

VAWA AND SPECIAL RULE CANCELLATION OF REMOVAL

BY HILLARY WALSH, ESQ.

The Violence Against Women Act (VAWA) provides immigration relief for noncitizens who have no immigration status in this country. Sometimes that relief is a green card; other times, it's a temporary protection from deportation and work authorization. In my experience, many immigration practitioners don't screen for VAWA and its removal defense counterpart, Special Rule Cancellation of Removal. I hope this article piques immigration lawyers' interest to dive deeper into understanding this incredible tool, and for non-immigration lawyer readers, I hope this helps you better understand our immigration laws, given that noncitizens often suffer abuse from their immediate family members.

Core VAWA Requirements

In its most basic form, VAWA provides relief for noncitizens who have suffered *battery* or *extreme cruelty* from their *U.S. citizen or Lawful Permanent Resident immediate family member*.¹ Generally, an "immediate family member" includes the noncitizen's adult child, stepchild, or the noncitizen's spouse, ex-spouse, or parent(s).² The noncitizen victim must also be a person of *good moral character* to qualify.

VAWA's Immigration Benefits

Usually, when a noncitizen enters the U.S. without permission, they can't receive a green card without first returning to their home country. But when that noncitizen leaves the U.S., immigration laws require them to stay out of the country for many years—usually 10 years—before they are allowed to receive a green card and return. (And that's only if they have a qualifying family member who can and will petition for them.) To bypass this 10-year bar, immigration laws allow noncitizens to apply for a waiver; however, many noncitizens aren't eligible for it. As a result, many noncitizens in the U.S. are faced with Hobson's Choice: they can stay in the country without permission, or they can be away from their U.S.-based family for 10-plus years.

VAWA offers a third choice: it allows qualifying noncitizens to apply for a green card without leaving the U.S.

EXAMPLE: Margarita entered the U.S. by walking through the desert in 1999. Her only family member with lawful status is her 21-year-old U.S. citizen daughter. Immigration laws don't allow U.S. citizen children to help their noncitizen parents apply for a waiver. Therefore, at first blush, you conclude Margarita must either stay in the country without status or leave for at least 10 years. But during the consultation, you ask a few VAWA screening questions; Margarita confides to you that her daughter routinely slaps her and threatens to call ICE on her. You now conclude that Margarita is a candidate for VAWA; this option allows her to apply for a green card without leaving the U.S. (and without needing a waiver that she otherwise would not be eligible for).



Some noncitizens have multiple unlawful entries, with many years of unlawful presence in the U.S. between their entries and exits. This triggers the "permanent bar." Unlike the 10-year bar mentioned above, there is no waiver for the permanent bar—if the noncitizen wants to become a resident, they have to leave the U.S. for 10 years before they can apply to re-enter lawfully—and even then, it's not a guarantee.



VAWA, however, provides an exception to this rule: if a noncitizen was here for more than six months without permission, left and then unlawfully reentered based on battery or extreme cruelty, VAWA allows the U.S. government to “waive” the unlawful entry (and therefore refrain from applying the permanent bar).³ This situation is also true if the noncitizen unlawfully re-entered after being deported.

EXAMPLE 1: Juan entered the U.S. by walking through the desert in 1999; in 2017, his U.S. citizen husband had beaten him for the last time—Juan returned to his hometown in Mexico. A few months later, Juan’s husband convinced Juan that he’d changed—he would never hit him again and he promised to finally begin the adoption process so Juan could finally become a father. Juan’s husband went to Mexico and handed Juan over to a coyote, who brought him back to the U.S. When Juan returned, things were better for a while, but then the violence came back. Based on this information, you conclude that Juan is a candidate for VAWA and a permanent bar waiver. This option allows Juan to apply for a green card without leaving the U.S. (and therefore without triggering the permanent bar).

EXAMPLE 2: Gerard’s wife is a U.S. citizen. She keeps constant tabs on where he is and who he is talking to: she installs an app on his phone so she can read all his texts; another app tracks his every move. When he doesn’t answer his phone by the second ring, she punishes him when he gets home by throwing things at him, smashing his cell phone, and blocking him from leaving the home. She gives him a \$10 a week

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allowance; all his income is deposited into her bank account, which he has no access to. Once, she kicked him out of the car with no money, forcing him to walk home in extreme weather conditions. One night, a neighbor hears shouting from their apartment and calls the police, who arrest Gerard; he is later deported. When his wife threatens to harm his children if he doesn't return—something she has done in the past—he unlawfully re-enters the U.S. Like Juan, you conclude that Gerard is a candidate for VAWA and waivers for having been deported and for triggering the permanent bar when he re-entered.

