file/904291/download> (stating that the battery or extreme cruelty should have occurred in the United States despite the INA lacking a reference as to where the battery or extreme cruelty must have occurred).

<sup>42</sup> 3 USCIS-PM D.2(E).

<sup>43</sup> *Matter of L-L-P-*, 28 I&N Dec. 241 (BIA 2021).

<sup>44</sup> 3 USCIS-PM D.2(E)(1); *see also* D-L-, AXXX XXX 112 (BIA July 26, 2017) (unpublished), available for purchase at <http://www.irac.net/unpublished/index> (finding that abuser spouse’s actions in absconding with couple’s son, not permitting contact with the child for many years, nor providing information about the child’s whereabouts or wellbeing, constituted extreme cruelty); B-J-G-, AXXX XXX 333 (BIA May 29, 2014) (unpublished), available for purchase at <http://www.irac.net/unpublished/index> (concluding that the “long-term impact of the husband’s alcoholism and gambling addiction on [respondent’s] psychological, emotional, and financial well-being” constituted extreme cruelty).

<sup>45</sup> *See Hernandez v. Ashcroft*, 345 F.3d 824, 828 (9th Cir. 2003). *But see Oviedo v. Garland*, 840 Fed. Appx. 192 (9th Cir. 2021) (unpublished) (sustaining IJ’s findings that applicant’s marriage to the allegedly abusive spouse was fraudulent, that the applicant lacked credibility, and that the fact that the applicant’s prior “wife was an alcoholic, insulted and yelled at him, demanded money, and threatened him with immigration consequences” did not rise to the level of extreme cruelty “in the form of ‘tactics of control ... intertwined with the threat of harm in order to maintain [the abusive wife’s] dominance through fear’ or ‘manipulative tactics aimed at ensuring [the abusive wife’s] dominance and control’”).

<sup>46</sup> *See Da Silva v. Att’y Gen.*, 948 F.3d 629, 638 (3d Cir. 2020).

<sup>47</sup> *See* 3 USCIS-PM D.2(E); L-M-A-, AXXX XXX XXX (BIA Mar. 5, 2012) (unpublished), <https://asistahelp.org/wp-content/uploads/2018/10/VAWA-Cancellation-BIA-unpublished-on-extreme-cruelty-on-child-in-common.pdf>.

citizen or LPR acquiesced to, condoned, or participated in the abuse” also may be considered extreme cruelty.<sup>48</sup>

**Example:** Zara, a U.S. citizen, did nothing to support or defend her noncitizen spouse, Katya, when Zara’s mother would lock Katya in a bedroom in the house they shared with Zara’s parents, and when Zara’s mother humiliated and denigrated Katya regularly, in front of other relatives. Zara herself also regularly kicked and hit Katya’s beloved dog, claiming that the dog “deserved” the abuse. Zara’s acquiescence to the abuse of Katya by Zara’s mother by taking no action to stop it, as well as Zara kicking Katya’s dog, both may be considered extreme cruelty.

The “cycle of violence” in abusive relationships is well-documented in scholarly works. At least one circuit court has cited and recognized such scholarship, finding that abuse very often includes a “contrite phase” with the manipulative use of promises and gifts, and as such, can itself constitute extreme cruelty.<sup>49</sup>

The determination of whether extreme cruelty has occurred should focus on how the abuser’s conduct affected the VAWA cancellation applicant’s quality of life and ability to function. For this reason, providing evidence of the actions, behavior, or words of the abuser as well as how the applicant felt as a result, is critical. Since the statutory standard looks to past harm, an improvement in the relationship between the abuser and the victim is not relevant. Whether the applicant “has been” subjected to battery or extreme cruelty at some point during the required relationship is key.<sup>50</sup>

Because there may be limited reviewability on appeal regarding this issue, it is critical to make the strongest case possible to the IJ that battery or extreme cruelty has in fact occurred.<sup>51</sup>

### **C. The extreme hardship requirement**

A VAWA cancellation applicant must establish that their removal would cause “extreme hardship” to themselves, their child, or their parent.<sup>52</sup> The VAWA cancellation hardship requirement is less onerous than the non-LPR cancellation hardship requirement in several ways.<sup>53</sup> First, “extreme hardship” requires proof of significantly less hardship than the requirement of “exceptional and extremely unusual hardship standard” in non-LPR cancellation cases.<sup>54</sup> Second, VAWA cancellation applicants can satisfy the hardship requirement by demonstrating hardship to themselves, even without showing hardship to a qualifying relative. Third, VAWA cancellation applicants may demonstrate eligibility through proof of extreme hardship to a child or parent, regardless of whether the child or parent has immigration status in the United States. In contrast, non-LPR cancellation applicants must show exceptional and extremely unusual hardship to a spouse, parent, or child who is a U.S. citizen or LPR.

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<sup>48</sup> 3 USCIS-PM D.2(E).

<sup>49</sup> See *Hernandez*, 345 F.3d at 828.

<sup>50</sup> See *Lopez-Birrueta*, 633 F.3d at 1217.

<sup>51</sup> See Part V.A, *infra*, for more on judicial review on appeal.

<sup>52</sup> INA § 240A(b)(2)(a)(v).

<sup>53</sup> Compare INA § 240A(b)(2)(a)(v) with INA § 240A(b)(1)(D).

<sup>54</sup> See, e.g., *Matter of Monreal*, 23 I&N Dec. 56, 59 (BIA 2001).

While there are no comprehensive regulations implementing the VAWA cancellation provisions in the statute, there are Executive Office for Immigration Review (EOIR) regulations specifying extreme hardship factors IJs can consider in VAWA cancellation cases.<sup>55</sup> The regulations direct IJs to apply the same hardship factors set out for former suspension of deportation applications. The regulations describe extreme hardship as a “degree of hardship beyond that typically associated with deportation.”<sup>56</sup> They provide the following list<sup>57</sup> of non-exclusive factors for establishing extreme hardship:

- The physical or psychological consequences of the abuse;
- The consequences of losing access to the U.S. legal system (including the “ability to obtain and enforce orders of protection, criminal investigations and prosecutions, and family law proceedings or court orders regarding child support, maintenance, child custody, and visitation”);
- The likelihood that the abuser’s family and friends in the country of return would harm the applicant or the applicant’s child(ren);
- The applicant’s and/or applicant’s child(ren)’s needs for services for victims of domestic violence that are not available or reasonably accessible in the country of return;
- The existence of laws and practices in the country of return that punish victims of domestic violence or individuals who take steps to leave an abusive situation;
- The abuser’s ability to travel to the country of return and the ability and willingness of authorities in the country of return to protect the applicant and/or the applicant’s children;
- The applicant’s age both at the time of entry to the United States and at the time of application, their immigration history, and their length of residence in the United States, including any authorized residence;
- The age, number, and immigration status of the applicant’s children and their “ability to speak the native language and to adjust to life in the country of return”;
- The health of the applicant, the applicant’s children, or the applicant’s parents, and the availability of any necessary medical treatment in the country of return;
- The applicant’s ability to find work in the country of return;
- Any family members of the applicant who are or will be lawfully residing in the United States;
- The financial and psychological impact of the applicant’s departure, and the impact of departure on educational opportunities;
- The current political and economic conditions in the applicant’s country of return;
- The applicant’s family and other ties to the country of return;
- The applicant’s contributions to and ties to a U.S. community; and
- The availability of other means of adjusting to LPR status.

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<sup>55</sup> See 8 C.F.R. § 1240.20(c) (directing that the extreme hardship standard set forth in 8 C.F.R. § 1240.58—a regulation interpreting VAWA cancellation’s predecessor suspension of deportation—applies to VAWA cancellation cases).

<sup>56</sup> 8 C.F.R. § 1240.58(b).

<sup>57</sup> The factors listed here are found at 8 C.F.R. § 1240.58(b) and (c).

Practitioners should assist VAWA cancellation applicants in presenting evidence of, and arguing, all applicable factors,<sup>58</sup> given that the hardship analysis is a case-by-case determination made based on the totality of the circumstances.<sup>59</sup> See **Part III.C** for a discussion of how practitioners can work with VAWA cancellation applicant clients to develop and present compelling extreme hardship evidence.

#### **D. Continuous physical presence**

A VAWA cancellation applicant must show they have been continuously physically present in the United States for at least three years immediately preceding the date of the application.<sup>60</sup> The VAWA cancellation continuous physical presence requirement is more lenient than the non-LPR cancellation physical presence requirement in several ways.<sup>61</sup> First, VAWA cancellation requires only a three-year period of continuous physical presence preceding the application, rather than a ten-year period. Second, the Notice to Appear (NTA) “stop-time rule,” which applies to both LPR and non-LPR cancellation, does not apply to VAWA cancellation.<sup>62</sup> This means that even if an applicant has not been in the United States continuously for three years when DHS serves them with an NTA (the charging document used to initiate removal proceedings), they may become eligible for VAWA cancellation if they accrue three years of continuous physical presence during the course of their removal proceedings, or even after an IJ orders removal.<sup>63</sup> Third, applicants who departed from the United States and subsequently returned, may be able to continue accruing continuous physical presence if their absence was connected to battery or extreme cruelty.<sup>64</sup>

There are three additional provisions related to calculation of continuous presence found at INA § 240A(d) that *do* apply to VAWA cancellation applicants. The three provisions are: (1) the stop-time rule related to commission of certain criminal and national security offenses, (2) the treatment of absences from the United States, and (3) the exceptions for members of the U.S. Armed Forces. First, the stop-time provision related to criminal offenses applies to VAWA cancellation applicants, which means that their continuous physical presence period terminates when they commit an offense referred to in INA § 212(a)(2) that renders them inadmissible under INA § 212(a)(2) or deportable under INA § 237(a)(2) or (a)(4).<sup>65</sup> Second, a cancellation applicant’s physical presence

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<sup>58</sup> There is extensive BIA case law on the meaning of “extreme hardship” in the context of other forms of relief. *See, e.g., Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999) (“Although it is, for the most part, prudent to avoid cross application between different types of relief of particular principles or standards, we find the factors articulated in cases involving suspension of deportation and other waivers of inadmissibility to be helpful, given that both forms of relief require extreme hardship and the exercise of discretion.”). To the extent beneficial in a given case, practitioners may want to incorporate extreme hardship case law from other relief contexts, particularly former suspension of deportation cases. These cases are quite relevant, since the extreme hardship factors set forth at 8 C.F.R. § 1240.58 are in fact VAWA suspension and “regular” suspension of deportation hardship factors.

