Learning from the Recent Interpretation of INA Section 245(a): Factors to Consider When Interpreting Immigration Law

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INTRODUCTION

Recently, the United States Citizenship and Immigration Services ("USCIS") adopted a policy that may seem insignificant, but will actually have a great impact on the lives of many battered immigrants. On April 11, 2008, USCIS issued a memorandum declaring: "Effective immediately, USCIS interprets the introductory text in section 245(a) of the [Immigration and Nationality] Act as effectively waiving inadmissibility under section 212(a)(6)(A)(i) of the Act for any alien who is the beneficiary of an approved VAWA self-petition."[1] This change in policy enables battered immigrants to apply for adjustment of status under section 245(a) of the Immigration and Nationality Act ("INA")[2] even if they entered the country unlawfully.[3]

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1. Memorandum from Michael L. Aytes, USCIS Assoc. Dir. of Domestic Operations, Adjustment of status for VAWA self-petitioner who is present without inspection, to Field Leadership (Apr. 11, 2008), at 2, *available at* http://www.uscis.gov/files/nativedocuments/VAWA_11Apr08.pdf [hereinafter Aytes Memo].

2. The Immigration and Nationality Act governs immigration in the United States; it was originally enacted in 1952 and has been amended numerous times by Congress. *See* U.S. Citizenship and Immigration Services (USCIS), How Do I Apply for Immigration Benefits as a

Adjustment of status allows an eligible person physically present in the United States ("U.S.") to obtain lawful permanent status without leaving the country.[4]

Prior to the circulation of this memorandum, several USCIS district offices refused to adjust the status of approved Violence Against Women Act ("VAWA") self-petitioners who entered the country without inspection.[5] These offices narrowly interpreted section 245(a) (the adjustment of status provision),[6] arguing that since these applicants entered the country illegally, they were inadmissible and therefore unable to adjust their status.[7] Such an interpretation was incorrect because it ignored the legislative history of VAWA and caused absurd and unjust results.[8]

This Comment argues that USCIS could have avoided its previous interpretation had it considered three important factors. First, USCIS could have avoided misinterpreting section 245(a) had it taken into account Congress's intent in VAWA. Second, USCIS could have analyzed the language of the applicable INA provisions to ensure that its interpretation was consistent with VAWA's statutory scheme. Third, USCIS could have considered how its policy produced unfair and illogical consequences for many battered immigrants, since they were unable to become lawful permanent residents ("LPRs") in the U.S. despite having an approved VAWA petition.

Part I of this Comment describes the background of the statutes relating to the adjustment of status for immigrant victims of domestic violence. Specifically, it provides the background on the Violence Against Women Act of 1994 ("VAWA 1994"), the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA"), and the Violence Against Women Act of 2000 ("VAWA 2000").

The next three sections argue that USCIS's previous refusal to grant adjustment of status to already approved VAWA applicants was a misapplication of the law that could have been avoided had USCIS taken certain factors into account. In particular, Part II argues that USCIS's previous

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Battered Spouse or Child?, http://www.uscis.gov (search for "humanitarian benefits" and click on "VAWA") (last visited Jan. 25, 2008).

3. *See* Aytes Memo, *supra* note 1, at 2.

4. *See* ANDORRA BRUNO, CONG. RESEARCH SERV., IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENT STATUS UNDER SECTION 245(I) (2002), at CRS-1, *available at* http://fpc.state.gov/documents/organization/10087.pdf.

5. I learned about this problem while interning at the International Institute of the Bay Area in Oakland, California. During my internship, I primarily worked on VAWA cases, and as a result, I became very familiar with the issues involved. In November 2007, three of our VAWA clients were not granted adjustment of status at their interviews despite having approved VAWA applications because they entered the U.S. without inspection.

6. Immigration and Nationality Act § 245(a) (2007), 8 U.S.C. § 1255(a) (2006) [hereinafter INA].

7. Interview with Eleonore Zwinger, Staff Attorney, Int'l Inst. of the Bay Area, in Oakland, Cal. (Sept. 27, 2007).

8. *See infra* Parts II and IV.

policy was clearly inconsistent with Congress's intent in VAWA 1994 and the VAWA 2000 amendments; had USCIS considered the legislative history of these statutes, it likely would not have interpreted section 245(a) so narrowly.

Part III examines the statutory construction of INA sections 245(a) and 245(i)[9] to support the proposition that USCIS misinterpreted the requirements for adjustment of status and thus circumvented the statutory scheme of VAWA. Part IV then analyzes the incongruent and unjust results caused by USCIS's previous policy and argues that USCIS could have avoided those unjust and illogical consequences had it considered the impact its interpretation would have on VAWA self-petitioners given the realities of domestic violence.

Finally, Part V concludes that USCIS's new interpretation of the law fulfills VAWA's promise to battered immigrants and advises USCIS to take into account Congress's intent and statutory language, as well as the impact its interpretation may have on beneficiaries, when interpreting immigration law.

I
BACKGROUND OF PERTINENT STATUTES

A. VAWA 1994

In 1994, Congress passed the Violence Against Women Act ("VAWA 1994").[10] It was the first time in U.S. history that the national government enacted legislation addressing domestic violence, which the government no longer considered a purely private matter, but "a problem we all share."[11]

VAWA 1994 was part of the landmark Violent Crime Control and Law Enforcement Act of 1994, the largest crime bill in the history of the country.[12] The substantial protections that VAWA 1994 provided to victims of domestic violence, such as the self-petitioning process, made it one of the most groundbreaking and important sections of this legislation.[13]

1. The Self-Petitioning Provision for Battered Immigrants

VAWA 1994 was particularly important to the immigrant community, since it specifically addressed the unique predicament that immigrant women and children face in domestic violence situations. Congress acknowledged the

9. Section 245(i) allows a person who entered the country without inspection to adjust her status in the U.S. if she pays the requisite fee and satisfies the other requirements. *See* INA § 245(i) (2007), 8 U.S.C. § 1255(i) (2000); *see also infra* notes 131-144 and accompanying text.

10. Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified in scattered sections of 8, 18, 20, 28, 42, and 44 U.S.C. (2006)) [hereinafter VAWA 1994].

11. William J. Clinton, Former U.S. President, Remarks by the President at Violence Against Women Act Event (Mar. 21, 1995) (transcript available at 1995 WL 117853).

