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BARRIERS TO PROTECTION AT HOME AND ABROAD: MEXICAN VICTIMS OF DOMESTIC VIOLENCE AND THE VIOLENCE AGAINST WOMEN ACT

Lee J. Teran*

I. INTRODUCTION	2
II. VIOLENCE AGAINST WOMEN ACT	9
A. <i>Protecting Women From Violence</i>	10
1. Trouble in the Immigrant Family	13
B. <i>Immigrant Provisions of VAWA — A Step Forward and Backward</i>	16
C. <i>Extreme Hardship and Battered Spouses</i>	22
III. THE STRUGGLE TO DEFINE EXTREME HARDSHIP	27
A. <i>History</i>	28
1. A Narrow Restrictive Interpretation	30
IV. THE CHANGES OF 1996	38
A. <i>A Movement Towards a Less Restrictive Standard</i>	38
B. <i>The Agency Confronts VAWA</i>	41
1. Judicial Intervention — If Mrs. Wang Were A Battered Spouse	49
V. CASE STUDIES OF MEXICAN APPLICANTS	55
A. <i>Mexican Immigration and VAWA</i>	56
B. <i>Mexican Women Define Extreme Hardship</i>	58
1. The Nature and Extent of Abuse	58
2. Access to United States Court and Criminal Justice System	59
3. Need for Services	61
4. Conditions Abroad	62
a. <i>Civil laws</i>	65
b. <i>Criminal law</i>	66
c. <i>Reform Efforts</i>	69
d. <i>Behavior of the Abuser</i>	70
e. <i>Potential Harm from Abusive Family, Friends..</i>	71

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C. <i>INS Response to Mexican Applicants</i>	71
VI. CONCLUSION	75

I. INTRODUCTION

The Immigration and Naturalization Service (INS) appealed the deportation relief of two Mexican women, Sara and Elena,¹ arguing that the women had failed to meet the statutory requirements to forestall their deportation. The INS argued that the women did not demonstrate that their expulsion would result in extreme hardship to themselves and their children.² The INS focused on the tender age of the women's children,

¹ To protect the identity of the women whose stories and cases I use in this article, I have changed their names. Sara is represented by faculty and students at the St. Mary's University School of Law Immigration Clinic. Her case materials are on file with the author. Elena is represented by the Northwest Immigrant Rights Project in Seattle, Washington. Briefs in her case are on file with the author.

² The women had applied to suspend their deportation under §244(a)(1), (3) of the Immigration and Nationality Act (INA), 8 U.S.C. 1254(a)(1), (3) (1994). The statute provided:

As hereinafter prescribed in this section, the Attorney General may, in his discretion suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in §1251(a)(4) (D) of this title) who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;

...

(3) is deportable under any law of the United States except section 1251(a)(1)(G) of this title and the provisions specified in paragraph (2); has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application; has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident (or is the parent of a child of a United States citizen or lawful permanent resident and the child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent); and proves that during all of such time in the United States the alien was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or the alien's parent or child.

The statute continues to provide relief from deportation to eligible non-citizens placed in deportation proceeding prior to April 1, 1997, the effective date of the Illegal Immigration and Immigrant Responsibility Act (IIRAIRA). With the passage of IIRAIRA, Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996), Congress repealed INA §244 but preserved relief for undocumented victims of domestic violence under a new form of deportation relief INA §240A(b), 8

their moderate but not lengthy residence in the United States, the absence of any involvement in their communities, and their ties to extended family in Mexico.³ The INS's arguments are not unusual and, in fact, are consistent with historical interpretation of hardship claims in deportation cases.⁴ However, the INS's opposition in the two women's cases is troubling because both women are victims of domestic violence and had relied on provisions of the Violence Against Women Act of 1994 (VAWA)⁵, which is designed to aid domestic violence victims.⁶

Immigration judges had granted the applications based on findings of extreme hardship, on evidence that the women and their children had been subjected to severe physical and emotional abuse, and that they feared return to Mexico where the legal system would not afford them

U.S.C. 1229b (Supp II. 1994) (cancellation of removal). For discussion of *IIRAIRA*, see *infra* at Section II, B. Battered spouses and children placed in deportation proceedings prior to April 1, 1997 apply under INA §244(a)(3), 8 U.S.C. 1254 (a) (3) (1995) for suspension of deportation. Those in newly designated removal proceedings instituted after April 1, 1997, apply under INA §240A(b)(2), 8 U.S.C. 1229b (Supp. II 1994) for cancellation of removal. See *infra* notes 14 & 30.

³ See briefs relating to Sara and Elena, *supra* note 1.

⁴ The two principle cases which interpret extreme hardship are *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978) and *INS v. Wang*, 450 U.S. 139 (1981). In *Anderson*, the Board of Immigration Appeals (BIA) set forth the factors to be considered in extreme hardship determinations. *Anderson* at 597. The Supreme Court in *Wang* held that the responsibility for defining this ambiguous term lies with the Attorney General and her delegates and furthermore, sanctioned a narrow construction of the term. *Wang* at 144 - 45. The case which typifies the narrow interpretation of extreme hardship and cites to other similar cases is *Hernandez-Patino v. INS*, 831 F.2d 750, 754-55 (7th Cir. 1987). See further discussion and additional cases, *infra* Section III.

⁵ VAWA is a part of the 1994 Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796.

⁶ *Id.* at §40701-40703. The immigration provisions of VAWA were codified at INA §§ 204(a)(1)(A)(iii), 8 U.S.C. 1154(a)(1)(A)(iii)(1994); 204(a)(1)(B)(2), 8 U.S.C. 1154(a)(1)(B)(2) (1994); 204(a)(1)(A)(ii), 8 U.S.C. 1154(a)(1)(A)(ii) (1994); 216(c)(4), 8 U.S.C. 1186a(c)(4) (1994); 244(a)(3), 8 U.S.C. 1254(a)(3) (1994); 244(g), 8 U.S.C. 1254(g) (1994). Along with provisions to aid undocumented victims of U.S. citizens and permanent residents, VAWA provides other measures targeting the problem of domestic violence, including authorization for the interstate enforcement of protective orders (18 U.S.C. §2265); creation of a federal offense for crossing state lines to injure, harass, or intimidate a partner (18 U.S.C. §2261); funds for public education and provisions for a national domestic violence hotline (42 U.S.C. §10416-18); appropriations for battered women's shelters (42 U.S.C. §10409(a)); confidentiality for victims and counselors (42 U.S.C. §§13942, 13951); grants to states for training of law enforcement (42 U.S.C. §3796hh); and a civil rights claim with the right to sue for punitive damages for gender motivated crimes (42 U.S.C. §13981). See also Violent Crime Control and Law Enforcement Act, §§40701-40703.

protection.⁷ In each case the INS appealed to the Board of Immigration Appeals (BIA),⁸ sharply criticized the courts' findings, and minimized the extent to which the women's abuse should be considered in the assessment of "extreme hardship."⁹ For example, the INS argued in Sara's case that "the immigration judge gave too much weight to the sole fact the respondent was a battered wife."¹⁰

⁷ Sara was found to have suffered abuse at the hands of her husband, Joe, a legal resident. Shortly after the birth of his first child, Joe began verbally abusing his wife. The violence turned physical, particularly after the birth of the couple's second child. Sara was hit, kicked, and threatened with weapons by her husband. Sara testified she would find no legal protection in Mexico. An expert witness Lic. Roberto Rosas, a Mexican attorney and now law professor, testified on the lack of resources in Mexico to support battered women. The judge granted Sara's application for suspension of deportation under INA §244(a)(1), but was forced to deny her application for VAWA suspension under INA §244(a)(3) because Sara had made a departure from the United States within the three years preceding her final deportation hearing. Brief, casual, and innocent departures from the United States do not interrupt the required physical presence for §244(a)(1) suspension. *See* INA §244(b)(2), 8 U.S.C. 1254 (b)(2) (1994). However, VAWA drafters committed an apparent error and failed to amend the suspension of deportation statute to excuse brief departures made by applicants for INA §244(a)(3) relief. *Id.* Notwithstanding her technical ineligibility for VAWA suspension, the judge determined that because she was a victim of domestic violence, she would suffer extreme hardship. "However the hardship of deporting her to Mexico results from the fact that even though she does not meet the three year time requirement, there is no escaping that she is, in fact, a battered spouse." Decision in case of Sara, *supra* note 1, at 9.

The immigration judge who heard Elena's case granted her application under INA §244(a)(3) (1994). Elena also had suffered severe battery and abuse by her legal permanent resident boyfriend, Adam, who was also the father of her child. On one occasion, Adam beat Elena, forced her into his car, and punched her until she bled. He then dumped her along the side of a road, hours from her home. Elena testified that she feared return to Mexico. Adam frequently traveled to Mexico and had threatened Elena and her family. Elena believed she would not be able to depend on the Mexican police for protection. Maria Lopez, a mental health professional who had lived and studied in Mexico, supported Elena's testimony. *See* brief relating to Elena, *supra* note 1.

⁸ The BIA and the corps of immigration judges are part of the Executive Office for Immigration Review (EOIR). CHARLES GORDAN, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE, §3.04 (1998) [hereinafter GORDAN, MAILMAN & YALE-LOEHR]. The EOIR and the INS are separate agencies within the Department of Justice, but both remain under the ultimate authority of the Attorney General. *Id.*

⁹ *See* briefs relating to Sara and Elena, *supra* note 1.

¹⁰ Service Brief in Support of Appeal at 12-13, Case of Sara, *supra* note 1. Likewise, the INS brief supporting the government appeal in Elena's case was critical of the court's extreme hardship finding, and suggested the respondent was motivated to seek residence to obtain U.S. services. "[T]he birth of a U.S. citizen child and

The decision of Congress to include "extreme hardship" as an eligibility standard and the INS responses in these and other cases threaten to undermine the advances made previously by VAWA to aid immigrant victims of domestic violence.¹¹ Heralded as the most significant legislation to aid victims of domestic violence,¹² VAWA was enacted in recognition of the fact that domestic violence is a serious national problem in the United States and that the undocumented immigration status of victims and their fear of deportation exacerbates domestic abuse.¹³ The immigration provisions of the law were significant because, for the first time, deportation relief was afforded specifically to battered and abused spouses and children of United States citizens and permanent residents.¹⁴ Additionally, undocumented victims of domestic violence were allowed to self-petition in order to become lawful residents without the assistance

desire to take advantage of U.S. social services does not constitute 'extreme hardship.'" INS Brief, Case of Elena, *supra* note 1.

¹¹ For other articles concerning VAWA and critical of provisions which undermine the goal to aid battered immigrants, see Janet Calvo, *The Violence Against Women Act: An Opportunity for the Justice Department to Confront Domestic Violence*, 72 INTERPRETER RELEASES 485 (Apr. 10, 1995) [hereinafter Calvo, *The Violence Against Women Act*]; Janet Calvo, *Domestic Policy in an Immigration Context: The Immigration Law Provisions of the Violence Against Women Act* (forthcoming; manuscript on file with the author) [hereinafter Calvo, *Domestic Policy*]; Felicia E. Franco, *Unconditional Safety for Conditional Immigrant Women*, 11 BERKELEY WOMEN'S L.J. 99 (1996) [hereinafter Franco, *Unconditional Safety*]; Linda Kelly, *Domestic Violence Survivors: Surviving the Beatings of 1996*, 11 GEO. IMMIGR. L.J. 303 (1997) [hereinafter Kelly, *Domestic Violence Survivors*]; Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW.U. L.REV. 665 (1998) [hereinafter Kelly, *Stories from the Front*]; Ryan Lilienthal, *Old Hurdles Hamper New Options for Battered Immigrant Women*, 62 BROOK. L. REV. 1595 (1996) [hereinafter Lilienthal, *Old Hurdles*].

¹² See Department of State News Release, Mar. 21, 1995. See also Donna E. Shalala, *Domestic Violence is Not a Private Matter: A Comprehensive Approach to Preventing and Ending the Violence*, 26 U. WEST L. A. L. REV. 29, 31 (1995) (noting that VAWA is part of the federal government's commitment to detect and end domestic violence).

¹³ See discussion on the legislative history of VAWA, *infra* Section II.

¹⁴ Prior to the passage of VAWA, undocumented battered women and children facing deportation had to meet the requirements of general suspension of deportation relief available to undocumented non-citizens. INA §244(a)(1). Deportation relief under VAWA, INA §244(a)(3); 8 U.S.C. 1254(a)(3) (1994), affords battered immigrants a less restrictive avenue for avoiding deportation. See Gail Pendleton, *Immigration Relief for Women and Children Suffering Abuse*, in DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN 65-66 (2ND ed. 1997) [hereinafter Pendleton, *Immigration Relief for Women and Children Suffering Abuse*]. Since the passage of IIRAIRA, relief from removal proceedings is available under INA §240A(b)(2), 8 U.S.C. 1229b(b)(2) (Supp. II 1994). See *supra* note 2.

of their U.S. citizen or permanent resident spouse or parent.¹⁵ VAWA commands that immigration laws remedy rather than perpetuate violence in families of citizens and lawful permanent residents.¹⁶

This article will address problems faced by undocumented women¹⁷ who are victims of domestic violence and who, as they seek the benefits of VAWA, attempt to prove they will suffer extreme hardship if deported. In passing the immigration provisions of VAWA, Congress intended to provide protection to battered immigrant women and to remove deportation as a tool of the abuser.¹⁸ The addition of “extreme hardship” as an eligibility standard is entirely inappropriate for this class of immigrants and is prone to interpretations which are unrelated to the problems and needs of domestic violence victims.¹⁹ Determinations in cases of battered immigrants must be based on consideration of the factors tied to domestic violence, including the nature and extent of abuse suffered by the victim and her need for support of U.S. social and legal systems.

The background of the “extreme hardship” standard and the dialogue between the agency²⁰ and the federal courts over the construction and

¹⁵ See INA §204(a)(1)(A)(iii); 8 U.S.C. §1154(a)(1)(A)(iii)(Supp. II 1994); INA §204(a)(1)(B)(ii), 8 U.S.C. §1154(a)(1)(B)(ii) (1994).

¹⁶ The legislative history to VAWA provides ample support for Congressional intent to amend immigration laws to provide protection for battered immigrants. See Section II, *infra*.

¹⁷ Women are not the only victims of domestic violence. Children, and in some cases men, can be victims of family violence. The immigration provisions of VAWA benefit spouses, including men, and children of abusive U.S. citizens and legal residents. INA §204(a)(1)(A)(iii); INA §204(a)(1)(B)(ii); INA §244(a)(3); INA §240A(b)(2). For the sake of simplicity, I do not refer to children each time I discuss victims of domestic violence. I also do not refer to men, since the vast majority of adult victims are women. See Bureau of Justice Statistics, DEP'T JUST., *Report to the Nation - Crime and Justice: The Data 21* (1983) (reporting that 95% of adult victims are women). Additionally, I use the term “undocumented” or “non-citizen” rather than the more pejorative “illegal alien” to refer to the status of foreign nationals who have entered the United States without authorization or who have entered lawfully but thereafter have violated the terms of their permission to stay. The term “illegal alien” has a negative connotation and fosters the stereotype of foreign nationals as criminals. I use the term “alien” only when I refer to statutory provisions that include that term.

¹⁸ See Section II, *infra*.

¹⁹ See *infra* Section III. See also Kelly, *supra* note 11, at 684-685; Calvo, *Domestic Policy*, *supra* note 11.

²⁰ I use the word “agency” to refer to the Attorney General, the Department of Justice, and components within the Department, the INS and the EOIR, responsible for implementation of immigration laws. See GORDON, MAILMAN & YALE-LOEHR, *supra* note 8 at §3.01(1). The Attorney General is authorized to implement the immigration provisions of VAWA and for interpretation of certain terminology, most notably “extreme hardship.” The actual rule-making and decision-making is divided between the INS, which adjudicates visa petitions and the EOIR, which reviews

application of the term will be examined.²¹ Extreme hardship determinations mirror the struggle between the government's enforcement concerns and the ameliorative nature of the relief to which extreme hardship is tied. Historically, courts have deferred to the government's concern to control immigration by narrowly construing "extreme hardship." When the agency and reviewing courts consider whether a foreign national will suffer extreme hardship if expelled, they frequently assign little weight to the social, economic, and political conditions of the home country.²² Yet, for many battered immigrant women, the conditions they face abroad are a significant aspect of the hardship they and their families will suffer.

Mexican victims of domestic violence face considerable adversity if deported. This article will focus on the inappropriateness of the addition of "extreme hardship" as a requirement for VAWA applicants as illustrated by Mexican women, who account for a significant number of VAWA applicants.²³ VAWA applications will be discussed in the context of the factors which Mexican women must set forth to convince the INS and immigration courts that they and their families will suffer "extreme hardship." For instance, Mexican women quite often cite the failure of their own country to protect victims as a major cause for their fear of deportation and their need to obtain the benefits of VAWA.²⁴ While domestic violence is becoming a public issue in Mexico, it lags behind the United States in terms of providing substantive legal remedies and social

applications for relief from deportation. See Michael G. Heyman, *Discretionary Adjudicatory Rulemaking: Due Process of Lawmaking and Immigration Law*, 11 GEO. IMMIGR. L.J. 83, 86 (1996) [hereinafter Heyman, *Discretionary Adjudicatory Rulemaking*] for his discussion on Congress' delegation of authority to interpret laws to the agency and how entities within the agency engage in rulemaking.

²¹ See *infra* Section III on the history of extreme hardship. Congress has never defined the term despite its inclusion in many sections of the statute, and instead left the task of defining extreme hardship to the agency. Agency determinations of extreme hardship have prompted considerable litigation but the role federal courts will continue to play in the dialogue is highly uncertain given Congress' recent attempts to curtail federal court review of immigration matters. See *infra* Section IV.

²² See *Matter of Anderson* and *infra* Section III.

²³ See *infra* Section V. For this discussion I draw from my experiences as well as those of my students while representing battered Mexican women at St. Mary's University School of Law Immigration Clinic. The Clinic was organized in 1994 to provide law students with practical training and to meet the needs of an under-served immigrant community in South Texas. In 1995, following the passage of VAWA, the Clinic, together with the Law School's Human Rights Clinic, began assisting battered immigrant women, most of whom are citizens of Mexico.

²⁴ In most of the cases of Mexican women handled by the St. Mary's Clinics, the VAWA applicants have recounted problems they or other domestic violence victims have had in Mexico obtaining protection and services. See discussion, Section V, *infra*.

services to deal with domestic abuse.²⁵ Mexican women face significant barriers to protection from domestic abuse in their country. Undocumented Mexican women in the United States will encounter substantial risks if they fail in their efforts to convince government adjudicators of their concerns and they are deported.²⁶

This article concludes by offering several proposals. Congress should heed concerns raised by immigrants that the INS and immigration courts discount or ignore altogether factors relevant to undocumented victims of domestic violence.²⁷ “Extreme hardship” should be removed as a standard for eligibility. Alternatively, the Department of Justice should define “extreme hardship” consistent with the purposes of the VAWA and take steps to eliminate disparate agency determinations of hardship. If retained as an eligibility standard, extreme hardship should be utilized not as a device for enforcement of immigration controls. Although the Department of Justice has recognized that “extreme hardship” should be broadly construed to encompass consideration of factors tied to domestic violence,²⁸ the agency’s measures are insufficient. Effective response to the needs of undocumented victims of domestic violence and the dangers posed by expulsion to countries that provide little or no protection could occur by Congress eliminating the requirement of “extreme hardship.”

²⁵ Only in Mexico, D.F., have Mexican legislators passed laws to address specific civil and criminal remedies for victims of domestic violence. *See* discussion *infra* at Section V.

²⁶ The conditions a battered woman may face if returned to a country like Mexico, which fails to protect victims of domestic violence, is but one factor which the INS and immigration courts must consider in VAWA cases. *See* discussion *infra* Section IV. There are many others. In fact, some battered immigrants face return to countries which potentially provide ample protection, but nevertheless, will face extreme hardships by being uprooted from the United States following the trauma of battery and cruelty.

²⁷ *See infra* note 93 for discussion of legislative proposals advocated by a network of battered immigrant supporters.

²⁸ On March 26, 1996, the Department of Justice issued interim regulations for purposes of guiding adjudication of VAWA self-petitions. *See* 61 Fed. Reg. 13,061-13,079 (1996). The agency also issued a high-level memorandum to all field offices on April 16, 1996. *See* Memorandum dated April 16, 1996 by T. Alexander Aleinikoff, Executive Associate Commissioner (on file with the author). The preamble to the regulations and the memorandum set forth a number of factors to be considered in the assessment of extreme hardship determinations. *See* 61 Fed. Reg. 13,061, 13,067 (1996). Then, in October 1998, the INS issued a memorandum addressing extreme hardship as used for VAWA self-petitions. *See* Memorandum dated October 16, 1998 by Paul W. Virtue, General Counsel (on file with the author). Finally, on May 21, 1999, the Department of Justice issued regulations for purposes of VAWA-related suspension of deportation and cancellation of removal. *See* 64 Fed. Reg. 27856, 27863 (1999). As argued in Section IV, these and other steps taken by the agency are laudatory but have not prevented actions within the agency which limit the law’s protections of undocumented battered women. *See infra* Section IV.

In the alternative, the agency must adopt a new approach to making "extreme hardship" determinations in VAWA cases, one not based on a case by case consideration of multiple factors which may or may not relate to domestic violence, but one which embraces a rebuttable presumption that immigrant victims of domestic violence meet the "extreme hardship" criteria.

If Congress fails to remove "extreme hardship" as an eligibility factor in VAWA cases and the agency refuses to establish a group specific definition²⁹ of this ambiguous term, battered immigrants who are denied relief because they fail to individually prove "extreme hardship" will likely be left with few alternatives to expulsion from the United States. Avenues previously available to immigrants seeking to appeal denials of administrative decisions are now barred,³⁰ as Congress has taken steps in recent legislation to drastically curtail litigation of immigration cases.

II. VIOLENCE AGAINST WOMEN ACT

In passing The Violence Against Women Act, Congress intended to protect undocumented women from domestic violence and prevent further violence at the hands of abusive United States citizen and legal resident spouses.³¹ VAWA recognizes the unique problems faced by these women, denounces domestic violence, provides protection for victims,

²⁹ The Department of Justice recently announced it will apply a group specific definition of "extreme hardship" to benefit Salvadoran and Guatemalan applicants for suspension of deportation under the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), 64 Fed. Reg. 27856, 27864 (May 21, 1999). See "'Hardship' Determination in NACARA Regulations Sparks Controversy, as Clinton Administration Ponders Scope," 76 INTERPRETER RELEASES at 412-415 (Mar. 15, 1999), and discussion *infra* Section IV. This approach to making extreme hardship determinations is appropriate for VAWA applicants, who more often than not share common characteristics.

³⁰ In 1996, Congress passed two pieces of legislation, the Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and the IIRAIRA, Pub. L. No. 104-208, 110 Stat. 3009. Together AEDPA and IIRAIRA purport to strip federal courts of jurisdiction over a wide range of immigration decisions. AEDPA §440(a) curtails judicial review of deportation orders relating to non-citizens deportable for specified criminal offenses. IIRAIRA §306(b) repealed INA §106, the section providing for judicial review of deportation and exclusion orders, and replaced it with INA §242, which substantially limits review of removal orders and discretionary decisions. See §242(a)(2)(B). As discussed in Section IV, B, *infra*, the legislation will pose significant obstacles to litigation on behalf of battered women who are denied VAWA relief administratively. See *infra* Section IV, B. IIRAIRA also modified the relief provided undocumented victims of domestic violence in the Crime Control Act. See *infra* Section II, B.

³¹ See S. REP. NO. 101-545, at 28 (1990); H.R. REP. NO. 103-395, at 25 (1993).

and promotes criminal sanctions for abuse.³² Immigration laws generally place control over the immigration process on the spouse with legal status, and Congress recognized that a non-citizen victim's dependence on her U. S. citizen or legal resident spouse aggravated the abusive situation.³³ VAWA was intended to send a strong message that "society will not tolerate domestic violence,"³⁴ and thus, must be interpreted to facilitate undocumented women's attainment of legal status, and furthermore, to prevent the expulsion of those qualified immigrants from the United States, where they have access to legal protections and services, to countries unable or unwilling to protect victims of domestic violence.³⁵

A. *Protecting Women from Violence*

Prior to the passage of VAWA, Congress studied all aspects of domestic and other violence against women, including the prevalence, severity and frequency of violence; consequences to both victims and society; costs to victims and society; and existing remedies and preventive programs.³⁶

³² See *supra* note 7 for codified sections. The statute is the first comprehensive federal statute to provide remedies to victims of family violence. S. REP. NO. 103-138 at 41, 42 (1993) (VAWA is a significant "step in forging a national consensus that our society will not tolerate violence against women."). See also Kerrie E. Maloney, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After Lopez*, 96 COLUM. L. REV. 1876, 1878 ("Violence against women in the United States constitutes a national epidemic mandating national intervention").

³³ The impact of immigration law on women in general and women who are victims of domestic violence has been the topic of a number of articles addressing the plight of battered immigrant spouses following the Immigration Fraud Amendments of 1986 (IMFA). See *infra* note 65 and accompanying text. See also Nancy Ann Root & Sharyn A. Tejani, *Undocumented: the Role of Women in Immigration Law*, 83 GEO. L.J. 605, 608-09 (1994) (immigration law may be gender-neutral when written, but in application have unintentional negative consequences for women).

³⁴ S. REP. NO. 103-138, at 41 (1993).

³⁵ See discussion *infra* at Section V. Mexican women often cite as a reason to stay in the United States their fear of returning to Mexico where they will not receive legal protections from further abuse by spouses able to travel abroad. The regulations governing VAWA self-petitions and VAWA relief in deportation and removal recognize as factors in determining "extreme hardship" the need of legal protections and supportive services in the United States that are unavailable abroad, country conditions that endanger a victim and her family, and the ability of the abuser to travel abroad to locations where protection is not available. 61 Fed. Reg. 13061, 13067 (Mar. 26, 1996), 64 Fed. Reg. 27856, 27863; 8 C.F.R. 2458(c) (1996).

³⁶ The legislative history of VAWA spans several years. Early versions of VAWA were introduced in Senate in 1990 and the House in 1991. See Calvo, *Domestic Policy*, *supra* note 11, at 15. In 1992, proposals to aid immigrant victims of domestic violence were introduced. *Id.* at 13. In 1994, the VAWA with protections for immigrant women, passed in the House. H.R. 1133, 103d Cong., 1st Sess. The Senate version of VAWA did not contain benefits for immigrants. S. 11, 103d Cong., 1st Sess. VAWA

Congressional reports recognized that spousal abuse is a serious and pervasive problem affecting as many as four million women a year,³⁷ and is exacerbated by existing laws and practices.³⁸ Domestic abuse was found to cross all economic classes, and affect all racial, ethnic and religious groups.³⁹ Congress found that in 1991 alone, at least 21,000 domestic crimes were reported to police each week.⁴⁰

Victims of domestic violence suffer a wide range of injuries from beatings, assaults with guns and other weapons, and sexual assaults. Of all women who are murdered, one-third are killed by their husbands or boyfriends.⁴¹ Moreover, women often suffer persistent, repeated acts of violence.⁴² An estimated 63% of domestic violence victims are beaten while they are pregnant.⁴³ Each year, at least one million victims of domestic violence need medical attention as a result of their abuse.⁴⁴ Congress found that domestic violence is enormously expensive, costing from five to ten billion dollars a year in health care, prosecution of offenders, and other related costs.⁴⁵

The extent of domestic violence among immigrants in the United States has not been determined. Congress relied on surveys indicating

was then considered in conference committee as part of the Violent Crime Control and Law Enforcement Act of 1994. *Id.* at 24.