<sup>59</sup> 8 C.F.R. § 1240.58(a).

<sup>60</sup> INA § 240A(b)(2)(A)(ii).

<sup>61</sup> *Compare* INA § 240A(b)(2)(A)(ii) *with* INA § 240A(b)(1)(A).

<sup>62</sup> INA §§ 240A(b)(2)(A)(ii), 240A(d)(1).

<sup>63</sup> Individuals who become eligible for VAWA cancellation after receiving a removal order will need to first prevail on a motion to reopen (or a motion to remand, if they have a pending appeal before the BIA) before they can seek cancellation.

<sup>64</sup> INA § 240A(b)(2)(B).

<sup>65</sup> INA § 240A(d)(1)(B).

period is broken if they leave the United States for a single period longer than ninety days, or for periods that in the aggregate add up to more than 180 days.<sup>66</sup> However, if a VAWA cancellation applicant can show that an absence or portion of an absence was connected to battery or extreme cruelty, then that absence does not count toward the 90- or 180-day limit.<sup>67</sup> Third, an applicant is exempt from the continuous physical presence requirement if they served at least twenty-four months in the U.S. Armed Forces, were in the United States at the time of enlistment or induction, and if separated from service, separated under honorable conditions.<sup>68</sup>

Though there is no statutory provision supporting it, the BIA has also created a separate line of precedent holding that even brief departures (well under the statutory ninety-day period) can break continuous physical presence if they are part of a formal, documented process where the individual was removed by immigration officials or departed under threat of removal.<sup>69</sup> Practitioners should thus carefully interview clients about any departure from the United States to determine if the client had any contact with immigration officials and, if they did, whether the contact with immigration officials prior to the departure may have broken the individual's continuous physical presence.

**Example:** Angelica has been physically present in the United States continuously since she entered on a tourist visa in March of 2015. In January 2018 DHS served her with an NTA and placed her in removal proceedings. While Angelica did not have the required three years of physical presence at the time DHS served her with the NTA, she completed the three years of continuous physical presence while her removal proceedings were pending, and she filed an application for cancellation of removal in April of 2018. Angelica can establish the required three years of continuous physical presence for VAWA cancellation because she has been in the United States continuously since March 2015, and the NTA stop-time rule does not apply to VAWA cancellation applicants.

### **E. Bars to eligibility applicable to VAWA cancellation**

The VAWA cancellation statute contains discrete statutory bars to eligibility which differ substantially from the bars to non-LPR cancellation of removal, and in some respects bar more individuals from relief. While the bars to non-LPR cancellation require a conviction to trigger ineligibility, that is not the case for many of the VAWA cancellation bars. VAWA cancellation is

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<sup>66</sup> INA § 240A(d)(2).

<sup>67</sup> INA § 240A(b)(2)(B). Note, however, that “[a]ny such period of time excluded from the 180 day limit shall be excluded in computing the time during which the [noncitizen] has been physically present for purposes of the three year requirement set forth in this subparagraph.” *Id.*

<sup>68</sup> INA § 240A(d)(3).

<sup>69</sup> See, e.g., *Matter of Castrejon-Colino*, 26 I&N Dec. 667 (BIA 2015); *Matter of Garcia-Ramirez*, 26 I&N Dec. 674 (BIA 2015); *Matter of Avilez*, 23 I&N Dec. 799 (BIA 2005); *Matter of Romalez*, 23 I&N Dec. 423 (BIA 2002); see also *Matter of Chen*, 28 I&N Dec. 676, 681 (BIA 2023) (affirming this line of cases). This line of BIA cases involves non-LPR cancellation applicants where the BIA was interpreting INA § 240A(d)(2), which applies to both non-LPR cancellation applicants and VAWA cancellation applicants. Practitioners could argue that these cases should not be extended to the VAWA cancellation context, particularly in light of the more lenient rules for continuous physical presence that Congress put in place for VAWA cancellation.

barred if applicants are convicted of an aggravated felony or are inadmissible or deportable under the following grounds in the INA:

- § 212(a)(2) criminal and related inadmissibility grounds;
- § 212(a)(3) security and related inadmissibility grounds;
- § 237(a)(1)(G) marriage fraud deportability ground;
- § 237(a)(2) criminal and related deportability grounds;
- § 237(a)(3) failure to register, document fraud, and falsely claiming U.S. citizenship deportability grounds; and
- § 237(a)(4) security and related deportability grounds.

Unlike the stop-time rule, the inadmissibility bars to eligibility for VAWA cancellation only apply to those individuals actually subject to “inadmissibility” in removal proceedings because they have not yet been “admitted,” which includes all who entered without inspection. Likewise, the bars listed that are found within the grounds of deportability, only apply to those VAWA cancellation applicants who have been “admitted” to the United States.<sup>70</sup> In unpublished opinions, the BIA has confirmed that the statutory language is clear in this respect.<sup>71</sup>

**Example:** Svetlana entered the United States without inspection and married a U.S. citizen, who abused her. Svetlana was convicted of child endangerment and placed in removal proceedings. Assuming Svetlana’s conviction is not a “crime involving moral turpitude” (CIMT), even if Svetlana’s conviction fits within the BIA’s definition of deportable “child abuse,” she is not barred from VAWA cancellation eligibility because she was never “admitted,” rather she is only subject to the grounds of inadmissibility and child abuse does not trigger inadmissibility.

<sup>70</sup> There is an important difference in statutory language between the bars to VAWA cancellation eligibility in INA § 240A(b)(2)(A)(iv) and the stop-time rule bar that applies to LPR, non-LPR, and VAWA cancellation in INA § 240A(d)(1), though both sections of the statute relate to grounds of inadmissibility and deportability. The U.S. Supreme Court in *Barton v. Barr*, 140 S. Ct. 1442 (2020), held that the stop-time rule related to the commission of certain offenses, applies to those who would be “hypothetically” inadmissible, despite having been admitted at last entry to the United States or having adjusted status. The Court held that this is because the stop-time statute says it applies “when the [noncitizen] has committed an offense referred to in section 212(a)(2) ...” even if the individual is not subject to inadmissibility grounds as a basis for removal. In removal proceedings, such individuals who have been admitted, are only subject to the grounds of deportability found in INA § 237. But for purposes of the stop-time rule, the Court has held that the inadmissibility grounds set out in INA § 212(a)(2) now apply as well. It is important to note, however, that the VAWA cancellation *eligibility bars* are not written with similar “referred to” language, but rather simply state “is not inadmissible under” and “is not deportable under.” More narrowly, the non-LPR cancellation bars to eligibility are only applicable if a *conviction* pursuant to one of the grounds cited has occurred. See INA § 240A(b)(1)(C), (b)(2)(A)(iv), and (d)(1).

<sup>71</sup> See A-L-S-, AXXX XXX 822 (BIA Oct. 3, 2017) (unpublished), available for purchase at <http://www.irac.net/unpublished/index> (IJ erred in finding respondent who entered the United States without inspection to be barred from VAWA cancellation due to a conviction for domestic violence, which is not a ground of inadmissibility); see also R-O-G-, AXXX XXX 647 (BIA Dec. 16, 2020) (unpublished), available for purchase at <http://www.irac.net/unpublished/index> (finding that a conviction for child abuse triggers deportability, but not inadmissibility, and “respondent correctly argues that, because she was not admitted, or charged as deportable, she cannot be found to be “deportable under ... [section 237(a) of the Act],” and thereby subject to a VAWA cancellation bar, citing *Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649, 652–53 & n.3 (9th Cir. 2004), which in turn suggests in a footnote that deportability grounds would not apply in the VAWA cancellation context if the applicant has not been admitted to the United States).

In any case that appears to fall within a bar, practitioners should closely examine the facts to determine whether there is an argument that a client is not in fact ineligible. Due to the breadth of applicability of these bars, practitioners should explore other forms of relief as well, such as non-LPR cancellation, if it appears that a client is barred from VAWA cancellation.

**Example:** Margi came to the United States with a tourist visa in 2012, overstayed her tourist status, married, and suffered severe abuse by their U.S. citizen spouse, Thomas. Margi fled their home along with the couple's two young children in 2022. That same year Margi's friend suggested that Margi borrow the friend's U.S. passport to apply for a Social Security number to work and support the children. Margi followed their friend's "advice," was caught, and because Margi had made a false claim of U.S. citizenship in applying for the passport, they are arguably ineligible for VAWA cancellation, because the false claim of citizenship ground of deportability is a bar to eligibility for VAWA cancellation. However, because Margi had resided in the United States for over ten years prior to the issuance of an NTA, and because a false claim of U.S. citizenship is not a bar to non-LPR cancellation, they are eligible to apply for that relief in lieu of VAWA cancellation.