12. Violence Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796 (1994) (codified in scattered sections of 2, 15, 16, 18, 21, 28, 31, and 42 U.S.C. (2000)).

13. *See* NANCY K. D. LEMON, DOMESTIC VIOLENCE LAW 913 (2d ed. 2001).

vulnerability of noncitizen survivors of domestic violence, noting that "[m]any immigrant women live trapped and isolated in violent homes, afraid to turn to anyone for help. They fear both continued abuse if they stay with their batterers and deportation if they attempt to leave."[14]

Congress also recognized that the existing immigration laws actually fostered the abuse of immigrant women by placing their ability to gain permanent lawful status completely in the abuser's control.[15] Under the INA, U.S. citizens and LPRs are not only allowed to file a relative visa petition requesting that their spouses be granted legal status based on a valid marriage, but they are given the power to "revoke such a petition at any time [for any reason] prior to the issuance of permanent or conditional residency to the spouse."[16] A U.S. citizen or LPR abusive spouse may use this process to deter the battered spouse from calling the police and filing charges.[17]

In an effort to prevent a U.S. citizen or a LPR abusive spouse from using the petitioning process as a means to control or abuse an immigrant spouse, Congress amended the INA and established the self-petitioning process.[18] This process permits battered immigrants to obtain LPR status without the cooperation or knowledge of the abusive spouse.[19] To gain permanent residency, however, the self-petitioner must follow a two-step process.[20]

First, the self-petitioner must file a petition with the Vermont Service Center ("Vermont Center"), a field office of USCIS that adjudicates all VAWA applications.[21] For a VAWA petition to be approved, a self-petitioner must demonstrate to the Attorney General the following elements: (1) a qualifying, good-faith marriage with a U.S. citizen or LPR abuser; (2) residence or former residence with the abuser during the marriage; (3) subjection to battery or extreme cruelty by the U.S. citizen or LPR spouse in the U.S.; (4) good moral character; and (5) current residence in the U.S. (unless the spouse is an employee of the U.S. government or member of the uniformed services).[22]

The second step of the self-petitioning process involves the application to adjust status to obtain permanent residency.[23] Adjustment of status is the process under immigration law that allows an eligible person physically present

14. H.R. REP. NO. 103-395, at 26-27 (1993).

15. *See id.* at 26.

16. *Id.* at 37.

17. *See id.* at 26.

18. *See id.* at 37.

19. *See id.*

20. *See* Maurice Goldman, *The Violence Against Women Act: Meeting Its Goal in Protecting Battered Immigrant Women?*, 37 FAM. & CONCILIATION CTS. REV. 375, 381 (1999).

21. *See id.*

22. *See* INA §§ 204(a)(1)(A)(iii)(I)-(II), 204(a)(1)(B)((ii)(I)-(II), 8 U.S.C. § 1154 (2006). Immigrant children who are battered by a U.S. citizen or LPR parent, as well as parents who are battered by a U.S. citizen or LPR child, also qualify to self-petition if they meet the requirements. *See* INA § 204(a)(1)(A)(iv), (vii). However, the focus of this Comment is on battered spouses.

23. *See* Goldman, *supra* note 20, at 381.

in the U.S. to obtain LPR status without leaving the country.[24] Eligibility to adjust status depends on whether the abusive spouse is a U.S. citizen or LPR.[25] A VAWA self-petitioner who is married to a U.S. citizen is eligible to apply for adjustment of status as soon as her VAWA petition is approved.[26] A self-petitioner who is married to a LPR, on the other hand, cannot apply for adjustment until a visa becomes available.[27] This difference is due to the fact that spouses of LPRs are subject to the family-sponsored visa quota under the INA while spouses of U.S. citizens are not.[28]

2. The "Intermediate" Remedy

As soon as a VAWA application is approved, USCIS has the option of placing the self-petitioner in deferred action if the self-petitioner does not have legal immigration status in the U.S.[29] Deferred action functions as an intermediate remedy that may be granted to already approved self-petitioners who are unlawfully present in the U.S. while they wait for a visa to adjust their status.[30] This intermediate remedy is not automatically granted to all self-petitioners who are unlawfully present in the country.[31] The Vermont Center makes the final determination on whether or not to grant deferred action; despite the Center's discretionary power, however, most self-petitioners are placed in deferred action.[32]

Deferred action is usually granted for a period of about fifteen months and needs to be renewed if the self-petitioners have not become eligible for adjustment of status at the time deferred action expires.[33] Generally, self-petitioners are in deferred action status until a visa becomes available and they are eligible to adjust.[34] The length of time a self-petitioner is on deferred action depends upon the immigration status of the abuser.[35] If the abuser is a LPR, the

24. *See* BRUNO, *supra* note 4, at CRS-1.

25. Melissa Del Bosque, *Selective Enforcement: Why Is the Bush Administration Ignoring a Law that Protects Abused Immigrants?*, TEX. OBSERVER, Mar. 7, 2008, *available at* http://www.texasobserver.org/article.php?aid=2704.

26. *See* Goldman, *supra* note 20, at 381.

27. *See id.*

28. *See* INA § 203(a)(2), 8 U.S.C. 203(a)(2) (2006); *see also* INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2006).

29. *See* USCIS, *supra* note 2.

30. Interview with Eleonore Zwinger, *supra* note 7.

31. *See* USCIS, *supra* note 2.

32. *Id.*

33. Interview with Eleonore Zwinger, *supra* note 7.

34. *See id.*

35. The INA sets out a family-sponsored visa limit up to 226,000 per year and creates a system of preferences for allotment of those visas according to the applicant's relationship to the U.S. citizen or LPR who files the petition. *See* INA §§ 201(c)(1)(B)(ii), 203(a). Spouses and children of LPRs are ranked second in the visa bulletin. INA § 203(a)(2). The visas are issued to eligible immigrants not only according to their relationship to the U.S. citizen or LPR, but also according to the order in which a petition on her behalf was filed, *see* INA § 203(e)(1), and the immigrant's country of origin, *see* INA § 203(c)(B)-(E).

self-petitioner will not qualify to adjust her status until a visa becomes available, which could take many years depending on her country of origin and the date she filed her VAWA self-petition.[36] If the abuser is a U.S. citizen, however, the self-petitioner will be able adjust to LPR status typically within eight to ten months after the VAWA application is approved because spouses of U.S. citizens are not subject to a categorical quota.[37]