³⁷ See S. REP. NO. 101-545, at 30 and H.R. REP. NO. 103-395, at 26. This figure is considered conservative. See Catherine Klein & Leslye Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 809 (1993). There are some scholars who estimate that as many as 50-70% of women experience some violence during marriage. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 10-11 (1991) (citing LENORE WALKER, *THE BATTERED WOMAN* 19 (1979), JENNIFER B. FLEMING, *STOPPING WIFE ABUSE* 155 (1979), and *SISTERHOOD IS GLOBAL* 703 (Robin Morgan ed., 1984)). Given that domestic violence is largely unreported, it is difficult to provide accurate figures. *Id.* at 11. Moreover, many surveys of domestic violence exclude the poor, the homeless, and those who do not speak English. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1249 n. 29 (1991) [hereinafter Crenshaw, *Mapping the Margins*].

³⁸ Examples cited include police refusal to arrest abusers and the disparate handling of crimes against victims of domestic violence by police, prosecutors, and judges. See H.R. REP. NO. 103-395, at 27; S. REP. NO. 103-138, at 41.

³⁹ See S. REP. NO. 101-545, at 37.

⁴⁰ See S. REP. NO. 103-138, at 37.

⁴¹ See S. REP. NO. 103-138, at 41. See also Calvo, *Domestic Policy*, *supra* note 11.

⁴² See S. REP. NO. 101-545, at 36-37. Unless there is intervention to prevent further abuse, it will likely continue and even become worse. The Senate reported that in over half of the cases in which women were murdered by their spouses, the police had been called at least five times. *Id.* at 37.

⁴³ See H.R. REP. NO. 103-395, at 26.

⁴⁴ See S. REP. NO. 103-138, at 41.

⁴⁵ See *id.*

that, in the Latina immigrant community in the District of Columbia, 77% of women are victims of abuse.⁴⁶ The rates cited by Congress are quite high, yet understandable. Battered immigrants are often isolated from a support system, might be unfamiliar with the legal system that could come to their aid, and face greater obstacles due to language and cultural barriers which hinder their ability to obtain protection and services in comparison to their U.S. citizen counterparts.⁴⁷ In many of these cases, the women's spouses had refused to file immigration petitions to legalize their status.⁴⁸ Significant numbers of undocumented spouses are deterred from leaving their abusers because they do not have the legal status or the employment authorization necessary to support themselves and their children.⁴⁹ Congress noted that threats of deportation and the fear of loss of child custody prevent foreign nationals from seeking help.⁶⁰ It found, "[m]any immigrant women live trapped and isolated in violent homes afraid to turn to anyone for help. They fear continued abuse if they stay, and deportation if they attempt to leave."⁵¹ Even when an

⁴⁶ See H.R. Rep. No. 103-395, at 26, 27 n. 13. Estimates of the level of violence among immigrants vary, but are nonetheless substantial. In a study by the Coalition for Immigrants Rights and Services, it was estimated that 48% of Latina immigrants suffered from domestic violence. Michelle Anderson, *A License to Abuse: the Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401 (1993) (citing Leslye Orloff, *Domestic Violence Bases Involving Immigrant and Refugee Communities: The Response of the Courts in Family Violence: Issues of Public Policy and Government Practice*).

⁴⁷ See Leslye Orloff, Deeana Jang, & Catherine Klein, *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 FAM. L.Q. 313, 316-17 (1995); Anderson, *supra* note 46, at 1404; Susan Girardo Roy, *Reforming Hope or Tolerating Abuse? Responses to Domestic Violence Against Immigrant Women*, 9 GEO. IMMIGR. L.J. 263, 267 (1995) (citing Christine Whalen & Martha King, *Abuse in a New Land - Immigrant Wives Often Isolated, Vulnerable*, SEATTLE TIMES, Aug. 8, 1994, at A1.). See also notes and materials from *Issues Facing Battered Immigrant Women*, presentation by Clemencia Prieto and Patricia Castillo at Seminar on Battered Immigrant Women and Children: Remedies Available Under Family and Immigration Law, September 18, 1998 (on file with author) (noting that Mexican women unable to speak English and unaccustomed to a support system outside the immediate family endure domestic violence longer than other U.S. victims).

Of course, if the figures cited by some that 50-70% of women experience violence during marriage, *see supra* note 37, then the level of violence among immigrants would be parallel to the general population.

⁴⁸ See H. REP. NO. 103-395, at 27 n. 13. Studies have reported that 64% of undocumented battered Latinas refuse to seek assistance from social service agencies out of fear of deportation; Anderson, *supra* note 46, at 1421 (citing CHRIS HOGELAND & KAREN ROSEN, *DREAMS LOST, DREAMS FOUND: UNDOCUMENTED WOMEN IN THE LAND OF OPPORTUNITY*, 12-13 (1991)).

⁴⁹ See H. REP. NO. 103-395, at 26-27.

⁵⁰ See *id.*

⁵¹ *Id.* at 26.

abused spouse has access to United States courts and social service agencies she may forego further legal protections and return to the abuser out of the fear of deportation.⁵² Congress understood that many abused immigrant women remain secluded in violent homes, fearing to take the necessary steps to obtain help.⁵³ In response to evidence that immigrant women remain trapped in abusive relationships and that existing immigration law fostered domestic violence by giving the abuser control of the alien spouse's ability to gain permanent legal status, Congress intended to create specific remedies for battered immigrant women.⁵⁴

1. Trouble in the Immigrant Family

Family reunification has long been a centerpiece of immigration law and policy,⁵⁵ and the family-sponsored immigration is a major criterion for obtaining immigration status in the United States.⁵⁶ Control over the process of immigration rested exclusively with the spouse who was an U.S. citizen or permanent resident.⁵⁷ In order to immigrate, non-citizens

⁵² *Id.* at 26-27. See also Krenshaw, *Mapping the Margins*, *supra* note 37, at 1247 (immigrant women caught in even the most abusive relationship will withstand the violence because of fear of deportation).

⁵³ See *id.*

⁵⁴ See H.R. REP. NO. 103-395, at 26. See also Calvo, *Domestic Policy*, *supra* note 11, at 486. The House of Representatives found that domestic violence is "terribly exacerbated in marriages where one spouse is not a citizen and the non-citizen's legal status depends on his or her marriage to the abuser." H.R. Rep. No. 103-395, at 26.

⁵⁵ GORDON, MAILMAN, & YALE-LOEHR, *supra* note 8, at § 36.01 (rev. ed. 1997).

⁵⁶ Of the 700,000 visas allocated each year to foreign nationals, 480,000 are available to family members of United States citizens and permanent residents. INA §201 (C)(1)(A), 8 U.S.C. 1151 (C) (1) (A) (1994). Family-based visas are allocated depending on whether the non-citizen is an immediate relative (spouse, parent, or unmarried child) of a United States citizen, (INA §201(b), 8 U.S.C. 1151 (b) (1994)), or comes within one of the four preference categories: 1) unmarried son or daughter of a United States citizen (INA §203(a)(1), 8 U.S.C. 1153 (a) (1) (1994)); 2) the spouse or unmarried son or daughter of a legal resident (INA §203(a)(2), 8 U.S.C. 1153(a)(2)); 3) the married son or daughter of a United States citizen (INA §203(a)(3), 8 U.S.C. 1153(a)(3)); or 4) the sibling of a United States citizen (INA §203(a)(4), 8 U.S.C. 1153(a)(4)). Non-citizens also may immigrate under the employment based, diversity, and refugee categories. INA §203(b), 8 U.S.C. 1153(b)(five categories of employment-based visas); INA §203(c), 8 U.S.C. 1153(c) (diversity); INA §208, 8 U.S.C. 1158 (asylum).

⁵⁷ Longstanding provisions for immigrating family members have placed control of the process on the United States citizen or legal resident spouse or parent seeking to bring the alien relative to the United States. When the first numerical restrictions were placed on immigration, the law required that a citizen or resident husband must file the immigrant petition for his wife. Act of May 29, 1921, Pub. L. No. 5, §2(a), 42 Stat. 153, 159. See Janet Calvo, *Spouse-Based Immigration Laws: The Legacy of Coverture*, 28 SAN DIEGO L. REV. 593, 600-01 (1991) [hereinafter Calvo, *Spouse-Based Immigration Laws*] for her insightful discussion of the history of immigration as

must generally depend on their U.S. citizen or permanent resident relatives to file an immigrant visa petition for them.⁵⁸ In spouse-based immigration, the abusing resident or citizen spouse often chooses not to process an immigrant petition to legalize his non-citizen spouse.⁵⁹ This left no avenue of relief to the alien spouse.⁶⁰

However, even when the resident or citizen does initiate the immigration process for his spouse, the law presents other obstacles that exacerbate difficulties faced by victims of violence.⁶¹ In response to INS charges that a significant number of marriage-related petitions were fraudulent, Congress passed in 1986 the Immigration Marriage Fraud Amendments (IMFA), which extended the period of INS review of marriage cases.⁶² The IMFA created a conditional resident status for those foreign national spouses married less than two years to United States citi-

it relates to women and the impact spouse-based immigration laws have had on domestic violence. Early immigration provisions gave preference to male citizens and legal residents seeking to immigrate their wives; women did not enjoy the same rights to immigrate male relatives until the 1952 Act. *Id.* at 602-04. *See also* Kelly, *Stories From the Front*, *supra* note 11, at 667-68.

⁵⁸ The first step in the process of according a foreign national spouse with permanent resident status is the filing by the United States citizen or legal resident spouse of an immigrant visa petition (I-130). 8 C.F.R. §204.1(a) (1)(1997). Upon approval, the foreign national beneficiary is designated as an immediate relative (if the petitioner is a United States citizen), INA §201(b)(2)(A)(i), or a second preference relative (if the petitioner is a legal resident). INA §203(a)(2). Immediate relatives may immediately apply to adjust status or seek an immigrant visa from abroad; second preference beneficiaries may seek permanent resident status once a visa becomes available. *See* GORDON, MAILMAN & YALE-LOEHR, *supra* note 8, at §41.01(1)(a).

⁵⁹ The non-citizen spouse is most often a woman. *See infra* note 266. *See also* Calvo, *Spouse-Based Immigration Laws*, *supra* note 57, at 614 (citing Houstoun et al., *Female Predominance of Immigration to the United States Since 1930: A First Look*, 18 INT'L MIGRATION L. REV. 908, 909 (1984)).

⁶⁰ *See* Matter of Cintron, 16 I&N Dec. 9 (BIA 1976).

⁶¹ Joe A. Tucker, *Assimilation to the United States: A Study of the Adjustment of Status and the Immigration Marriage Fraud Statutes*, 7 YALE L. & POL'Y REV. 20, 26 (1989) [hereinafter Tucker, *Assimilation to the United States*].

⁶² *See* Pub. L. No. 99-639, 100 Stat. 3538. INS charged that 30% of marriages between foreign nationals seeking immigrant status and their United States citizens or legal resident spouses were fraudulent. *See* Tucker, *Assimilation to the United States*, *supra* note 61 (citing *Fraudulent Marriage and Fiance Arrangements to Obtain Permanent Resident Status: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 35 (1985) (statement of Alan C. Nelson, Comm'r, INS)). Subsequently, it was revealed that the fraud claims were exaggerated and largely based on the opinion of INS investigators, rather than on solid evidence. *See* INS Reveals Basis for Fraud Claims, 65 INTERPRETER RELEASES 26 (1988). IMFA is an example of immigration measures which value enforcement over family unification. *Id.* at 26.

zens or legal residents, and required the filing of a joint petition for removal of the condition two years later.⁶³ Failure to comply could lead to the non-citizen's deportation.⁶⁴ The statute was widely criticized for effectively forcing immigrant victims of battery and abuse to stay in violent relationships because of fear of losing their immigrant status.⁶⁵

Following the passage of IMFA, Congress began to address the flaws in family immigration law and the particular problems faced by battered immigrant women. In response to reports that IMFA interfered with an immigrant's ability to extract herself from an abusive situation,⁶⁶ Congress passed a battered spouse waiver as part of the Immigration Act of 1990,⁶⁷ and thereby Congress loosened the control that an abusive spouse could exert over his spouse's immigration status. The waiver removed the joint filing requirement for conditional residents when the immigrant spouse could establish that she had been battered or subjected to extreme cruelty by her U.S. citizen or resident spouse. Nonetheless, while the waiver of the joint filing requirements benefited many immigrant women, it provided no relief to women whose abusive spouses refused to file the initial application for permanent residency or who filed and later withdrew the application. Thus, while Congress had taken an important first step by creating the battered spouse waiver it had not yet addressed the crises facing battered women whose abusive husbands refused to initiate the immigration process.

The existing legal framework for family reunification fell short of addressing the needs of undocumented women who would normally benefit from the family immigration system and aggravated problems faced by victims of domestic violence.⁶⁸ Congress acknowledged that it had to seize control of the immigration process from abusive spouses and

⁶³ See Pub. L. No. 99-639, 100 Stat. 3538. Prior to IMFA, the foreign national spouse would receive lawful residence unconditionally. Under IMFA, codified at INA §216, lawful status is conditional on further review by the INS at the end of a two-year period. Within a three month period before the second anniversary of her conditional status, the resident and her spouse generally must file a joint petition to remove the condition and appear at the INS for an interview. A waiver of the requirement to file the joint petition was permitted if 1) the non-citizen could demonstrate extreme hardship (INA §216(c)(4)(A)), or 2) the non-citizen obtained a divorce and could demonstrate she entered the marriage in good faith (INA Section 216(c)(4)(B)). See INA § 216, 8 U.S.C. 1186(a) (1994).

⁶⁴ See INA §237(a)(1)(D), 8 U.S.C. §1227(a)(1)(D) (Supp. II 1994).

⁶⁵ See Calvo, *Spouse-Based Immigration Laws*, *supra* note 57; Anderson, *supra* note 46; Margaret M. R. O'Herron, *Ending the Abuse of the Marriage Fraud Act*, 7 GEO. IMMIGR. L.J. 549 (1993); Anna Park, *The Marriage Fraud Act Revised: The Continuing Subordination of Asian and Pacific Islander Women*, 1 ASIAN AMERICAN & PACIFIC ISLANDER L.J. 29 (1993); Franco, *supra* note 11.

⁶⁶ H. R. REP. NO. 101-723, at 51-78 (1990).

⁶⁷ Pub. L. No. 101-649, 101 Stat. 4978, INA §216(c)(4).

⁶⁸ See Calvo, *Domestic Policy*, *supra* note 11.

remove deportation as a tool of the abuser. By taking action to provide relief to undocumented spouses of U.S. citizens and legal residents, Congress would thereby address the problems of domestic violence and also preserve the integrity of family-based immigration.

B. *Immigrant Provisions of VAWA - A Step Forward and Backward*

With VAWA, Congress closed the gap in remedies available to those undocumented spouses and children who would normally benefit from the U.S. immigration system, but could not attain legal status because they are victims of domestic violence and abuse.⁶⁹ The immigration provisions of the statute provide two avenues to benefit undocumented battered spouses of legal residents and United States citizens, and if successful in either instance, battered spouses acquires lawful resident status without the aid of the abusive spouse or parent.⁷⁰

⁶⁹ See S. REP. NO. 101-545, *supra* note 32.

⁷⁰ VAWA does not provide benefits to undocumented battered women and children whose abusive relatives are not U.S. citizens or legal residents, but there is another avenue of relief available to some victims under U.S. refugee law which is gradually beginning to recognize gender-based asylum claims. See Deborah Anker, Nancy Kelly & Laura Gilbert, *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Apply as Refugees Under United States Asylum Law*, 11 GEO. IMMIGR. L.J. 709 (1997); Pamela Goldberg, *Asylum Law and Gender-Based Persecution*, 94-9 IMMIGRATION BRIEFINGS (Sept. 1994); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625 (1993). See also Dorothy Q. Thomas & Michele E. Brasky, *Domestic Violence as a Human Rights Issue*, 58 ALB. L. REV. 1119 (1995) (while traditionally domestic violence has not been viewed as a human rights issue, there is a growing recognition that international law can provide protection to domestic violence victims). A refugee is defined as an individual who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. See INA §101(a)(42), 8 U.S.C. §1101 (a) (42). An individual in the United States who seeks refugee status may apply for asylum under INA §208 or withholding of removal under §241(b)(3). See INA §208, 8 U.S.C. §1153; INA §241 (b)(3), 8 U.S.C. 1251 (b) (3). In 1995, the INS promulgated a series of guidelines for the adjudication of gender-based claims. See INS Office of International Affairs, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (May 26, 1995), reprinted in 72 INTERPRETER RELEASE 771, 781 (June 5, 1995). The guidelines recognize that domestic violence is a form of persecution. "Forms of harm that have arisen in asylum claims and that are unique to or commonly befall women have included . . . domestic violence . . ." *Id.* at 9. In its first opinion concerning a domestic violence victim applying for asylum, the Board in *Matter of R-A-*, Int. Dec. 3403 (BIA 1999), ruled against the claimant, but stated "we do not read the literal language of the [INA] actually to foreclose a construction that would accord refugee status to a battered spouse." *Id.* at 9.

First, the law permits a battered spouse to file a self-petition visa with the INS.⁷¹ The domestic violence victim must establish her relationship to, and the legal status of, her spouse and demonstrate that during the marriage, which was entered into in good faith, she or her child has been battered or subjected to extreme cruelty. She must also prove that she is a person of good moral character and if deported, she, or her United States citizen or legal resident child or parent will suffer extreme hardship.⁷² Once approved, the beneficiary of a self-petition is eligible to apply for permanent resident status.⁷³

Second, a new form of relief was made available to battered spouses and children facing deportation. Applicants against whom the INS initiates deportation proceedings can apply to suspend those proceedings.⁷⁴

⁷¹ See INA §204(a)(1)(A)(iii), 8 U.S.C. 1154(a)(1)(A)(iii) (spouse and children of United States citizens); §204(a)(1)(B)(ii), 8 U.S.C. 1154(a)(1)(B)(ii) (spouse and children of lawful permanent residents). The law permits the spouse and children battered or subjected to extreme cruelty by a United States citizen or lawful resident spouse/parent to submit a petition (Form I-360) to the INS for designation as a foreign national eligible to apply for immigrant status. Spouses who have not been abused but whose children have suffered abuse may also submit a self-petition. *Id.*

⁷² See *id.* See Lauren Gilbert, *Family Violence and the Immigration and Nationality Act*, 98-3 Immigration Briefings at 5-10 (Mar., 1998).

⁷³ Spouses and children of United States citizens are considered immediate relatives and may apply immediately for immigrant status. See INA §201(b)(2)(A)(i). Spouses and children of lawful permanent residents fall under the preference categories for visa allocation and must await visa availability before applying for immigrant status. See INA §203(a)(2).

The beneficiary of a self-petition may apply with the INS an adjustment of status application under INA §245. To be eligible to apply for adjustment of status, the applicant must have been inspected and admitted or paroled into the United States. See INA §245(a). In 1994, Congress amended §245 to permit applicants who had illegally entered the United States to apply for adjustment. See INA §245(i). However, the law expired in October, 1997, and Congress opted to not extend §245(i) except for those non-citizens who had filed a visa petition by January 14, 1998. A visa applicant who does not qualify to adjust status in the United States must depart the country and apply abroad at a United States consulate. This presents a hardship to battered spouses who may fear return to their country where they may encounter the abusive spouse or where they may become stranded if the consulate refuses to issue the visa. See Gilbert, *supra* note 72, at 10.

⁷⁴ See INA §244(a)(3), 8 U.S.C. §1254(a)(3). The statute provides that the Attorney General may suspend deportation and grant permanent resident status to spouses and children who have been battered or subjected to extreme cruelty by their U.S. citizen or legal resident spouse or parent. The relief relaxes the requirements generally provided to other aliens seeking suspension relief. VAWA suspension applicants must establish that they have been physically present in the United States for at least three years. *Id.* For others seeking suspension of deportation, the physical presence requirement is seven years (INA §244(a)(1), 8 U.S.C. §1254(a)(1)) or, if the applicant is deportable for certain criminal convictions, the presence requirement climbs to ten years (INA §244(a)(2), 8 U.S.C. §1254(a)(2)). As discussed *supra* note

Applicants must establish elements similar to those of the self-petition, plus additional evidence of at least three years physical presence in the United States.⁷⁵ VAWA also includes a flexible evidentiary standard for battered women, and mandates that the INS consider “any credible evidence” submitted by the VAWA applicant.⁷⁶ Accordingly, all forms of credible evidence submitted by the applicant in support of self-petitions and suspension of deportation must be considered.⁷⁷

Enthusiasm for VAWA was tempered by the requirement that applicants must meet eligibility standards beyond those required of family-based visa applicants.⁷⁸ Congress imposed on VAWA applicants for self-petitions and suspension of deportation the additional task of demonstrating to the satisfaction of the Attorney General that deportation will

2, Congress amended the statute in 1996, and suspension of deportation became unavailable to those placed in proceedings after April 1, 1997. Thereafter, deportation proceedings became known as “removal proceedings” and the relief became “cancellation of removal” under INA §240A(b). See INA 240 (b)(1), 8 U.S.C. 1129 b(b)(1). Under cancellation of removal, aliens who are not victims of domestic violence must demonstrate ten years of physical presence and exceptional and extremely unusual hardship. INA §240A(b)(1). INA §240A(b)(2) replaces INA §244(a)(3) for battered spouses and children and the relief remains largely intact.

Suspension (or cancellation) is only available to one in a deportation (or removal) proceeding. An application is presented to the Immigration Judge and a decision is rendered following a hearing to determine the applicant’s eligibility and whether as a matter of discretion the relief should be granted. See Pendleton, *Immigration Relief for Women and Children Suffering Abuse*, *supra* note 14, at 89.

⁷⁵ See *id.* There are some important distinctions between a VAWA self-petition and VAWA deportation/removal relief. When applying for suspension/cancellation, the VAWA applicant may be divorced from her abuser. See INA §244(a)(3); §240A(b)(2). Furthermore, she is not required to prove a “good faith marriage.” *Id.* However, evidence of marriage fraud may result in a finding that the applicant is not a person of good moral character or a finding that she does not merit discretionary relief. See Pendleton, *Immigration Relief for Women and Children Suffering Abuse*, *supra* note 14, at 87.

⁷⁶ See INA §204(a)(1)(H), 8 U.S.C. §1154(a)(1)(H) (with regard to self-petitions); §244(g), 8 U.S.C. §1254(g) (regarding suspension of deportation applications), now also at INA §240A(b)(2). This provision was passed in response to the INS’s handling of domestic violence cases of the alien spouses admitted to the United States on a conditional basis. See Franco, *supra* note 11, at 120. The restrictive guidelines and high standards of proof used by the INS in considering which evidence the agency would consider in its review of battered spouse waivers for conditional residents, generated widespread criticism. See Anderson, *supra* note 46, at 1417-1418.

⁷⁷ The statute provides though that “[t]he determination of what evidence is and the weight to be given that evidence shall be within the sole discretion of the Attorney General.” INA §204(a)(1)(H); INA §244(g); INA §240A(b)(2).

⁷⁸ See Lee Teran and Barbara Hines, *Suspension of Deportation as Relief for Battered Immigrant Women and Children*, IMMIGRATION NEWSLETTER, Vol. 23, No. 1 (July 1995); Calvo, *Domestic Policy*, *supra* note 11.

result in “extreme hardship” to the applicant or to her parent or child.⁷⁹ The Congressional record is silent as to the rationale for inserting extreme hardship findings in the final version of the VAWA remedies.⁸⁰ VAWA would have provided welcome relief to undocumented battered spouse and children if not for the impediments placed in its final provisions.⁸¹

⁷⁹ The hardship standard appears as a requirement for self-petitions under INA §§204(a)(1)(A)(ii), B(ii)(iii), for suspension of deportation under §244(a)(3), and for cancellation of removal under §240A(b)(3). See INA §240 (a)(1) (A)(ii), B(ii)(iii), 8 U.S.C. §1154 (a)(1)(B)(iii); INA §244 (a)(3), 8 U.S.C. §1254 (a)(3); INA §240 A (b)(3), 8 U.S.C. §1229b (b)(3). There is a slight, although possibly significant, difference between the language of requirement in §244(a)(3) and that in §240A(b)(2) and §204(a)(1). Under INA §244(a)(3), a VAWA applicant must show that she “is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to [her] or to [her] parent or child.” INA §244 (a)(3), 8 U.S.C. §1254 (a)(3). The hardship requirement for cancellation of removal deletes the term “in the opinion of the Attorney General.” Compare INA §244(a)(3) (VAWA suspension) with INA §240A(b)(2) (VAWA cancellation). See *infra* Section IV, 1 for discussion on how the absence of the words may affect judicial review of extreme hardship determinations.

⁸⁰ The extreme hardship eligibility standard did not appear in early drafts of the legislation. See Kelly, *Stories From the Front*, *supra* note 11, at 704. The final version of the immigration provision was developed during the House and Senate conference committee. There, Senator Simpson proposed inclusion of the extreme hardship and good moral character criteria to stem concerns of fraud and unfounded applications for immigration benefits. See Interview with Kathleen Sullivan, former counsel to the Senate Immigration Subcomm., Aug. 20, 1998 (notes on file with the author).

⁸¹ Unquestionably, Congress has the power to set the quota and standards for admission of non-citizens to the United States. See *Chae Chin Ping v. U.S.*, 130 U.S. 581 (1889); *Fiallo v. Bell*, 430 U.S. 787 (1977). The plenary power doctrine arose from the principle that immigration matters rest within the confines of the nation’s legislation and executive authority. The doctrine has prompted a number of authoritative articles, among them: Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectics*, 66 HARV. L. REV. 1362 (1953); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Peter Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

The plenary power doctrine is based on the federal government’s power over foreign policy. See also *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). However, VAWA was passed not as a foreign policy measure, but to meet domestic objectives to respond to the problem of family violence in the United States. Calvo, *Domestic Policy*, *supra* note 11, at 1. Given the unchecked power Congress has to determine the fate of non-citizens, one would expect that Congress would give careful, reasoned

The extreme hardship requirement, imposes a burden that detracts from the overriding concern of VAWA to end domestic violence and remove obstacles faced by its victims. Critics charge that the hardship factor which is tied to immigration control, is inapplicable in the scheme of family immigration.⁸² Moreover, women face the enormous and unsettling task of proving extreme hardship, a term which has had a narrow and restrictive interpretation for the past twenty years.⁸³

In 1996, Congress focused again on immigration legislation, and battered spouses faced renewed threats to obtaining full and unencumbered legal status. The 1996 Illegal Immigration and Immigrant Responsibility Act (IIRAIRA)⁸⁴ made critical changes to immigration law designed to expedite the removal of deportable aliens and to limit their ability to obtain discretionary relief from deportation. Applicants for admission to the United States now face a three-year bar to entry if they have previously resided unlawfully in the United States for at least six months.⁸⁵ The bar to admission climbs to ten years for those seeking entry following unlawful presence of one year or more.⁸⁶ After April 1, 1997, deportation and exclusion proceedings collapsed into new removal proceedings,⁸⁷ and common forms of relief from deportation such as suspension of deportation were replaced with new relief called "cancellation of removal."⁸⁸ IIRAIRA significantly restricts the availability of relief to undocumented aliens by increasing the physical presence requirement

consideration to the statutory provisions it passes, particularly those that do not relate to foreign policy concerns but are passed to ameliorate domestic problems.