### **1. Waiver of ineligibility for conviction of domestic violence and stalking**

Though the general waiver for certain criminal inadmissibility grounds under INA § 212(h) is not available to VAWA cancellation applicants,<sup>72</sup> there is a special waiver for ineligibility based on the deportation ground encompassing convictions of domestic violence, stalking, and violations of domestic violence protective orders.<sup>73</sup> The requirements for this waiver are:

- The applicant was not the primary perpetrator of the violence in the relationship, and
- Either the applicant was acting in self-defense, the applicant violated a protective order intended to protect the applicant, *or* the crime in question did not result in serious bodily injury and there was a connection between the crime and the abuse.<sup>74</sup>

Any credible evidence relevant to an application for this waiver should be considered by the IJ, though the determination as to what is credible and the weight to be assigned to such evidence is made at the discretion of the court.<sup>75</sup>

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<sup>72</sup> *Matter of Y-N-P*, 26 I&N Dec. 10 (BIA 2012), accorded *Chevron* deference in *Garcia-Mendez v. Lynch*, 788 F.3d 1058, 1063 (9th Cir. 2015).

<sup>73</sup> See *Jaimés-Cardenas v. Barr*, 973 F.3d 940, 944–45 (9th Cir. 2020) (concluding that this waiver can only waive the categories of offenses specified in INA § 237(a)(7)); *Rodriguez-Benitez v. Holder*, 763 F.3d 404, 407–08 (5th Cir. 2014) (same).

<sup>74</sup> INA §§ 237(a)(7), 240A(b)(5).

<sup>75</sup> INA § 237(a)(7)(B).



**Example:** Arturo is from Peru and came to the United States on a student visa five years ago, overstayed, and last year married Carlos, a U.S. citizen. Carlos became abusive and struck Arturo. Arturo struck Carlos back, but Carlos was not seriously injured. Both spouses were arrested and both pled guilty to domestic violence, with Arturo subsequently placed in removal proceedings. His conviction for domestic violence will make him ineligible for VAWA cancellation unless he qualifies for the waiver under INA § 237(a)(7). Since Arturo was not the primary aggressor in the relationship, and was striking back in self-defense, he appears to meet both requirements for the waiver. He actually meets the second requirement through two alternative means, as his offense was both an action in self-defense *and* there was a connection between the offense and the abuse, with Carlos not suffering serious bodily injury. Either means of meeting the second requirement would suffice.<sup>76</sup>

## F. Good moral character

A VAWA cancellation applicant must demonstrate that they have been a person of good moral character for three years preceding the date of the application, in contrast to the ten-year period necessary for non-LPR cancellation.<sup>77</sup> As with non-LPR cancellation, VAWA cancellation is considered a “continuing” application and the good moral character period accrues until the entry of a final administrative order.<sup>78</sup> The good moral character requirement derives from INA § 101(f), which lists specific conduct that will bar good moral character if committed during the relevant period, and also contains a “catch-all” provision that allows IJs to go beyond the specified bars to find a lack of good moral character for other reasons. An additional important difference from non-LPR cancellation is that the VAWA provision allows an applicant to overcome what would otherwise be an INA § 101(f) good moral character bar if the relevant act or conviction is “connected to” the abuse and does not give rise to one of the separate conduct or crime-based VAWA cancellation ineligibility bars.<sup>79</sup> The Third Circuit, in a 2020 decision, concluded that the term “connected to” was unambiguous and means having a causal or logical relationship.<sup>80</sup> The Third Circuit reasoned that this broad definition of “connected to” furthered the VAWA cancellation statute’s purpose to “ameliorate the impact of harsh provisions of immigration law on abused women.”<sup>81</sup>

The BIA has issued one published case that discusses good moral character in the VAWA cancellation context, *Matter of M-L-M-A*.<sup>82</sup> In that case, the BIA concluded that the respondent’s filing of a fraudulent asylum application, and her conflicting testimony at her individual hearing

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<sup>76</sup> Note that if Carlos’ conviction in the example is also a “crime involving moral turpitude” (CIMT), he may be barred from VAWA cancellation, unless the CIMT does not trigger deportability.

<sup>77</sup> INA § 240A(b)(2)(A)(iii).

<sup>78</sup> *Matter of M-L-M-A*, 26 I&N Dec. 360, 363 (BIA 2014).

<sup>79</sup> INA § 240A(b)(2)(C).

<sup>80</sup> *Da Silva v. Att’y Gen.*, 948 F.3d 629, 638 (3d Cir. 2020). The Third Circuit rejected the BIA’s suggestion that the exception only applied if the abuser asked, encouraged, compelled, or coerced the applicant to commit the relevant offense. *Id.* at 633.

<sup>81</sup> *Id.* at 636.

<sup>82</sup> 26 I&N Dec. 360 (BIA 2014).

about with whom she entered the United States (which had caused the IJ to find her not credible) were insufficient to support a finding that she lacked good moral character.<sup>83</sup>

**PRACTICE TIP:** Practitioners should always present favorable evidence supporting a good moral character finding. Where an INA § 101(f) bar is potentially in play, if facts allow, practitioners should argue that the bar has not been triggered, that the abuse-related exception applies, and/or seek continuances so that the individual hearing is scheduled for a date more than three years from the date of the conduct in question.

**EXAMPLE:** Tatiana, from Brazil, is in removal proceedings and eligible for VAWA cancellation except for the good moral character bar under INA § 101(f) for having spent 180 days or more in prison during the three-year period. She was recently released after spending eight months in jail for an assault conviction. Tatiana’s U.S. citizen husband subjected her to emotional and physical abuse throughout their marriage. He also cheated on her with various women during their marriage, including a coworker, Linda. After Tatiana discovered sexually explicit text messages between her husband and Linda, she confronted Linda and her husband about the affair. When Linda told Tatiana that the affair would continue, Tatiana exploded and hit Linda on the nose. This incident led to Tatiana’s assault conviction and subsequent eight months’ imprisonment during the three-year good moral character period. Tatiana may be able to overcome the INA § 101(f) good moral character bar by showing that her conviction and related custody time for assaulting Linda was “connected to” her husband’s extreme cruelty, which included his ongoing infidelity to her.<sup>84</sup>

## G. Discretion

As with LPR and non-LPR cancellation, a VAWA cancellation applicant must establish that they merit a favorable exercise of discretion. In exercising discretion, the agency “weigh[s] the favorable and adverse factors presented to decide whether on balance, the totality of the evidence ... indicates that the respondent has adequately demonstrated that he [or she] warrants a favorable exercise of discretion.”<sup>85</sup> The BIA has recognized that the “factors that we may consider to be favorable or adverse to a respondent’s application with respect to one form of discretionary relief from removal may differ from those we consider with respect to another form of relief.”<sup>86</sup> As such, the discretion analysis is subjective and fact-specific.

The BIA has issued two precedent decisions that address discretion in VAWA cancellation cases. In *Matter of M-L-M-A-*, the BIA noted that a respondent’s divorce from an abusive spouse

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<sup>83</sup> *Id.* at 363.

<sup>84</sup> The facts of this example are derived from *Da Silva v. Att’y Gen.*, 948 F.3d at 638, where the First Circuit held that the petitioner’s assault convictions “are connected to the extreme cruelty she suffered,” given that the petitioner assaulted her abusive husband’s girlfriend while confronting her husband and the girlfriend about their affair.

<sup>85</sup> *Matter of A-M-*, 25 I&N Dec. 66, 76 (BIA 2009) (internal quotations omitted).

<sup>86</sup> *Id.* at 77; see also *Mencia-Medina v. Garland*, 6 F.4th 846, 849–50 (8th Cir. 2021) (finding that the BIA adequately considered respondent’s history as a domestic abuse survivor in its discretionary analysis, where it “expressly considered—as one of several ‘significant favorable factors’—that Mencia-Medina ‘was mistreated by family members and others when he was a child, causing him to suffer from psychological problems.’”).

and subsequent long-term relationship with another man were relevant negative discretionary factors in VAWA cancellation cases, since “a purpose of VAWA relief is to empower [noncitizens] to leave abusive relationships.”<sup>87</sup> However, the BIA concluded that the respondent’s positive equities—including long-time U.S. residence, family ties with six U.S. citizen children and LPR parents, the hardship she and her family would experience if she were removed, lack of criminal record, and the fact that she had never worked without authorization—outweighed the negative factors. Additional negative factors that were overcome by the positive equities in *M-L-M-A* included the respondent’s filing of a fraudulent asylum application more than a decade earlier, and that the IJ had found her not credible due to conflicting testimony.<sup>88</sup>

In contrast, in *Matter of A-M*, the BIA reversed the IJ’s positive discretionary determination. In that case, the BIA considered as negative discretionary factors the fact that the respondent was applying for VAWA related relief twice based on the same abusive relationship—she had successfully obtained LPR status as a VAWA self-petitioner, divorced her abusive husband years earlier, was no longer in an abusive relationship, and had since re-married. She was subsequently placed in removal proceedings as a “noncitizen smuggler” for attempting to bring two minor children into the United States who were not her own, as a “favor” to their mother. The BIA noted that she had “already relied on her relationship with her ex-husband to adjust her status as a VAWA self-petitioner.”<sup>89</sup> The BIA reasoned that these factors “weigh[ed] heavily against granting” VAWA cancellation given that the statute’s underlying purpose was to enable noncitizens to leave their abusive spouses “who may use the threat of deportation or sponsorship for an immigration benefit to maintain control over them.”<sup>90</sup> These negative factors—coupled with a 2003 driving under the influence conviction, failure to provide proof of income tax filing, and the smuggling—outweighed the “substantial” positive factors in the case, which included the respondent’s long-time U.S. residence, children with lawful status, employment as a housekeeper, the hardship to her U.S. citizen son who suffered from a medical condition, and the remorse she expressed about her smuggling-related removability.