B. IIRAIRA 1996

On September 30, 1996, President Clinton signed into law the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA").[38] IIRAIRA created new barriers to gaining lawful permanent residence for many family-based petitions. For example, IIRAIRA mandated that every foreign national seeking to immigrate to the U.S. must be "admissible."[39] Perhaps most importantly, it incorporated into the INA a range of inadmissibility grounds that made undocumented immigrants ineligible for admission.[40]

One controversial ground of inadmissibility penalizes persons who entered the U.S. without authorization because they are considered "inadmissible." More precisely, section 212(a)(6) (the "unlawfully present ground of inadmissibility") of the INA provides: "An alien present in the United States *without being admitted or paroled*, or who arrived in the United States at any time or place other than as designated by the Attorney General, is *inadmissible*."[41] The term "admitted" in the immigration context means "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."[42]

This was the first time Congress made an illegal entry a ground of inadmissibility, thereby affecting most immigrants already present in the U.S. who entered the country without a visa or any other legal documentation.[43] At the same time, however, Congress created a narrow exception for battered women and children with approved VAWA petitions:

> Exception for certain battered women and children. – Clause (i) should not apply to an alien who demonstrates that –
>
> (I) the alien is a VAWA self-petitioner;
>
> (II) (a) the alien has been battered or subjected to extreme cruelty

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36. *See id.*
37. *See* INA § 201(b)(2).
38. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996) (codified in scattered sections of 8 and 18 U.S.C. (2000)) [hereinafter IIRAIRA].
39. *See* INA § 245(a)(2).
40. INA § 212(a) (2007), 8 U.S.C. § 1182(a) (2000).
41. INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (emphasis added).
42. 8 U.S.C. § 1101(a)(13)(A) (2000).
43. *See id.*

> by a spouse or parent, . . . or
>
> (b) the alien's child has been battered or subjected to extreme cruelty by a spouse or parent of the alien . . .
>
> (III) there was a substantial connection between the battery or cruelty described in subclause (I) or (II) and the alien's unlawful entry into the United States.[44]

The exception does not apply to approved VAWA self-petitioners who can demonstrate that they first arrived in the U.S. before April 1, 1997; these applicants can adjust to LPR status without needing to prove the "substantial connection" requirement of the exception.[45]

In other words, for purposes of adjusting the status of self-petitioners, the battered immigrant exception exempts qualifying self-petitioners from the "unlawful entry" inadmissibility ground in two situations: (1) where self-petitioners "first arrived" in the U.S. before April 1, 1997 and (2) where self-petitioners are able to show a "substantial connection" between domestic violence and the unlawful entry.[46] If self-petitioners do not fall under either category, they are permanently barred from adjusting status under IIRAIRA, since there is no waiver for this ground of inadmissibility,[47] and therefore are required to return to their country of origin for consular processing.[48]

C. VAWA 2000

On October 28, 2000, President Clinton signed the Victims of Trafficking and Violence Protection Act, which included VAWA 2000.[49] VAWA 2000 purported to accomplish two basic things: reauthorize key programs included in VAWA 1994, such as battered women's shelters, the National Domestic Violence Hotline, and rape prevention grant programs, among others; and improve VAWA 1994 in areas that had been shown to be necessary.[50]

Congress believed that the VAWA 1994 protections of battered immigrants needed substantive improvements to ensure that these victims were

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44. INA § 212(a)(6)(A)(ii) (2007) (emphasis added).

45. *See* H.R. 104-2202, 104th Cong. (1996).

46. *See id.*

47. *See* INA § 212(a)(6)(A).

48. Consular processing is the process which citizens of foreign countries must complete to obtain LPR status in the U.S. Consular processing is equivalent to the adjustment of status process, except that consular processing takes place at the nearest U.S. embassy or consulate located in the foreign person's country of nationality. As with adjustment of status, an applicant going through consular processing must wait until a visa becomes available (if they are not married to a U.S. citizen) and be interviewed by an immigration officer. *See* Path2USA, *Consular Processing*, http://www.path2usa.com/immigration/greencard/consularprocess.htm (last visited May 13, 2005).

49. Violence Against Women Act of 2000, Pub. L. No. 106-386, Div. B, 114 Stat. 1464, (2000) (codified in scattered sections of 42 U.S.C. (2006)) [hereinafter VAWA 2000].

50. *See id.*

able to flee from a violent environment without the threat of deportation.[51] Thus, Congress reaffirmed its commitment to assisting battered immigrants by including the Battered Immigrant Women Protection Act (the "Act") as part of VAWA 2000.[52] The Act expanded the categories of immigrants eligible for VAWA protection, improved battered immigrant access to public benefits, restored the protections offered under VAWA 1994 that were affected by IIRAIRA, and provided other measures of protection to battered immigrants.[53]

Perhaps one of the most significant protections included in the Act is the amendment to the adjustment of status provision. Congress amended the INA in an effort to restore immigration protections for victims of domestic violence by "removing barriers to adjustment of status."[54] Specifically, the Act added the category of abused immigrants with approved self-petitions to those eligible for adjustment of status, exempting this class from having to have been inspected and admitted, or paroled[55] into the U.S. as otherwise required by the adjustment of status provision.[56] As a result, section 245(a) now reads:

> The status of an alien who was inspected and admitted or paroled into the United States *or the status of any other alien having an approved petition for classification as a VAWA self-petitioner* may be adjusted by the Attorney General . . . to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigration visa is immediately available to him at the time his application is filed.[57]

1. USCIS's Previous Interpretation of VAWA 2000

After Congress modified the adjustment of status provision in VAWA 2000, many USCIS district offices, including the office in San Francisco, recognized that already approved VAWA self-petitioners were exempted from the unlawful presence ground of inadmissibility and eligible for adjustment of status under INA section 245(a) regardless of the manner of entry.[58]

In August 2007, however, the San Francisco ("S.F.") district office began

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51. *See* 146 CONG. REC. H8813, H8816 (daily ed. Oct. 5, 2000) (statement of Cong. Member Schakowsky).

52. Battered Immigrant Women Protection Act of 2000, H.R. 3244, 106th Cong. §§ 1501-13 (2000).

53. *See id.*

54. *Id.* § 1506.

55. In immigration law, parole is an extraordinary measure, sparingly used by the Attorney General to bring an otherwise inadmissible person into the U.S. for a temporary period of time due to an urgent humanitarian reason or significant public benefit. *See* USCIS, Humanitarian Parole, http://www.uscis.gov (search for "humanitarian parole") (last visited May 14, 2008).