⁸² See discussion *infra* Section II, C.

⁸³ See discussion *infra* Section III.

⁸⁴ See IIRAIRA, Pub. L. No. 104-208, 110 Stat. 3009, implemented Sept. 30, 1996.

⁸⁵ See IIRAIRA §301(b)(1), 8 U.S.C. §1182 (a)(9)(B)(i)(I), INA §212(a)(9)(B)(i)(I).

⁸⁶ See IIRAIRA §301(b)(1), 8 U.S.C. §1182 (a)(9)(B)(i)(I), INA §212(a)(9)(B)(i)(II).

⁸⁷ Compare former INA §§236 (exclusion proceedings) and 242 (deportation proceedings) and new INA §240 (removal proceedings).

⁸⁸ See INA §240A (a) and (b), 8 U.S.C. §1229b (a) and (b). Individuals who have been lawfully present at least seven years, five of which were as legal residents, and who are not aggravated felons may have removal proceedings canceled (§240A(a)). Undocumented individuals may apply for relief under INA §240A(b) if they have been continuously present for at least ten years, are persons of good moral character, and can demonstrate exceptional and extremely unusual hardship. The previous statute required seven years presence and extreme hardship. See INA §244(a)(1), 8 U.S.C. §1254 (a)(1). See *supra* note 2. IIRAIRA also provided that the applicant must acquire the required physical presence prior to the institution of removal proceedings and that any departure exceeding ninety days or an aggregate of one hundred and eighty days would break presence for purposes of relief. See IIRAIRA §304; INA §240A(d). IIRAIRA also limited the number of individuals who could be granted cancellation relief under §240A(b) to 4,000 people. See IIRAIRA §304, 8 U.S.C. §1229b (d) and (e), INA §240A (d) and (e).

from seven years to ten years and level of hardship requirement from extreme hardship to exceptional and extremely unusual hardship.⁸⁹

However, for the most part, Congress retained the VAWA provisions by exempting battered women and children from some of IIRAIRA's harsh restrictions imposed on unlawfully present aliens, and creating new protections for immigrant victims of violence. Battered women and children may still self-petition, and retain relief from deportation under the new cancellation of removal.⁹⁰ New charges of inadmissibility, based on unlawful presence in the United States, are waived in the cases of beneficiaries of VAWA.⁹¹ Moreover, to further aid immigrant victims of domestic violence, IIRAIRA prohibits INS officers from making adverse determinations based solely on information gained from the abuser and prohibits the unauthorized release of information about battered women and children.⁹²

Despite dramatic setbacks in immigration law in 1996, efforts to address the needs of battered immigrants have continued on the legislative front. Advocates have renewed legislative efforts to expand protections for battered immigrants, including proposals to eliminate extreme hardship as an eligibility standard for VAWA self-petitions.⁹³

⁸⁹ INA §240A(b)(1), 8 U.S.C. §1229b(b)(1). See Curtis Pierce, *The Benefits of "Hardship": Historical Analysis and Current Standards for Avoiding Removal*, 76 INTERPRETER RELEASES 405, 408-11 (Mar. 15, 1999).

⁹⁰ INA §240A(b)(2), 8 U.S.C. §1229b(b)(2). The statute has the same requirement for physical presence (3 years), hardship (extreme), and good moral character, as did the previous statute. However, battered spouses applying for §240A(b)(2) relief are restricted by the 4,000 person cap on adjustments to legal status. See INA §240A(c), 8 U.S.C. §1229b(c). In 1997, Congress made one change to §240A(c) in the Nicaraguan Adjustment and Central American Relief Act (NACARA). Battered spouses and children granted suspension of deportation under INA §244(a)(3) are now exempted from the 4,000 person cap. See NACARA §201.

⁹¹ See INA §212(a)(9)(B)(iv) exempts battered spouses but requires that the applicant demonstrate a "substantial connection" between the unlawful entry or overstay and the domestic violence. Battered spouses who entered the United States prior to April 1, 1997, IIRAIRA's effective date, need not meet the "substantial connection" test. See Gilbert, *supra* note 72, at 10-11.

⁹² See IIRAIRA §384, 8 U.S.C. § 1367.

⁹³ On July 22, 1997, a coalition of advocates for battered immigrant women, the National Network for Battered Immigrants, drafted a series of proposals to deal with shortcoming in the immigration provisions for battered immigrant spouses and children. See Network Proposal on file with author (recognizing the burdens that VAWA applicants face, the proposal calls for Congress to amend VAWA by deleting "extreme hardship" as a factor for self-petitions and removal relief). On January 19, 1999, portions of the Network's proposal were introduced to Congress as the Violence Against Women Act II (H.R. 257) and the Violence Against Women Act of 1999 (S. 51) (on file with the author). See summary at 76 INTERPRETER RELEASES 371 (Mar. 8, 1999). Included is a proposal to delete the "extreme hardship" requirement from VAWA self-petitions. Additionally, the bills would, if passed, restore INA §245(i) for

Congress should heed this call to discard extreme hardship determinations in VAWA cases.⁹⁴ Extreme hardship is an undefined eligibility standard that is prone to varying interpretations and is inconsistent with any relief designed to aid victims of domestic violence. The following section also addresses the administrative responses to the statutory requirement for extreme hardship determinations. The agency has made some effort toward ameliorating the severity of the hardship requirement, but problems will persist unless firmer steps are taken.

C. *Extreme Hardship and Battered Spouses*

Codified in many parts of the INA, "extreme hardship" is a requirement most often applied to those individuals who seek to immigrate but who do not qualify under the traditional visa allocation system in which applicants apply for family or employment-based visas.⁹⁵ The law imposes strict eligibility standards such as extreme hardship to those forms of immigration relief that bypass the conventional immigrant visa scheme.⁹⁶

battered spouse and children, *see supra* note 73, and remove barriers to suspension/cancellation for VAWA applicants who have not accumulated three years of presence before the institution of deportation/removal proceedings. *See supra* note 74. Any immigration-related bill faces a Congress which favors tight immigration controls, and which has for the past decade focused on the expulsion of deportable and inadmissible non-citizens. *See* Anti-Drug Abuse Act of 1988; IMMACT: AEDPA; IIRAIRA. On the other hand, in the midst of the restrictions on non-citizens, Congress has exempted battered spouses and children from the harshest provisions of the new legislation, and expanded their access to benefits. *See* IIRAIRA §309 (battered spouses and children not subject to 212(a)(6) grounds of inadmissibility and 212(a)(9) bars to reentry) and the NACARA (exempting battered spouses and children from the 4,000 person cap on grants to suspension of deportation). Moreover, the INS is reported to favor deletion of the "extreme hardship" requirement for self-petitions. Interview with Gail Pendleton, Immigration Project of the National Lawyers Guild (June 28, 1999).

⁹⁴ *See* Kelly, *Stories From the Front*, *supra* note 11, at 704 (arguing that both the extreme hardship and good moral character requirements should be repealed by Congress.)

⁹⁵ *See supra*, note 56.

⁹⁶ *See infra*, note 97. Two notable exceptions are present. Under INA §201(b)(2)(A)(i), 8 U.S.C. §1151(b)(2)(A)(i), widows and widowers of United States citizens may apply for immigrant visas despite the death of a U.S. citizen petitioning spouse following two years of marriage and with evidence of a good faith marriage. Furthermore, at INA §101(a)(27)(J), the statute permits abandoned and abused children to immigrate upon the finding by a juvenile court that it would not serve the child's best interests to be returned to the country of origin. There is no requirement to demonstrate extreme hardship in either the case of the widow/widower or the special immigrant juvenile.

The imposition of a hardship requirement, which is reasonable for purposes of some benefits, is out of place in the scheme of family immigration. *See* Calvo, *Spouse-Based Immigration Laws*, *supra* note 57, at 636; Calvo, *Domestic Policy*, *supra* note

Consequently, deportable non-citizens ineligible for an immigrant visa must meet this standard when applying to suspend deportation, and cancellation of removal.⁹⁷

Battered spouses of permanent residents and United States citizens do not fit within the category of foreign nationals for whom extreme hardship is an appropriate eligibility standard. The addition of extreme hardship as a requirement for battered women to obtaining legal residence is a burden that unnecessarily distinguishes victims of domestic violence from other foreign national spouses eligible to immigrate. The visa petition filed by a legal resident or U.S. citizen for his foreign national spouse must be accompanied by evidence of the petitioner's legal status and a lawful marriage between the parties.⁹⁸ No evidence of any hardship, extreme or otherwise, is required. Additionally, the conditional resident spouse who has been battered is not burdened with proving extreme hardship when she seeks to remove the condition. Yet, the only difference between the battered undocumented applicant for VAWA benefits and the battered conditional resident is that the conditional resident's abusing spouse initiated the immigration process by filing and completing an immigrant visa. There is no justification for impeding an undocu-

11. See also Tucker, *Assimilation to the United States*, *supra* note 61, at 26 (some immigration policies devalue the principle of family unity). Once the status of the U.S. citizen or legal resident petition and the relationship to the beneficiary is established in a visa application, the non-citizen beneficiary may apply for permanent resident status, and must demonstrate only that s/he is not inadmissible under the grounds laid out in INA §212. GORDAN, MAILMAN & YALE-LOEHR, *supra* note 8, at §50.02(1).

⁹⁷ Applicants for suspension of deportation under INA §244(a)(1) (and cancellation of removal under INA §240A(b)(1)) are typically individuals who have entered the United States illegally or have violated a lawful entry, and have remained undetected in the country for enough time to qualify for the relief. Concerns about rewarding non-citizens who are unlawfully present and who are ineligible to immigrate based on a family or employment-based visa have prompted Congress to impose hardship standards. See *infra* Section III and accompanying discussion. Another class of non-citizens required to demonstrate "extreme hardship" to gain resident status are those who meet the eligibility criteria for a family- or employment-based visa, but are inadmissible due to criminal or other misconduct. A general visa applicant is required to demonstrate "extreme hardship" if the applicant is inadmissible under INA §212(a)(2)(A)(i)(I) (admission or conviction of a crime of moral turpitude), §212(a)(2)(D) (acts of prostitution), §212(a)(6)(C) (fraud or misrepresentation), and the applicant is seeking a waiver of the ground of inadmissibility under INA §212(h) or §212(i). The waiver requires that the applicant demonstrate "extreme hardship" to specified family members. Thus, only when the beneficiary has engaged in criminal behavior, prostitution, fraud, or misrepresentation is a finding of extreme hardship necessary to outweigh the negative factors of inadmissibility.

⁹⁸ See GORDON, MAILMAN & YALE-LOEHR, *supra* note 8, at §41.01(2)(a).

mented battered spouse's access to legal status simply because her abuser never initiated an immigrant visa petition.⁹⁹

"Extreme hardship" is consistent with enforcement goals set by Congress to limit access to immigration benefits, and thus has long been considered a significant obstacle to attaining relief from expulsion and ultimately immigrant status. One commentator noted that proving extreme hardship presents an "insurmountable burden."¹⁰⁰ In line with Congress's intent to limit the availability of discretionary relief to only a deserving few, courts typically construe extreme hardship quite narrowly.¹⁰¹ Unquestionably, the recent trend in Congress has been to deal severely with illegal immigration, and to impose strict eligibility standards to immigration benefits available to undocumented individuals.

Attached to both forms of VAWA relief, however, extreme hardship is an artificial barrier. Battered spouses are members of a class of individuals already eligible to immigrate and it is not likely that undocumented women will purposely become domestic violence victims in order to gain

⁹⁹ See Franco, *supra* note 11, at 122. See also Calvo, *Domestic Policy*, *supra* note 11, at 29-31. Professor Calvo surmises that one reason some members of Congress were willing to encumber the immigration provisions of VAWA with an extreme hardship standard was that they consider families plagued by violence to be unworthy of an immigration benefit. The willingness of Congress to impose the burden of proving hardship conflicts with its objective to stop domestic violence and to prevent immigration law from further use as a tool of the abuser. See *id.* The law thereby serves only those immigrants suffering abuse who can demonstrate extreme hardship, and ignore other immigrants who may be victims of serious abuse.

¹⁰⁰ Jonathon Foersta, *Suspension of Deportation: Towards a New Hardship Standard*, 18 SAN DIEGO L. REV. 663 (1981). Consideration of extreme hardship should entail a balancing of the agency's enforcement goals and the ameliorative nature of the relief. See William Underwood, *Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases*, 72 IND. L.J. 885, 886 (1997). Whether or not INS enforcement goals are balanced equally with the humane concerns for non-citizens, the extreme hardship standard still remains inappropriate as a standard attached to a statute which has nothing to do with stemming the tide of illegal immigration.

¹⁰¹ See generally *INS v. Phinpathya*, 464 U.S. 183 (1984), citing S. REP. NO. 82-1137, pt. 1, 25 (1952):

[Congress] made the criteria for suspension of deportation more stringent both to restrict the opportunity for discretionary action . . . and to exclude: 'aliens [who] are deliberately flouting our immigration laws by the processes of gaining admission into the United States illegally or ostensibly as nonimmigrants but with the intention of establishing themselves in a situation in which they may subsequently have access to some administrative remedy to adjust their status to that of permanent residents.'

Hernandez-Cordero v. INS, 819 F.2d 558, 562 (5th Cir. 1987) (Case concerns Mexican couple with four U.S. citizen children denied suspension; court sided with congressional intent was to restrict, not increase, the number of aliens eligible).

legal status in the United States.¹⁰² VAWA is meant to provide meaningful relief to battered spouses who are eligible to immigrate and are already in the United States. The statute is not concerned with nor does it foster illegal immigration.

“Extreme hardship” is an inappropriate standard for battered immigrant spouses because Congress and the courts have never defined the term;¹⁰³ a determination in any given case is unpredictable.¹⁰⁴ Determinations of “extreme hardship” have been based traditionally on review of a number of elements known as the *Anderson* factors.¹⁰⁵ These factors include the applicant’s age and health, length of residence, family and community ties in the United States, immigration history, other means to adjust status, and to a limited extent, the economic, social, and political conditions of the applicant’s native country.¹⁰⁶ VAWA requires the agency to examine all relevant factors when considering any VAWA application.¹⁰⁷ Furthermore, the agency has promulgated interim rules that instruct adjudicators of VAWA self-petitions to consider factors relative to the abuse suffered by the applicant. The factors include: the nature and extent of the abuse, the legal and social protection available to the applicant in the United States, and the unavailability of similar protection and services abroad.¹⁰⁸ However, Congress and the courts give the agency wide latitude in the ultimate determination of a given extreme

¹⁰² See Kelly, *Domestic Violence Survivors*, *supra* note 11, at 321. Nor is it likely that women would succeed in fraudulently obtaining legal status based on false evidence of battery or extreme cruelty. Congress raised concerns regarding fraud when it included “extreme hardship” as a standard of eligibility. See *Anderson*, *supra* note 46, at 1426. Fraud can be dealt with through evidentiary guidelines for proving battery and extreme cruelty and determining good faith marriage, not by adding an additional eligibility standard unrelated to the perceived problem. It is unfair to burden an undocumented battered spouse with proving “extreme hardship” in order to gain an immigrant visa or relief from deportation. A strict immigration control devise, which is appropriate for some immigration benefits provided to undocumented non-citizens, is unnecessary for this population of otherwise eligible immigrants and threaten to deprive immigrant victims with the status that will best protect them from continuing violence and abuse. Inclusion of the hardship standard labels battered spouses as unwelcome or unworthy immigrants.

¹⁰³ See *Matter of Hwang*, 10 I&N Dec. 448 (BIA 1964).

¹⁰⁴ “Extreme hardship” is a nebulous term and the agency and courts have failed to provide much interpretative guidance. See Susan L. Kamlet, *Judicial Review of “Extreme Hardship” in Suspension of Deportation Cases*, 34 AM. U. L. REV. 175, 177 (1984). In fact, litigation surrounding determinations of the issue of extreme hardship has generated a wide range of disparate and even inconsistent decisions. *Id.* at 105.

¹⁰⁵ See *Matter of Anderson*, 16 I&N Dec. 596.

¹⁰⁶ See *id.* at 597.

¹⁰⁷ See INA §§204(a)(1)(H); 244(g); 240A(b)(2).

¹⁰⁸ See 61 Fed. Reg. 13061-13079; Leslye Orloff et al., *No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 FAM. L.Q. 313, 327 (1995); Lilienthal, *supra* note 11.

hardship claim. Consequently, similarly situated battered spouses receive disparate treatment depending on the location where they live or the adjudicators assigned to their cases.¹⁰⁹ The agency has not distanced itself from the historical and traditional interpretations of extreme hardship. *Anderson* and its progeny, which preceded VAWA and do not address extreme hardship as it relates to domestic violence, interpret the term with particular emphasis on the need to demonstrate lengthy residence and strong family and community ties in the United States. These are factors that many domestic violence victims are unable to meet.¹¹⁰ Additionally, *Anderson* and other cases have found that the economic and political conditions an alien will face abroad should generally not be a determinative factor in assessing extreme hardship when most undocumented aliens come to the United States from countries which are not as economically and politically advanced.¹¹¹ In applying the *Anderson* factors, adjudicators may be prompted to deny relief to battered women who are otherwise eligible to immigrate but who fail to meet a traditional profile precisely because they are domestic violence victims.¹¹²

¹⁰⁹ Agencies often have difficulty providing consistent interpretations of law, particularly when the governing statutes are vague. As Professor Heyman notes, agencies engage in “a kind of best guess” when interpreting statutory terms. See Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 SAN DIEGO L. REV. 861, 866 (1994). Furthermore, a statutory term will likely be subject to a variety of interpretations when within a large agency there is a mix of “hardnosed types showing greater conservatism than their more permissive counterparts.” *Id.* at 888.

¹¹⁰ See Calvo, *Spouse-Based Immigration Laws*, *supra* note 57, at 636. See also cases cited *infra* notes 162, 163. The reliance on *Anderson* and the emphasis placed on long residential ties to the United States in extreme hardship findings is inappropriate in VAWA cases because Congress diminished the length of time that a battered spouse would need to qualify for suspension or cancellation. Section 244(a)(1) relief is dependent on at least seven years physical presence. The presence requirement climbs to ten in §240A(b)(1) cases. VAWA applicants need only prove presence of three years for purposes of relief under INA §244(a)(3); §240A(b)(2), and there is no term of physical presence required before filing a VAWA self-petition under INA §204(a)(1)(A)(iii) and §204(a)(1)(B)(ii).

¹¹¹ See *Matter of Anderson*, 16 I&N Dec. 596, 598 (BIA 1978). See also Kamlet, *supra* note 104, at n. 38.

¹¹² Similar concerns are raised by the good moral character requirement, also an element that is not required of other visa applicants. See Kelly, *supra* note 11, at 686-687; Cecelia Espenosa, *No Relief for the Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersections*, manuscript on file with the author. The addition of the standard will undoubtedly lead to denials of VAWA applications in cases in which the conduct is tied to the abuse. For instance, a woman who defends herself against her abusive husband's attacks and is charged and convicted of assault may be ineligible for VAWA under the terms of the statute. INA §101(f), 8 U.S.C.A. 1101 (1996). A woman who stood by as her child is battered also may be held ineligible as being a person of bad moral character.

Congress's ill-conceived decision to include extreme hardship as an eligibility criterion sends the wrong message to the immigrant community. Difficulty in obtaining legal status hinders battered immigrant women seeking to leave an abusive situation. Absent Congressional action to remove the hardship factor, the success of immigration cases brought under VAWA depends on the willingness of the Department of Justice to depart from traditional concepts in the determination of extreme hardship. Absent a new construction of extreme hardship in VAWA cases, insurmountable barriers to attaining legal status will defeat the ameliorative purposes of the new legislation.

III. THE STRUGGLE TO DEFINE EXTREME HARDSHIP

The term "extreme hardship" first appeared in the early development of relief for deportable aliens, and it reappears from time to time when Congress considers extending or restricting immigration benefits. Because Congress has never defined extreme hardship, "not a definable term of fixed and inflexible content or meaning,"¹¹³ the task of interpreting the eligibility standard has been assigned to the agency which is given wide latitude to assess the "facts and circumstances of each case."¹¹⁴ In *Matter of Anderson*, the Board, drawing from comments by a House Judiciary Report,¹¹⁵ outlined the factors considered relevant to the determination of extreme hardship: family ties in the United States and abroad, length of residence in the United States, health of the applicant, eco-

Both the extreme hardship and good moral character standards contribute to the notion that battered women are less desirable as immigrants, and to the stereotype that battered women are somehow at fault for the abuse. The standards are not consistent with the goal of Congress to support battered women. Calvo, *Domestic Policy*, *supra* note 11, at 8.

¹¹³ *Matter of Hwang*, 10 I&N Dec. 448 (BIA 1964).

¹¹⁴ *Matter of Ige*, 20 I&N Dec. 880, 882 (1994).

¹¹⁵ In 1975, the House Judiciary Committee met to consider adding an unusual hardship standard to the statute authorizing adjustment of status, and in the process discussed the factors which the Committee believed should be considered in extreme hardship determinations. See H.R. REP. NO. 94-506 at 17 (1975). The Board of Immigration Appeals in *Matter of S*, 5 I&N Dec. 409 (1953) had set forth the following factors considered relevant for determining the then hardship standard, exceptional and extremely unusual: 1) length of the non-citizen's residence, 2) family ties in the United States and abroad, 3) possibilities for obtaining a visa abroad, 4) financial difficulties in traveling abroad to obtain a visa, 5) the applicant's health and age. See *id.* at 410-11. The 1975 House Report suggested consideration of additional factors: 1) economic and political conditions in the country to which the non-citizen would be deported, 2) the applicant's business and occupation, 3) other means available to immigrate, 4) any special assistance the applicant offered to the community or the United States, 5) his or her immigration history, and 6) ties to the community. See Sana Loue, *What Went Wrong with Wang?: An Examination of Immigration and Naturalization Service v. Wang*, 20 SAN DIEGO L. REV. 59, 61 (1982).

conomic and political conditions of the applicant's native country, financial status, the possibility of other means of adjustment of status, community service, immigration history, and position in the community.¹¹⁶ However, the agency has traditionally adopted a narrow construction of the term, one favoring the government. Courts have struggled over the "extreme hardship" determination, but following the Supreme Court's decision in *INS v. Wang*¹¹⁷ courts increasingly opted to defer to agency interpretations of the standard.¹¹⁸

Battered immigrant women are threatened by the traditional agency construction of extreme hardship and by the reluctance of federal courts to intervene in agency determinations. The agency has taken some positive steps, such as promulgating rules and policy statements sensitive to the concerns of battered spouses. However, extreme hardship in VAWA cases is still determined on a case by case basis with no guarantee that adjudicators will give adequate consideration to factors favoring victims of domestic violence.

A. History

Prior to 1940, immigration law provided no relief to deportable aliens.¹¹⁹ In the Alien Registration Act of 1940, Congress incorporated a provision for the suspension of deportation and adjustment to legal status for those non-citizens who could demonstrate the following: five years residence, good moral character, and serious economic detriment to the applicant's spouse, parent, or child who was a United States citizen or lawful permanent resident.¹²⁰ In 1948, the Act was amended to permit non-citizens with seven years residence and good moral character to qualify, regardless of the presence of family in the United States.¹²¹ In 1952, Congress revised suspension of deportation in response to heavy criticism that the economic detriment standard was too lenient and gave unfair

¹¹⁶ See *Anderson*, 16 I&N Dec. at 597. See also *Matter of S-*, 5 I&N Dec. 409 (1953).

¹¹⁷ See *supra* note 4.

¹¹⁸ Reviewing courts either deferred to the government's narrow view of extreme hardship or had difficulty in reviewing a multi-factor determination. One court found extreme hardship to be a "highly subjective standard that is difficult, if not impossible, to review." *Hernandez-Cordero*, 819 F.2d 558 (5th Cir. 1987).

¹¹⁹ Only by a private bill addressed to Congress could a foreign national obtain relief from deportation. See *INS v. Wang*, 450 U.S. 139, 140 (1981) (citing *Foti v. INS*, 375 U.S. 217, 222 (1963)).

¹²⁰ See Alien Registration Act of 1940, 54 Stat. 672 (amending §19 of the 1917 Immigration Act). The history of the suspension of deportation is also discussed in Kamlet, *supra* note 104; Foersta, *supra* note 100; Underwood, *supra* note 100; Curtis Pierce, *The Benefits of "Hardship": Historical Analysis and Current Standards for Avoiding Removal*, INTERPRETER RELEASES, Vol. 76, No. 10 at 406-407 (Mar. 15, 1999).

¹²¹ See Act of July 1, 1948, 62 Stat. 1206.

advantage to foreign nationals who violated immigration laws over those waiting to immigrate legally.¹²² The new statute required that the suspension applicant demonstrate exceptional and extremely unusual hardship to designated family members.¹²³

Later, the statute came under attack for setting too harsh a standard.¹²⁴ In the 1962 Act, extreme hardship became the standard for determination in suspension cases.¹²⁵ The 1962 Act required that aliens seeking suspension of deportation demonstrate "in the opinion of the Attorney General" that deportation would cause extreme hardship to the applicant and/or to the applicant's spouse, parent, or child who is a United States citizen or lawful permanent resident.¹²⁶ The statute further required that applicants prove a physical presence of seven years and good moral character during the entire term of physical presence, and demonstrate that she merits favorable exercise of discretion.¹²⁷ Suspension of deportation remained substantially intact until the recent passage of the IIRAIRA,¹²⁸ which repealed suspension relief under INA §244, renamed the relief "cancellation of removal," and retreated to the pre-1962 standard of requiring exceptional and extremely unusual hardship.¹²⁹

"Extreme hardship" appears in other immigration statutes. In 1957, Congress authorized the Attorney General to waive exclusion for foreign nationals eligible to immigrate, but inadmissible on criminal or prostitution grounds.¹³⁰ To qualify for a waiver of inadmissibility, visa applicants

¹²² See *INS v. Phinpathya*, 464 U.S. 183 (1984). See also Foerstel, *supra* note 100, at 667-68; Underwood, *supra* note 100, at 889.

¹²³ See The Immigration Act of 1952, 66 Stat. 163, 214 (1952).

¹²⁴ See S. REP. NO. 82-1137 (1952); S. REP. NO. 81-1515 at 600-61 (1950). See also Foerstel, *supra* note 100, at 666.

