

FAX Brief



An Update of Statistics and Issues Facing Immigrants and Refugees

Issue LI (51)

May 5, 1999

THE VIOLENCE AGAINST WOMEN ACT, Part 2: CANCELLATION of REMOVAL

Battered immigrant spouses and children in deportation or removal proceedings may be eligible for relief under the Violence Against Women Act ("VAWA") by applying for "suspension of deportation" or "cancellation of removal," either of which, if granted, will result in termination of proceedings and lawful permanent residence for the applicant. This FaxBrief will conclude the discussion of VAWA by explaining who is eligible for suspension or cancellation (and the difference between the two), the process, and the basic options available for abuse survivors under the Act. As with the self-petition process, this law allows the abused immigrant spouses of U.S. citizens ("USCs") and lawful permanent residents ("LPRs") as well as their children, to protect themselves from deportation or removal and to obtain legal status without the assistance or permission of the USC/LPR abuser.⁴ This allows the abuse survivor to defend herself and her children, and to end immigration-related threats by the abuser. As we learned with the problems in obtaining status under the self-petitioning process, suspension and cancellation may provide an emergency escape.

⁴ Please note that the language of VAWA applies to either women or men who have been abused by their spouses; because the majority of abuse survivors are women, we will be referring to the self-petitioners as women.

Suspension of Deportation & Cancellation of Removal

The first significant difference between self-petitioning and suspension or cancellation is that the latter two are available only if the applicant is under deportation or removal proceedings.⁵ These proceedings commence when the INS files an indictment or "charging document" known as an Order to Show Cause ("OSC") in deportation cases or Notice to Appear ("NTA") in removal cases, alleging that the individual is deportable or removable. The timing of the service of the OSC/NTA is critical: In order to be eligible for VAWA suspension/cancellation, the applicant must have accrued three years of physical presence in the U.S. before service of the OSC/NTA. In fact, service of the OSC/NTA "stops the clock" and no more time towards eligibility may be accrued.

In this context, VAWA suspension or cancellation is a form of relief against deportation or removal. Therefore, the first issue with any suspension/cancellation application is whether the respondent is deportable or removable. In most cases, the immigration judge will not consider a VAWA suspension/cancellation application until deportability has been established. The applicant may concede that she is deportable or removable. If the applicant does not concede deportability, and INS fails to establish deportability, the judge will terminate the case.

To apply, the applicant must fill out an application form and assemble supporting documentation, then file the application with the court and send a copy to the INS. Unlike the self-petition process, in which the applicant ordinarily does not have an interview, the suspension/cancellation process is a courtroom proceeding. The applicant faces an immigration judge hears witnesses and takes other evidence, and ultimately decides whether or not to grant the application (as well as the further question of deportation or removal). A trial attorney, akin to a prosecutor represents the INS in the process. The trial attorney can cross-examine witnesses, object to evidence presented by the applicant, introduce government evidence (which can either support or undermine the case of the applicant), and appeal the decision of the immigration judge. In addition, the court provides for an interpreter (often a bilingual court clerk) as needed. Because of the adversarial nature of the court and the complexity of the proceeding, an experienced attorney or BIA-accredited representative is essential for the representation of the applicant.

⁵ Deportation refers to proceedings commenced on or before March 31, 1997, while "removal" refers to proceedings commenced on or after April 1, 1997. Suspension pertains to deportation, while cancellation pertains to removal.

As with VAWA self-petitions, the applicant *must* establish both that there has been a legal marriage to the abusive spouse as well as the immigration status of the abusive spouse. The abuser *must* be a USC or LPR; if not, the applicant will be ineligible. The relationship is proven by submitting copies of the certificate of the marriage to the USC/LPR abuser (and a translation to English, if needed), and termination of all prior marriages of both the abuser and the self-petitioner. Proof of status is established by a copy of the abuser's citizenship (if s/he is a U.S. citizen) – or lawful permanent residence (if s/he is a resident).

A critical difference between VAWA self-petitions and VAWA suspension/cancellation is that the suspension/cancellation applicant *may already be divorced at the time she applies for suspension or cancellation*. This means that suspension or cancellation may be an option for abuse survivors who are otherwise ineligible to self-petition because of a final divorce decree.

As in the self-petition process, the VAWA suspension/cancellation applicant must also prove the following: that the marriage to the abuser was made "in good faith", that is, not in an attempt to avoid immigration laws, or to buy a green card; that physical or mental abuse by the USC/LPR has taken place against the spouse or children; that she is a person of "good moral character"; and that she and/or her child would suffer extreme hardship as a result of being deported.

If the immigration judge rules that the applicant has satisfied all of the requirements for VAWA suspension or cancellation, then the application may be approved. If the INS trial attorney does not appeal the decision, the applicant is given a "conditional grant" and then must wait until one of the annual 4,000 permanent residency slots for immigrants who win cancellation becomes available (including non-VAWA suspension and cancellation grants). Once available, the grantee becomes a permanent resident.

It is absolutely essential for potential applicants in deportation or removal proceedings to retain experienced counsel. It is just as important for a *potential* applicant who is *not* currently in proceedings to seek counsel beforehand. Once told that the only way to apply is while under proceedings, many misinformed individuals will believe that being placed in proceedings will solve their immigration problems. Once someone is in removal proceedings, their options are significantly limited, and they risk being deported.