56. *See* H.R. 3244 § 1506(a)(1)(A).

57. INA § 245(a) (2007) (emphasis added).

58. Interview with Eleonore Zwinger, *supra* note 7.

refusing to adjust the status of approved VAWA self-petitioners who entered the country without inspection and admission or parole after April 1, 1997 and did not qualify for the battered women and children exception.[59] The S.F. district joined other districts, including Chicago, Oregon, Washington, Illinois, and Texas, which were already refusing the adjustment applications of approved self-petitioners.[60] Such an abrupt change in policy came after adjudication officers in the S.F. district received notification from the USCIS Headquarters in Washington, D.C., instructing them not to adjust the status of approved VAWA self-petitioners who entered the U.S. illegally after April 1, 1997 and to keep these applications on hold until USCIS interpreted Congress's VAWA 2000 amendment to the adjustment of status provision.[61]

USCIS's justification for adopting this policy was that even though Congress amended the adjustment of status provision to exempt VAWA self-petitioners from the "inspection and admission or parole" requirement, which is part of the introductory text of section 245(a), this provision still requires self-petitioners to be "admissible" under section 245(a)(2).[62] USCIS argued that the amendment did not eliminate the "admissibility" requirement because Congress did not amend section 245(a)(2) or the unlawful present admissibility ground in section 212(a)(6)(A)(i).[63] As a result, USCIS interpreted section 245(a) as requiring all VAWA self-petitioners seeking adjustment of status under this provision to be admissible.

2. USCIS New Interpretation of VAWA 2000

USCIS's change in policy attracted the attention of lawmakers in Congress. In November 2007, Senator Kennedy—a strong supporter of battered immigrants' rights—sent a letter to USCIS's Director Emilio Gonzalez, urging him to reconsider any narrow reading of the VAWA 2000 amendment to the adjustment of status provision and to allow all self-petitioners to adjust status regardless of their manner of entry into the U.S.[64] Senator Kennedy concluded that USCIS's narrow interpretation is "contrary to both the language of the statute and the intent of Congress to protect battered spouses and children from further harm."[65] Other members of Congress joined Senator Kennedy in writing to Emilio Gonzalez, also urging him to rectify USCIS's policy.[66]

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59. *See id.*

60. *Id.*

61. *Id.*

62. *See id.*; *see also* Aytes Memo, *supra* note 1, at 1-2.

63. *See* Aytes Memo, *supra* note 1, at 1.

64. Letter from Senator Edward Kennedy to Emilio Gonzalez, USCIS Director (Nov. 15, 2007) (on file with author) [hereinafter Senator Kennedy's 2007 Letter to USCIS].

65. *See id.*

66. *See, e.g.*, Letter from Zoe Lofgren, U.S. House Representative, to Emilio Gonzalez, USCIS Dir. (Nov. 28, 2007) (on file with author); Letter from Lynn Woosley, U.S. House Representative, to Emilio Gonzalez, USCIS Dir. (Jan. 18, 2008) (on file with author); Letter from

The congressional pressure, as well as the hard work of many national and local advocates[67] for battered immigrants, motivated USCIS to change its policy and to interpret the adjustment of status provision in line with Congress's intent. In his April 11, 2008 memo, USCIS Associate Director of Operations Michael Aytes announced USCIS's change in its policy with respect to approved VAWA self-petitioners who entered into the U.S. unlawfully.[68] Now, USCIS interprets Congress's 2000 amendment to the adjustment of status provision as waiving the unlawful presence ground of inadmissibility for approved VAWA self-petitioners.[69] USCIS adjudication officers, therefore, are required to grant adjustment of status to all approved VAWA self-petitioners, even if they entered the country without inspection.

Although I applaud USCIS for changing its policy and ensuring that VAWA's promise to protect battered immigrants is being fulfilled, I argue that USCIS could have avoided misinterpreting the adjustment of status provision had it considered the following: (1) Congress's intent in VAWA 1994 and VAWA 2000; (2) the language of section 245(a) in connection with the statutory scheme of VAWA; and (3) the incongruent and unjust results caused to battered immigrants in light of the realities of domestic violence.

II
INCONSISTENT WITH CONGRESSIONAL INTENT

Congressional records illustrate that USCIS's prior refusal to adjust the immigration status of approved VAWA self-petitioners who entered unlawfully contradicted Congress's intent regarding battered immigrants. Had USCIS taken the legislative history of VAWA 1994 and VAWA 2000 into account, it likely would not have misinterpreted the adjustment of status provision.

A. VAWA 1994 Legislative History

Congress passed VAWA 1994 "to respond both to the underlying attitude that [domestic] violence is somehow less serious than other crime and to the resulting failure of our criminal justice system to address such violence."[70] The two-fold purpose of VAWA was to eliminate existing laws and law enforcement practices that condoned abuse or protected abusers and to commit the legal system to protecting victims of abuse while identifying and punishing

Barbara Lee, U.S. House Representative, to Emilio Gonzalez, USCIS Dir. (Jan. 22, 2008) (on file with author).

67. *See, e.g.*, Susan Bower, Managing Attorney, Int'l Inst. of the Bay Area; Ellen Kemp, Dir. of Legal Advocacy, Nat'l Immigration Project of the Nat'l Lawyers Guild, Inc.; Gail Pendleton, Nat'l Immigration Project of the Nat'l Lawyers Guild, Inc.; Mary Kenney, Senior Staff Attorney, Am. Immigration Law Found.; Beth Werlin, Litig. Clearinghouse Attorney, Am. Immigration Law Found.

68. *See* Aytes Memo, *supra* note 1, at 2.