**Practice Tip:** In arguing that VAWA cancellation applicant clients merit favorable discretion, practitioners should highlight how the facts in their case warrant a favorable discretion given the purpose of the VAWA statute and seek to analogize to *M-L-M-A* and distinguish *A-M*.

### III. VAWA Evidentiary Standard

Like VAWA self-petitions, VAWA cancellation applications benefit from a more generous evidentiary standard than other forms of relief from removal. VAWA cancellation applicants may submit “any credible evidence” relevant to the application and this includes testimony.<sup>91</sup> What evidence is credible and how much weight to afford the evidence is within the IJ’s discretion.<sup>92</sup>

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<sup>87</sup> 26 I&N Dec. 360, 364 (BIA 2014).

<sup>88</sup> *Id.*

<sup>89</sup> *Matter of A-M*, 25 I&N Dec. at 77.

<sup>90</sup> *Id.*

<sup>91</sup> INA § 240A(b)(2)(D).

<sup>92</sup> *Id.*

While “more weight will be given to primary evidence” in making a credibility determination, “other forms of documentary evidence may be submitted, including evidence ... not ... identified in the Service’s regulations” in recognition of the vulnerable state of VAWA applicants generally.<sup>93</sup> The EOIR-42B instructions provide helpful insight into possible evidence in cancellation cases.<sup>94</sup> The credible evidence standard applies to each element of VAWA cancellation and is applied on a case-by-case basis.

#### **A. Evidence of the abuser’s U.S. citizenship or LPR status**

VAWA cancellation specifically protects certain family members of U.S. citizens or LPRs and therefore requires the applicant to submit evidence of the abuser’s U.S. citizenship or LPR status. To prove the abuser’s U.S. citizenship or LPR status, practitioners may look to the USCIS Policy Manual for suggestions on primary evidence of the abuser’s U.S. citizenship or LPR status, such as the following:

- A birth certificate original or copy issued by a civil authority that establishes the abuser’s birth in the United States;
- A copy of an unexpired U.S. passport issued initially for a full ten-year period to the abuser over the age of eighteen at the time of issuance;
- A copy of an unexpired U.S. passport issued initially for a full five-year period to the abuser under the age of eighteen at the time of issuance;
- A statement executed by a U.S. consular officer certifying the abuser to be a U.S. citizen and the bearer of a currently valid U.S. passport;
- The abuser’s Certificate of Naturalization or Certificate of Citizenship or a copy of either document;
- The abuser’s Report of Birth Abroad of a Citizen of the United States (Department of State Form FS-240), or
- A copy of the abuser’s Permanent Resident Card (Form I-551).<sup>95</sup>

Some applicants may find it difficult to provide primary evidence of the abuser’s U.S. citizenship or LPR status because the abuser may have withheld these documents or the relevant agency may refuse to provide this documentation without the abuser’s consent. Practitioners should therefore rely on the generous “any credible evidence” standard to present secondary evidence for this requirement. According to the USCIS Policy Manual, secondary evidence of U.S. citizenship status includes a receipt or approval notice of a “Petition for Alien Relative” (Form I-130) filed by the abuser, the abuser’s A-Number with a copy of an appointment notice for a naturalization oath ceremony, or information on a marriage license or certificate showing the abuser’s birth in the

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<sup>93</sup> 8 C.F.R. § 204.1(f)(1). For more on the credible evidence standard in the VAWA self-petition context, see INS, “*Extreme Hardship*” and *Documentary Requirements Involving Battered Spouses and Children* (Aug. 16, 1998), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Gov-DOJMemoVirtue-ExtremeHardship-08.16.98.pdf>.

<sup>94</sup> See Instructions, EOIR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents (July 2015), <https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir42b.pdf>.

<sup>95</sup> 3 USCIS-PM D.2(B)(1).

United States.<sup>96</sup> As examples of secondary evidence of LPR status, the USCIS Policy Manual lists a copy of the pages of the abuser’s passport with visas and entry stamps showing their name and immigration status or the abuser’s A-Number with verification of status.<sup>97</sup>

VAWA cancellation applicants who lack access to primary and secondary evidence of the abuser’s U.S. citizenship or LPR status may also consider strategies available to them through ICE Office of the Principal Legal Advisor (OPLA), the prosecutors who represent DHS in removal proceedings. For example, practitioners could ask ICE OPLA to provide proof of the abuser’s status or stipulate to the abuser’s status. Indeed, the VAWA regulations allow USCIS to assist applicants in verifying the abuser’s status through a search of USCIS records.<sup>98</sup> Similarly, practitioners may ask ICE OPLA to conduct the search or to ask USCIS to conduct this search citing the VAWA regulations and their applicability to removal proceedings.

## **B. Evidence of battery or extreme cruelty**

To prove battery or extreme cruelty through any credible evidence, practitioners should remember that domestic abuse covers a broad array of activity, including physical, sexual, and psychological attacks, as well as economic coercion against the applicant and violence against another person, animal, or thing if it can be established that the act was deliberately made to perpetrate extreme cruelty against the applicant.<sup>99</sup> While the EOIR-42B application states that the battery or extreme cruelty should have occurred in the United States, the INA does not specify that the battery or extreme cruelty must have occurred in any particular place. VAWA cancellation applicants should therefore consider including evidence of battery or extreme cruelty that occurred within the United States and, where relevant, abroad.<sup>100</sup> See **Part II, Section B**.

Before gathering all the potential evidence of battery or extreme cruelty, practitioners should ensure that survivors of violence or cruelty understand that what they have endured qualifies as battery or extreme cruelty. Often, survivors see this treatment as common in their home country or because it is part of a longtime, normalized pattern. However, battery or extreme cruelty facts and patterns will become apparent to both the practitioner and the survivor if practitioners take the time to learn the whole story and ask about all forms of contact between the survivor client (or the client’s abused child) and the abuser. The domestic abuse “power and control” wheel developed by experts is a helpful tool, both to use in connection with evidence of the types of past abuse suffered by the applicant, and to explain the broad scope of domestic abuse to the immigration court.<sup>101</sup> Practitioners should consider starting their interviews with broader, open-ended questions and ending with narrower questions to try to capture as many facts as possible and draw connections between common treatment or normalized behavior and battery or extreme cruelty. An example of a broad, open-ended question is “How often did the two of you go on a date?” and an example of a narrow question on this topic is “Did he ever accuse you of flirting with others

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> 8 C.F.R. §§ 103.2(b)(17)(ii), 204.1(g)(3).

<sup>99</sup> 3 USCIS-PM D.2(E).

<sup>100</sup> INA § 240A(b)(2)(A)(i).

<sup>101</sup> Domestic Abuse Intervention Programs, *The Duluth Model: Wheel Information Center*, <https://www.theduluthmodel.org/wheels/>.

when you were out on dates?” Ultimately, practitioners should consider the following examples of extreme cruelty in every VAWA cancellation case:

- Social isolation of the applicant;
- Unfounded accusations of infidelity;
- Incessantly calling, writing, or contacting;
- Interrogating friends and family members;
- Stalking;
- Making threats against the applicant and the applicant’s loved ones, including pets;
- Economic abuse (*e.g.*, not allowing the applicant to get a job or controlling all money in the family);
- Using threats relating to a child or pet to coerce or blackmail; and
- Degrading comments.

Once the practitioner and the VAWA cancellation applicant understand the full scope of the battery or extreme cruelty, they can work as a team to gather the pertinent evidence. The most important credible evidence of battery or extreme cruelty is the applicant’s declaration and testimony, but it is also important to corroborate this credible evidence as much as possible. The VAWA self-petition regulations provide helpful examples of such evidence, including in a non-exhaustive list: “reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel.”<sup>102</sup> Aside from these examples, practitioners should consider civil protection orders, medical records of injuries stemming from the abuse, intake forms from domestic violence organizations or sexual assault shelters, letters from counselors, Child Protective Services reports, photos of the injuries, torn clothing, or destroyed property, transcripts from 911 calls, psychological evaluations, email and social media threats, and affidavits from neighbors, friends, or family who witnessed the abuse.

### **C. Evidence of hardship**

To prove extreme hardship, VAWA cancellation applicants should attempt to provide evidence of the suggested enumerated factors under 8 C.F.R. § 1240.58(c), which discusses extreme hardship factors in the VAWA cancellation of removal context. Because VAWA cancellation is the post-IIRIRA equivalent of VAWA suspension of deportation, 8 C.F.R. § 1240.20(c) directs that extreme hardship standard in VAWA cancellation claims is governed by 8 C.F.R. § 1240.58. A legacy INS memo on VAWA self-petitions provides additional insight into hardship factors and lists linguistic or cultural factors that make securing employment in the country of return difficult, as well as other economic factors in the United States or abroad.<sup>103</sup>

Practitioners should assist VAWA cancellation applicants in presenting evidence of, and arguing, all applicable factors, given that the hardship analysis is a case-by-case determination based on the totality of the circumstances.<sup>104</sup> To distinguish evidence of hardship from evidence of

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<sup>102</sup> 8 C.F.R. §§ 204.2(c)(2)(iv), 204.2(e)(2)(iv).

<sup>103</sup> See INS, “*Extreme Hardship*” and *Documentary Requirements Involving Battered Spouses and Children* (August 16, 1998), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Gov-DOJMemoVirtue-ExtremeHardship-08.16.98.pdf>.