¹²⁵ See Act of October 24, 1962, Pub. L. No. 87-885, 94, 76 Stat. 1247, 1248 (1962).

¹²⁶ The higher hardship standard in the 1952 Act was retained in the 1962 Act for those with serious violations and deportable under §241(a)(2), (3), and (4), 8 U.S.C. 1251 (a)(2)(3) and (4). Applicants were required to demonstrate ten years of physical presence, good moral character, and exceptional and extremely unusual hardship. Act of October 24, 1962, Pub. L. No. 87-885, 76 Stat. 1247 (1962).

¹²⁷ See INA §244(a)(1), 8 U.S.C. §1254 (a)(1).

¹²⁸ See *supra* note 2.

¹²⁹ IIRAIRA is a major overhaul of immigration law. Title III, Subtitle A, Section 304, reconfigures deportation and exclusion proceedings which after April 1, 1997 become "removal proceedings." "Cancellation of removal" replaces suspension of deportation and requires that applicant demonstrate ten years of residence, good moral character, and the heightened hardship standard. INA §240(A)(b)(1).

¹³⁰ See Act of September 11, 1957, Pub. L. 85-316, §5, 71 Stat. 639. Codified at INA §212(h), 8 U.S.C. §1182 (h) (B) (1996) provides relief to foreign nationals who were inadmissible due to the commission of certain crimes but who could demonstrate that selected family members would suffer extreme hardship. The statute was amended in the Immigration Act of 1990, which provided that the waiver would apply to conduct that occurred more than 15 years prior to the application. Through a drafting error the extreme hardship waiver was eliminated. The

are required to demonstrate that their deportation will result in extreme hardship to a spouse, parent, or child who is a United States citizen or lawful permanent resident.¹³¹

Extreme hardship is an eligibility standard under which conditional residents may obtain permanent residence in accordance with the IMFA.¹³² In the 1986 legislation, Congress provided two waivers of the requirement that the conditional resident and spouse file at the end of the two years a joint petition to remove the condition. The first waiver was centered on a showing of extreme hardship based on circumstances arising since the acquisition of conditional immigrant status.¹³³ The second required evidence that the marriage had been entered in good faith, the alien spouse had terminated the marriage for good cause, and the alien was not at fault for meeting the requirement of a joint petition.¹³⁴

More recently in IIRAIRA, Congress attached extreme hardship as a qualifying factor to waivers for fraud and misrepresentation under INA §212(i).¹³⁵ Until Congress amended the statute in 1996 to require a finding of extreme hardship to the spouse or parent of the applicant, the §212(i) waiver required only the exercise of discretion. IIRAIRA also mandates a finding of extreme hardship to waive a new ground of inadmissibility under INA §212(a)(9) for those aliens seeking admission to the United States following an illegal presence in the United States of at least six months.¹³⁶

1. A Narrow Restrictive Interpretation

Extreme hardship determinations generated considerable litigation following the decision in *Foti v. INS*.¹³⁷ In *Foti*, the Supreme Court held that suspension of deportation cases were subject to review in the Circuit Court of Appeals incident to an appeal of a final order of deportation. Review has most often centered on the definition of extreme hardship and the respective roles played by the Attorney General and the review-

MISCELLANEOUS AND TECHNICAL IMMIGRATION AND NATURALIZATION AMENDMENTS OF 1991, Pub. L. No. 102-232, §307(8), 105 Stat. 1733, 1755 (1991) restored the extreme hardship waiver regardless of the date of commission of the offense. Recently in the IIRAIRA, §212(h) was amended to preclude relief to permanent residents who are aggravated felons and to those immigrants with less than seven years lawful residence.

¹³¹ See INA §212(h), 8 U.S.C. §1182(h) (1996).

¹³² See *supra* discussion at Section II, A, 1.

¹³³ See INA §216(c)(4)(A), 8 U.S.C. §1186 (c)(4)(A) (1996).

¹³⁴ See INA §216(c)(4)(B) (1989), 8 U.S.C. §1186(c)(4)(B) (1996).

¹³⁵ See INA §212(i), 8 U.S.C. 1182 (1996).

¹³⁶ INA §212(a)(9)(B)(v), 8 U.S.C. §1182(a)(9)(B)(v) (1996).

¹³⁷ *Foti v. INS*, 375 U.S. 217 (1963).

ing federal courts in extreme hardship determinations.¹³⁸ The *Foti* Court did not rule on the scope of judicial review of extreme hardship and post-*Foti* the litigation has produced a variety of divergent decisions.¹³⁹ In some cases in which courts were asked to review the denial of a claim to extreme hardship by the Board, courts have rejected the Board's restrictive, conservative view of the meaning and application of extreme hardship and favored an approach consistent with the humanitarian purposes of the statute. Other courts have refused to interfere with the Board's determination of extreme hardship, citing the Attorney General's broad authority in the area of immigration.

In *Wang v. INS*,¹⁴⁰ a Korean couple who overstayed their visas and were ordered deported, moved to reopen deportation proceedings after they had accumulated over seven years physical presence in the United States. Mr. and Mrs. Wang argued that their deportation would cause an extreme hardship to their two U.S. citizen children. The Ninth Circuit acknowledged that the law did not provide relief to all aliens who met the good moral character and physical presence requirements, but found that "the statute should be liberally construed to effectuate its ameliorative purpose, . . . so that suspension of deportation will be granted to the alien for whom the hardship from deportation would be different and more severe than that suffered by the ordinary alien who is deported."¹⁴¹

The Supreme Court reversed. The Court reviewed the Ninth Circuit's rejection of the Board's extreme hardship determination.¹⁴² The Court

¹³⁸ See, e.g., *Ravancho v. INS*, 658 F.2d 169, 174-75 (3d Cir. 1981) (deciding that the Attorney General should interpret the statutory provision in light of the humanitarian motives which impelled Congress to enact it.)

¹³⁹ See Kamlet, *supra* note 104, at 184-186, for a review of the tension between competing notions of appellate court review of agency determinations of extreme hardship. Some courts considered extreme hardship to involve a statutory interpretation that permitted federal court intervention. Findings of fact made in the determination narrowed the review, but if the interpretation is both law and fact, courts could step in even if there was substantial evidence to support the lower court finding. Finally, many courts have decided that the determination of hardship rests under the Attorney General's discretion and judicial review was limited to only an abuse of discretion.

¹⁴⁰ 622 F.2d 1341 (9th Cir. 1980) (*en banc*), *rev'd*, 450 U.S. 139 (1981) (*per curiam*).

¹⁴¹ *Id.* at 1346 (citing *Wadman v. INS*, 329 F.2d 812, 817 (9th Cir. 1964)).

¹⁴² See *INS v. Wang*, 450 U.S. at 139, 142-43. In this instance, the first issue before the Court was not whether the Ninth Circuit's review of the Board's extreme hardship decision was correct, but whether the Ninth Circuit should have reopened the deportation case. The Court decided that Mr. and Mrs. Wang had supported their motion to reopen their deportation proceedings with conclusory statements and thus, they had failed to meet the requirements of INS regulations governing motions to reopen. See *id.* at 143. The Court then took aim at what it considered the "more fundamental" question, the Ninth Circuit's rejection of the Board's review of extreme hardship. See *id.* at 144.

found that the lower court had interfered with the Attorney General's authority.

[T]he Act commits their definition [of the words "extreme hardship"] in the first instance to the Attorney General and his delegates, and their construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute.¹⁴³

As to the meaning of extreme hardship, the Court found this "a crucial question in this case," and although the words are "not self-explanatory, and reasonable men could easily differ as to their construction" the interpretation is left to the Attorney General.¹⁴⁴ However, the *Wang* Court did sanction a narrow definition of the term, one it found to be consistent with the statute and with the "exceptional nature of the suspension remedy"¹⁴⁵ to accord immigrant status outside the visa allocation scheme.

Wang was an admonishment to lower courts to refrain from interfering with the Attorney General's authority to review substantively extreme hardship,¹⁴⁶ but the Court did not outline boundaries for further federal

¹⁴³ *Id.* at 144.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* Following *Wang*, the Supreme Court in *INS v. Phinpathya*, 464 U.S. 183 (1984) reiterated that suspension of deportation is extraordinary relief. In its interpretation of the "continuous physical presence" requirement, the Court stated, "suspensions of deportation are 'grossly unfair to aliens who await abroad their turn on quota waiting lists,' and Congress wanted to limit the number of aliens allowed to . . . remain through discretionary action." *Id.* at 191 (citing H.R. REP. NO. 82-1365 (1952)).

¹⁴⁶ See Kamlet, *supra* note 104, at 176. See also Heyman, *Judicial Review*, *supra* note 104, at 892. Professor Heyman attributes what he terms the "stunted judicial review of immigration decisions" to three themes. See *id.* at 862-64. One is the court's recognition of congressional power over immigration matters and reluctance to interfere in legislation relating to the admission of non-citizens. The plenary power doctrine, while technically a theory which insulates Congress from constitutional challenge to immigration legislation, also "reflects a mood decidedly unfavorable to aliens." *Id.* at 862. Secondly, the nature of immigration law is one in which non-citizens who are unlawfully present seek to apply for relief as a matter of administrative grace. *Id.* at 863. Finally, judicial restraint in immigration matters is attributed to the deference courts are likely to show towards agency decisions. This deference is exemplified in *Chevron, U.S.A., Inc. v. National Resource Defense Council, Inc.*, 467 U.S. 837 (1984) and *Heckler v. Chaney*, 470 U.S. 821 (1985). See *id.* at 863-64. In *Chevron*, the court ruled that federal courts should generally defer to agency interpretations of statutes that the agency administers and should reject an interpretation only when contrary to Congressional intent. Following *Chevron*, the court in *Heckler* held that when there is no meaningful standard upon which to determine an agency's exercise of discretion, the decision is committed to the agency and not the court. While *Wang* was decided prior to *Chevron* and *Heckler*, the case was an omen of what was to come. *Id.* at 891 n. 146. See also Daniel Kanstrom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration*

court review of extreme hardship determinations. Some courts, particularly the Ninth Circuit, maintained a close watch on the Board, chiding the agency for failing to consider all relevant factors, to assess the cumulative effect of factors it did consider, and to provide a reasoned explanation for the extreme hardship determination.¹⁴⁷

In *Prapavat v. INS*,¹⁴⁸ decided in the wake of *Wang*, the Court of Appeals refused to affirm the Board's extreme hardship finding because it did not properly consider all relevant factors, individually and cumulatively. The court criticized the Board's conclusory assessments and superficial treatment of evidence of hardship.¹⁴⁹ While most courts reviewed the Board decisions for procedural errors, some have come very close to a substantive review of the extreme hardship determinations. For instance, in *Gutierrez-Centeno v. INS*,¹⁵⁰ the Court of Appeals reversed the Board's decision because it had failed to give "considerable, if not predominant weight" to separation between the respondent and family which would occur if Gutierrez was deported.¹⁵¹

However, in another prominent series of cases, circuit courts refused to overturn Board decisions absent a complete failure to consider relevant factors.¹⁵² Federal court unwillingness to interfere with determinations

Law, 7 TUL. L. REV. 703, 734-35 (1997) (discussing the trend in judicial deference to administrative decisions).

¹⁴⁷ See *Cerrillo-Perez v. INS*, 809 F.2d 1419 (9th Cir. 1987); *Jara-Navarette v. INS*, 813 F.2d 1340 (9th Cir. 1986); *Luna v. INS*, 709 F.2d 126 (1st Cir. 1983). See also cases cited by Kamlet, *supra* note 104, at 192. However, Stephen Feldman characterizes the post-*Wang* Ninth Circuit cases as "uneven" on the issue of court deference to agency determinations of extreme hardship. See Feldman, *supra* note 125, at 34-35.

¹⁴⁸ 662 F.2d 561 (9th Cir. 1981).

¹⁴⁹ See *id.* at 562 ("the Board tacitly invoked a floodgates argument by simply assuming that 'most deported aliens' would experience the same degree of hardship as the Prapavats"). See also *Ravancho v. INS*, 658 F.2d 169, 176. The court stated:

We read the Supreme Court's *Wang* decision as reiterating the basic precept, which our prior opinion had also referred to, that Congress entrusted to the Attorney General, and not to the courts, discretion to determine whether a petitioner has shown extreme hardship to warrant suspension of deportation. While the scope of such review may be narrow, it extends at least to a determination as to whether the procedure followed by the Board in a particular case constitutes an improper exercise of that discretion.

¹⁵⁰ 99 F.3d 1529 (9th Cir. 1996).

¹⁵¹ See *id.* at 1533. See also *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) ("[T]he BIA abused its discretion because it failed to consider the hardship to Salcido and her U.S. children if they are separated because of Salcido's deportation to Mexico."); *Casem v. INS*, 8 F.3d 700, 703 (9th Cir. 1993) ("The inquiry into family ties . . . must not be limited to noting the benefits of living near one's immediate or extended family. The BIA also must examine the impact of 'untying' the family ties Congress sought to safeguard.").

¹⁵² See *Hernandez-Patino v. INS*, 831 F.2d at 755; *Bueno-Carrillo v. Landon*, 682 F.2d 143 (7th Cir. 1982). See also cases cited by Kamlet, *supra* note 104, at 197, n. 156.

by the Attorney General of extreme hardship is illustrated in the Fifth Circuit's case, *Hernandez-Cordero v. INS*.¹⁵³ The Board had affirmed the immigration judge's finding of no extreme hardship in the case of a Mexican couple, who were admittedly "industrious, law-abiding and the type that anyone would desire as a next-door neighbor" and who had lived in the United States for twelve years and had three United States citizen children, aged eight to eleven.¹⁵⁴ The *en banc* court held that the Board retained unfettered discretion to determine whether a suspension applicant met the extreme hardship requirement and, ultimately, whether he should be granted the relief, "'a matter of grace,' similar to a presidential pardon."¹⁵⁵ The court refused to consider the Hernandez-Cordero family's claim, finding that *Wang* eliminates substantive review unless "the hardship is uniquely extreme, at [,] or closely approaching [,] the outer limits of the most severe hardship the alien could suffer and so severe that any reasonable person would necessarily conclude that the hardship is extreme."¹⁵⁶ The court held that it could review the case for procedural errors, but only if it was evident that the Board had utterly failed to consider relevant extreme hardship factors.¹⁵⁷ The Fifth Circuit also found that it lacked authority to determine the weight that should be assigned to the "extreme hardship" factors.¹⁵⁸ The court approved the Board's

¹⁵³ See *supra* note 101.

¹⁵⁴ *Id.* at 567.

¹⁵⁵ *Id.* at 561 (citing *United States ex rel. Kalondis v. Shaughnessy*, 180 F.2d 489, 491 (2nd Cir. 1950)). The Fifth Circuit concluded that the extreme hardship determination was to be treated in line with the ultimate decision to grant relief. See Heyman, *supra* note 104, at 894. Professor Heyman is highly critical of the Fifth Circuit's decision in *Hernandez-Cordero* and the Court's reliance on *Jay v. Boyd*, 351 U.S. 345 (1980), a case which defined the ultimate decision on whether to grant the relief as unfettered. The court initially recognized the statute as two-tiered, divided between statutory eligibility issues, including extreme hardship, and the decision whether to grant or deny relief. In the end it found the hardship determination to be of the same character as the final discretionary decision. The court relied on two aspects of extreme hardship. First, it found express authority for the agency to determine extreme hardship, parallel to the ultimate authority to grant or deny the relief, in the statutory language, "in the opinion of the Attorney General" attached to the eligibility standard, INA §244(a)(1). *Hernandez-Cordero*, 819 F.2d 558, 562 (5th Cir. 1987). Secondly, the Court found the word "extreme" to be "a highly subjective standard difficult, if not impossible, to review." *Id.*

The characterization of extreme hardship determinations as highly discretionary has been resurrected in recent debates over the impact of Congress' new rules on judicial review. See discussion *infra* at Section IV, B.

¹⁵⁶ *Hernandez-Cordero*, 819 F.2d at 563. The dissent is critical of the majority's terminology, arguing that it more closely mirrored the "exceptional and extremely unusual" standard and that Congress intended INA §244(a)(1) to be read with more compassion. *Id.* at 565.

¹⁵⁷ See *id.* at 563.

¹⁵⁸ See *id.* (citing *Sanchez v. INS*, 755 F.2d 1158, 1160 (5th Cir. 1985)).

construction of "extreme hardship." "Congress meant to narrow the availability of the relief, not expand it."¹⁵⁹

Despite the Attorney General's discretion to determine extreme hardship, she has failed to provide more than "limited guidance in terms of [a] measurement"¹⁶⁰ of the factors to be considered. Only general observations based on review of the few decisions published by the Board can be made.¹⁶¹ Favorable extreme hardship determinations are more likely in suspension cases in which the applicant has established physical presence in the United States well beyond the statutory requirement, has significant ties to immediate family in the United States, and can demonstrate substantial involvement in the U.S. community.¹⁶² Separation from family in the United States and the presence of a United States citizen child of school age receives added weight, but a positive finding is less likely if the children are very young.¹⁶³

¹⁵⁹ *Id.* at 562 n.3. The court in *Hernandez-Cordero* appears to interpret *Wang* as almost precluding review of extreme hardship. Feldman, *supra* note 125, at 34. Other courts have also accepted the same narrow interpretation. See *Najafi v. INS*, 104 F.3d 943 (7th Cir. 1997); *Astrero v. INS*, 104 F.3d 264 (9th Cir. 1996).

¹⁶⁰ *In Re O-J-O*, Int. Dec. 3280 at 25 (BIA 1996) (Rosenberg, Board member, concurring). Another Board Member comments that the *Anderson* factors do "little in the way of providing content to the ambiguous phrase 'extreme hardship.'" *Id.* at 37 (Filppu, Board Member, dissenting). However, extreme hardship gains some measurement of a definition once compared to the stricter standard found in INA §244(a)(2) and 240A(b)(1) of exceptional and extremely unusual hardship. Underwood, *supra* note 101. The adjectives "unique" and "unusual" are more appropriately applied to the heightened standard. *Id.*

¹⁶¹ As of 1996, there were approximately 20 decisions published by the Board on the rule of extreme hardship. See *In Re O-J-O*, Int. Dec. 3280 at 14 (Holmes, Board member, concurring). There are also eight decisions relating to motions to reopen and extreme hardship. *Id.*

¹⁶² See *Matter of Loo*, 15 I&N Dec. 601, 605 (BIA 1976) (25 years residence and permanent resident daughter); *Matter of McCarthy*, 10 I&N Dec. 227 (BIA 1963) (40 years residence in United States, lawful resident spouse and three United States citizen children). In evaluating a case and the potential for a favorable extreme hardship finding, practitioners more often rely on their own experience and that of other practitioners in the field. Unpublished decisions of immigration judges and the Board also provide a source for interpretation. See National Lawyers Guild, Immigration Project, *Supplement to Materials on Suspension of Deportation*, texts of unpublished BIA Decisions, June 11, 1986 (on file with the author).

¹⁶³ *Matter of Kim*, 15 I&N Dec. 88 (BIA 1974) (hardship to 6-1/2 and 3 year old United States citizen children not established). The Board has commented that a suspension applicant can not "gain an immigration benefit merely because he has fathered a child in this country." *Bueno-Carrillo v. Landon*, 682 F.2d 143 (7th Cir. 1982). See also *Hernandez-Patino v. INS*, 831 F.2d 750 (7th Cir. 1987). On the other hand, other exceptional factors, such as military service, see *Matter of Gee*, 11 I&N Dec. 639 (BIA 1966) and *Matter of Lum*, 11 I&N Dec. 295 (BIA 1965), advanced age, see *Matter of Ching*, 12 I&N Dec. 710 (BIA 1968) (55 years of age), poor health see

While minimal guidance exists for assessing the weight to be given to these factors,¹⁶⁴ *Anderson* and other Board cases do comment on the significance assigned to conditions in the country where the applicant faces deportation. In *Anderson*, the respondent had urged the Board to find that conditions in the impoverished country of the Dominican Republic be dispositive of his extreme hardship claim. Respondent pointed to a House Judiciary Committee Report that advised consideration of conditions in an applicant's native country be an element in determination of extreme hardship.¹⁶⁵ The Board declined to place "critical emphasis on the economic and political situation" of the home country. Instead, the Board ruled economic conditions were relevant only when accompanied by additional factors.¹⁶⁶

Courts have adhered generally to the position that difficulties in readjusting to life abroad merit little consideration and that economic loss alone does not constitute extreme hardship. As the court firmly held in *Bueno-Carrillo v. INS*,¹⁶⁷ the factor relating to conditions in an alien's home country is not dispositive in an extreme hardship determination.¹⁶⁸ Even in cases in which applicants claimed they would face persecution abroad, no extreme hardship has been found.¹⁶⁹ Courts have reversed

Matter of Leong, 10 I&N Dec. 274 (BIA 1963) (disabled during military service), and U.S. residence beginning during the formative years, see Matter of Woo, 10 I&N Dec. 347 (BIA 1963) have tipped the scales in favor of an extreme hardship finding.

¹⁶⁴ But see *Hernandez-Cordero*, 819 F.2d at 558, in which the immigration judge denied suspension relief to a Mexican couple with three United States citizen children, aged 8, 9, and 11. The respondents owned their own home and had their own business. Their application for suspension of deportation was supported by expert testimony that the family would suffer a substantial financial and emotional loss by the sale of their home and business, and the children would suffer hardship by the interruption of their education in the United States.

¹⁶⁵ Additional factors include advanced age, severe illness, or family ties. *Matter of Anderson*, 16 I&N Dec. 596, 597-598 (BIA 1978).

¹⁶⁶ *Id.* at 598. See also Kamlet, *supra* note 104, at 179-89.

¹⁶⁷ See *Bueno-Carrillo*, 682 F.2d at 143, 146. ("We do not believe that Congress intended the immigration courts to suspend the deportation of all those who will be unable to maintain the standard of living at home which they have managed to achieve in this country.")

¹⁶⁸ See *id.*

¹⁶⁹ See Matter of Kojoory, 12 I&N Dec. 215, 219-220 (BIA 1967) (a claim of persecution if respondent were deported to Iran would not support a finding of extreme hardship); Matter of Liao, 11 I&N Dec. 113, 116 (BIA 1965) ("The question presented . . . is whether the respondent can support a claim of 'extreme hardship' by relying upon . . . the fact that he expressed political views which are not looked upon with favor by the Nationalist Government of China. We are of the opinion that the political aspect of this case has no relation to a determination of 'extreme hardship' . . ."). See also *Gebremichael v. INS*, 10 F.3d 28, 40 (1st Cir. 1993) ("In choosing to discount evidence of persecution when calculating 'extreme hardship' the Board was within the limits of its discretion.")

the Board in a few cases involving exceptionally severe conditions abroad,¹⁷⁰ but generally they have supported the Board's determinations that no extreme hardship exists even when dangerous conditions abroad threaten the applicant.¹⁷¹

After *Anderson* was decided in 1978, the Board remained silent on the question of extreme hardship until its 1994 determination in *Matter of Ige*.¹⁷² The Board reiterated its position that extreme hardship was not definable, but dependent on consideration of a range of factors to be narrowly construed. Absent evidence of "advanced age or severe illness combine[d] with economic detriment," conditions the respondent would face abroad were not determinative of extreme hardship. Further, the Board assigned little weight to the presence of young United States citizen children in the family and to the possibility the parents would face separation from the children, which the Board considered a matter of the parent's choice.¹⁷³

The narrow, restrictive construction of extreme hardship applied in suspension of deportation cases has carried over to determinations of the term found in other immigration provisions. In some circumstances that application is consistent with the overall policy of immigration enforcement. For instance, under INA Section 212(h), aliens otherwise eligible to immigrate but inadmissible, because of a conviction for a crime of moral turpitude or engagement in prostitution, may be admitted only upon a showing of extreme hardship to designated family members. Extreme hardship is defined for purposes of INA Section 212(h) as it is in INA Section 244(a)(1) suspension cases.¹⁷⁴ This high standard is imposed on 212(h) applicants notwithstanding the fact that they, unlike the general suspension applicants, are eligible to immigrate to the United States under the visa quota system. It is difficult to argue that application of a narrow construction of the term to 212(h) cases is inappropriate given a legitimate immigration policy to restrict the admission of criminals and others deemed undesirable.

The Attorney General's narrow interpretation of extreme hardship is inappropriate in other contexts. In the cases of conditional residents

¹⁷⁰ See *Santana-Figueroa v. INS*, 644 F.2d 1354, 1358 (9th Cir. 1981) (an applicant's inability to find employment in the country to which he or she would be deported and the prospect of destitution may be grounds for an "extreme hardship" finding); *Zavala-Bonilla v. INS*, 730 F.2d 562, 568 (9th Cir. 1984) (Board failed to consider possible persecution claim and respondent's total inability to find work); *Carrete-Michel v. INS*, 749 F.2d 490, 493 (8th Cir. 1984) (Board did not give proper weight to evidence of total inability to work).

¹⁷¹ See, e.g., *Gebremichael v. INS*, 10 F.3d 28 (1st Cir. 1993); *Diaz-Salazar v. INS*, 700 F.2d 1156, 1160 n.4 (7th Cir. 1983).

¹⁷² See *Matter of Ige*, 20 I&N Dec. 880 (1994).

¹⁷³ See *id.* at 882-83.

¹⁷⁴ See *Osuchukwu v. INS*, 744 F.2d 1136, 1140 (5th Cir. 1984); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

seeking to remove the two year condition on their legal resident status, it is an inconsistent standard which conflicts with policies which should favor the applicant. When Congress passed the extreme hardship waiver for those conditional residents unable to file a joint petition to remove the two year condition, it expected the waiver to be interpreted in a manner which supported the applicant's continued residence in the United States and the interests of the applicant's children, and favored a determination that would account for situations of domestic violence.¹⁷⁵ The INS ignored Congress' interpretation and promulgated restrictive regulations which called for a "common, everyday meaning" of the term.¹⁷⁶ Moreover, the agency refused to acknowledge that domestic violence standing alone would justify an extreme hardship waiver.¹⁷⁷ In fact, the INS' narrow interpretation of the extreme hardship waiver for conditional residents fueled criticism of the agency for its insensitivity toward domestic violence victims and contributed to the movement in Congress to pass the battered spouse waiver.¹⁷⁸

IV. THE CHANGES OF 1996

While 1996 began the most productive period for defining extreme hardship, it ended with new efforts to bar judicial review of a broad range of immigration matters. *Wang* left unresolved the extent to which federal courts may review extreme hardship determinations. This issue is now dependent on judicial interpretations of the new bars to judicial review, particularly those affecting discretionary decisions.

A. Movement Towards a Less Restrictive Standard

In early 1996, the Board issued three succeeding precedent decisions concerning extreme hardship. While generally adhering to the principles established in *Anderson*, the Board laid new groundwork for considera-

¹⁷⁵ See S. REP. NO. 99-491, at 8 (1986). See also *Calvo*, *supra* note 57, at 610-11.

¹⁷⁶ 53 Fed. Reg. 30, 015 (August 10, 1988).