69. *See id.*

70. S. REP. NO. 103-138, at 38 (1993).

the perpetrators of domestic violence.[71]

At the time Congress passed this landmark legislation, Congress was well aware of the special problems facing battered immigrants.[72] The House Committee on the Judiciary noted in its report on VAWA 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."[73] The Committee also recognized the unique predicament faced by immigrant battered women: fear of continuous abuse if they stay and deportation if they attempt to leave the abuser.[74]

As a result, Congress extended its efforts to prevent manipulation of immigration laws by the abuser. In particular, Congress created the self-petitioning process, among other special routes, to assist battered immigrant victims in adjusting their immigration status without the abuser's cooperation.[75] It did this with the specific intent to "prevent the citizen or resident from using the petitioning process as a means to control or abuse an alien spouse."[76]

B. VAWA 2000 Legislative History

By 1998, however, President Clinton and Congress realized that the VAWA 1994's provisions were not providing sufficient protection to immigrant victims of domestic violence. In a March 11, 1998 memorandum, then-President Clinton acknowledged the need for new legal protections for battered immigrants:

> We have made great progress since the enactment of [VAWA 1994], but there remains much to be done. We must continue to work to implement the Act fully and to restore the Act's protection for immigrant victims of domestic violence here in the United States so that they will not be forced to choose between deportation and abuse.[77]

In VAWA 2000, Congress responded by creating new legal provisions to aid battered immigrants and by removing obstacles that made it harder for immigrants to escape abusive relationships.[78] It expanded the categories of immigrants eligible for VAWA protection, improved battered immigrants' access to public benefits, and created two new visas for noncitizen victims of

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71. H.R. REP. No. 103-395, at 25 (1993).

72. *Id.*

73. *Id.* at 26.

74. *Id.*

75. *See supra* notes 14-37 and accompanying text.

76. *Id.*

77. Memorandum from William J. Clinton, Former U.S. President, Executive Memorandum on Combating Violence Against Women (Mar. 12, 1998) (transcript available at 1998 WL 107484).

78. VAWA 2000, Pub. L. No. 106-386, Div. B, 114 Stat. 1464, (2000) (codified in scattered sections of 42 U.S.C. (2006)).

crimes: the U- and T-visas.[79]

1. Intent of the Battered Immigrant Women Protection Act

In 2000, Congress recognized that VAWA 1994 had only created a mechanism for battered immigrants to file an application through the self-petitioning process, but had not created a mechanism for them to obtain lawful permanent residency while living in the U.S.[80] At the time, Congress did not think this additional step was necessary, since INA section 245(i) allowed many of them to adjust their status in the country.[81]

Section 245(i) permits "an alien physically present in the United States who . . . *entered the United States without inspection*" to apply for adjustment of status if, among other things, he pays the requisite fee and is "admissible to the United States for permanent residence."[82] With the elimination of section 245(i)'s relief in 1998, however, the battered immigrant was required to return to his or her home country and wait until a visa became available to apply for adjustment of status in order to gain lawful permanent residency.[83]

This explains why Congress enacted the Battered Immigrant Women Protection Act.[84] Congress purposefully titled section 1506(a) of the Act *Removing Barriers to Adjustment of Status for Victims of Domestic Violence.*[85] Senator Leahy, a strong supporter of this Act, observed that the title clearly indicated Congress's intent to "make it *easier* for abused women and their children to become lawful permanent residents."[86]

More specifically, with the creation of this Act, Congress intended the immigration provisions of VAWA 2000 to aid battered immigrants by eliminating residual obstacles or "Catch-22" glitches (the choice between staying with the abuser or fearing deportation if she escapes), impeding immigrants from escaping abuse.[87] As Senator Abraham, one of the bill's cosponsors, said, "In this bill, we establish procedures under which a battered

79. *See id.*

80. *See* 146 CONG. REC. S10163, S10219 (daily ed. Oct. 11, 2000) (statement of Senator Abraham).

81. *Id.*

82. INA § 245(i) (2007), 8 U.S.C. § 1255(i) (2000) (emphasis added); *see also infra* notes 131–144 and accompanying text.

83. *Id.* Once section 245(i) expired in 1998, Congress modified this provision in 2000 and extended the deadline for people to apply for adjustment of status to April 30, 2001. *See* Legal Immigration Family Equity (LIFE) Act of 2000, Pub. L. 106-553, 114 Stat. 2762A-142 (2000). In addition to changing the expiration date, the LIFE Act amendments of 2000 added section 245(i)(1)(c), which requires beneficiaries who file a visa petition (or labor application) after January 14, 1998 to be physically present in the U.S. on the date the LIFE Act amendments were enacted, namely, December 21, 2000. *Id.*

84. H.R. 3244 §§ 1501-13.

85. *Id.* § 1506(a).

86. 146 CONG. REC. at S10185 (statement of Senator Leahy) (emphasis added).

87. *Id.* at S10192 (statement of Senator Hatch).

immigrant can take all the steps he or she needs to take to become a lawful permanent resident *without leaving this country*."[88]

Similarly, Senator Kennedy, the other co-sponsor of this provision, made clear in a October 11, 2000 speech on the Senate floor that the purpose of the Act was to help "battered immigrants by restoring access to a variety of legal protections *undermined by the 1996 immigration laws*."[89] He was referring to IIRAIRA's new grounds of inadmissibility, including section 212(a)(6)(A)(i), the basis USCIS districts used to refuse adjustment of status requests to approved VAWA self-petitioners.[90] That same day, Senator Biden expressed a similar view: "the battered immigrant women provision . . . strengthens and refines the protections for battered immigrant women in the original act and *eliminates the unintended consequences of subsequent changes in immigration law* to ensure that . . . battered immigrants also escape abuse without being subject to other penalties."[91]

2. Illustrations of How the Act Works

Senator Kennedy illustrated how the Battered Immigrant Women Protection Act would enable battered immigrants to escape domestic violence by sharing the story of Donna:

> [The Act] restores and expands vital legal protections like 245(i) relief. This provision will assist battered immigrants, like Donna, who have been in legal limbo since the passage of the 1996 immigration laws. Donna, a national of Ethiopia, fled to the U.S. in 1992[92] after her father, a member of a prominent political party, was murdered. In 1994, Donna met Saul, a lawful permanent resident and native of Ethiopia. They married and moved to Saul's home in Massachusetts. Two years later, Saul began drinking heavily and gradually became physically and verbally abusive. The abuse escalated and Donna was forced to flee from their home. She moved in with close family friends who helped her seek counseling. She also filed a petition for permanent residence under the provisions of the Violence Against Women Act.
>
> Unfortunately, with the elimination of 245(i) the only way for Donna

88. *Id.* at S10219 (statement of Senator Abraham) (emphasis added).

89. *Id.* at S10170 (statement of Senator Kennedy) (emphasis added).

90. *See id.*

91. *Id.* at S10204 (statement of Senator Biden) (emphasis added); *see also id.* at S10192 (statement of Senator Hatch) ("[T]he Battered Immigrant Women Protection Act of 2000 . . . continues the work of the Violence Against Women Act of 1994 ("VAWA") in removing obstacles inadvertently interposed by our immigration laws that many [sic] hinder or prevent battered immigrants from fleeing domestic violence safely and prosecuting their abusers.").