<sup>104</sup> 8 C.F.R. § 1240.58(a).

battery and extreme cruelty, practitioners should ensure that the evidence of hardship focuses on the aftermath and impact of the abuse as opposed to seeking to document that the battery and extreme cruelty occurred. Beyond the evidence of hardship resulting from the battery or extreme cruelty, practitioners should also include evidence of general hardship such as family ties, health issues, and financial instability. Practitioners should always include evidence of hardship to the applicant even when they can also demonstrate hardship to a child and/or parent. Including all possible evidence of hardship will create a persuasive record, especially where the applicant's child turns twenty-one or marries and thus their hardship can no longer be considered. The IJ should assess the evidence of hardship in the aggregate.<sup>105</sup>

Evidence of extreme hardship might include declarations, letters from the applicant's children's teachers regarding the "Americanization" of the children, medical records of the abuse or relating to the health of the applicant or their children, country condition reports relating to the likely financial, employment, and societal difficulties the applicant or their children might face in the home country, court documents such as orders for protection, police reports, and other relevant credible evidence.<sup>106</sup> To the extent that the applicant argues that they could not obtain necessary treatment for mental health conditions in the country of return, they should provide evidence about the lack of adequate mental health treatment in that country.<sup>107</sup> Ultimately, VAWA cancellation applicants and their counsel should think creatively and holistically about what evidence to submit.

The following chart sets out common cancellation hardship factors and provides a list of sample evidence that may be gathered as proof for each factor:

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<sup>105</sup> When assessing hardship, be it extreme or exceptional and extremely unusual, IJs must look at the totality of the circumstances. *See* 8 C.F.R. § 1240.58(a); *see also Matter of Recinas*, 23 I&N Dec. 467, 472 (BIA 2002) ("Part of that [hardship] analysis requires the assessment of hardship factors in their totality, often termed a 'cumulative' analysis."); *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) ("In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation, e.g., economic detriment due to loss of a job or efforts ordinarily required in relocating or adjusting to life in the native country").

<sup>106</sup> *See* 8 C.F.R. § 204.2(c)(1)(vi) (describing forms of evidence for showing extreme hardship in the context of VAWA self-petitions).

<sup>107</sup> *See, e.g., Simental-Galarza v. Barr*, 946 F.3d 380, 382–83 (7th Cir. 2020) (BIA found no extreme hardship despite evidence of applicant's mental health diagnoses, social worker's recommendation that he "continue therapy in a stable, supportive environment," and sister's speculation that "Mexico did not have the mental health resources that are available here," given that the applicant did not offer evidence that they could not receive mental health treatment in Mexico); *see also Matter of J-J-G-*, 27 I&N Dec. 808, 811 (BIA 2020) (concluding, in context of non-LPR cancellation of removal, that where hardship claim is based on qualifying relative's health condition and that relative is accompanying the applicant to the country of removal, the applicant must demonstrate that "adequate medical care for the claimed condition is not reasonably available in that country").

Cancellation Hardship Factors	Potential Evidence
<p>The nature and extent of the physical or psychological consequences of abuse.</p>	<ul style="list-style-type: none"> <li>• A mental health evaluation as well as the applicant’s declaration and testimony discussing the impact of the abuse and the mental health effects of relocating to the country of return given the past abuse.</li> <li>• Photos and hospital records documenting the impact of the injuries.</li> <li>• Declarations from those with personal knowledge.</li> </ul>
<p>The effect of loss of access to the United States courts and criminal justice system, including, but not limited to: The ability to obtain and enforce orders of protection,<sup>108</sup> Criminal investigations, and Prosecution or court orders regarding child support, maintenance, child custody,<sup>109</sup> and visitations.</p>	<ul style="list-style-type: none"> <li>• Declaration from a country conditions expert discussing the criminal justice system in the country of return.</li> <li>• Reports and articles on the reliability of the criminal justice system in the country of return.</li> </ul>
<p>The likelihood that the abuser’s family, friends, or others acting on behalf of the abuser in the country of return would physically or psychologically harm the applicant or the applicant’s child(ren).</p>	<ul style="list-style-type: none"> <li>• The applicant’s declaration and testimony discussing the location of the abuser’s family, friends, or others who may harm the applicant on behalf of the abuser.</li> <li>• Declarations from the applicant’s family and friends in the country of return who have personal knowledge of the existence, location, and behavior of the abuser’s family who reside in the country of return.</li> <li>• Articles documenting any criminal activity by the abuser’s family, friends, or others who may act on behalf of the abuser.</li> </ul>

<sup>108</sup> A protection order is of little use abroad if the abuser travels back and forth to the victim’s homeland. *See, e.g.,* UNICEF Child Protection Section, *Behind Closed Doors: The Impact of Domestic Violence on Children* (2006), <https://www.acesdv.org/wp-content/uploads/2014/06/BehindClosedDoors.pdf>.

<sup>109</sup> Child custody disputes and protection orders are compelling hardship factors. A grant of custody is meaningless if the parent is deported; the abusive parent would then be free to reopen the custody decision without challenge. *See* Gail Pendleton & Ann Block, *Applications for Immigration Status Under the Violence Against Women Act*, in *Immigration and Naturalization Law Handbook* 436, 457 (AILA 2001–02 ed.).



Cancellation Hardship Factors	Potential Evidence
<p>The applicant’s needs or the needs of the applicant’s child(ren) for social, medical, mental health, or other supportive services unavailable or not reasonably accessible in the country of return</p>	<ul style="list-style-type: none"> <li>• Declaration from a country conditions expert or a medical health expert discussing the seriousness of the qualifying relative’s medical condition and the unavailability of appropriate care in the country of return.<sup>110</sup></li> <li>• Reports and articles on the unavailability of social, medical, mental health or other supportive services, as well as discrimination and/or social isolation suffered by domestic violence survivors.</li> </ul>
<p>The existence of laws and social practices in the country of return that would punish the applicant or the applicant’s child(ren) because they have been victims of domestic violence or have taken steps to leave an abusive household.</p>	

**D. Evidence of good moral character**

Proving good moral character will often require showing or successfully arguing that the VAWA cancellation applicant does not present any of the bars listed under INA § 101(f). However, as noted above in **Part II.F**, practitioners should always present favorable evidence supporting a good moral character finding.

Favorable evidence supporting a good moral character finding could include:

- Notarized affidavits and other letters from friends, community members, children’s teachers, clergy, employer(s), etc.;
- Awards or certificates of appreciation;
- Proof of volunteer work;
- Proof of donations to charity;
- Academic record, if enrolled in school; and
- Photos with family and engaging with the community.

What other types of favorable evidence exists will depend on the particular client’s life. Aside from this favorable evidence, practitioners should also ensure that client has a clean social media

<sup>110</sup> See *Matter of J-J-G*, 27 I&N Dec. 808 (BIA 2020).

presence and that any profile or account activity will not undermine a good moral character finding.

Note that favorable evidence for good moral character will often overlap with evidence that the VAWA cancellation applicant merits a favorable exercise of discretion.

#### **IV. Procedural Issues and Strategies in VAWA Cancellation Cases**

VAWA cancellation cases require navigating procedural issues and devising strategies that will safeguard the client's interests.

First, practitioners should assist VAWA cancellation clients to pursue both VAWA cancellation and a VAWA self-petition simultaneously, if eligible, as well as adjustment of status as soon as the applicant becomes eligible.<sup>111</sup> It is generally advantageous for the client to pursue both paths to permanent residency, if possible. However, for clients pursuing both paths to permanent residency, it is important to know what agency has jurisdiction over each petition or application. USCIS has sole jurisdiction over the VAWA self-petitions (Form I-360), and while removal proceedings are pending, the IJ has sole jurisdiction over an adjustment of status application, except in the case of "arriving aliens" as would be indicated on the NTA.<sup>112</sup> VAWA cancellation applicants pursuing a VAWA self-petition simultaneously who are "immediate relatives,"<sup>113</sup> may file for adjustment of status immediately after filing a VAWA self-petition with USCIS and receiving a receipt notice. In contrast, VAWA cancellation applicants pursuing a VAWA self-petition as the unmarried child or spouse of an LPR are not "immediate relatives" and thus must wait until their second preference (F2A) priority dates are "current" in order to apply to adjust status. IJs should grant continuances of proceedings<sup>114</sup> or administrative closure<sup>115</sup> while the VAWA self-petition is pending, and some IJs will terminate removal proceedings based on a receipt notice and proof of a prima facie case for VAWA self-petition and VAWA-based adjustment eligibility.<sup>116</sup> If USCIS approves the self-petition,<sup>117</sup> the applicant may seek a joint motion from ICE OPLA to dismiss the removal proceedings or request termination pursuant to *Matter of Coronado Acevedo*, 28 I&N Dec. 648 (A.G. 2022), thus

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<sup>111</sup> For more on this process, see ILRC, *The VAWA Manual* (8th ed. June 2020).

<sup>112</sup> See 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1).

<sup>113</sup> "Immediate relatives" include parents, spouses, or unmarried children under 21 years of age of U.S. citizens. However, for those eligible for both a VAWA I-360 and VAWA cancellation, an immediate relative would include a spouse or child but not a parent because there is no possible parent relationship for VAWA cancellation.

<sup>114</sup> For continuances while awaiting visa petition or other "collateral" relief, see *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009) (setting out factors in deciding whether a continuance is appropriate). *But see Matter of L-A-B-R*, 27 I&N Dec. 405 (A.G. 2018).

<sup>115</sup> See *Matter of Cruz-Valdez*, 28 I&N 326 (A.G. 2021) (discussing matters that are appropriate for administrative closure). See also EOIR, *Administrative Closure 22-03: Provide guidance to adjudicators on administrative closure in light of Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021) Nov. 22, 2021), <https://www.justice.gov/eoir/file/oppm17-04/download>.