¹⁷⁷ In a letter to Congresswoman Louise Slaughter, Bonnie Derwinski, Acting INS Director of Congressional and Public Affairs stated:

Of the two types of waiver applications, the one most likely to be utilized by a battered spouse is the good faith/good cause application. The extreme hardship application requires that the alien establish that such hardship would arise as a result of the alien's deportation. In the case of a battered spouse, the hardship has already been suffered while in the United States, and it would not be likely to be aggravated by departure from this country.

Reprinted in 66 INTERPRETER RELEASES 1428, 1429 (1989). The agency therefore considered extreme hardship to relate exclusively to hardship from deportation and not to the hardship occasioned by any abuse in the marriage. See *Anderson*, *supra* note 46, at 1413.

¹⁷⁸ Congresswoman Slaughter spearheaded the amendment to IMFA that provided for battered spouse women now codified at INA §216(c)(4)(C). See *Anderson*, *supra* note 46 at 1414.

tion of the term in INA Section 244(a)(1) suspension cases, particularly with regard to consideration of country conditions. *Matter of O-J-O*¹⁷⁹ is the case of a twenty-four-year old Nicaraguan who had lived in the United States for ten years and sought suspension of deportation. The respondent had “relatively weak” family ties in the United States, but based his suspension claim of extreme hardship he would suffer if uprooted from and forced to return to the desperate conditions in post-war Nicaragua.¹⁸⁰

The Board found the *Anderson* factors “provide[d] a framework for analysis [of extreme hardship],” but that other factors could also be considered.¹⁸¹ The determination of hardship necessarily requires the cumulative review of factors, as the adjudicator must consider “the entire range of factors . . . in their totality and determine whether the combination of hardships takes the case beyond those hardships undeniably associated with deportation.”¹⁸² The case recognizes that even ordinary hardships, when viewed in the aggregate, may rise to the level of extreme hardship.¹⁸³

O-J-O- appeared to signal that the Board, at least a majority of its members, was ready to depart from *Wang* and *Anderson*. In her concurring opinion, Board Member Rosenberg criticized the dissent for its “isolated examination” of extreme hardship and adherence to a narrow and restrictive interpretation of the term, which is divorced from an individualized measurement of the hardship factors presented by the respondent.¹⁸⁴ Extreme hardship determinations require an assessment of the “level or degree of hardship, including the *unique character* of the suffering, but *not* the extent to which others who may be similarly situated would or would not experience the same type of hardship to the same extent.”¹⁸⁵

While in previous cases political and economic conditions were assigned little weight in the overall extreme hardship determination,¹⁸⁶ a majority of the Board in *O-J-O-* found that the desperate economic and political conditions in Nicaragua deserved serious attention.¹⁸⁷ The

¹⁷⁹ See *In Re O-J-O*, Int. Dec. 3280 (BIA 1996).

¹⁸⁰ *Id.* at 7-8. *O-J-O-*'s father had died and his mother and brother lived abroad. However, he had assimilated into the American culture, had performed exceptionally in school, was deeply involved in his church, and had developed a strong personal and social bond to relatives and friends.

¹⁸¹ *Id.* at 5.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 25 (Rosenberg, concurring).

¹⁸⁵ *Id.* at 29 (emphasis in original).

¹⁸⁶ See *Matter of Kojoory*, 12 I&N Dec. 215 (BIA 1967); *Matter of Liao*, 11 I&N Dec. 113 (BIA 1965).

¹⁸⁷ *In Re O-J-O-*, Int. Dec. 3280 at 7 (BIA 1996).

Board favorably cited a Ninth Circuit case, *Tukhowinich v. INS*,¹⁸⁸ which reversed the Board for its failure to address the volatile political and economic situation in Thailand following a military coup.¹⁸⁹

Furthermore, in *Matter of L-O-G*,¹⁹⁰ a companion case decided the same day as *O-J-O*, a majority of the Board ruled that “[a] restrictive view of extreme hardship is not mandated either by the Supreme Court or by our published case law; and, found that L-O-G-, also a Nicaraguan, had made a *prima facie* showing of hardship.¹⁹¹ The Board supported the finding on the conditions the family would face in Nicaragua.¹⁹²

Nonetheless, strong dissents in *O-J-O* and *L-O-G* indicate that any movement toward an expansive view of extreme hardship may be met by stiff opposition from Board members who still favor the narrow, historical interpretation.¹⁹³ The dissenters, using language reminiscent of *Wang*,¹⁹⁴ dismissed the claims of hardship as insignificant and no more serious than the usual hardships incident to deportation. Less than six months after *O-J-O* and *L-O-G*, the Board issued a third decision, *Matter of Pilch*.¹⁹⁵ This time a unified court ruled against a Polish couple who had resided in the United States for approximately ten years, had three U.S. citizen chil-

¹⁸⁸ 64 F.3d 460 (9th Cir. 1995). The case concerned a Thai woman who had been in the United States ten years, but was single, had no United States citizen or lawful resident family, and had not been active in community organizations in the United States.

¹⁸⁹ *Id.* at 463.

¹⁹⁰ *In Re L-O-G*, Int. Dec. 3281 (BIA 1996).

¹⁹¹ *Id.* at 8.

¹⁹² Nicaragua was described by the Board as “an extremely poor country, still in political turmoil, with a shattered economy, very high unemployment, and minimal government services.” *Id.* at 12.

¹⁹³ While the decisions represented the most expansive determinations of extreme hardship in precedented cases, some Board members were reluctant to affirmatively say so. The majority in *O-J-O*- termed the decision “a close case,” *O-J-O*-, Int Dec. 3280 at 9, and Board Member David B. Holmes in his concurring opinion in the same case considered the ruling to be not out of line with earlier Board decisions. *Id.* at 20. However, the case did prompt members of Congress to take action and replace extreme hardship with the more stringent standard of “exceptional and extremely unusual hardship” now attached to cancellation of removal under INA §240A(b), the statute which replaced INA §244(a)(1) in IIRAIRA. Cong. Reg. No. 828 at 213, 104th Cong., 2d Sess. (1996). Citing *O-J-O*-, the report states, “The extreme hardship standard has been weakened by recent administrative decisions holding that forced removal of an alien who has become ‘acclimated’ to the United States would constitute a hardship sufficient to support a grant of suspension of deportation.”

¹⁹⁴ *In Re O-J-O*, Int. Dec. 3280, at 47. While the dissenters maintained they favored a flexible approach to the extreme hardship determination, their support for *Wang* is unwavering. “. . . [T]he Board long ago resolved the ambiguity in the statutory language in favor of a narrow construction that mandated strong showings of hardship to obtain relief.”

¹⁹⁵ *Matter of Pilch*, Int. Dec. 3298 (BIA 1996).

dren between the ages of four and six, two siblings who were legal residents, and had an established, lucrative business. The Board in *Pilch* stated it did not construe extreme hardship narrowly,¹⁹⁶ but the negative finding in light of the respondents' lengthy residence, strong community ties, and presence of U.S. citizen children mirrored *Wang* and its progeny.

The Board's willingness to distance itself from a restrictive view of extreme hardship, to "consider the entire range of factors . . . in their totality,"¹⁹⁷ and to weigh more heavily the desperate country conditions the alien will face conforms with the humanitarian intent behind the suspension statute. *O-J-O* provides some aid to VAWA applicants, but the final determination of any extreme hardship claim is still dependant on the facts and circumstances in each case and the adjudicators preferences as to the weight assigned to one or more of the factors considered.¹⁹⁸

B. *The Agency Confronts VAWA*

Over the past two years, the Department of Justice has received and adjudicated over five thousand VAWA self-petitions.¹⁹⁹ The INS has approved the majority of these petitions, in large part due to the promulgation of favorable interim regulations for adjudicating VAWA self-petitions and to the centralization of adjudication of all self-petitions into one service center staffed by officers who received VAWA specific training.²⁰⁰ However, the benefit of such positive determinations are overshadowed by disparities seen in many cases handled outside the service center and by the agency's failure to take appropriate steps to ensure that VAWA cases are adjudicated in a manner consistent with the interim rules and the purpose of VAWA.

Implementation of VAWA has been a slow and uneven process.²⁰¹ While the law authorized self-petitions to be filed beginning January 1, 1995, the Department of Justice did not issue interim rules or begin adjudications until March 26, 1996.²⁰² The proposed, unfinalized²⁰³ regulations govern the INS adjudication of self-petitions. The EOIR, which

¹⁹⁶ *Id.* at 6.

¹⁹⁷ *In Re O-J-O*, Int. Dec. 3280, at 5.

¹⁹⁸ *Matter of Ige*, 20 I&N Dec. 880 (1994). See also Underwood, *supra* note 100, at 903.

¹⁹⁹ Report of adjudications for fiscal years 1997 and 1998 on file with the author.

²⁰⁰ The INS Central Office has implemented at the Vermont Service Center training of VAWA adjudications by domestic violence advocates (notes of interview with Gail Pendleton, Immigration Project of the National Lawyers Guild) (on file with author). However, while the Department of Justice has conducted training at some field offices, the Department has yet to implement broad-based training in the dynamics of domestic violence and the immigration provisions of VAWA at the INS district level. See *id.* It is reported that some officers have been resistant to such training. See Gilbert, *supra* note 72, at 11.

²⁰¹ See Calvo, *The Violence Against Women Act*, *supra* note 11.

²⁰² 61 Fed. Reg. 13061-13079 (Mar. 26, 1996).

oversees the immigration courts, did not issue rules governing VAWA suspension/cancellation cases.²⁰⁴ On April 16, 1996, the INS issued a memorandum to field offices addressing the adjudication of self-petitions.²⁰⁵ Initially, the adjudication of VAWA self-petitions was decentralized in the four INS service centers which are also charged with processing general visa petitions, and to the INS district offices which would receive VAWA petitions from applicants qualified to apply for adjustment of status. On May 6, 1997, the INS issued a second memorandum to its field offices in conjunction with its decision to consolidate adjudication of VAWA self-petitions at the INS service center in Vermont.²⁰⁶

The INS did take steps towards setting standards for determining extreme hardship consistent with the purpose of VAWA. Receptive to proposals made by advocates for domestic violence victims, the INS issued rules that expand the factors considered relevant for determinations of extreme hardship in VAWA cases.²⁰⁷ Moreover, on October 16, 1998, the agency issued a memorandum specifically addressing extreme hardship for purposes of VAWA self-petitions.²⁰⁸ Unlike the INS rules

²⁰³ Final regulations were expected by spring, 1998, but were initially stalled while the agency considered whether applicants for VAWA self-petitions were to submit to fingerprinting at INS officers. As part an effort to ensure the integrity of criminal records checks, prompted by concerns that the agency had naturalized criminal aliens, the INS now mandates that all applicants for adjustment of status and naturalization be fingerprinted at designated INS offices. Presently, VAWA applicants, who must demonstrate good moral character, submit clearance letters from local police stations. The final regulations are now pending a final review by the INS General Counsel. Interview with Gail Pendleton, Immigration Project, National Lawyers Guild and co-coordinator of the National Network on Behalf of Battered Immigrant Women (notes on file with the author).

²⁰⁴ The INS and the EOIR, which include the Immigration Courts and the EOIR, are separate agencies within the Department of Justice. GORDON, MAILMAN, & YALE-LOEHR, *supra* note 8.

²⁰⁵ Memorandum, *Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses and Children of U.S. Citizens or Lawful Permanent Residents*, Apr. 16, 1996 [hereinafter Aleinikoff Memo].

²⁰⁶ Memorandum, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues*, May 6, 1997 [hereinafter Virtue I Memo]. The Department of Justice announced that the purpose for centralization of VAWA petitions was to "ensure sensitive and expeditious processing of the petitions filed by this class of at-risk applicants." 62 Fed.Reg. 16,607-08 (Apr. 7, 1997).

²⁰⁷ Preamble to Interim Regulation, 61 Fed. Reg. 13061 (Mar. 26, 1996). To its credit, the INS worked closely with advocates from organizations serving victims of domestic violence. See Gilbert, *supra* note 72, at 4.

²⁰⁸ Memorandum dated October 16, 1998 for Terrance M. O'Reilly from Paul Virtue, *Extreme Hardship and Documentary Requirements Involving Battered Spouse and Children*, reprinted in 76 INTERPRETER RELEASES 162 (Jan. 25, 1999) [hereinafter Virtue II Memo].

promulgated following IMFA, the interim rules for adjudication of VAWA self-petitions²⁰⁹ encourage consideration of the nature and effect of the abuse suffered by the applicant and her family.²¹⁰ The INS must "consider all credible evidence of extreme hardship submitted with the self-petition, including evidence of hardship arising from circumstances surrounding the abuse."²¹¹ In the preamble to the rules, the INS links extreme hardship to the conditions the VAWA applicant and her family would face abroad if deported,²¹² suggesting that "the circumstances surrounding domestic abuse may cause extreme hardship."²¹³ The preamble and the April 16, 1996 memorandum set forth six factors in assessing extreme hardship:

- (1) the nature and extent of the physical and psychological consequences of the battering or extreme cruelty;
- (2) the impact of the loss of access to the U.S. courts and criminal justice system (including but not limited to 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);
- (3) the self-petitioner's and/or the self-petitioner's child's need for social, medical, mental health, or other supportive services which would not be available or reasonably accessible in the foreign country;
- (4) the existence of laws, social practices, or customs in the foreign country that would penalize or ostracize the self-petitioner or self-petitioner's child for having been the victim of abuse, for leaving the abusive situation, or for actions taken to stop the abuse;
- (5) the abuser's ability to travel to the foreign country and the ability and willingness of foreign authorities to protect the self-petitioner and/or the self-petitioner's child from future abuse; and

²⁰⁹ 53 Fed. Reg. 30011 (Aug. 10, 1988) With regard to "extreme hardship" the IMFA rules provide only that the term be interpreted with "common everyday meaning." *Id.* at 30015.

²¹⁰ Preamble to Interim Rules, 61 Fed. Reg. at 13067-13068.

²¹¹ *Id.* The full text of the rules provides:

The Service will consider all credible evidence of extreme hardship submitted with a self-petition, including evidence of hardship arising from circumstances surrounding the abuse. The extreme hardship claim will be evaluated on a case by case basis after a review of the evidence in the case. Self-petitioners are encouraged to cite and document all applicable factors, since there is no guarantee that a particular reason or reasons will result in a finding that deportation would cause extreme hardship. Hardship to persons other than the self-petitioner or the self-petitioner's child cannot be considered in determining whether a self-petitioning spouse's deportation would cause extreme hardship.

²¹² *See supra* note 210.

²¹³ 61 Fed. Reg. at 13067. *See* 8 C.F.R. 204.2(e)(viii).

- (6) the likelihood that the abuser's family, friends, or others acting on behalf of the abuser in the foreign country would physically or psychologically harm the self-petitioner and/or the self-petitioner's child.²¹⁴

The rules and memorandum are a positive movement favoring abused immigrants who claim extreme hardship.²¹⁵ So too is the INS decision to route all VAWA self-petitions from INS district offices to a special unit trained in VAWA adjudication at a remote INS service center.²¹⁶

However, the interim rules fall short of setting firm standards for determining extreme hardship consistent with purposes of VAWA. The six domestic violence-related factors listed in the preamble are not included in the rules, nor do the rules weigh the factors against other traditional factors.²¹⁷ Moreover, while the preamble and memoranda identify the domestic violence related factors for consideration in extreme hardship determinations, they also direct adjudicators to consider case law interpreting hardship in suspension of deportation cases.²¹⁸ The rules fail to center the extreme hardship determinations squarely on factors relating to abuse and the need for protection, and instead permit determinations based on review of factors that may not relate to situations and experiences of battered immigrant women.²¹⁹

The rules and INS memoranda dictate standards and procedures for VAWA self-petitions, and thus, do not address "extreme hardship" determinations in deportation and removal proceedings.²²⁰ Until recently, no

²¹⁴ 61 Fed. Reg. 13061 (Mar. 26, 1996); Aleinikoff Memo, *supra* note 205, at 8-9.

²¹⁵ Moreover, INS rules recognize that VAWA is consistent with United States policy favoring family immigration. Approved self-petitions accord the beneficiary with immediate relative a second preference status. If the VAWA applicant had been the beneficiary of a previously filed visa petition, the earlier priority date assigned to the petition is transferred to the approved self-petition. 61 Fed. Reg. 13077; 8 C.F.R. 204.2(h)(2). Additionally, if the abuser were to lose his legal status, the abused spouse and children who have approved self-petitions retain their eligibility to immigrate. 61 Fed. Reg. 13073; 8 C.F.R. 204.2(c)(H)(iii).

²¹⁶ *See supra* note 206.

²¹⁷ Compare the preamble at 61 Fed. Reg. 13067 with 8 C.F.R. 204.2(c)(viii) (1997).

²¹⁸ 61 Fed. Reg. at 13067. "The phrase 'extreme hardship' has acquired a settled judicial and administrative meaning . . . largely in the context of suspension of deportation cases under section 244 of the Act." *See also* Virtue II Memo, *supra* note 208, at 3, which states, "The meaning of [extreme hardship] has, however, been well-explored in the judicial and administrative setting." The INS continued reliance on *Matter of Anderson*, a case appropriate for long-term undocumented residents is inappropriate for VAWA applicants and prevents a VAWA-centered approach to adjudication.

²¹⁹ *See also* Gilbert, *supra* note 72, at 9.

²²⁰ 61 Fed. Reg. 13061 (Interim Rules regarding Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant: Self-Petitioning for Certain Battered or Abused Spouses and Children).

rules governing “extreme hardship” in expulsion proceedings existed, but following passage of the Nicaraguan Adjustment and Central American Relief Act (NACARA),²²¹ legislation to amend IIRAIRA so that certain nationalities, including Central Americans, would be able to apply for relief from deportation and removal under the less stringent pre-IIRAIRA rules,²²² the government issued interim regulations which set standards subject to the narrow *Anderson* factors for “extreme hardship” determination in all cases.²²³ The government failed to include in the new rules the special extreme hardship factors identified previously in the VAWA self-petition regulations, but after receiving numerous comments which requested consideration of the circumstances of battered spouses and children in deportation and removal proceedings, the government issued final regulations which incorporate domestic violence-related factors for “extreme hardship” determinations in cases involving battered spouses and children.²²⁴

The agency continues to be reluctant to assign any weight to “extreme hardship” factors, and requires that VAWA applicants individually prove hardship on a case-by-case basis.²²⁵ However, over time and through case law, the contours of the term have been set, based on the consideration of a narrow set of circumstances that favor the agency’s interest in strict controls over illegal immigration. VAWA applicants must contend with this long-standing definition and the inclination of adjudicators to consistently apply the traditional meaning.

The Attorney General is not bound under all circumstances to apply a narrow construction of “extreme hardship,”²²⁶ and retains broad discretion in making the determinations relative to immigration and claims for

²²¹ Pub. L. No. 105-139.

²²² IIRAIRA’s repeal of INS §244 suspension of deportation and establishment of the new, more restrictive cancellation of removal under INA §240A(b)(1) placed obstacles to gaining relief from expulsion for many Central Americans and nationals of former Soviet-bloc countries who had fled their countries and sought refuge in the United States. See 74 INTERPRETER RELEASES 1837 (Dec. 8, 1997). NACARA provides an amnesty for unlawfully-present Nicaraguans and Cubans, and permits nationals of El Salvador, Guatemala, and the former Soviet Union, and other Eastern Europeans to apply for suspension of deportation under the less stringent rules pre-IIRAIRA. *Id.*

²²³ 63 Fed. Reg. 64895, 64902-64904 (Nov. 24, 1998). The preamble to the rules sets forth a lengthy discussion of the case law governing “extreme hardship” including *Matter of Anderson*, *Matter of O-J-O*, and *Matter of Pilch*. The proposed rules include a list of factors drawn primarily from *Anderson*.

²²⁴ 64 Fed. Reg. 27856, 27863 (May 21, 1999); 8 C.F.R. §240.20(c0), 240.58.

²²⁵ 8 C.F.R. 240.58(a) (“Extreme hardship is evaluated on a case-by-case basis, taking into account the particular facts and circumstances of each case.”). See Virtue II Memo, *supra* note 208, at 4.

²²⁶ Although the Court found that “the Board did not exceed its authority” when it applied extreme hardship narrowly, the Court affirmed the Board’s discretion to

relief from deportation and removal.²²⁷ The meaning given to “extreme hardship” may be altered as determinations of the term may be “var[ie]d to meet the purposes of the law” and the harm to be remedied.²²⁸ When a given statutory term is defined narrowly in one section, the same term may be construed differently for purposes of another section. As the Supreme Court stated in *Atlantic Cleaners and Dyers v. United States*, “Most words have different shades of meaning, and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.”²²⁹

The interests at stake require not only that the factors related to abuse and the need for protection be considered, but that any extreme hardship claim support the statute’s goal to end violence, remove deportation as a tool of the abuser, and preserve the integrity of family-based immigration. The Attorney General should find that the factors relating to abuse and common to victims of domestic violence applying for VAWA relief presumptively support a finding of extreme hardship.²³⁰ The government

interpret the term “. . . the Act commits their definition in the first instance to the Attorney General and [her] delegates.” *Wang*, 450 U.S. at 144.

²²⁷ In *Jay v. Boyd*, 351 U.S. 345, 354 n. 156 (1956), the Court ruled that the Attorney General had “unfettered discretion” to decide to suspend deportation. *See also Hernandez-Cordero v. INS*, 819 F.2d 558, 560-61 (5th Cir. 1987); *Achacoso-Sanchez v. INS*, 779 F.2d 1260, 1264 (7th Cir. 1985).

²²⁸ *See Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427 (1932).

²²⁹ *Id.* at 433. *See also Grand Lodge of International Association of Machinists v. King*, 335 F.2d 340, 344 (9th Cir. 1964). Statutes may have different purposes and “the reason for the limited scope of one [is] absent in the context of the other.” *Erlenbaugh v. U.S.*, 409 U.S. 239, 245-47 (1972). *See also Nations Bank of North Carolina v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995) (“As our decision underscores, a characterization fitting in certain contests may be unsuitable in others.”).

One may posit if the agency were to redefine extreme hardship for purposes of VAWA, it would thereby be disregarding the intent of Congress, which in 1994 when VAWA passed, was well aware of agency and court interpretations of the term and arguably favored a narrow meaning. However, Congress was silent as to its intent, and the agency should therefore be free to assign to the term whatever meaning best fits the purpose of the statute. Additionally, when Congress passed IIRAIRA in 1996, it did not add to VAWA relief the heightened standard of exceptional and extremely unusual hardship as it did for the new INA §240A(b) cancellation of removal relief. In fact, one may argue that because Congress was aware of *In Re O-J-O* and added the more restrictive hardship standard to INA §240A(b) in response to the case, that Congress favored a more relaxed standard for extreme hardship for purposes of relief for battered spouses and children.

²³⁰ Similarly, in her discussion of the new substantial connection test assigned VAWA applicants in IIRAIRA, Linda Kelley encouraged the INS to incorporate presumptions favoring the victim in its drafting of regulations. *See Kelley supra* note 11, at 326.

should mandate that the safety and welfare of the applicant remain the primary focus in any determination of extreme hardship of victims of domestic violence.²³¹ In contrast to the minor role country conditions have played traditionally, findings that women will face hardships incident to the abuse in her native country, a fear many Mexican VAWA applicants maintain,²³² should weigh heavily in the extreme hardship determination.²³³ To the extent the traditional factors, such as family ties,

²³¹ Assigning presumptive weight to VAWA-related factors necessarily restricts the choices given the adjudicator in the extreme hardship determination. Extreme hardship is a standard of eligibility and it is appropriate and necessary to establish guideposts to define the term. Additionally, if as one court has ruled, that extreme hardship is wholly discretionary and now barred from judicial review under IIRAIRA's new rules, establishing firm standards are needed for the protection of battered spouses and children. See *Kalaw v. INS*, 133 F.3d 1147 (9th Cir. 1997) and discussion *infra* at Section IV, B, 1.

I also favor establishing rules which limit the "leeway of choice" given the adjudicator to make the ultimate discretionary decision whether to grant cancellation of removal/suspension of deportation to an undocumented battered spouse. Heyman, *supra* note 109, at 879 (non-citizens receive greater protection when the agency has standards to apply to discretionary adjudication and judicial review is available). See also Daniel Kanstrom, *Surrounding the Hole in the Doughnut*, *supra* note 146 (arguing also for more specific standards to guide discretionary adjudications). There is a legislative mandate favoring battered spouses and children. Absent strong countervailing negative factors, it would seem inappropriate for the immigration court to deny as a matter of discretion an application for suspension/cancellation based on VAWA. In *Matter of Ricco*, 15 I&N Dec. 548, 549 (BIA 1976), the Board objected to consideration of the views of a House Judiciary Committee in the discretionary determination of a suspension case, and ruled that discretion should be governed by the particular circumstances of the case. However, while the Board may be reluctant to consider a single Congressional report, its discretionary decisions most certainly must be governed by a broad-based Congressional policy. See *Matter of Lee*, 11 I&N Dec. 649, 650-51 (BIA 1966). Moreover, the Board gave favorable treatment to asylum seekers, who like domestic violence victims, face life-threatening consequences to removal. See *Matter of Pula*, 19 I&N Dec. 469 (BIA 1987).

²³² See discussion *infra* Section V.

²³³ This article focuses on the country conditions a VAWA applicant may face if deported and argues that dangerous conditions should be given presumptive weight. I do not thereby contend that a battered woman who will not face hardship tied to conditions in her home country cannot demonstrate extreme hardship for purposes of eligibility under VAWA. Each and all of the factors tied to battery and abuse should weigh heavily in the extreme hardship determination. The extent and nature of the battery and extreme cruelty a woman has withstood may alone be so severe to constitute extreme hardship. Even in traditional cases, a single hardship factor has been found to constitute extreme hardship. See *Meija-Carrillo v. INS*, 656 F.2d 520, 522 (9th Cir. 1981) (citing *Urbano de Malaluan v. INS*, 577 F.2d 589, 593-94 (9th Cir. 1978)) ("Separation from family alone may establish extreme hardship."). Furthermore, in the context of asylum cases, the Board has evaluated the nature of abuse in terms of relief. It is well accepted that in cases of severe past persecution,

lengthy residence, and attachment to community do not relate to the abuse suffered by the applicant and her need for protection, they should be assigned little weight in the overall determination of extreme hardship in a VAWA case.²³⁴

Consistent with its broad powers over immigration matters, the agency can set standards for consideration of discretionary relief which benefit specific groups. The government recently accepted it has such authority when it established a group-specific definition of extreme hardship to aid Salvadorans and Guatemalans applying for suspension of deportation under NACARA.²³⁵ Once a Central American NACARA applicant submits an application which includes questions pertaining to hardship, s/he is presumed to meet the extreme hardship requirements, a presumption the INS has the burden to overcome.²³⁶ Significantly, the Depart-

even in situations in which future persecution is unlikely, asylum may be granted. *Matter of Chen*, Int. Dec. 3104 (BIA 1989); *Matter of B-*, Int. Dec. 3251 (BIA 1995).