92. Even though Senator Kennedy did not explicitly say that Donna entered into the U.S. unlawfully, that is implicit from the fact that "the only way" Donna could obtain LPR status is by returning to Ethiopia. If Donna had entered lawfully, she would not have been required to do consular processing in order to adjust her immigration status.

> to obtain her green card is to return to Ethiopia . . . . This legislation will enable her to obtain her green card here, where she has the support and protection of family and access to the domestic violence counseling she needs.[93]

Based on this language, it is evident that Congress deliberately enacted the VAWA 2000 amendments to INA section 245(a) to allow *all* approved VAWA self-petitioners to adjust their status in the U.S., regardless of manner of entry. Despite this, however, the S.F. district office refused to grant adjustment of status to several approved VAWA self-petitioners represented by the International Institute of the Bay Area (the "Institute"), a non-profit organization in Oakland dedicated to providing legal assistance to immigrants. I became familiar with these cases while interning at the Institute in the fall of 2007. One of these cases illustrates the scenario Senator Kennedy describes. Maria,[94] who is currently represented by the Institute, was not granted LPR status despite the fact that her case is exactly the same as Donna's:

> Maria entered the U.S. without inspection in September 2001. She left Mexico with the intention to escape her severely abusive grandmother and to live with her parents in the U.S. In October 2003, Maria met her husband, a U.S. citizen, and they married in April 2005. Shortly thereafter, her husband began physically and mentally abusing Maria regularly. Maria was forced to flee from their home to escape the abuse. She filed a VAWA petition with USCIS based on her status as a battered spouse of a U.S. citizen. Maria's petition was approved on June 6, 2007, and upon receiving approval of the petition, she filed an application to adjust status. On September 12, 2007, USCIS refused to adjust Maria's application, citing INA section 212(a)(6)(A)(1) as its basis because Maria entered the country without inspection. Since Maria did not qualify for section 245(i) relief, the only way for her to obtain permanent residency was to return to Mexico.[95]

Maria's problem is the type of problem that the Battered Immigrant Women Protection Act was intended to solve.[96] There is no doubt, therefore, that the S.F. district office, as well as other USCIS districts across the country, disregarded Congress's intent when they refused to adjust the status of approved self-petitioners based on their unlawful entry into the country.

3. Congress's Intent Reinforced in 2002

In response to some Immigration and Naturalization Service (INS) offices'[97] refusal to adjust the status of approved VAWA applicants, Senator

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93. 146 CONG. REC. at S10170 (statement of Senator Kennedy).

94. For confidential purposes, I do not use Maria's real name. I learned about her case while assisting Eleonore Zwinger, a staff attorney at the Institute who is representing Maria.

95. *See* Interview with Eleonore Zwinger, *supra* note 7.

96. *See* 146 CONG. REC. at S10219 (statement of Senator Abraham).

97. Following the creation of the Department of Homeland Security in 2002, the INS

Kennedy wrote to then-INS Commissioner James Ziglar on May 3, 2002.[98] As one of the co-sponsors of the Battered Immigrant Women Protection Act, Senator Kennedy expressed concern that some INS offices were failing to implement the immigration provisions of VAWA 2000.[99]

In his letter, Senator Kennedy claimed that if Congress had intended to narrowly limit the "class of approved self-petitioners eligible to adjust under VAWA 2000" to only those who met the battered spouse and children exception under INA section 212(a)(6)(A)(ii), it "would have *explicitly* stated so in the legislation."[100] He then argued that Congress's intent in making "general amendments to [INA's] existing adjustment of status provisions" in VAWA 2000 was to ensure that battered immigrants are able to escape abuse.[101] Senator Kennedy urged INS to rectify its position on this matter, stating that "the VAWA 2000 amendments to INA § 245 were intended to allow *all* approved self-petitioners to adjust their status to permanent residence in the United States, *regardless of manner of entry*."[102]

In sum, the legislative histories of VAWA 1994 and VAWA 2000 unmistakably show that Congress intended to encourage immigrant victims of domestic violence to seek help from the criminal justice system and to provide legal immigration status for them and their children.[103] The congressional record for VAWA 2000 is particularly illustrative of how the amendments were intended to remedy the unintended consequences of the illegal entry ground of inadmissibility under section 212(a)(6)(A)(i).[104] In his 2002 letter, Senator Kennedy reaffirmed Congress's commitment to helping battered immigrants, stating that VAWA self-petitioners are eligible for adjustment under section 245(a) irrespective of the illegal entry.[105] Had USCIS considered this legislative history, it likely would not have adopted its previous policy.

III
STATUTORY CONSTRUCTION

The plain language of INA section 245(a), especially given the statutory scheme of VAWA, demonstrates that the VAWA 2000 amendment was

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immigration services function was transferred to USCIS. *See* U.S. DEP'T OF JUSTICE EXECUTIVE OFF. FOR IMMIGR. REV., FISCAL YEAR 2005-2010 STRATEGIC PLAN 3 (2004), *available at* http://www.usdoj.gov/eoir/statspub/FinalTEREOIRStrategicPlan2005-2010September%202004.pdf.

98. Letter from Senator Edward Kennedy to James Zingler, INS Comm'r (May 3, 2002) (on file with author) [hereinafter Senator Kennedy's 2002 Letter to INS].

99. *See id.*

100. *Id.* (emphasis added).

101. *Id.*

102. *Id.* (emphasis added).

103. *See supra* notes 70-91 and accompanying text.

104. 146 CONG. REC. S10163, S10170 (daily ed. Oct. 11, 2000) (statement of Senator Kennedy).

105. Senator Kennedy's 2002 Letter to INS, *supra* note 98.

designed to allow approved VAWA self-petitioners to adjust their status regardless of their manner of entry. In addition, USCIS should have interpreted section 245(a) to implicitly waive the general language of section 212(a)(6)(A)(i) when viewed in conjunction with 245(i).