However, EOIR appears to take the position that administrative closure is generally not available in the jurisdiction of the Sixth Circuit, due to a 2020 decision, *Hernandez-Serrano v. Barr*, 981 F.3d 459 (6th Cir. 2020). Note that this administrative closure "pause" in removal proceedings is not the same as dismissal or termination. If a case is administratively closed, the individual is still in removal proceedings, which eventually must be dismissed, terminated, or otherwise resolved.

<sup>116</sup> See *Matter of Coronado Acevedo*, 28 I&N Dec. 648 (A.G. 2022).

<sup>117</sup> Note that the decision to approve a VAWA self-petition is not discretionary in that if USCIS determines that the noncitizen meets all the eligibility requirements for the self-petition, USCIS will approve the self-petition. See 3 USCIS-PM D.5(C)(1). However, USCIS does have the discretion to approve or deny VAWA-based adjustment of status.

shifting jurisdiction over the adjustment application to USCIS. Alternatively, once the priority date for the VAWA self-petition becomes current, the applicant could pursue adjustment before the IJ.

One important reason to pursue a VAWA self-petition and possibly adjustment of status simultaneously with VAWA cancellation is that there is no provision in the VAWA cancellation statute for derivative beneficiaries. Even when a parent is applying as the parent of an abused child, the child cannot be included in the parent's cancellation application. The abused child must, therefore, apply separately for VAWA cancellation and should request that the court consolidate the cases.<sup>118</sup> Consolidation of the cases will allow the IJ to have a holistic and therefore more sympathetic understanding of the family's situation and will promote administrative economy. Alternatively, if the parent is eligible for a VAWA self-petition, the parent may ask the IJ for a continuance to allow the time to prepare and file a VAWA self-petition with USCIS that would include the child as a derivative, assuming the child meets the "child" definition found at INA § 101(b)(1), since only children who meet this definition can be included as derivatives on a self-petition.

Second, practitioners should prepare clients to testify credibly and, where the client's credibility is in doubt, present witnesses who can bolster the client's credibility. For example, in *Lopez-Umanzor v. Gonzales*, the Ninth Circuit reviewed the IJ's assessment of the VAWA cancellation applicant's credibility against the credibility of a detective and an absent informant.<sup>119</sup> Counsel for the petitioner offered several expert witnesses on the subject of domestic violence for purposes of establishing the petitioner's credibility.<sup>120</sup> However, the IJ denied the expert witnesses the opportunity to testify and found the petitioner not credible.<sup>121</sup> Because the IJ engaged in "prejudgment, personal speculation, bias, and conjecture" and refused to allow the petitioner's expert witness to testify, the Ninth Circuit held that the IJ had violated the petitioner's due process rights and remanded the case to a new IJ for a new hearing.<sup>122</sup> Similarly, in addition to conducting direct examination moot sessions with the VAWA cancellation client, practitioners should be ready to offer witnesses who can assist the IJ with their credibility assessment, if the IJ signals that they are doubting the VAWA cancellation client's credibility. Furthermore, practitioners should preserve the record for appeal by objecting to the IJ's refusal to hear from a witness and presenting offers of proof as needed.<sup>123</sup>

Third, VAWA cancellation applicants are eligible for a work permit, or "employment authorization document" (EAD), once the EOIR-42B application for cancellation is filed with the immigration court. Applicants may file the EOIR-42B along with prima facie evidence of eligibility before or at the master calendar hearing. Practitioners should ask the immigration court to stamp the first page of their copy of the EOIR-42B. With this stamped copy in hand, practitioners may file Form I-765, Application for Employment Authorization, under category (c)(10) with USCIS and

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<sup>118</sup> If the IJ grants the parent VAWA cancellation, the child may then seek parole, as discussed in Part V, Section C.4.

<sup>119</sup> 405 F.3d 1049 (9th Cir. 2005).

<sup>120</sup> *Id.* at 1056.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1056–57, 1059.

<sup>123</sup> *Id.* at 1051, 1058. An offer of proof tells the court what the evidence would have been, had it been allowed in. *See* Fed. R. Evid. 103(a)(2); 8 C.F.R. § 1240.9 (stating that proffers are part of the record).

include this stamped copy as evidence that the Form EOIR-42B application is pending. Note that if removal proceedings are terminated or dismissed, the EOIR-42B will no longer be pending. Therefore, practitioners should counsel their clients on this should OPLA offer joint dismissal of proceedings or move for dismissal unilaterally as an exercise of prosecutorial discretion.<sup>124</sup>

Fourth, the \$100 filing fee for the EOIR-42B must be paid to USCIS. However, a low income or detained applicant may seek a fee waiver from the IJ. The fee waiver request should be in writing and include a proposed order for the IJ to complete and sign. If the IJ grants the fee waiver, or the applicant will pay the fee, the practitioner should send either the fee or the IJ's order granting the fee waiver with a copy of the Form EOIR-42B application to USCIS pursuant to the "Instructions for Submitting Certain Applications in Immigration Court and for Providing Biometric and Biographic Information to U.S. Citizenship and Immigration Services."<sup>125</sup> The \$100 application fee may be waived and practitioners who have a self-petition on file with USCIS and have already paid the biometrics fee should ask the IJ to waive the biometrics fee.

## **V. After the Immigration Judge Decision**

How the IJ rules on the VAWA cancellation application will determine the steps required following that decision. However, whether the IJ denies the VAWA cancellation application, or reserves a decision with intent to grant, the practitioner should be prepared for long-term representation given the VAWA cancellation framework.

### **A. What to do if the immigration judge denies the application?**

If the IJ denies the VAWA cancellation application, the applicant must decide whether to waive or reserve appeal to the BIA. Generally, if the applicant is unsure whether to appeal, they should reserve appeal to preserve this right and to benefit from the automatic stay of removal during the thirty-day appeal period. If they waive appeal, the waiver will be enforceable if the applicant did so knowingly and voluntarily.<sup>126</sup>

If the applicant reserves appeal, a notice of appeal must be filed no later than thirty calendar days after the IJ's oral decision or the mailing of the IJ's written decision.<sup>127</sup> The applicant must file Form EOIR-26, Notice of Appeal from a Decision of an Immigration Judge, together with

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<sup>124</sup> NIPNLG created a template opposition to a DHS unilateral motion to dismiss that is available to its members.

<sup>125</sup> See USCIS, *Instructions for Submitting Certain Applications in Immigration Court and for Providing Biometric and Biographic Information to U.S. Citizenship and Immigration Services*, <https://www.ice.gov/doclib/about/offices/opla/preOrderInstructionsEOIR.pdf>.

<sup>126</sup> See *Matter of Rodriguez-Diaz*, 22 I&N Dec. 1320, 1323 (BIA 2000) (holding that the right to appeal was not validly waived when the IJ asked pro se respondent if he accepted the order as "final" without adequate explanation).

<sup>127</sup> 8 C.F.R. §§ 1003.3, 1240.15 (2020). On December 16, 2020, the Department of Justice published a final rule titled "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," 85 Fed. Reg. 81,588 (Dec. 16, 2020) (amending 8 C.F.R. §§ 1003, 1240), which changed several aspects of the administrative appeal process. As of the publishing of this practice advisory, this final rule is enjoined. *Centro Legal de la Raza v. EOIR*, No. 21-cv-00463-SI, 2021 WL 916804 (N.D. Cal. Mar. 10, 2021); *Cath. Legal Immigration Network, Inc. v. EOIR*, Civil Case No. 21-00094 (RJL) (D.D.C. Apr. 3, 2021), ECF No. 46. For a comprehensive chart on the state of Trump administration regulations, see "OIL's Currently Effective Regulations Handout," [https://nipnl.org/PDFs/practitioners/practice\\_advisories/gen/2023\\_30Jan-OIL-currently-effective-regs.pdf](https://nipnl.org/PDFs/practitioners/practice_advisories/gen/2023_30Jan-OIL-currently-effective-regs.pdf).

the filing fee or a Form EOIR-26A, Request for Fee Waiver, with the BIA in Falls Church, VA.<sup>128</sup> The filing fee for an appeal from a decision of an IJ is \$110 as of this writing,<sup>129</sup> and may be paid online<sup>130</sup> or by check or money order payable to the “United States Department of Justice.”<sup>131</sup> The Notice to Appeal and fee or fee waiver must be *received* by the BIA before the thirty-day deadline.<sup>132</sup> If the BIA denies the fee waiver request, the BIA will reject the appeal and provide the applicant fifteen days to refile the rejected appeal with the fee or new fee waiver request.<sup>133</sup> The accepted filing of an appeal from an IJ decision in removal proceedings automatically stays the IJ’s decision.<sup>134</sup>

If the BIA eventually denies the appeal, the applicant may file a petition for review with the U.S. court of appeals with jurisdiction over the immigration court that issued the decision.<sup>135</sup> Practitioners should rely on *Guerrero-Lasprilla v. Barr*, to establish the circuit court’s jurisdiction over cancellation cases notwithstanding § 1252(a)(2)(B), which bars review over certain discretionary decisions.<sup>136</sup> In *Guerrero-Lasprilla*, the Supreme Court found that 8 U.S.C. § 1252(a)(2)(D) preserved review of “questions of law” and that “questions of law” included mixed questions of law and fact. Mixed questions of law and fact involve review of the application of the law to the facts. Because a common question in cancellation cases is if the IJ applied the hardship standard correctly to the facts of the case, practitioners may seek judicial review of a cancellation case by relying on *Guerrero-Lasprilla*.<sup>137</sup> Although in *Patel v. Garland* the Supreme Court barred federal review of IJ factual findings in applications for relief from removal, such as cancellation of removal, mixed questions of law and fact remain justiciable.<sup>138</sup> Practitioners should take care to present claims in petitions for review as mixed questions of law and fact or purely legal.<sup>139</sup>

If the applicant is sure that they do not want to reserve appeal, they can either accept an order of removal or request post-hearing voluntary departure. To obtain post-hearing voluntary departure, the applicant must qualify under INA § 240B(b) and should comply with the voluntary

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<sup>128</sup> These forms are available online at [www.justice.gov/eoir/list-downloadable-eoir-forms](http://www.justice.gov/eoir/list-downloadable-eoir-forms).