If, however, the noncitizen's re-entry isn't tied to battery or extreme cruelty, they can still apply for VAWA Deferred Action (rather than a green card). Also, if a noncitizen is in removal proceedings and can't ask U.S. Citizenship and Immigration Services (USCIS) to grant them a green card because of jurisdiction being with the court, they can still ask USCIS to grant the VAWA Deferred Action.⁴ Deferred Action allows the noncitizen to obtain temporary work authorization and a Social Security number; in most states, this will allow the noncitizen to also obtain a driver's license. It will also usually prevent the removal of the noncitizen for the duration of the Deferred Action grant. These seemingly simple benefits are absolutely life-changing for unlawfully present noncitizens in the U.S.

If your client is in removal proceedings, screen them for VAWA Special Rule 42b Cancellation of Removal. The eligibility requirements are significantly different when compared to VAWA with USCIS, but the thrust is the same: did the respondent/noncitizen experience battery or extreme cruelty from their U.S. citizen or Lawful Permanent Resident immediate family member? Are they a person of good moral character? Notably, unlike regular 42b Cancellation of Removal, which requires the respondent to show that their qualifying family member would experience hardship if the respondent were deported, in the Special Rule context, the judge will evaluate if the *respondent* would experience hardship if they were deported. This option is a game-changer.

Screening for VAWA: Legal Standards are Objective

Our experiences and cultural upbringings shape the way we see and understand the world. For example, I didn't know that I was legally "abused" as a child until I was a 26-year-old family law student at the William S. Boyd Law School at UNLV. Up to that point, I still thought my parents were just disciplining me. For me (and for many people), the abuse was "normal."

This experience is always in the back of my mind when screening for VAWA. For example, if I ask a Mexican woman if she has ever experienced "battery" or "extreme cruelty" from her U.S. citizen spouse, I know she's coming from country that widely reports extreme violence against women; therefore, her standard for "battery" or "extreme cruelty" has, at least partly, been shaped by that background. Given this, it's very possible that she has normalized many things that are not "normal" to others. Asking her if her spouse has ever "abused" her is not an adequate way to screen her for VAWA.

Instead, I lean into one of the many reasons I love the law: our legal standards. Legal standards don't change from person to person or from culture to culture; they are a firmly placed yard stick based on an objective standard. With this in mind, I explain what a legal standard is and then provide examples of what case law has identified as meeting the "battery or extreme cruelty" legal standard. Ultimately, it's often when I do a trauma-informed declaration that I can truly access whether the client's experiences have met the legal standard; and in my experience, most of the time it does.

ENDNOTES:

1. This article provides a basic overview of the statutes' requirements; this description does not incorporate all elements for relief. See 8 U.S.C. § 1229b(b)(2) (Special Rule Cancellation of Removal statute); 8 U.S.C. § 1154 (VAWA self-petitioner statute).
2. An "immediate" family member has many meanings in immigration law. In the VAWA Special Rule context (VAWA in removal proceedings), an "immediate" relative is a lawful resident or U.S. citizen parent, spouse, or ex-spouse; in short, in court, and child's cruelty doesn't count. 8 U.S.C. § 1229b(b)(2) (Special Rule Cancellation of Removal statute). By contrast, in the VAWA context (VAWA before USCIS), an "immediate" family member is a U.S. citizen child or stepchild 21 years of age or older, or a resident or U.S. citizen spouse; put differently, to USCIS, a parents' cruelty doesn't count. 8 U.S.C. § 1154 (statutory basis for VAWA self-petitioners).
3. See *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003) (finding U.S. citizen's conduct of luring his noncitizen spouse back to his home abroad qualified as an act of "extreme cruelty.")
4. 8 U.S.C. §§ 1154(a)(1)(D)(i)(IV), (a)(1)(K) (providing that when a VAWA self-petition is approved, the self-petitioning noncitizen and their dependent children included in the petition become eligible for deferred action and work authorization.)

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