A. Plain Meaning of Section 245(a)

It is well established that the starting point in every case involving construction of a statute is the language itself.[106] Generally, a statute's wording is the primary, and ordinarily the most reliable, tool used to interpret the statute's meaning.[107] Where the language of the statute is clear, the legislative history or other "extrinsic" evidence is not needed to ascertain the statute's meaning.[108]

1. Disjunctive "Or"

Prior to the enactment of VAWA 2000, INA section 245(a) required all applicants seeking to adjust status to have been inspected and admitted or paroled into the U.S.,[109] unless they satisfied the "substantial connection" requirement of the battered women and children exception.[110] Through the VAWA 2000 amendments, Congress amended section 245(a) by inserting the following after the words "United States": "or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1)."[111]

In 2005, Congress amended the INA yet again to make it even clearer that it was referring to VAWA self-petitioners.[112] As a result of these changes, the most recent version of section 245(a) now reads, in pertinent part:

> The status of an alien who was inspected and admitted or paroled into the United States *or* the status of any other alien having an approved petition for classification as a *VAWA self-petitioner* may be adjusted by the Attorney General . . . to that of an alien lawfully admitted for

106. *See, e.g.*, United States v. Hohri, 482 U.S. 64, 69 (1987); Kelly v. Robinson, 479 U.S. 36, 43 (1986); Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985); Watt v. Alaska, 451 U.S. 259, 265 (1981).

107. *See* Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 454 (1989); *Watt*, 451 U.S. at 266 n.9.

108. INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with the unenacted legislative intent."); *see also* George Costello, Cong. Research Serv., *Statutory Interpretation: General Principles and Recent Trends* (Mar. 30, 2006), at CRS-2, *available at* http://www.fas.org/sgp/crs/misc/97-589.pdf.

109. *See* INA § 245(a) (1999), 8 U.S.C. § 1255(a) (2000).

110. INA § 212(a)(6)(A)(ii) (1999).

111. H.R. 3244 § 1506.

112. In 2005, Congress reauthorized the Violence Against Women Act, which was set to expire that year. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. Law No. 109-162, § 811, 119 Stat. 2960 (2006).

permanent residence . . . .[113]

Basic grammar construction demonstrates that the VAWA 2000 amendment to section 245(a) is designed to allow self-petitioners who entered without inspection, admission, or parole to adjust their status. This is evident by Congress's choice to use the word "or."

Courts have consistently held that the use of the disjunctive "or" in a list means that only one of the listed requirements needs to be satisfied.[114] Through the use of "or" in section 245(a), Congress created two independent categories of noncitizens that qualify for adjustment of status. The first category (the one before the word "or") consists of those who are inspected and admitted or paroled into the U.S.[115] The second category (the one after the word "or") includes persons with approved VAWA self-petitions.[116] Since the first category is comprised of persons who entered the country with inspection and admission or parole, it follows that the second category must be of those who did *not necessarily* enter with inspection, admission or parole, but who meet the condition of having an approved VAWA self-petition. Thus, if an approved self-petitioner entered the country with inspection and admission or parole,[117] she may adjust her status under either category. If an approved self-petitioner entered the country *without* inspection and admission or parole, she is eligible to adjust only under category two without having to satisfy the requirement of admissibility in category one.[118]

2. Conjunctive "And"

Despite Congress's use of the word "or" in the VAWA 2000 amendment to section 245(a), USCIS districts refused to grant adjustment of status to approved self-petitioners who entered the country without inspection because they had narrowly interpreted the VAWA 2000 amendment by construing the "or" to mean "and."[119] As a result of this narrow interpretation, these districts

113. INA § 245(a) (2007) (emphasis added).

114. *See, e.g.*, Zorich v. Long Beach Fire Dep't & Ambulance Serv., Inc., 118 F.3d 682 (9th Cir. 1997); United States v. O'Driscoll, 761 F.2d 589 (10th Cir. 1985). The use of the disjunctive "or" creates mutually exclusive conditions that can rule out mixing and matching. United States v. Williams, 326 F.3d 535, 541 (4th Cir. 2003) ("A serious drug offense . . . is defined as a conviction for either '(i) an offense under the Controlled Substance Act . . . for which a maximum term of imprisonment of ten years or more is prescribed by law . . . *or* (ii) an offense under State law, involving . . . a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law.' . . . The disjunctive structure indicates that subsections (i) and (ii) are mutually exclusive. That is, a crime may qualify as a serious drug offense by meeting all the requirements of (i) or all the requirements of (ii), but not some of the requirements of (i) and some of (ii).") (emphasis added).

115. *See* INA § 245(a).

116. *See id.*

117. In other words, the approved self-petitioner was "admitted" into the country. *See* H.R. 2202, 104th Cong. (1996).

118. *See supra* note 114 and accompanying text.

119. *See* Interview with Eleonore Zwinger, *supra* note 7. USCIS argues that even though

required self-petitioners to have an approved VAWA self-petition *and* to be admissible to the U.S. in order to adjust, arguing that Congress did not explicitly waive the "admissibility" requirement of section 245(a)(2) when it amended the adjustment of status provision in VAWA 2000.[120] Under USCIS's previous interpretation, only approved self-petitioners who entered the country with inspection and admission or parole were eligible to adjust.

Generally, use of the conjunctive "and" in a list means that all of the listed requirements must be satisfied.[121] However, if a strict grammatical construction will frustrate evident legislative intent, courts may read "and" as "or," or "or" as "and."[122] Courts have recognized that congressional intent plays a crucial role in the interpretation of a statute and how to interpret the words "and" and "or."[123]

The legislative history of both the VAWA 1994 immigration provisions and the VAWA 2000 amendments demonstrates that Congress intended the word "or" to have its plain meaning and not to be interpreted as "and." The legislative history of VAWA 1994 reflects Congress's desire to help immigrant women escape abusive relationships through the self-petitioning process.[124] As mentioned earlier, the primary purpose for creating the self-petitioning process was to prevent the U.S. citizen or LPR batterer from using immigration law as a means to blackmail and control the noncitizen spouse.[125]

The legislative history of VAWA 2000 provides stronger evidence to illustrate that Congress intended the word "or" to have its literal meaning, since the purpose of amending section 245(a) was to strengthen the protections for battered immigrants created by VAWA 1994.[126] Congress's goal was to make the adjustment of status process easier for abused women to become LPRs.[127]

The legislative history of both VAWA 1994 and VAWA 2000 thus demonstrates that if the word "or" is construed to mean "and" in section 245(a), it would frustrate Congress's intent to strengthen VAWA 1994 and to allow

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the 2000 amendment inserted approved VAWA self-petitioners as a category eligible to adjust, subsection (2) of section 245(a) still requires all applicants to be "admissible." *See id.*

120. *See id.*

121. *See* Zorich v. Long Beach Fire Dep't & Ambulance Serv., Inc., 118 F.3d 682, 684 (9th Cir. 1997); United States v. O'Driscoll, 761 F.2d 589, 597 (10th Cir. 1985).