<sup>129</sup> 8 C.F.R. §1103.7(b)(1). On December 18, 2020, the Department of Justice published a final rule titled *Executive Office for Immigration Review; Fee Review*, 85 Fed. Reg. 82,750 (Dec. 18, 2020) (amending various sections of 8 C.F.R.), which raised the fees charged by EOIR. A federal court enjoined the fee rule with respect to all filings except motions to reopen or reconsider filed with the IJ, and thus as of the date of this advisory’s publication the BIA appeal filing fee remains \$110. *Cath. Legal Immigration Network, Inc. v. EOIR*, No. 20-03812, 2021 WL 184359 (D.D.C. Jan. 18, 2021). For a comprehensive chart on the state of Trump administration regulations, see “OIL’s Currently Effective Regulations Handout,” [https://nipnl.org/PDFs/practitioners/practice\\_advisories/gen/2023\\_30Jan-OIL-currently-effective-regs.pdf](https://nipnl.org/PDFs/practitioners/practice_advisories/gen/2023_30Jan-OIL-currently-effective-regs.pdf).

<sup>130</sup> EOIR’s payment portal is available at <https://epay.eoir.justice.gov/index>.

<sup>131</sup> 8 C.F.R. § 1003.8(a)(4)(i).

<sup>132</sup> An untimely appeal is subject to summary dismissal. 8 C.F.R. § 1003.1(d)(2)(i)(G) (2020).

<sup>133</sup> 8 C.F.R. § 1003.8(a)(3).

<sup>134</sup> 8 C.F.R. § 1003.6(a).

<sup>135</sup> 8 U.S.C. § 1252(a)(1).

<sup>136</sup> 140 S. Ct. 1062 (2020).

<sup>137</sup> *But see Hernandez-Morales v. Att’y Gen.*, 977 F.3d 247, 249 (3d Cir. 2020) (finding hardship is a discretionary judgment call, not a legal question); *Galeano-Romero v. Barr*, 968 F.3d 1176, 1182-84 (10th Cir. 2020) (coming to the same conclusion).

<sup>138</sup> 142 S. Ct. 1614 (2022).

<sup>139</sup> For further discussion on *Patel v. Garland*, see National Immigration Litigation Alliance, *Judicial Review of ‘Discretionary’ Relief after Patel v. Garland* (July 18, 2022), <https://immigrationlitigation.org/wp-content/uploads/2022/07/Patel-Updated.pdf>.

departure regulations.<sup>140</sup> The IJ may grant voluntary departure at the conclusion of removal proceedings for no more than sixty days and the IJ may impose conditions to ensure the applicant's timely departure from the United States.<sup>141</sup>

## **B. What to do if the client has an order of removal?**

A noncitizen with an order of deportation or an order of removal who is eligible for VAWA cancellation may file a motion to reopen.<sup>142</sup> In recognition of the vulnerabilities of those seeking VAWA protections, the statutory provisions for motions to reopen provide rules that are more generous than the rules for regular motions to reopen for other forms of relief filed under INA § 240(c)(7)(A). There is no deadline at all for motions to reopen exclusion or deportation proceedings (those proceedings commenced before April 1, 1997) to seek VAWA adjustment or suspension. There is a one-year deadline from the date of entry of the final order of removal for a motion to reopen to pursue VAWA cancellation.<sup>143</sup> However, the one-year-filing deadline may be waived if the applicant shows “extraordinary circumstances” or “extreme hardship to his or her child.”<sup>144</sup> This reopening provision applies to both VAWA self-petitioners and VAWA cancellation applicants.<sup>145</sup> A motion to reopen pursuant to these special VAWA provisions must include the cancellation of removal application to be filed with the IJ or a copy of the self-petition that has been or will be filed with USCIS should the IJ reopen the proceedings.<sup>146</sup> Practitioners should also include documentary evidence of eligibility as exhibits to the motion to reopen.<sup>147</sup> To benefit from the VAWA motion to reopen provision, the applicant must be in the United States at the time of filing.<sup>148</sup> An automatic stay of removal applies once the motion is filed and pending a final disposition of the motion, which includes appeals of the motion, so long as the motion establishes that the applicant is a “qualified alien.”<sup>149</sup>

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<sup>140</sup> 8 C.F.R. § 1240.26(c)(1)–(2). They should also prove that they warrant a favorable exercise of discretion based on the factors set forth in *Matter of Gamboa*, 14 I&N Dec. 244 (BIA 1972).

<sup>141</sup> For further discussion on navigating immigration court processes, see ILRC, *Removal Defense: Defending Immigrants in Immigration Court* (2019).

<sup>142</sup> INA § 240(c)(7)(C)(iv), 240(c)(7)(C)(iv)(I).

<sup>143</sup> INA § 240(c)(7)(C)(iv)(III).

<sup>144</sup> *Id.*; see also O-D-, AXXX XXX 254 (BIA July 19, 2017) (unpublished), available for purchase at <http://www.irac.net/unpublished/index> (finding that although the respondent did not file the motion to reopen within one year of the entry of her final order of removal, the respondent had shown extraordinary circumstances that warranted an exercise of the BIA's discretionary authority).

<sup>145</sup> INA § 240(c)(7)(C)(iv)(I)–(II).

<sup>146</sup> INA § 240(c)(7)(C)(iv)(II).

<sup>147</sup> See *Matter of Chen*, 28 I&N Dec. 676 (BIA 2023) (noting that a motion to reopen should establish prima facie eligibility for relief sought).

<sup>148</sup> INA § 240(c)(7)(C)(iv)(IV).

<sup>149</sup> INA § 240(c)(7)(C)(iv). See 8 U.S.C. § 1641(c)(1)(B) for a definition of the term “qualified alien.”

## C. What to do if the immigration judge reserves the decision?

### 1. Cancellation of removal is subject to a numerical cap

Congress limited the number of cancellation applicants who may adjust to LPR status each fiscal year to 4,000 nationwide.<sup>150</sup> VAWA cancellation applicants, along with non-LPR cancellation applicants, are subject to this cap. This low number of applicants for both VAWA cancellation and non-LPR cancellation who may be granted cancellation on a yearly basis has led to long backlogs.<sup>151</sup> Because of the backlog, an IJ who wishes to grant a VAWA cancellation application for a non-detained respondent immediately at the conclusion of the merits hearing generally cannot do so once the annual limitation has been reached, and must instead “reserve” a decision in the case until a cancellation grant number becomes available. However, an IJ does not have to reserve a decision if the respondent is detained. For detained cases, “the [Office of the Chief Immigration Judge] is administering the cap so as to permit detained cases ... to proceed to decision throughout the fiscal year.”<sup>152</sup> If the IJ wishes to deny or pretermite<sup>153</sup> the application, a 2016 EOIR Operating Policies and Procedures Memorandum and regulation that went into effect in 2018 state that IJs are not required to reserve a decision in those circumstances.<sup>154</sup> The regulation allows IJs and the BIA to issue final decisions denying cancellation applications, without restriction, regardless of whether the annual limitation has been reached. Given the backlog, the IJ will need to review the reserved decision potentially several years after the individual merits hearing, and if the applicant is still eligible, may then enter an order granting VAWA cancellation on or after the date when a number becomes available. At that point, the cancellation grant results in LPR status. Thereafter, OPLA should initiate production of the LPR card by forwarding the IJ’s order and the “A file” to USCIS.<sup>155</sup> If OPLA fails to forward the “A file” to USCIS, advocacy with OPLA and with USCIS may be required.

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<sup>150</sup> INA § 240A(e)(1).

<sup>151</sup> Note that when Congress enacted this statutory provision as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the number of IJs was significantly lower than the current number. There were sixty-nine IJs in 1990 and eighty-six IJs in 1994. EOIR; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135 (Oct. 18, 1999) (amending 8 C.F.R. § 3). In 1998, there were 202 IJs. Transactional Records Access Clearinghouse (TRAC), Immigration, *Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow* (June 18, 2009), <http://trac.syr.edu/immigration/reports/208/>. As of the date of publication of this practice advisory, there are approximately 600 IJs nationwide. EOIR, Office of the Chief Immigration Judge (Jan. 19, 2023), <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge#:~:text=OCIJ%20provides%20overall%20program%20direction,adjudications%20centers%20throughout%20the%20Nation>.

<sup>152</sup> EOIR, *Operating Policies and Procedures Memorandum 17-04: Applications for Cancellation of Removal or Suspension of Deportation that are Subject to the Cap* (Dec. 20, 2017), <https://www.justice.gov/eoir/file/oppm17-04/download>.

<sup>153</sup> Pretermination means that an IJ disregards the application without a hearing if the applicant has not established a prima facie claim for relief under the applicable laws and regulations. See *Zhu v. Gonzales*, 218 F. App’x 21, 23 (2d Cir. 2007) (unpublished).