²³⁴ If the Attorney General fails to highlight the importance of the abuse and protection in extreme hardship determinations adjudicators will have license to deny applications based on a woman's ties to family in her home country, minimal residence in the United States, and lack of participation in community groups. Family and community ties and protection are relevant, but must be viewed in the context of domestic violence. A VAWA applicant may have no U.S. family or her only family in the U.S. may consist of small children. While she may have members of her family abroad, they may not be able to provide her with protection and solace. Minimal residence should not be viewed negatively because the suspension and cancellation removal statutes only require three years physical presence in contrast to the seven and ten years required for traditional suspension and cancellation of removal. Moreover, there is no term of residence required for VAWA self-petitions. Strong attachment to community has been required for suspension applicants to gain legal status, but battered women often are isolated and are unable to participate in community activities. Their ties to the community also must be considered in the context of the abuse they have suffered.

²³⁵ 64 Fed. Reg. 27856, 27864-27867 (May 21, 1999). The decision of the Department of Justice to extend a rebuttable presumption of extreme hardship for Salvadorans and Guatemalans followed intense lobbying by immigrant advocacy organizations and Central American governments. See *Hardship Determination in NACARA Regulations Sparks Controversy, as Clinton Administration Ponders Scope*, 76 INTERPRETER RELEASES 412, 414-15 (Mar. 15, 1999) [hereinafter *Hardship Determination in NACARA*]; Memorandum, *INS No. 1965-98 Implementation of Section 2.3 of the Nicaraguan Adjustment and Central American Relief Act*, (Jan. 8, 1999) [hereinafter *INS No. 1965-98*] (on file with the author) (The memorandum prepared by a counsel for the Embassy of El Salvador in response to the proposed regulations on NACARA, argued that group specific standard of extreme hardship for Central Americans applying for NACARA relief is consistent with the statute and in keeping with the Attorney General's broad authority to interpret hardship).

²³⁶ 64 Fed. Reg. 27866. The government considered its approach to be a balance between providing a blanket hardship finding and evaluating hardship on a case-by-case basis. *Id.* at 27865. There had been stiff opposition to a group-specific hardship

ment of Justice considered, but rejected, the approach to determining “extreme hardship” provides to VAWA applicants, that of simply promulgating rules containing a list of factors.²³⁷

There is every reason to establish a similar approach for VAWA applicants who must also meet the “extreme hardship” standard. The agency has identified the domestic violence-related hardship factors. A group specific determination that immigrant victims who suffer one or more of the identified hardships presumptively meet the extreme hardship standard would be consistent with the ameliorative purpose of VAWA and the legislative history.

1. Judicial Intervention - If Mrs. Wang Were A Battered Spouse

Although Congress retains the power to limit judicial review in immigration matters,²³⁸ non-citizens have long enjoyed access to federal courts for review of immigration decisions.²³⁹ The previous discussion on the litigation surrounding suspension of deportation demonstrates how federal courts have been quite active in reviewing discretionary applications for relief from deportation,²⁴⁰ and how non-citizens have successfully challenged the denial of applications for relief and exposed agency abuse of discretion.²⁴¹ As is often the case with vague statutory terms,²⁴² there has been much litigation surrounding extreme hardship determina-

standard from some Republican representatives who perceived the proposal as a move to grant a blanket amnesty to Salvadorans and Guatemalans. *Hardship Determination in NACARA*, *supra* note 235, at 414. *But see INS No. 1915-98*, *supra* note 235, which also urged that the INS had the authority to withhold and extend a discretionary benefit to specified groups as long as consistent with the statutory scheme, and *Fook Hong Mak v. INS*, 435 F.2d 728, 729-30 (2nd Cir. 1970). “The legislature’s grant of discretion to accord a privilege does not imply a mandate that this must inevitably be done by examining each case rather than by identifying groups.” *INS No. 1915-98*, *supra* note 235, at 4.

²³⁷ 64 Fed. Reg. at 27865. The Department considered that a group-specific hardship would be consistent with the statute, and “would be appropriate and would further an interest in greater administrative efficiency.” *Id.*

²³⁸ See *supra* note 81 for discussion of Congress plenary power over immigration matters. See also Lenni Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1412-16 (1998).

²³⁹ THOMAS ALEXANDER ALEINIKOFF, DAVID MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 927-35 (4th ed. 1998) [hereinafter ALEINIKOFF ET AL.]

²⁴⁰ See *supra* Section III.

²⁴¹ See cases cited *supra* note 170. Even when federal courts challenge agency decisions, they should not be viewed as opponents. As Professor Heyman notes, “the relationship must be reconceptualized to reflect the need for dialogue between the two branches, a dialogue that can lead to the orderly and coherent development of the law.” Heyman, *supra* note 105, at 865.

²⁴² The INA contains numerous vague terms that require interpretation and thereby frequently foster litigation. See M. Isabel Medina, *Judicial Review: A Nice*

tions.²⁴³ However, with its 1996 legislation, Congress dramatically limited the power of federal courts to review agency orders of deportation/removal,²⁴⁴ and curtailed review of discretionary decisions.²⁴⁵ These changes lead to the troubling prospect there will be no avenue of judicial review of agency determinations which are inconsistent with the ameliorative purpose of VAWA. To be decided is the extent to which the new rules for judicial review bar review in immigration cases, including discretionary decisions, and more particularly whether immigration eligibility

Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 29 CONN. L. REV. 1525, 1529.

²⁴³ In the early cases, jurisdiction was grounded on the writ of habeas corpus, Art. 1, §9, cl. 2 of the Constitution. ALENIKOFF ET AL, *supra* note 239, at 928. Later litigants relied on the Declaratory Judgment Act and the Administrative Procedure Act until 1961 when Congress added §106 to the 1952 Immigration and Nationality Act. *Id.* at 928-32. See also Benson, *supra* note 238, at 1424 (despite early Congressional efforts to limit jurisdiction over immigration matters in 1907 and 1917, courts reviewed deportation and exclusion redress via habeas corpus). See Kamlet, *Judicial Review of "Extreme Hardship," supra* note 104, at 196-200 (even following *Wang* in which the court ruled that the definition of "extreme hardship" lies with the Attorney General, courts continued to grapple with interpretation of the standard).

²⁴⁴ AEDPA, the first of the two statutes passed in 1996, eliminated judicial review of deportation orders of non-citizens who are aggravated felons, as defined by INA §101(a)(43). AEDPA §440a. Shortly after, Congress passed IIRAIRA, which repealed INA §106(a), the statute which since 1962 had governed judicial review of deportation orders. IIRAIRA established new §242 that bars judicial review of removal orders in the cases of selected criminals and review of discretionary decisions.

²⁴⁵ IIRAIRA §306 bars review of certain discretionary grants including cancellation of removal under §240A(b), and "any other decision or action . . . specified . . . to be in the discretion of the Attorney General."

In the wake of legislation to bar judicial review, the EOIR, in "response to the enormous and unprecedented increase in the number of appeals being filed with the Board," has taken the disturbing step of proposing to streamline its own appellate review. In the proposed rule published at 64 Fed. Reg. 49043-46 (Sept. 14, 1998), the EOIR would give authority to a single Board member to affirm without opinion the decision of an Immigration Judge. See 75 INTERPRETER RELEASES 1301 (Sept. 21, 1998). One of the categories of cases that the new rules would impact is discretionary decisions. The preamble to the proposed rules states that the rules would authorize the Board chairman to designate for purposes of the streamlining procedure

(3) cases seeking discretionary relief for which the appellant clearly appears to be statutorily ineligible;

(4) cases challenging discretionary decisions where it does not appear that the decision-maker has applied the wrong criteria or deviated from precedents of the Board or the controlling law from the United States Court of Appeals or the United States Supreme Court;

63 Fed. Reg. at 49042, reported in 75 INTERPRETER RELEASES at 1311.

standards, like extreme hardship, which involve a mix of discretion and statutory interpretation remain subject to any review.²⁴⁶

IIRAIRA repealed INA §106a and established new, more restrictive rules for judicial review.²⁴⁷ Review of orders of deportation and new removal proceedings lie with the circuit court, but the statute places a number of limitations on those cases that may be heard.²⁴⁸ Of concern to VAWA applicants who would apply for cancellation of removal and be denied is §242(a)(2)(B) that bars judicial review of “any judgment regarding the granting of relief under §§212(h), 212(i), 240A, 240B, or 245.”²⁴⁹ and further eliminates federal court review for “any other decision or action of the Attorney General the authority of which is specified under this chapter to be in the discretion of the Attorney General. . . .”²⁵⁰ IIRAIRA also sets forth an all-encompassing review restriction at §242(g):

[E]xcept as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.²⁵¹

There has been vigorous litigation centered on the court-stripping provisions, and so far most courts have rejected the notion that the new legislation bars all judicial review of constitutional claims and issues of statutory interpretation.²⁵² However, the negative impact of §242 on

²⁴⁶ This section does not purport to present an exhaustive treatment of the new judicial review rules. For a comprehensive analysis of the effects of AEDPA’s and IIRAIRA’s changes to judicial review, see Benson, *supra* note 238, and Medina, *supra* note 242.

²⁴⁷ IIRAIRA §306(a)(2), codified at INA §242.

²⁴⁸ INA §242(a).

²⁴⁹ INA §242(a)(2)(B)(i).

²⁵⁰ INA §240(a)(2)(B)(ii).

²⁵¹ INA §242(g). *But see Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. ____ , 119 S.Ct. 2016 (1999) in which the Supreme Court narrowly construed INA §242(g) to limit jurisdiction only to areas specified by the statute.

²⁵² Most of the litigation that has emerged, since Congress passed its court-stripping measures, concerns foreign nationals deportable based on criminal conduct. AEDPA and IIRAIRA curtailed judicial review in the cases of non-citizens deportable for a broad range of offenses, including those relating to drugs, firearms, and aggravated felonies. Litigants have asserted that judicial review remains by way of *habeas corpus*, long a mainstay of review of immigration decisions, and that, further, the absence of any judicial intervention violates the Constitution. *See* Benson, *supra* note 238. While conceding that serious constitutional issues remain reviewable even for criminal non-citizens, the government has repeatedly suggested that Congress implicitly repealed *habeas* review under 28 U.S.C. §2241 for immigration decisions, and that AEDPA’s repeal of INA §106(a)(10) and the

applications for suspension of deportation and extreme hardship determinations was felt immediately in the case *Kalaw v. INS*.²⁵³ The court ruled that statutory eligibility questions, such as whether the respondent met the required physical presence or, to some extent, the good moral character requirement, were reviewable, but was not persuaded that the negative extreme hardship determination was subject to review under IIRAIRA's new jurisdiction rules and §242.²⁵⁴ The court found that determination to be "clearly a discretionary act" and thus no longer subject to review under the new rules.²⁵⁵

Are all avenues of judicial review now foreclosed for VAWA applicants denied relief based on negative extreme hardship findings? Will negative determinations raise constitutional or statutory eligibility questions for

sweeping provisions in the new INA §242(g) block *habeas corpus* jurisdiction for aliens. The government has argued that AEDPA and IIRAIRA do not implicate the Constitution because courts of appeal retain jurisdiction in immigration cases over substantial constitutional questions. *See, e.g., Mojica v. Reno*, 920 F. Supp. 130 (E.D.N.Y. 1997), *aff'd sub nom Henderson v. INS*, 157 F.3d 106 (2nd Cir. 1998), *cert. denied* (1999). Notwithstanding, most courts have rejected the government's sweeping arguments. *See Lerma de Gardia v. INS*, 141 F.2d 215 (5th Cir. 1998); *Salazar-Haro v. INS*, 95 F.3d 309 (3rd Cir. 1996), *cert. denied*, 117 S.Ct. 1842 (1997); *Kolster v. INS*, 101 F.3d 785 (1st Cir. 1996); *Hincapie-Nieto v. INS* 92 F.3d 27 (2nd Cir. 1996). *But see LaGuerre v. INS*, 164 F.3d 1035 (7th Cir. 1998) (District courts lack jurisdiction to consider *habeas* claims). In a significant post-AEDPA and IIRAIRA decision from a court appeals, *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied* (1999), the First Circuit ruled that writs of *habeas corpus* remain available in immigration cases, and that Congress did not explicitly repeal §2241 for purposes of immigration cases in either AEDPA or IIRAIRA. *Id.* at 121. Furthermore, the court declined to limit *habeas* jurisdiction in order to avoid the serious and substantial constitutional questions which it would be forced to address if AEDPA and IIRAIRA were held to have repealed §2241, that of Congress' power under Article III to strip federal courts of jurisdiction and the Suspension Clause guarantee of *habeas corpus*. *Id.* at 123. The *Goncalves* court did not fully resolve the scope of review in *habeas* cases involving immigration matters, although it did permit review of the petitioners' issue of statutory interpretation. *Id.* at 124-25. *See also Henderson v. INS*, 157 F.3d at 122 (court has jurisdiction under *habeas* to review statutory claims which "affect the substantial rights of aliens"). Several district courts had ruled that review was confined to only "grave constitutional error or a fundamental miscarriage of justice." *Duldulao v. Reno*, 958 F. Supp. 476, 479 (D. Haw. 1997); *see also Mbiya v. INS*, 930 F. Supp. 609, 612 (N.D. Ga. 1996) (used the term "manifest injustice"); *Ozoanya v. Reno*, 968 F. Supp. 1, 6 (D.D.C. 1997) ("substantial constitutional claims" would be heard in *habeas* cases); *Gutierrez-Martinez v. Reno*, 989 F. Supp. 1205 (N.D. Ga. 1998); *Morisath v. Smith*, 988 F. Supp. 1333 (W.D. Wash. 1997); *Jurado-Gutierrez v. Greene*, 977 F. Supp. 1089 (D. Colo. 1997). The origins of these heightened standards come from rules applied to state prisoner post-conviction relief. *Goncalves*, 144 F.3d at 124. *See also Benson*, *supra* note 238, at 1470-71.

²⁵³ 133 F.3d 1147 (9th Cir.1997).

²⁵⁴ *Id.* at 1152.

²⁵⁵ *Id.*

which review is guaranteed? Or, are extreme hardship determinations purely discretionary as concluded by the *Kalow* case²⁵⁶ and now entirely outside the scope of judicial review?

Given the consensus that the new rules do not bar review of constitutional violations, cases which challenge the agency's failure to adhere to established guidelines will be considered.²⁵⁷ Beyond the constitutional issues, courts will be asked to decide the scope Congressional intent to bar review of discretionary decisions and to settle long-standing questions as to the character of extreme hardship determinations. *Kalow* correctly interpreted the intent of Congress to bar review of the ultimate discretionary decision of the adjudicator whether to grant or deny an application for specified benefits under the INA. However, most forms of immigration relief are infused with discretionary interpretations of law and fact.²⁵⁸ Extreme hardship is an example of a statutory eligibility standard that involves the use of discretion in final determinations. Section 242 can be more narrowly construed to bar the decision only as to whether to grant or deny relief.²⁵⁹ Unfortunately, *Kalow* signals that courts are prepared to broadly interpret §242 to bar review not only of

²⁵⁶ The word "discretion" is, as Professor Heyman states, a "conversation stopper." Heyman, *supra* note 109, at 865.

²⁵⁷ See United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). See also *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991) (statutory provision limiting judicial review in legalization cases did not preclude the review of a case challenging violation of the statute and constitutions); *Achacoso-Sanchez v. INS*, at 1265 (a court can act when the Board violates procedural rights).

²⁵⁸ Professor Kanstroom describes immigration law as a "fabric of discretion and judicial deference." Kanstroom, *supra* note 146, at 709. Some statutes are expressly discretionary but other provisions involving a wide range of adjudicatory functions have come to be considered discretionary. Discretion expressly prescribed by the statute is termed by Professor Kanstroom as "delegated discretion." *Id.* at 751-59. He then sets forth forms of interpretative discretion which includes "a mix of 'legal' categorization and definition with factual inquiry," a process difficult to define and monitor. *Id.* at 764.

²⁵⁹ Section 242 can be construed to preserve the right of access to court review for aliens denied suspension/cancellation of removal. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) ("judicial review of final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.") Any doubt as to the applicability of INA §242 to review any or all aspects of deportation/removal cases should be resolved in favor of judicial access. For instance, the statute restricts review of decisions "regarding the granting of relief" under the specified statutes, language which limits the bar to the aspect of decisions expressly discretionary, *i.e.* the ultimate decision to grant an application. INA §242(2)(B)(i). Moreover, INA §242(2)(B)(ii) limits review of other decisions or actions which are "specified under this title to be in the discretion of the Attorney General," again limiting consideration to only those decisions Congress has expressly prescribed to be discretionary. This analysis preserves for consideration questions as to whether a given applicant satisfies standards of eligibility, albeit the

the ultimate discretionary decisions, but also statutory eligibility issues intertwined with discretion.²⁶⁰

Ultimately, the Supreme Court will resolve the debate left open by *Wang*, and renewed by Congress' desire to curtail immigration litigation of discretionary decisions, the extent to which the judiciary may review extreme hardship determinations.²⁶¹

agency may exercise some discretion in the interpretation and application of eligibility issues.

A narrow reading of §242 which encompasses limits on review of only the ultimate discretionary decision in a given relief statute is consistent with a pattern of court decisions which have generally been exceedingly differential to that aspect of agency discretion. In *Jay v. Boyd*, 351 U.S. 345 (1956), the Court found that the final decision as to whether to grant or deny relief had no statutory standards and was left entirely to the Attorney General to decide. *Id.* at 353. In *Achacosa-Sanchez v. INS*, 779 F.2d 1260 (7th Cir. 1985), Judge Easterbrook described a process of plenary discretion and judicial restraint in the case of a respondent seeking to reopen her deportation to apply for adjustment of status. "In order to tell whether Achacosa-Sanchez deserves merciful treatment, one must know not only the facts of her case, but also the circumstances of the tens of thousands of other aliens seeking relief. If the Board is doing its job well, it is comparing the applicants against each other as well as evaluating them under moral and prudential standards. That comparison entails the assessment of thousands of aliens who are invisible to judges when a single alien seeks judicial review. The nature of the comparison makes it unsuited for judicial resolution." *Id.* at 1265.

²⁶⁰ Other courts have in the past drawn the distinction between review of extreme hardship and the discretionary determination. *See, e.g.*, *Hernandez-Patino*, 831 F.2d 750, 752 (7th Cir. 1987). The court then distinguished itself from the earlier case ("the application for suspension of deportation was denied for failure to satisfy statutory eligibility requirements, and thus, our role is different from that of this Court in *Achacosa-Sanchez*. . . which reviewed a BIA decision made on purely discretionary grounds"). *See also* *Banks v. INS*, 594 F.2d 760, 762 (9th Cir. 1979) (hardship findings depend on the specific circumstances of the case); *Gebremichael v. INS*, 10 F.3d 28, 40 (1st Cir. 1993) (suspension of deportation "involves a two-step process: (1) a finding of statutory eligibility; and (2) an exercise of agency discretion"). These courts acknowledged the Board's unfettered authority to define extreme hardship, but recognized the need to review the misapplication of relevant factors.

²⁶¹ An interesting change in law may affect the significance of *Kalaw*. In support of its opinion that extreme hardship findings are not reviewable, the *Kalaw* court relied on language in the suspension of deportation statute, specifically that extreme hardship is determined "in the opinion of the Attorney General." *Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997). Yet, when Congress repealed INA §244, the statute considered in *Kalaw*, and substituted relief under §240A(b), it eliminated the phrase. Congress may have peeled off a layer of the agency's discretion for determining hardship. Although the *Wang* court did not mention the "in the opinion of the Attorney General" language, it is likely the court relied on the phrase to conclude that the statute delegated to the Attorney General the discretion to determine extreme hardship. Heyman, *supra* note 109, at 893.

V. CASE STUDIES OF MEXICAN APPLICANTS

Immigrant domestic violence victims still face significant obstacles that the Department of Justice has yet to address. Despite the rules, the agency memorandum, and the centralization of adjudications of self-petitions, there remains a lack of uniformity and consistency in the process.²⁶² The situation of Mexican VAWA applicants is indicative of problems attendant to extreme hardship as an eligibility standard for battered immigrants. Mexican undocumented women hold a prominent place in the United States immigrant community and represent a significant number of the victims of violence seeking relief under VAWA. The outcome of the struggle to define and shape extreme hardship for purposes of VAWA cases will profoundly affect this group of women. A number of issues relevant to extreme hardship are evident in the review of VAWA cases involving Mexican battered women. The discussion in this section is drawn from experiences of the students and faculty of St. Mary's University School of Law Immigration and Human Rights Clinics.²⁶³ First, there is no need to incorporate an eligibility criterion tied to control of illegal immigration to the VAWA eligible spouse and children who have come to the United States lawfully or unlawfully. There is no evidence that women and children have engaged in fraud to obtain VAWA benefits.²⁶⁴ On the other hand, extreme hardship determinations are an extraordinary burden to both applicants and the INS. Battered women must collect and present voluminous documentation, a process that complicates and delays what should be a routine application process for them and for the INS. Furthermore, the conflict between traditional and VAWA-centered extreme hardship determinations has led to disparate and unfounded decisions in the cases of battered Mexican women. This underscores the need for Congress to discard extreme hardship altogether or for the agency to depart from its traditional interpretations relative to immigration benefits in order to guarantee the needs of all battered immigrant women. Mexican spouses of U.S. citizens and legal residents unable to meet a narrow standard of hardship face deportation to a country that does not offer adequate legal protections. Congress could not have intended that legislation aimed at curbing domestic violence would be implemented in a manner that jeopardizes the security needs of battered immigrant women.

²⁶² See discussion *infra* Section V, C.

²⁶³ The Clinics have assisted since 1995 over 100 Mexican women and children in applying for benefits under the immigration provisions of VAWA.

²⁶⁴ Each of the Clinic's clients came with detailed accounts of battery and abuse, and in many cases the violence had occurred over a substantial period of time. More often than not, the women produced evidence of the abuse in police and medical records and statements of neighbors, teachers, and relatives. See also Kelly, *Stories from the Front*, *supra* note 11, at 688 ("Fear of fraud, however, is entirely misplaced. Domestic violence is an underreported, not overreported, epidemic").

A. Mexican Immigration and VAWA

Since the 1970s, Mexicans have led in the number of immigrants coming to the United States have been Mexicans,²⁶⁵ and most new immigrants are women.²⁶⁶ Since 1997, over five thousand spouses and children of U.S. citizens and legal residents have applied for VAWA benefits,²⁶⁷ with a significant number of these applicants being Mexican women.²⁶⁸

The figures illustrate the high profile of Mexican women in the general immigrant population and in the pool of applicants seeking VAWA benefits, and also indicates that regarding the overall population of family-based immigration, VAWA applicants are a relatively small group.²⁶⁹ It is not known how many undocumented women, including Mexicans, are eli-

²⁶⁵ U.S. IMMIGRATION AND NATURALIZATION SERVICE STATISTICAL YEARBOOK FOR THE IMMIGRATION AND NATURALIZATION SERVICE, 1995, at 30 (U.S. Government Printing Office 1997) [hereinafter INS YEARBOOK]. In 1995, the total population of Mexicans who immigrated to the United States was 90,045. The next leading nation, Russia, sent 54,133. *Id.* Beginning in the early part of the century, Mexicans began immigrating to the United States to work on the railroad and in agriculture. AT THE CROSSROADS: MEXICO AND U.S. IMMIGRATION POLICY 3 (Frank D. Bear, Rodolfo O. De La Garza, Bryan R. Roberts, Signey Weintraub eds., 1997). Until the 1970s, Mexican migration was relatively small in comparison to European immigration. *Id.* But, with the increase in U.S. demand for low-skilled labor in the agricultural and service industries, and the economic problems in Mexico, Mexican immigrants, both illegal and legal grew. *Id.* at 8-9.

²⁶⁶ In 1995, women accounted for 56.9% of those Mexicans who immigrated. INS YEARBOOK, *supra* note 265, at 56. Early Mexican migrants were predominantly male, but as more Mexican men became legal residents there was a rise in female migration. Katherine M. Donato, *U.S. Policy and Mexican Migration to the United States, 1942-92*, 75 SOC. SCI. Q. 705, 714 (Dec. 1994). During the mid-1970s there began a steady increase of undocumented women entering the United States, first as women joined their families already in the U.S., and then due to the economic crisis in Mexico in the 1980s. *Id.* at 723-24. Also, cited for the increase in undocumented Mexican women in their changing role in the Mexican family and greater independence. Tim Golden, *Evolving Roles of Mexican Women Evident in Rising Illegal Migration*, AUSTIN AMERICAN STATESMAN (July 26, 1992). See also Linda Miller Matthis, *Gender and International Labor Migration: A Network Approach*, 1996 SOC. JUST. 38 (Sept. 1, 1996) (More women are coming on their own or with the help of female relatives and friends, rather than spouses and other male relatives.).

²⁶⁷ INS report of adjudications for fiscal years 1997 and 1998. *Memorandum from Karen Fitzgerald*, INS Office of Programs, Oct. 25, 1998, at 30 (on file with the author).

²⁶⁸ *Id.* The INS does not record the country of origin of VAWA applicants, but acknowledges that a substantial number are from Mexico and Central America.

²⁶⁹ VAWA applications account for a fraction of the total number of foreign nationals who immigrate to the United States. In 1995, 458,482 individuals acquired legal status based on family-based visas. INS YEARBOOK, *supra* note 265, at 46. Of those, 83,893 were Mexican citizens. *Id.* at 47. Mexican VAWA applicants also represent a small population within the larger group of undocumented immigrants. It

gible to apply for VAWA. Given the high rate of domestic violence at all levels of the United States population,²⁷⁰ a corresponding high rate of VAWA applications would be expected. It may well be that most battered immigrant spouses and children, isolated from the general population, remain unaware of the immigration provisions of VAWA.²⁷¹ The eligibility standard may be a useful and legitimate tool serving immigration enforcement goals but, appended to VAWA, it is a barrier which may limit the number of women willing or able to apply and ultimately the number who will gain resident status.²⁷²

Mexican battered women must submit extensive documentation to support the claim of extreme hardship with each application they file. It is common for the evidence submitted to support the extreme hardship claim to substantially exceed evidence on other eligibility points.²⁷³ The task of preparing a VAWA petition is not only difficult and time-consuming, it necessarily requires the assistance of legal counsel. Battered spouses are generally unable to afford a private immigration attorney to assist them, and there are few public interest organizations with the expertise and staff to handle the cases.²⁷⁴

Extreme hardship claims also present a burden to the agency. The INS estimates that the majority of an officer's time spent adjudicating VAWA

is estimated that 2,700,000 out-of-status Mexicans reside in the United States. *Id.* at 183.

²⁷⁰ See *supra* notes 37-45 and accompanying text.

²⁷¹ See *supra* note 47 and accompanying text.

²⁷² It is quite possible, although undetermined (*see supra* note 80), that some members of Congress, expecting large numbers of battered immigrants to apply for VAWA, incorporated the factors of extreme hardship and good moral character in order to limit the number of spouses and children who would ultimately gain legal status. Placing such a barrier may be reasonable when considering legislation to benefit the undocumented population in general. To impose such limitations on a group which is eligible to immigrate is entirely unreasonable.

²⁷³ The length of a VAWA self-petition prepared by the St. Mary's clinics for its Mexican clients can reach 250 pages. Most of the material is collected and organized to support the women's extreme hardship arguments. Included, at a minimum, are birth and immigration records of children and other family members in the United States, school records of children, all available evidence of the applicant's residence in the United States, detailed affidavits of friends, relatives, and other witnesses, affidavits of psychologists, counselors, and of experts on Mexico, State Department and human rights organization reports on conditions in Mexico, and other news articles relating to domestic violence in Mexico.

²⁷⁴ For instance, in the San Antonio INS District, an area covering 81 South Texas counties, there are only 39 members of the American Immigration Lawyers Association (membership list on file with the author). There are also only four small public interest organizations, including the St. Mary's clinics, available to handle VAWA cases.

self-petitions is devoted to reviewing evidence of hardship.²⁷⁵ There is no administrative advantage to including extreme hardship as a standard of eligibility, as there is no evidence that undocumented Mexican spouses and children of U.S. citizens and legal residents are abusing VAWA,²⁷⁶ or that VAWA is an ill-conceived magnet which attracts to the United States undocumented individuals hoping to gain an immigration benefit.

B. *Mexican Women Define Extreme Hardship*

As Mexican VAWA applicants confront the issue of extreme hardship, they press for a change from the traditional determination of the eligibility standard. Mexican VAWA applicants cite a number of reasons to support their belief that expulsion to their home country will result in an extreme hardship to them and their immediate family. Applicants may rely on some of the traditional factors often cited to support claims to extreme hardship: family ties to U.S.-born or legal resident children, parents and siblings; long-term residence in the United States; health concerns; and ties to schools, churches, and other community organizations. However, battered immigrants rely heavily on factors relevant to the abuse that they and their children have suffered. Mexican VAWA applicants, including those who lack extensive ties to family and to community organizations in the United States, cite hardships they will face because they have been victims of domestic violence. The following discussion illustrates how the circumstances of Mexican battered women are applicable to the six extreme hardship factors set forth in the preamble to the interim rules and the Aleinikoff memorandum.

1. The Nature and Extent of Abuse

Mexican battered women applying for VAWA report a wide range of physical and psychological abuse at the hands of their U.S. citizen and legal resident spouses. They report they have been slapped, kicked, and beaten. Some have been threatened with weapons, including guns and knives, and some have suffered sexual abuse and rape.²⁷⁷ The women

²⁷⁵ Interview with Gail Pendleton of the National Immigrant Project of the National Lawyers Guild. Ms. Pendleton has participated in the training of INS officers assigned to the Vermont Service Center (notes on file with author).

²⁷⁶ Even if fraud were a problem, it likely would be detected in the review of evidence of battery and extreme cruelty or good faith marriage.

²⁷⁷ In the case of Sara, she recounted the following incident:

One evening, my husband came home drunk and brought a friend home with him. He demanded that I make dinner for them. When I told him we did not have enough food, he hit me in the eye, grabbed me by the neck, sat me down and put a gun to my neck. He threatened to kill me if I did not cook for them. I cooked the little food we had for the children and fed it to them.

The stories of Mexican battered women are consistent with other victims of domestic violence who may report serious physical trauma caused by beatings and weapon attacks. C. P. EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-

commonly report that the abuse began with name-calling and then escalated into more severe physical violence.²⁷⁸ Women recount that their spouses are often possessive and jealous and will isolate the women from friends and family.²⁷⁹ Abusive spouses frequently denigrate their Mexican wives because they are undocumented, threaten to call the INS to have the women deported and boast that they will bar the women from their children.²⁸⁰

2. Access to United States Court and Criminal Justice System.

Mexican battered women fear the loss of those protections afforded to them in the United States. They fear that deportation will result in the loss of access to courts that are able to protect them against continuing violence and provide them with redress for child custody and support. Mexican domestic violence victims find in the United States, notably in California, Texas, and Illinois, the states to which Mexicans are most likely to immigrate,²⁸¹ criminal justice systems able to provide them with broad legal protection and services.²⁸² Each state defines domestic violence to encompass a wide range of abuses against a spouse, former

DEFENSE AS LEGAL JUSTIFICATION 8 (1987). Studies estimate that 22% to 35% of women attended at hospital emergency rooms had sustained injuries due to domestic violence. T. Randall, *Domestic Violence Intervention Calls for More than Treating Injuries*, 264:8 J. AM. MED. ASS'N 939-40 (Aug. 22/29, 1990).

²⁷⁸ The women report that during courtship they were treated well, but that the abuse began usually after marriage. Name-calling is often the first sign of abuse that gradually escalates into more serious physical violence. This is a typical pattern of abusive relationships. See ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 42, 105-106 (1987). Domestic violence often consists of chronic and repeated physical and emotional abuse. See S. REP. NO. 101-545, at 36. Over time the abuse often becomes more severe. See *id.* at 37

²⁷⁹ This behavior also is consistent with typical battery and abuse situations. BROWNE, *supra* note 278, at 42.

²⁸⁰ See Klein & Orloff, *Providing Legal Protection to Battered Women*, *supra* note 37. In one case handled by the clinic, that of Susana, her husband aggressively sought her deportation. He obtained custody of the couple's two small children, and in an effort to have her removed to Mexico, contacted the INS. When she was arrested and placed in deportation proceedings, he then appeared at the immigration court to press for her deportation. Notes on file with the author.

²⁸¹ INS Yearbook, *supra* note 265, at 63.

²⁸² See Klein & Orloff, *supra* note 37, for analysis of state statutes in the United States which respond to domestic violence. See also Billy G. Mills & Mary Lyons McNamara, *California's Response to Domestic Violence*, 21 SANTA CLARA L. REV. 6 (1981); *Review of Selected 1994 California Legislation*, 26 PAC. L. J. 202, 380, 382, 475-476 (1995) (California); Sheila M. Murphy, *Orders of Protection and the Battered Women Syndrome*, LOY. U. CHI. L.J. 397 (1992) (Illinois); Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979-1991*, 33 S. TX. L. REV. 353 (1992) (Texas). See also Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1852 (1993)

spouse, and other co-habitants.²⁸³ The legislatures in California, Illinois and Texas have demonstrated recognition of the gravity of domestic violence. Each has passed comprehensive measures for the issuance of enforceable protective orders to guarantee the safety of battered women and their families in and out of the home,²⁸⁴ provided criminal sanctions for domestic violence,²⁸⁵ and mandated police interventions and assistance to victims.²⁸⁶

VAWA represents a federal response to domestic violence statute. Besides the immigration provisions, VAWA contains other provisions to combat domestic violence. VAWA authorizes the interstate enforcement

(over the past twenty years, there has been substantial progress in the development of legal remedies for domestic violence victims in the United States).

²⁸³ California defines abuse as “intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another. CALIFORNIA ANN. STAT., PENAL CODE 13700(a). The Illinois Domestic Violence Act defines abuse as “physical abuse, harassment, intimidation of a dependent, interference with personal liberty, or willful deprivation. ILL. ANN. STAT. CH. 750 §60/103(1) (Smith & Hurd, 1993). Harassment includes conduct that creates a disturbance at employment, in school, repeated telephone calls, repeated following, and keeping one under surveillance. *Id.* at § 601.103(1).

In Texas, family violence is defined as “an act . . . that is intended to result in physical harm, bodily injury, assault, or sexual assault or is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault. . . .” VERNON’S TEXAS ANN. STAT., §71.01(2).

²⁸⁴ *See also* CALIFORNIA ANN. STAT. FAMILY CODE §§ 6240 *et seq.* In California judicial officers are authorized to issue emergency protective order valid up to seven days. §6257. Permanent orders are valid up to three years. §6345. *See also* ILLINOIS ANN. STAT. CH. 750 §60/210 *et seq.* (blue book prohibits use of *et seq.* When citing consecutive sections or subsections R 3.4) (Smith & Hurd). Emergency orders in Illinois may last up to 21 days and plenary orders are valid for up to two years. §60/220. *See also* VERNON’S ANN. TEXAS STATUES, FAMILY CODE §71.01 *et seq.* (In Texas an abused spouse may obtain a protective order valid up to one year.)

²⁸⁵ It is a crime in each state not only to commit assaults on domestic partners, but also to violate protective orders. CALIF. ANN. STAT., PENAL CODE §273.6; ILLINOIS ANN. STAT. CH. 720, §5/12-30 (Smith-Hurd); VERNON’S ANN. STAT. PENAL CODE §25.07. In Illinois it is also a crime to interfere with the reporting of domestic violence, ILL. ANN. STAT. CH. 720 §5/12-6.3, and in California the malicious disclosure of the location of a domestic violence shelter is an offense. CALIF. ANN. STAT., PENAL CODE §273.7.

²⁸⁶ For example, the California Penal Code requires law enforcement department develop and implement policies for response to domestic violence calls. CALIF. ANN. STAT., PENAL CODE §13701. Section 13519 of the California Penal Code provides for a course of instruction for police officers to aid in handling domestic violence complaints. Under the Illinois Domestic Violence Act, law enforcement officers are required to use all reasonable means to prevent abuse, including transportation to a shelter for the victim, medical assistance if needed, or accompanying the victim to retrieve belongings. Smith & Hurd, ILL. ANN. STAT., CH. 750 §60/304.

of protection orders,²⁸⁷ establishes a federal offense for crossing state lines to harass or intimidate a partner,²⁸⁸ provides grants to states for training of police,²⁸⁹ and creates a civil rights claim for gender-motivated crimes.²⁹⁰ While domestic violence remains a serious problem in the United States,²⁹¹ Mexican women in abusive relationships in this country enjoy a greater measure of protection than they would if they were returned to Mexico.

3. Need for Services

Attendant to legal protections offered by the United States criminal justice system are the social services that offer protection and psychological counseling to Mexican battered women and their families. Shelters for battered women are found throughout the United States, including in the states of California, Texas, and Illinois.²⁹² Also available for battered women are psychological services at the shelters or in schools that their children attend. There are now many agencies in the United States that are reaching out to serve immigrant women.²⁹³ Many Mexican VAWA

²⁸⁷ 18 U.S.C. §2265 (1997).

²⁸⁸ 18 U.S.C. §2261 (1997).

²⁸⁹ 42 U.S.C. §3796hh (1997).

²⁹⁰ 42 U.S.C. §13981 (1995).

²⁹¹ Domestic violence is still a major cause of injury to women in the United States. Pamela Goldberg & Nancy Kelley, *Recent Developments: International Human Rights and Violence Against Women*, 6 HARV. H.R.J. 195 (1993). Despite decades in the development of substantive legal remedies and social services, there still exist serious shortcomings in the delivery of legal protection to victims of violence, and in many areas, U.S. criminal justice systems have yet to meet the needs of non-white and poor women. Kimberly Crenshaw, *Mapping the Margins*, *supra* note 37, at 1250 (1991). *See also* Katherine Culliton, *Legal Remedies for Domestic Violence in Chile and the United States: Cultural Relativism, Myths, and Realities*, 26 CASE W. RES. J. INT'L L. 183, 187-89 (Latina women often face difficulties accessing protection and services in the United States because police and social workers tend to blame the Latino culture for domestic problems). However, despite the recurring problems surrounding family violence in the United States and deficiencies in our criminal justice systems, Mexico still lags behind the United States in terms of the legal and social resources available to combat domestic violence. *See* Section 4 *infra*. Moreover, it is Mexican women applying for VAWA who readily identify the shortcomings in the Mexican systems as a problem. *Id.*

²⁹² California and Illinois have passed legislation to provide grants for battered women's shelters. CAL. HEALTH AND SAFETY CODE §300.5(b); ILL. ANN. STAT. CH. 20, para. 2210 (Smith & Hurd 1998).

²⁹³ There are agencies in the United States devoted to serving battered immigrant women. Notably, AYUDA in Washington, D.C., the Asian Pacific Island Family Safety Center in Seattle, and Mujeres Unidas y Accion in San Francisco are a few of the organizations specifically set up to serve battered immigrants. *See* Girardo-Roy, *supra* note 47, at 286-87. Public interest legal organizations have established projects to assist battered women, including immigrants. *See* Virginia Martinez, *Chicanas and*

applicants depend on U.S. social service agencies. The women's statements supporting their VAWA applications state that they have become dependent on shelters and the counseling services in which they and their children are enrolled. Applicants fear that deportation will break the few ties they do have to needed social and health services.

4. Conditions Abroad

Mexican women applying for immigrant status in the United States fear deportation to Mexico because the country has failed to construct adequate legal protections for victims of domestic violence. They recount the difficulties they had in obtaining protection prior to coming to the United States when they lived in their country with their spouses.²⁹⁴ They also are aware that the proximity of Mexico to the United States increases the threat that their batterer, who persists in the abuse, will be able to carry out continued violence. Mexican women's concern for their protection and that of their children is central to their efforts to avoid deportation and obtain legal status in the U.S. Mexico's lack of a support network and a legal structure to aid victims of domestic violence should weigh heavily in extreme hardship determinations.²⁹⁵

the Law 136-137, in *LATINOS IN THE UNITED STATES* (Antoinette Sedillo Lopez ed., 1995) (explaining that the Mexican American Legal Defense and Education Fund (MALDEF) established its Chicana Rights Project in part to address problems of battered women.) In many local communities in states in which most immigrants reside, service centers and shelters have set up Spanish language hotlines and hired bilingual staff. See Claudia Diaz Olavarrieta & Julio Sotelo, *Domestic Violence in Mexico*, 96 JAMA 1937 (June 26, 1996). In an effort to reach out to battered immigrant women and children, VAWA allocates funds specifically for service to immigrants and other marginalized groups. 42 U.S.C. §§10416-18.

²⁹⁴ In one case, that of Marta, she testified that her husband once beat her and threw her out of their home in Mexico; she was forced to spend the night sleeping with their animals. She called the police, who persuaded her husband to let her see her children, but refused to provide assistance with regard to the abuse. Notes on file with the author.

²⁹⁵ In their efforts to represent battered Mexican women, students and faculty of the St. Mary's Clinics have interviewed and obtained statements from Mexican attorneys, analyzed Mexico's civil and criminal codes, and collected human rights reports and news articles relating to Mexico's response to domestic violence. The experts consulted include Lic. Roberto Rosas, a Mexican attorney and law professor at St. Mary's University, Lic. Patricia Begne, a family law expert who teaches law at the Universidad de Guanajuato, Lic. Marta Silvia Briones Cardena, attorney with the Centro de Atencion de Victimas de Delitos in Monterrey, N.L., Mexico, and Lic. Teresa Ulloa, an attorney with the Mexicana de Defensa y Promocion de los Derechos (C.M. .D.P.D.H.) in Mexico, D.F. The information and materials collected have been used to support the claims of extreme hardship for the Clinics' clients and have been distributed to other domestic violence advocates in a manual *Legal Remedies for Battered Mexican Immigrants* (on file with the author).

Domestic violence in Mexico is a serious national problem, considered "widespread and vastly underreported."²⁹⁶ The few surveys that have been conducted conclude that violence in Mexican families is a problem faced by every generation and members of every social, economic, and educational group,²⁹⁷ in both rural and industrial areas. Most commentators agree that at a minimum, states should provide victims of domestic violence the following: 1) access to emergency shelters; 2) civil and criminal laws which address domestic violence, including provisions for enforceable protective orders; and 3) effective response by law enforcement to victims of violence.²⁹⁸ Mexico only has recently begun to build legal and social systems with which to control the domestic violence

²⁹⁶ U.S. State Department Country Report, *Mexico: Country Reports on Human Rights Practices for 1998*, at 19 (Feb. 26, 1999) [hereinafter State Dept. Report]. Few studies have tracked the level and nature of domestic violence in Mexico, but those that do report alarming rates. Carlos Montes de Oca Estradas, *Atención y Prevención de la Violencia Doméstica: Una Propuesta Jurídica*, in FORO ESTATAL SOBRE LA FAMILIA MEMORIAS 195 (1993). See also NAOMI NEFT & ANN LEVINE, WHERE WOMEN STAND: AN INTERNATIONAL REPORT ON THE STATUS OF WOMEN IN 140 COUNTRIES (1997).

²⁹⁷ See Rolando Cordera Campos, *Notas en Torno a la Violencia en la Familia*, EL NACIONAL, Nov. 1, 1996. The majority of victims of domestic violence are women. Esperanza Barajas, *Chuayffet propone más educación para abatir la violencia intrafamiliar*, EL EXCELSIOR, Oct. 29, 1996 (reporting that during the first six months of 1995, 90% of the victims were women and 87% of the aggressors were men.). In a survey of 342 low and middle income women, aged 15 or older, in Mexico City, 33% were reported to have lived in a violent relationship. Lori Heise, Jacqueline Pitanguy & Adrienne Germani, *Violence Against Women, the Hidden Health Problem*, WORLD BANK DISCUSSION PAPERS, at 8. See also Olavarrieta & Sotelo, *supra* note 293. (citing Ramirez J. and Vásquez G., *Mujer y Violencia: un Hecho Cotidiano Salud Publica Mex.*1993, 35:148-160). In 1995, the Asociación Mexicana contra la Violencia Hacia las Mujeres, A.C. (COVAC), one of Mexico's leading advocates for domestic violence victims, in collaboration with the United Nations Population Fund and the Attorney General of the Federal District, issued a report in which it was found that 35% of those interviewed knew of a family member who had suffered some form of violence in the previous six months. See COVAC study on file with the author.

²⁹⁸ WORLD BANK DISCUSSION PAPERS, *supra* note 297. However, it must be recognized that even when states do provide the minimum in terms of shelters, civil and criminal laws addressing family violence, and law enforcement response, domestic violence persists as a serious problem. More appropriately, these minimum measures should be seen as first steps and that only when states follow up with comprehensive efforts to engage police, courts, and social service agencies in dealing with the dynamics of the battering relationship and the persistence of batterers will there be systemic change. See David Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1176-78 (1995).

plaguing the country and, therefore, does not provide sufficient protection and services to battered women.²⁹⁹

Mexico's civil and criminal codes remain antiquated and cumbersome and inadequate to meet the needs of domestic violence victims. With the exception of recent legislative changes to the codes in the Federal District,³⁰⁰ most Mexican codes fail to address domestic violence.³⁰¹ Furthermore, the country lacks adequate police response and social services to respond to the needs of victims and their families.³⁰²

²⁹⁹ Critique of the Mexican response to domestic violence does not suggest that only the United States has developed successful models to combat domestic violence. Some United States advocates hold such a view. See Culliton, *Legal Remedies for Domestic Violence in Chile and the United States*, *supra* note 291 (Latin American countries are developing models that are distinct, but effective). Judgment of the Mexican legal system does not reflect a notion that Mexico has all the problems and North Americans have all the answers. *Id.* at 197.

Women's groups in Mexico have long struggled to call attention to the problems women face, including the plight of victims of domestic violence. See Suzie Siegel, *Mexican Women Work for Progress*, TAMPA TRI. (Mar. 8, 1996). As in the United States and Europe, the women's movement in Mexico formed in the 1970s, and organized around the issues of abortion, rape, and domestic violence. Eli Barton, *The Struggle for Life, or Pulling Off the Mask of Infamy*, in *WOMEN AND POLITICS WORLDWIDE* 451 (Barbara Nelson & Najma Chowdhury eds., 1994). Women's advocates have called for battered women's shelters, increased criminal enforcement, broad public education campaigns, and changes to civil and criminal codes. Rolando Cordera Campos, *Notas en Torno a la Violencia en la Familia*, *supra* note 297; Gabriela Romero Sanchez, *Tipificar como Delito la Violencia Intrafamiliar, Demandan Grupos*, NOVEDADES, Oct. 26, 1996, at 132. However, it is only recently that efforts to force public response to domestic violence have had some measure of success.

³⁰⁰ See *infra* notes 326 and 327 and accompanying text (describing the legislation).

³⁰¹ Comments of Lic. Patricia Begne, Lic. Roberto Rosas, and Lic. Teresa Ulloa. See *supra* note 295 and discussion, *infra*, Sections a and b. However, while the Mexican states lag behind Mexico, D.F. in terms of legal protections for victims of domestic violence, some state legislators are considering code changes. See Miguel Dominguez, *Apreuban Ley Intrafamiliar*, REFORMA (June 9, 1999) (State of Tamaulipas); Andrea Medina Rosas, *Mujeres y Hombres, Vocas Unidos* (February 21, 1995) (State of Jalisco); Rosaura Barahora, *Y la Violencia Intrafamiliar?* (Nuevo Leon).

³⁰² See, e.g., U.S. State Dept. Report at 20:

Women are reluctant to report abuse or file charges, and even when notified, the police are reluctant to intervene in what society considers to be a domestic matter. Police are also inexperienced in these cases and unfamiliar with appropriate investigative technologies.

a. *Civil laws*

Mexico only has recently begun exploring changes to its civil laws to respond to the problem of domestic violence.³⁰³ Outside the Federal District, the civil codes in Mexico fail to provide specific substantive relief.³⁰⁴ Consequently, remedies for abused women are confined to procedures for separation and divorce.³⁰⁵ Divorce in Mexico must be based on one or more grounds listed in the Mexican codes that the petitioning party has the burden of proving and, even in an abusive situation, divorce proceedings are lengthy and unwieldy.³⁰⁶ Furthermore, and most impor-

³⁰³ See discussion, *infra*, Section C on reform movement in Mexico. Despite recent proposals for changes in Mexico, D.F., civil protections for domestic violence victims have yet to be enforced. See *infra* notes 326-327 and accompanying text.

³⁰⁴ However, the Mexican states may soon incorporate the changes made in the Federal District to their own codes. Mexico is a civil law country; the Codes of the 31 Mexican states and the Federal District govern all civil and criminal matters. With few exceptions, the 31 Mexican states had adopted or closely follow the civil and criminal codes of the Federal District. Paul Bernstein *El Derecho y El Hecho: Law and Reality in the Mexican Criminal Justice System*, 8 CHICANO L. REV. 40, 44 (1985). Court decisions are primarily an analysis of code provisions. Margarita Trevino Bulli & David Coale, *Torts and Divorce: A Comparison of Texas and the Mexican Federal District*, 11 CONN. J. INT'L L. 29, 42 (Fall 1995).

³⁰⁵ Divorce proceedings became legal in Mexico in 1931, but it was not until 1974 that women were granted equal rights in seeking separation and divorce. Neft and Levine, *supra* note 296, at 358. A woman may obtain an uncontested divorce, *divorcio voluntario (por mutuo consentimiento)*, but only if there is an agreement from both parties. Interview with Lic. Roberto Rosas. See also Artículo 272, Código Civil para el Distrito Federal (C.C.D.F.), art. 272 (Mex.). If a woman is unable to obtain such an agreement for divorce, she must resort to filing a contested lawsuit, *divorcio necesario (contencioso)*. Interview with Lic. Roberto Rosas; See Artículo 267, Código Civil para el Distrito Federal (C.C.D.F.), art. 267 (Mex.). See also Julian Guitron, *Mexico: A Decade of Family Law, 1983-1993*, 33 Univ. Louisville J. Fam. L. 445 (1994-95).

³⁰⁶ There are a number of grounds for divorce listed in the Mexican codes, including adultery, a husband's prostitution of his wife, chronic or incurable illnesses, mental illness, and abandonment of home without cause. Artículo 267, Código Civil para el Distrito Federal (C.C.D.F.), art. 267 (Mex.). One ground, *sevicia* (extreme cruelty), is tied to domestic violence. *Id.* at XI. Art. 267 has been amended to include additional domestic violence-related grounds. However, outside the Federal District, the petitioning party in a Mexican divorce carries a heavy burden in proving a case, even in establishing sufficient cruelty for a divorce. The civil code provides that extreme cruelty, threats, and grave injuries upon one party may justify a divorce, but only if the situation has made living together intolerable. See CÓDIGO CIVIL PARA EL DISTRITO FEDERAL, COMENTADO, VOL. 1 AT 195 (1990). See also Guitrón, *supra* note 305, at 458. A Supreme Court *Jurisprudencia*, a case of legal precedent, illustrates the difficulties in obtaining divorce based on cruelty and violence. "Extreme cruelty must be such that marital union cannot be endured and is not based on a simple argument or an isolated beating that can be tolerated." Jesús Enrique Pantoja Mercado,

tantly, Mexican law does not generally provide for enforceable orders of protection, an essential instrument for the protection of domestic violence victims.³⁰⁷

b. *Criminal law*

In Mexico, victims of domestic violence may request criminal prosecution of their abuser, but enforcement is inadequate and unless the victim sustains serious physical injury, prosecution is unlikely.³⁰⁸ Domestic violence victims in Mexico are reluctant to file criminal charges against their abuser,³⁰⁹ and in those situations in which charges are leveled, the authorities will either fail to act or fail to adequately protect the victim.³¹⁰

Adición a la Fracción XI de Artículo 323 del Código Civil Vigente en el de Estado Guanajuato, FORO ESTATAL SOBRE LA FAMILIA MEMORIAS 87 (1993).

Under Mexican law, there is clear support for preservation of the family and disfavor of divorce. There are few jurisdictions that provide for a no-fault divorce, and even then the provisions are ineffective for battered women because the codes require a two year separation before a no-fault divorce can be filed. ARTÍCULO 267, §XVIII, CÓDIGO CIVIL PARA EL DISTRITO FEDERAL. Family interests are also reflected in the Mexican Constitution. Article 4 of the Constitution assures the protection of the family, although interestingly, the provision follows the declaration that men and women are to be treated equally. CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANAS, TITLE I, ART. 4. *See also* Antoinette Sedillo Lopez, *Two Legal Constructs of Motherhood: "Protective" Legislation in Mexico and the United States*, 1 S. CAL. REV. L. 7 WOMEN'S STUD. 239, 243 (1992).

³⁰⁷ *See* Klein and Orloff, *supra* note 37, at 811 and Donald Dutton, *THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES* 234 (1995). Code changes in Mexico, D.F. provide a limited protection order. *See infra* note 237. Outside Mexico, D.F., the only comparable remedy in Mexico is the separation order, *separación de personas*, which is tied to the divorce proceedings and thus, is available only for married women. Interview with Lic. Roberto Rosas. Separation orders are obtained in a family court and may permit a woman and her children to occupy the family home. They remain valid for short periods of time, and only during the pendency of a divorce. *See* ARTÍCULOS 525-535, CÓDIGO CIVIL DE PROCEDIMIENTOS CIVILES DEL ESTADO DE MEXICO. (The party may apply for an order providing for occupancy of the home and child support. The order is valid for 15 days but will be voided if the party does not pursue a divorce). The codes do not provide for any civil or criminal sanctions if a separation order is violated. Interview with Lic. Roberto Rosas.

³⁰⁸ Interview with Lic. Marta Silvia Briones Cardenas, Attorney for Centro de Atención a Víctimas de Belitos, June 7, 1997 (notes on file with the author).

³⁰⁹ U.S. State Department Report, *supra* note 296. *See also* COVAC Study, *infra* note 297.

³¹⁰ *See* U.S. State Department Report, *supra* note 296 and COVAC Study, *supra* note 297. *See also* Olavarrieta and Sotelo, *supra* note 293 (Judicial authorities refuse to act because they view domestic violence as a private matter, not one of public concern).