<sup>154</sup> 8 C.F.R. § 1240.21(c); EOIR, *Operating Policies and Procedures Memorandum 17-04: Applications for Cancellation of Removal or Suspension of Deportation that are Subject to the Cap* (Dec. 20, 2017), <https://www.justice.gov/eoir/file/oppm17-04/download>. The rule and OPPM went into effect on January 4, 2018, and apply prospectively. Decisions that were reserved prior to January 4, 2018, will not be impacted.

<sup>155</sup> Practitioners should confer with OPLA to ensure that they have done this or will do this.

## **2. Counsel the client on what activity may jeopardize the immigration judge's reserved decision**

Practitioners should explain to the VAWA applicant the meaning of the IJ reserving a decision and the impact of the numerical backlog on their case. Essentially, while the IJ reserving a decision signals a likely grant of VAWA cancellation, the decision is not final, meaning that the applicant must take care to not jeopardize their VAWA eligibility while waiting for a cancellation grant number to become available. Practitioners should review the VAWA cancellation eligibility criteria orally with the client and provide these criteria in writing. Practitioners should counsel the VAWA applicant against departures from the United States. In cases where hardship to a child was material to an IJ's reserved decision, practitioners should counsel against the child marrying before the IJ has finalized their decision. Practitioners should also explain the type of criminal conduct that would trigger ineligibility and the acts that would result in a denial for lack of good moral character. Practitioners should specifically highlight DUI offenses and the *Matter of Castillo-Perez* decision, especially when it comes to clients who already have a DUI offense on their record.<sup>156</sup> Practitioners should note that if the applicant is convicted of a criminal offense or engages in conduct that renders them ineligible for VAWA cancellation prior to a final decision on the application, OPLA will likely submit a motion to prepermit the pending VAWA cancellation application and, where relevant, file an amended NTA charging inadmissibility or deportability for additional bases related to the new conduct or conviction. Finally, negative conduct, which includes arrests without a conviction, and failing to continue with the positive activities presented to the IJ in support of good moral character and favorable discretion, could imperil a positive discretionary finding. The goal is to assist VAWA cancellation applicants to understand that the IJ's decision is not final and their case remains pending.

In addition, the practitioner has a duty of candor to inform the immigration court if a client's actions result in clear ineligibility for VAWA cancellation. Practitioners should help their VAWA clients understand this duty.

## **3. Establish a communication plan**

Because the numerical cap and immigration court backlog mean that VAWA cancellation applicants will likely remain in legal status limbo for years, practitioners should establish an ongoing communication plan with their clients. A communication plan ensures that the practitioner and client will remain in frequent communication regarding new facts relevant to the case and will avoid difficulties in locating the cancellation applicant in the future regarding the status of their application. Such ongoing communication will help the applicant understand the status of their application in the backlog and reinforce the importance of keeping their legal representative apprised of any changes relevant to VAWA cancellation, as well as their current contact information. Furthermore, a communication plan ensures that the applicant will update the immigration court and DHS of any changes of address.<sup>157</sup>

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<sup>156</sup> For further discussion on *Matter of Castillo-Perez*, please refer to NIPNLG and Catholic Legal Immigration Network, *Practice Pointer: Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019) (Mar. 25, 2020), [https://nipnlg.org/PDFs/practitioners/practice\\_advisories/gen/2020\\_25Mar\\_Castillo-Perez.pdf](https://nipnlg.org/PDFs/practitioners/practice_advisories/gen/2020_25Mar_Castillo-Perez.pdf).

<sup>157</sup> 8 C.F.R. § 1003.15(d)(2).



## D. What to do if the immigration judge approves the application?

### 1. Seek parole benefits for children or parents pursuant to INA § 240A(b)(4)(A)

VAWA cancellation does not allow for derivative beneficiaries, but individuals granted VAWA cancellation may obtain humanitarian parole for their children or parents. Children of successful VAWA cancellation applicants, as well as parents of children granted cancellation, are eligible to receive humanitarian parole under INA § 212(d)(5) beginning on the date when the IJ approves the VAWA cancellation application.<sup>158</sup> A grant of humanitarian parole, which is mandatory under the VAWA cancellation provisions, allows the child or parent to subsequently apply for adjustment of status, once a visa petition is filed by the VAWA cancellation recipient (or another qualifying petitioner) and their visa preference priority date becomes current.<sup>159</sup> While there is no deadline for filing for adjustment, and parole may be extended or renewed, parole may also be revoked if the parent or child granted VAWA cancellation does not exercise “due diligence” in filing a visa petition on behalf of the paroled relative.<sup>160</sup> For paroled parents, the VAWA cancellation recipient would first need to naturalize in order for such a petition to be filed since LPRs cannot file a family petition for a parent.

Adult sons and daughters of individuals granted VAWA cancellation have limited options to legalize their status through their parents. Adult sons and daughters do not qualify for parole under the VAWA cancellation provision, because it refers specifically to the VAWA cancellation grantee’s “child.” However, if the adult son or daughter was abused by a U.S. citizen or LPR parent, they could instead seek placement in removal proceedings per a 1997 legacy INS memo that states that “INS district offices shall promptly issue a Notice to Appear to any [individual] who makes a credible request to be placed in proceedings in order to raise a claim for cancellation of removal under INA § 240A(b)(2).”<sup>161</sup> However, it is important to advise clients of all the risks associated with this strategy—including a potential denial and order of removal—and ensure compliance with ethical duties. Note that while opting for a VAWA self-petition may avoid removal proceedings altogether, the VAWA self-petition process covers only “children” as of the date of filing unless the child qualifies for the up to twenty-five years of age exception as discussed in **Part II, Section A.2**. If the child does qualify for the up to twenty-five years of age exception, practitioners should consider pursuing a VAWA self-petition before pursuing removal proceedings pursuant to the 1997 legacy INS memo.

## VI. Conclusion

VAWA cancellation of removal offers certain noncitizen battered spouses, children, sons, daughters, and parents of abused children an avenue to gain permanent residency in the United

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<sup>158</sup> INA § 240A(b)(4). As discussed in Part V, Section C.1, an IJ’s approval is contingent upon the applicant no longer being subject to the numerical cap.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> INS, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* (May 6, 1997), reprinted in 74 No. 23 *Interpreter Releases* 962 (June 16, 1997).

States. The eligibility requirements for VAWA cancellation differ from other types of cancellation of removal and, while the requirements are generally more lenient than those of other types of cancellation relief, some VAWA cancellation requirements are more stringent. Similarly, though VAWA cancellation resembles VAWA self-petitions, there are important differences. Practitioners should take care to understand the unique VAWA cancellation eligibility requirements, comply with the evidentiary requirements, and undertake strategies that will best protect the applicant's interests.

## VII. Appendix

### A. Comparison Chart—VAWA Self-Petition with Adjustment of Status, VAWA Cancellation, and Non-LPR Cancellation

Requirements	VAWA Self-Petition & Adjustment	VAWA Cancellation	Non-LPR Cancellation
<b>Continuous Physical Presence</b>	None. Must be in U.S. to adjust status, but may self-petition & consular process from abroad.	3 years	10 years
<b>Absences Breaking Continuous Physical Presence</b>	Not applicable	Limits each absence to 90 days, 180 days in aggregate. Absence not counted if connected to abuse or for certain military service.	Limits each absence to 90 days, 180 days in aggregate. Absence not counted if for certain military service.
<b>Stop Time Rule</b>	Not applicable	None for NTA service, Yes for crimes referenced in INA § 240A(d)(1)(B).	Yes both for NTA service & crimes referred to in INA § 240(A)(d)(1)(B).
<b>Residence with Abuser</b>	Can be abroad, including before or after marriage.	No stated requirement	Not applicable
<b>Disqualifying Conduct and Crimes</b>	INA § 212(a) inadmissibility grounds apply, with a variety of exemptions, exceptions and special waivers for some grounds.	Conviction of an aggravated felony. Being inadmissible or deportable for <i>convictions and conduct</i> listed in INA §§ 212(a)(2)-(3) and 237(a)(1)(G), 237 (a)(2)-(4) (INA § 237(a)(7) waiver may apply).	Convictions of offenses under INA §§ 212 & 237 (INA § 237(a)(7) waiver may apply).
<b>Good Moral Character</b>	3 years immediately preceding the filing date.	3 years at the time of decision by IJ (waiver	10 years at the time of decision by IJ (INA

		available if act or conviction connected to abuse).	§ 237(a)(7) waiver may apply).
<b>Hardship to Qualifying Relative or to Applicant</b>	None required.	Yes, extreme hardship to applicant or applicant's child or parent.	Yes, exceptional and extremely unusual hardship to applicant's U.S. citizen or LPR spouse, parent or child.
<b>Discretion</b>	No for self-petition, Yes for adjustment.	Yes	Yes
<b>INA § 240A(c) Bars</b>	No	No	Yes
<b>4,000 Numerical Cap</b>	No	Yes, unless relief via NACARA or former suspension.	Yes, unless relief via NACARA or former suspension.
<b>Work Authorization</b>	May file I-765	May file I-765	May file I-765
<b>Application Form</b>	USCIS Form I-360 & Form I-485	Form EOIR-42B	Form EOIR-42B
<b>Fee</b>	No fee for Form I-360, \$1140 for Form I-485 age 14 & up, \$85 biometrics, all fees are waivable.	\$100 for application + \$85 biometrics, IJ may waive application fee and possibly biometrics fee.	\$100 for application + \$85 biometrics, IJ may waive fees except biometrics fees.
<b>Derivative Children</b>	Can include if filing as a spouse.	No derivatives, but grantees' children and parents of child grantees must be paroled.	None