As with the civil codes, Mexican criminal code provisions outside the Federal District do not specifically protect domestic violence victims.³¹¹ Physical abuse by a spouse is generally considered a minor offense, and criminal prosecution usually will result only in cases in which a woman can prove she has sustained serious and visible bodily injury (*lesion*), or a credible threat to her life.³¹² A victim is not only burdened with having to go to extraordinary lengths to demonstrate she has suffered a significant injury, but also she must identify her abuser and establish a motive.³¹³ Moreover, the criminal codes do not provide for enforceable no contact orders which would provide some protection for women while charges are pending.³¹⁴ This is a further barrier to women, who often forego filing charges when they are unable to obtain protection.³¹⁵

The criminal justice system is also viewed as unsympathetic to domestic violence victims, particularly those who are poor.³¹⁶ Police protection in Mexico is woefully inadequate to protect victims of family violence, and most Mexican citizens still view the police as corrupt and incompetent.³¹⁷ Furthermore, surveys indicate that less than half of the criminal complaints are prosecuted.³¹⁸ The serious shortcomings of the Mexican crimi-

³¹¹ Only the Federal District's criminal code contains provisions specific for domestic violence victims, but there have been no reported prosecutions. *See infra* section c.

³¹² Prosecution is declined unless the victim suffered a serious injury, lesion, which requires more than 15 days to heal, and which can be verified with a medical certificate. Patricia Begne, *La Mujer en México*, 83 (1990). *See also* Interview with Lic. Marta Silvia Briones Cardenas, attorney for Centro de Atención a Víctimas de Delitos, June 7, 1997. Notes on file with the author.

³¹³ *See* Olavarrieta and Sotelo, *infra* note 293. The Mexican court will not ordinarily accept uncorroborated testimony, and the victim must therefore produce witnesses. *Id.*

³¹⁴ *See* Statements of Lic. Roberto Rosas, Lic. Teresa Ulloa, and Lic. Patricia Begne, *supra* note 295.

³¹⁵ COVAC Study, *supra* note 297 at 53. Most domestic violence victims refuse to press charges against their abuser out of fear they will be subjected to added violence or abuse. *Id.*

³¹⁶ Olavarietta and Sotelo, *supra* note 293; Bernstein, *supra* note 304, at 48.

³¹⁷ STATE DEPT. REPORT, *supra* note 302. Statement of Lic. Teresa Ulloa, *supra* note 295.

³¹⁸ *See* COVAC Study, *supra* note 297. In 60% of family violence cases in which prosecution was unsuccessful, the authorities had failed to act. *Id.* at 56. In only 32% of the cases in which prosecution was viewed as successful was the abuser jailed, and then only for a few hours. *Id.* at 55.

In the United States, there is, as in Mexico, a high rate of unreported incidents of domestic violence. It is estimated that 30% of victims in the United States report abuse. *See* S. REP. NO. 103-138 (1993). However, it is more likely in the United States that a complaint will be aggressively prosecuted. *See* Cheryl Hanna, *No Right to Choose*, *supra* note 283 at 1852-1853; *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498 at 1514-27 (1993). *See also* Rice, *supra*

nal justice system result in little protection to victims and allow abusers to batter with impunity.³¹⁹

Access to shelters and advocacy centers and service agencies are essential to the protection of battered and abused women. Unfortunately, there is a dearth of emergency shelters available for Mexican women fleeing a violent home. In many urban areas, there are shelters for children who have been abandoned or abused, but few facilities have been established specifically for battered women.³²⁰

There are few governmental and non-governmental agencies that provide services specifically to women victims of violence. Non-governmental agencies remain centered in a few state capitals,³²¹ and frequently face funding shortages that severely limit their outreach and effectiveness.³²² New government-sponsored agencies that are centered in a few urban centers are organized to provide assistance to all crime victims, not just battered women, and also lack sufficient resources to attend to all the domestic violence victims who need services.³²³ Moreover, few of the

note 278 and interview with Lic. Teresa Ulloa, *supra* note 295. Furthermore, the dockets in Mexican criminal courts are overcrowded and prosecutions frequently exceed a year. Margarita Trevino Balli & David Coale, *Torts and Divorce: A Comparison of Texas and the Mexican Federal District*, 11 CONN J. INT'L L. 29, 51 (Fall 1995). See also Teresa Rice, *A Third of Mexican Women are Victims of Domestic Abuse*, NOTIMEX, April 14, 1992 at 94.

³¹⁹ In one example which demonstrates the problems with Mexico's criminal justice system, a young law student who had been repeatedly abused by her former boyfriend was later jailed and charged with murder when she mortally injured the boyfriend while trying to defend herself. Norma Garza, *Perspectiva, Caso de pagina roja*, EL NORTE, Jan. 14, 1990. The woman had on two occasions tried to lodge criminal charges against the boyfriend, but because she could not prove a serious injury, her charges were ignored by prosecutors.

³²⁰ Even in Mexico City, the "most heavily populated city in the world," there are few shelter facilities devoted to battered women. See Olavarrieta and Sotelo, *supra* note 293. One shelter located in a working class suburb far from the metropolitan area requires a woman demonstrate she is filing a legal action against her partner. *Id.* See also interview with Lic. Teresa Ulloa, *supra* note 295.

³²¹ Rice, *supra* note 318. Non-governmental agencies, such as COVAC which provide legal and psychological counseling to battered women, are located only in some state capitals, out of reach to suburban and rural areas of the country.

³²² *Id.* at 3.

³²³ Mexico's serious economic problems cannot be ignored and, at some level, account for the government's inability to deal effectively with the problem of domestic law. Funding for services to domestic violence victims must compete with public funds for other health and social problems, such as alcoholism, diseases, and malnutrition. See Olavarrieta and Sotelo, *infra* note 318. The Attorney General's Centro de Atención a Víctimas Intrafamiliar (CAVI), a victims' advocacy unit, was the first government-sponsored office organized to deal with domestic violence. See Teresa Rice, *supra* note 268. It offers psychological and legal counseling and prevention workshops. See also Olavarrieta and Sotelo, *supra* note 293. CAVI does

agencies have been funded to construct shelter facilities for battered women.³²⁴

c. *Reform efforts*

Women's groups in Mexico have focused attention on the problem of domestic violence, and through their efforts, studies have been generated, government initiatives to serve victims have surfaced, and legislative proposals have been debated.³²⁵ Two pieces of legislation were recently passed in the Federal District, one to establish centers for attention to victims of domestic violence,³²⁶ and the other to revamp the civil and criminal codes to address the problem.³²⁷ However, there has been lack of enforcement of these reform measures,³²⁸ a signal that the Mexican

not have sufficient staff to handle the large number of requests for services. See statement of Lic. Teresa Ulloa, *supra* note 295.

The Mexican government sponsors child welfare agencies, Desarrollo Integral de la Familia (DIF), but until recently DIF offices did not address the specific problems of battered women. Interview with Maria de la Luz Garza, Director of the Centro de Atención Psicológica Casa de la Mujer in San Pedro Garza García, Nuevo León, México (June 6, 1997). The center she directs is a branch of DIF and in 1990 began to provide services to rape victims. However, in many areas, DIF offices are considered poor advocates and insensitive to the plight of battered women. See Francisco Mejía, *Muere un Niño cada dos Días, Víctima de la Violencia Familiar en México*, INFOLATINA, Oct. 30, 1996.

³²⁴ See Statement of Lic. Teresa Ulloa., *supra* note 295.

³²⁵ See *supra* note 297.

³²⁶ LEY DE ASISTENCIA Y PREVENCIÓN DE LA VIOLENCIA INTRAFAMILIAR DEL D.F. (on file with the author). The measure authorized the establishment of centers organized to receive and process complaints of domestic violence, summon parties involved, resolve disputes through mediation and arbitration, and provide psychological assistance.

³²⁷ In November 1997, the President of Mexico and a majority of federal legislators initiated amendments to the Mexico D.F. Civil Code, Civil Procedure Code, Penal Code, and Criminal Procedure Code. The amendments were publicized December 30, 1997 in the Official Federal Register. Included in the changes was the provision for no contact protective orders at the filing of a divorce, before the divorce if there is an emergency, but only during the proceedings. ARTÍCULO 282, CÓDIGO CIVIL PARA EL DISTRITO FEDERAL (C.C.D.F.) ARTÍCULO 282 (MEX.). The Federal District code also now defines domestic violence. ARTÍCULO 323 TER, CÓDIGO CIVIL PARA EL DISTRITO FEDERAL (C.C.D.F.), ARTÍCULO 323 ter (Mex). The amendments are made only to the Mexico D.F. codes, and not to other state codes. See also State Department Report, *supra* note 296.

³²⁸ See STATE DEPT. REPORT, *supra* note 296 at 20, and Interview of Lic. Teresa Ulloa and of Lic. Patricia Begne, see *supra* note 295. The government does not have the resources to open offices to attend to family violence cases. Moreover, even though changes have been made to the codes in Mexico, there has been no corresponding training of police, prosecutors, and judges to ensure that the laws will be enforced. Lic. Ulloa reported that in July 1998 no protection orders had been

government is unprepared to institute major changes to aid victims of domestic violence.³²⁹

Without aggressive measures to end domestic violence and provide protection to its victims, Mexico cannot provide a safe haven to Mexican women caught in abusive relationships in the United States. If forced to return to Mexico, these women face archaic civil laws designed to discourage divorce, criminal codes which punish only the most grievous injuries, and untrained, understaffed, and unsympathetic law enforcement.

d. *Behavior of the Abuser*

As indicated in the discussion on the conditions for battered women in Mexico, women fear their abusive spouses will follow them to Mexico, and because of the proximity of Mexico to the United States, their fears are justified.³³⁰

Mexican women often state that returning to Mexico is not an escape alternative because their spouses threaten to follow them abroad. The women report that their abusive spouses, particularly those who are Mexican citizens, frequently travel to Mexico and know well the country and the location of the women's families.³³¹ Even when the abuser is a United States citizen, the spouse may fear he will follow and harass her. In a case involving a Mexican woman, the abusive husband was a bounty hunter who boasted he had traveled often to Mexico on business and could find her if she fled to that country.³³²

issued by the Federal District Superior Court, and there were no reports of any convictions against batterers in Mexico, D.F. The failure to implement the domestic violence legislation is consistent with past omissions. While Mexico has passed commendable human rights legislation, its legal system is exceedingly slow and the government has failed to enforce new laws and protections. *See Mexico: A Country Guide* 67 (Tom Burns, ed., 1991).

³²⁹ Perhaps in recognition of shortcomings of the new legislation, the President of the Human Rights Commission of the Federal District, Luis de la Barrera Solórzano, was quoted as saying that the Ley de Asistencia was a point of departure and an educational tool. Maria Luisa Perez, *Buscar educar contra violencia familiar*, REFORMA, July 26, 1996.

³³⁰ *See discussion supra* Section 4.

³³¹ *See supra* note 1 for stories of Sara and Elena. In both cases the abusive spouses had ties to Mexico and frequently traveled to that country. *See also* case of Marta, discussed at *supra* note 294.

³³² Case of Susana whose husband possessed an arsenal of weapons and threatened to kill Susana if she took their children to Mexico (notes on file with the author). It is not uncommon to find among clinic clients who live in proximity to the U.S./Mexico border, who have U.S. citizen spouses make credible threats to follow their victims to Mexico.

e. *Potential Harm from Abusive Family, Friends*

Because the abusers often have strong ties to Mexico, many women report they fear retaliation from the abusive spouse's family and friends. The women feel vulnerable to continued abuse at the hands of family or friends who are angered by action the women may have taken, such as reporting the spouse to the police and obtaining protection and child custody orders. One woman produced letters from her incarcerated spouse threatening to have her killed in Mexico.³³³

C. *INS Response to Mexican Applicants*

The INS centralization of VAWA self-petition adjudication in one service center with officials trained specifically to adjudicate these claims has contributed to a high rate of approval of self-petitions, including those of battered Mexican women.³³⁴ It is evident that the six factors incorporated in the preamble to the interim rules and the Aleinikoff Memorandum play a significant, if not determinative, role in extreme hardship determinations at the INS service center.³³⁵

This positive development is overshadowed by the fact that for many battered Mexican women, their efforts to gain legal status are undermined by extreme hardship traditionalists within the agency. Within INS district offices handling VAWA cases, one finds that factually-similar cases of Mexican women receive disparate treatment,³³⁶ and individual

³³³ See Case of Consuelo. Her spouse was jailed for a drug offense, but wrote threatening letters to Consuelo from prison. Case notes on file with the author.

³³⁴ See Memorandum of Karen Fitzgerald, Office of Programs, October 25, 1998, *supra* note 268. The accompanying report indicates that in fiscal year 1997, 2,491 VAWA petitions were received by the INS; 1,210 were approved and 406 were denied. In 1998, the INS received 3,331 VAWA petitions, approved 1,677 and denied 810. The report does not indicate the reason(s) for denial of petitions except that some applicants failed to prove eligibility and some abandoned their application. The report does not indicate the number of approved VAWA petitions later revoked by local INS officers. See *infra* note 337.

³³⁵ Gail Pendleton of the National Immigration Project reports that adjudicators at the Vermont Service Center assign greater importance to the six domestic violence-related factors than to the traditional factors. In fact, if an applicant were to rely solely on the traditional *Anderson* factors and not detail hardship tied to abuse, the Vermont adjudicators suspect fraud. Interview with Gail Pendleton, notes on file with the author. See also Gilbert, *supra* note 72.

³³⁶ The case of Sara, *supra* note 1, and that of another Mexican woman, Marta, *supra* note 294, illustrate this point. Both women were married to permanent residents and both had suffered serious abuse of many years at the hands of their spouses. Marta had been hit, slapped and kicked, subjected to verbal abuse, and threatened with weapons by her husband. Sara has been subject to similar physical and emotional abuse and threats with weapons. Both women had been abused by their spouses in Mexico and feared return to that country. They testified their husbands could easily find them and presented testimony from an expert that the

cases handled at both the district and service center levels are treated differently,³³⁷ all based on differences of opinion within the agency

Mexican legal system affords no protection to domestic violence victims. But Marta's case differed in that her situation more closely met with what practitioners would consider a case of traditional extreme hardship. Her five children ranged in age from 4 to 13, and she was active in her church and other community organizations. Sara on the other hand had three small children, aged 3 to 6 and was not active in her community, factors that traditionally would weigh against an extreme hardship finding. The immigration judges assigned to the cases ruled in favor of both women. The INS chose not to appeal Marta's case, but did so in Sara's case. Despite evidence that Sara had suffered severe battery and abuse and that her husband had threatened her with harm if she returned to Mexico, the INS strenuously argued that she did not meet the *Anderson* standard. Ignoring the evidence of abuse and need for protection, the government argued, "[A]ll the children are of tender enough age to adapt themselves quickly to education, culture, and society in Mexico, where they could enjoy the support of all their extended family." INS Brief on Appeal at 9. The case is pending appeal to the Board of Immigration Appeals. Case files on file with the author.

³³⁷ The case of Sara, *supra* note 1 is further complicated by the fact that after the INS appealed the immigration judge's decision to grant Sara's application for suspension of deportation based on a perceived failure to meet extreme hardship, an INS regional office granted Sara's VAWA self-petition filed under INA §204. The INS officer who adjudicated the self-petition, based the decision on the same evidence used at Sara's deportation hearing, and found that she did meet the extreme hardship standard. In other cases in which the INS regional offices have approved VAWA self-petition, the local INS district office has reviewed and readjudicated the same petition. In the case of Nora, another battered spouse, the San Antonio INS district revoked an approved self-petition based in part on the local office's disagreement with a regional officer's assessment of the evidence supporting extreme hardship. (Case file on file with the author). The INS determined that Nora had failed to prove extreme hardship based entirely on a traditional analysis of extreme hardship:

There is nothing in the record to demonstrate that the petitioner's deportation would result in extreme hardship to her or to her children. The petitioner is a non-elderly adult. The petitioner indicates she is in good health. The petitioner has a steady employment history as a cook and as a waitress. A history of employment in these fields will help her find employment anywhere she may live. The petitioner is not a member of any persecuted minority. The petitioner is not the citizen of a war-torn country.

The INS failed to consider any of the evidence that Nora's attorney submitted concerning the emotional and psychological scars caused by the abuse and Nora's need for protection and support services. Therefore, the government ignored its own regulations and internal memorandum relating to the adjudication of extreme hardship. In another San Antonio case, that of Esther, the INS again revoked a VAWA self-petition filed and approved by the designated INS Service Center, and again ignored the regulations and internal memorandum. (Case file on file with the author.) The reasons for the INS' finding that Esther did not meet the "extreme hardship" standard are almost identical to those in the case of Nora:

You are a non-elderly adult. You are, by your own statement, in good health. You were employed in Mexico for five years at an automobile plant. Therefore,

regarding "extreme hardship" determinations. Of particular concern to undocumented battered women is that INS officers in some districts now routinely review petitions approved by the service centers and, in some instances, have revoked VAWA self-petitions due to contrary views on the extreme hardship determination.³³⁸ This effectively undermines the benefits that a positive adjudication of a self-petition carries.

Immigration judges hearing deportation/removal cases, as well as those charged with appellate review of denied VAWA self-petitions, have issued unpublished opinions in cases and determined that the applications failed to meet a standard for extreme hardship tied to the traditional narrow interpretation of that term.³³⁹ Furthermore, as evident in the arguments advanced by the INS trial attorneys in briefs discussed at the outset of this article, the lawyers prosecuting cases against victims of domestic violence appear to be guided by the body of traditional cases relating to extreme hardship.

Traditionalists handling cases of Mexican battered women either ignore the circumstances of the abuse the women have suffered when considering extreme hardship, or minimize its significance and assign greater

you have had a good employment history in your own country and marketable skills. You are not a member of any racial, ethnic, or religious minority group. By your own statement, you have had no political problems with the government in Mexico. The majority of your relatives are in Mexico (your surviving parent and your brothers) while your relatives in the United States consist only of a sister and an aunt.

³³⁸ At the San Antonio INS district office, VAWA cases were closely monitored by the examinations staff, which was acknowledged as such at a December 2, 1997 liaison meeting between the INS and local immigration attorneys (notes on file with the author). The adjustment of status cases filed by VAWA beneficiaries have been assigned to officers who have not been trained in domestic violence or VAWA. They have also been assigned to review approved VAWA self-petitions, and have revoked petitions approved by the INS service centers. *See supra* note 337.

³³⁹ In the case of Moira, a Mexican woman represented by the Florida Immigrant Advocacy center, the immigration judge hearing Moira's application for cancellation of removal under INA §240A(b)(2), ruled that she did not establish extreme hardship based on a traditional analysis. Furthermore, the judge opined that Moira's U.S. citizen daughter who reportedly witnessed the abuse of her mother, "may remain behind to receive counseling" and that any hardship the child would suffer would be "the result of parental choice." Decision of the Immigration Judge in the case of Moira (on file with the author) at 24. The Administrative Appeals Unit (AAU) which handles appeals of denied self-petitioners, also has issued unpublished decisions centered on the traditional extreme hardship factors. (Decisions on file with the author). The October 16, 1998 memo to Terrance O-Reilly, Director of the AAU, was in response to the AAU memorandum requesting clarification on the meaning of "extreme hardship" as used in self-petitioning provisions of the Act. *See* Virtue II Memo, *supra* note 208, at 2. The memo appears to have a positive effect in that on January 27, 1999, the AAU issued a decision which analyzed the extreme hardship claim using domestic violence-related factors. (Decision on file with the author.)

weight to the factors which historically govern the final determination such as long-term residence coupled with strong community and family ties.³⁴⁰ Furthermore, they dismiss concerns that battered Mexican women need the security of U.S. social and legal services and that they face adversity abroad.³⁴¹ Traditionalists opine that Mexican battered women can escape from their abuser by returning to Mexico, and that they will enjoy safe haven in their own country.³⁴² The hardships of living abroad are seen as no greater than for other Mexicans, and women must endure any failure of the Mexican legal and social structures to deal with domestic violence. This view is best evidenced by the denial of a VAWA self-petition filed by a Mexican woman who had been repeatedly raped and abused by her U.S. spouse and expressed fear at returning to Mexico.

[E]veryone living in Mexico must live under the Mexican legal system. It is axiomatic that when a Mexican citizen lives in Mexico, Mexican law applies to that person. While Mexican law (in practice) may favor men in family relations matters, you have failed to demonstrate that the situation is so one-sided and extreme as to constitute anything other than a tolerable social disadvantage.³⁴³

These responses to Mexican VAWA cases exhibit more of a concern for Mexican illegal immigration, a non-issue when it comes to battered women, and fail to address and find solutions for the emotional and security needs of the women. The U.S. Supreme Court long ago acknowledged that "deportation is a drastic sanction, one which can destroy lives and disrupt families."³⁴⁴ It was Congress' intention when it passed the immigration provisions of VAWA to address undocumented battered

³⁴⁰ See case files of Nora and Esther, *supra* note 337, and Maria, *infra* note 343. In each case, the INS office at San Antonio denied the womens' VAWA self-petitions on grounds that they had failed to demonstrate extreme hardship, and in each analyzed the hardship claim based on traditional factors and ignored any factor related to the violence they had suffered and their need for protection and services.

³⁴¹ See case of Maria, *infra* note 343.

³⁴² In briefs filed in the case of Elena, *supra* note 1, the INS argued that the respondent "can avoid contact with [her spouse] simply by leaving the United States."

³⁴³ From the March 7, 1997 denial of the self-petition filed by Maria, case on file with the author. There are other instances in which the INS has ignored or minimized the hardships Mexican women face. The author and her students have worked on two cases in which the INS arrested women it knew had been battered and were likely to apply for VAWA, determined that a high bail bond was warranted, and then detained the women in a remote detention facility. In one woman's bond redetermination hearing, the INS attorney arguing against release, and stated that detention of the woman provided her with safe haven from her abusive spouse. (Case notes on file with the author.) These incidents further highlight the need for training of INS officers in the dynamics of domestic violence and VAWA.

³⁴⁴ *Gastelum-Guinones v. Kennedy* 374 U.S. 469, 479 (1963). Deportation may deprive one "of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

women's fears of deportation. For Mexican women, those fears center on concern that they will be forced to return to a country which, now and for the foreseeable future, offers little protection to its victims of domestic violence.

VI. CONCLUSION

The extreme hardship standard serves no reasonable immigration-related purpose with regard to battered immigrants. The term and its narrow construction in *Anderson*³⁴⁵ and *Wang*,³⁴⁶ support an orderly immigration process and a quest to limit the number of individuals who could gain an immigration benefit following illegal entry or overstay of lawful entry. It follows that the Board would be reluctant in *Anderson* to assign significant weight to considerations of country conditions to hardship determinations. The requirement of proof of extreme hardship and its restrictive interpretation in cases of foreign nationals eligible for immigrant visas but inadmissible due to criminal convictions, prostitution, or fraud is also consistent with an immigration policy favoring admission of law-abiding immigrants. The addition of the "extreme hardship" requirement is incompatible with an immigration policy favoring foreign nationals who meet the eligibility requirements to immigrate, and with a policy to end domestic violence.

Congress failed in its responsibility to serve the interests of battered and abused immigrants by including the requirement of extreme hardship in order to attain legal status.³⁴⁷ VAWA is not about illegal immigration or the need to protect the United States from criminals and other unworthy individuals. Congress should eliminate extreme hardship altogether as a requirement for VAWA relief.³⁴⁸ Congress has the opportunity to

³⁴⁵ *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978).

³⁴⁶ *INS v. Wang*, 450 U.S. 139 (1981).

³⁴⁷ Congress also failed to define the terms. Congress has often been criticized not only for the substance of legislation it passes, but in its delegation of lawmaking to other branches. Heyman, *supra* note 109, at 866. Congress' failure to define extreme hardship for VAWA purposes leaves the agency with the responsibility to formulate the legal standards, a task more appropriately handled by Congress. *Id.* The Attorney General has never defined extreme hardship, but rather has given only limited guidelines. Regulations which govern extreme hardship for self-petitions and cancellation of removal, should incorporate and assign presumptive weight to the six VAWA-related factors.

³⁴⁸ Bills pending in Congress would delete the extreme hardship requirement only for self-petitions. *Supra* note 93. However, Congress should protect the interests of battered spouses and children without regard to whether or not they are facing deportation/removal by eliminating extreme hardship from the self-petition and suspension of deportation/cancellation of removal requirements. An alternative approach I would favor would be to replace the extreme hardship standard for suspension of deportation/cancellation of removal with a more lenient standard. For example, in her article, *Spouse-Based Immigration Laws: Legacies of Coverture*, Janet

revisit VAWA and hopefully it will re-evaluate the need to include extreme hardship.³⁴⁹

If Congress fails to act, then it is incumbent on the Attorney General to establish clear guidelines for determining extreme hardship based on such factors as violence suffered by the applicant and the needs she and her family have for protection and rehabilitation. Courts have been extraordinarily deferential to the agency, dimming the prospect of judicial intervention, but changes made by IIRAIRA to further curtail judicial intervention in immigration decision-making pose serious obstacles to review.

The Attorney General has not taken adequate steps to protect VAWA applicants and prevent disparities in the adjudication of VAWA cases. Decisions rest with adjudicators and judges who have little guidance beyond a list of factors which may be considered and who have wide latitude to assign weight to factors as they deem appropriate. Furthermore, adjudicators of VAWA petitions who rely on *Wang* and *Anderson* will favor those cases of women who have traditionally been found eligible for immigration relief: those who demonstrate a lengthy residence in the United States, have school-age children, and engage in community activities. With no clear understanding of the standards the INS and immigration courts will apply, VAWA applicants and their advocates can not predict the outcome of their cases.

Unless the Attorney General pronounces that *Anderson*, *Wang* and their progeny do not control hardship determination in VAWA cases, and assigns determinative weight to the VAWA-related factors, outdated interpretations of extreme hardship will undermine Congressional intent to curb domestic violence. A narrow, restrictive interpretation of hardship for VAWA applicants unable to show the strong ties traditionally favored, but who have been battered or subjected to incidents of extreme cruelty will result in the deportation of women the law was designed to protect. An expansive interpretation of extreme hardship and one in which the factors tied to abuse and protection are given added weight serves the Congressional goal to protect immigrants caught in abusive relationships and to preserve family immigration.

It is fair to assume that Congress delegated the primary responsibility for interpreting extreme hardship to the Attorney General. She has a highly sensitive task and cannot ignore the human suffering and the potential for danger in interpreting extreme hardship harmoniously with

Calvo called on Congress to substitute "substantial" for "extreme" hardship with regard to the IMFA waiver. See *supra* note 57, at 637.

³⁴⁹ If Congress were to amend that statute, it would be the first time it has discarded extreme hardship once is has attached the hardship standard to an immigration benefit. It would seem unlikely given Congress' hostility to immigrants over the past ten years that it would pass such pro-immigrant legislation, but it has been receptive to legislation favoring battered women.

VAWA. The alarming statistics relating to death and serious injury to victims of domestic violence in the United States and other countries like Mexico bear this out.