122. *See, e.g.*, De Sylva v. Ballentine, 351 U.S. 570 (1956); United States v. Moore, 613 F.2d 1029 (D.C. Cir. 1979); *see also* Costello, *supra* note 108.

123. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.").

124. *See supra* notes 70-79 and accompanying text.

125. *See id.*

126. *Supra* note 78 and accompanying text.

127. *Supra* note 86 and accompanying text.

immigrant battered victims to adjust their status without leaving the country.[128]

B. Parallel Between Section 245(a) and Section 245(i)

In 1997, the INS determined that the unlawful presence ground of inadmissibility under 212(a)(6)(A)(i) should not apply to those seeking adjustment under INA section 245(i).[129] Given the similarities between the general adjustment of status provision in section 245(a) and the language in section 245(i), the unlawful presence ground of inadmissibility must also be waived for VAWA self-petitioners seeking to adjust status under section 245(a), as it was waived for persons who adjust their status under section 245(i).

1. Background on 245(i)

On August 26, 1994, Congress amended INA section 245 with the enactment of the FY1995 Commerce, Justice, State (CJS) Appropriations Act.[130] This Act added a new, temporary subsection (i) to section 245 of the INA that enabled otherwise ineligible persons to adjust status while inside the U.S. upon approval of their petition and payment of the penalty fee.[131] Section 245(i) provides that once the application and the applicable fee are submitted, the Attorney General "may adjust the status of the alien to that of an alien lawfully admitted for permanent resident if—(A) the alien is eligible to receive an immigrant visa and *is admissible to the United States for permanent residence*; and (B) an immigrant visa is immediately available to the alien."[132]

Even though section 245(i) permits certain immigrants to adjust status, it does not change any substantive immigration rights. It simply streamlines the immigration process by eliminating the need for immigrants to go through cumbersome consular processing.[133] In addition, section 245(i) does not waive

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128. *See supra* notes 70-91 and accompanying text.

129. Legal Memorandum from David Martin, INS Gen. Counsel, *Request for Legal Opinion: The Impact of the 1996 Act on Section 245(i) of the Act*, to Michael L. Aytes, Assistant Comm'r, Office of Benefits (Feb. 19, 1997), *reprinted in* 74 Interpreter Releases 516 App. 2 (Mar. 24, 1997) [hereinafter Martin Memo].

130. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1995, Pub. L. 103-317, 108 Stat. 1724 (1994); *see also* BRUNO, *supra* note 4, at CRS-1.

131. Currently, to qualify for adjustment under section 245(i), a person must: (1) be "physically present in the United States" at the time of filing; (2) fall "within one of the classes enumerated in [section 245(c)]" *or have "entered the United States without inspection"*; (3) be either a beneficiary of a visa petition filed on or before April 30, 2001, or a labor certification under section 212(a)(5)(A) filed on or before April 30, 2001; (4) have been physically present on December 31, 2000 if the beneficiary petition was filed after January 14, 1998; and (5) pay the $1,000 penalty fee. INA § 245(i) (emphasis added). As shown from these requirements, section 245(i) is a very narrow exception to the adjustment of status provision—an exception under which most VAWA self-petitioners do not qualify to adjust.

132. *Id.* (emphasis added).

133. *See* BRUNO, *supra* note 4, at CRS-3.

any ground of inadmissibility, which means that the unlawful presence ground of inadmissibility fully applies.[134]

The provisions of section 245(i) that permit the admission of immigrants who entered the country without inspection, as is the case for many section 245(i) applicants, conflict with the unlawful presence ground of inadmissibility.[135] Shortly after the passage of IIRAIRA in 1996, the INS General Counsel was asked to resolve this conflict.[136]

On February 19, 1997, INS General Counsel David Martin considered the effect of section 212(a)(6)(A)(i) on the ability of persons who entered the U.S. without inspection to adjust status under section 245(i).[137] He found that when Congress enacted the unlawful presence ground of inadmissibility in 1996, "Congress clearly did not intend to render all illegal entrants inadmissible to the United States."[138] General Counsel Martin defended this finding based on Congress's exemption of certain battered spouses and children under section 212(a)(6)(A)(ii)[139] and the inclusion of a savings clause in section 212(a) that exempts illegal entrants from inadmissibility if "otherwise provided" in the INA.[140]

General Counsel Martin reasoned that "[b]y retaining this savings clause, Congress left the door open to the possibility that the policy concerns of other sections of the [INA] may outweigh those of the individual grounds of inadmissibility of section 212(a)."[141] After analyzing the language of section 212(a)(6)(A) and legislative history of section 245(i), he concluded that Congress's goals[142] in enacting section 245(i) would be frustrated if the INS were to deem illegal entrants "inadmissible" when they otherwise qualify for adjustment of status under section 245(i).[143] As a result, General Counsel Martin declared that persons who entered the country without inspection and who are seeking to adjust under section 245(i) are deemed "admissible" and therefore eligible to adjust their status in the U.S.[144]

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134. IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 694 (10th ed. 2006).

135. *See id.*

136. *See id.*

137. Martin Memo, *supra* note 129, at 2.

138. *Id.* at 5.

139. *See id.* at 5-6.

140. *See id.* at 6. Section 212(a) of the INA begins with the savings clause: "*Except as otherwise provided in this Act*, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States." INA § 212(a), 8 U.S.C. § 1182 (2006) (emphasis added).

141. Martin Memo, *supra* note 129, at 6.

142. Congress enacted section 245(i) primarily to allow otherwise qualified persons, who have reached the last step of the immigration process, to stay in the U.S. while their adjustment is pending, thereby relieving them from having to travel to a U.S. Consulate or embassy abroad and wait for the approval notice. *See* BRUNO, *supra* note 4, at CRS-3.

143. Martin Memo, *supra* note 129, at 6.

144. *See id.* at 7; *see also* Acosta v. Gonzales, 439 F.3d 550, 556 (9th Cir. 2006) (concluding that an alien who accrues more than one year of unlawful presence in violation of

2. Interpretation of 245(a)

As in the context of section 245(i), USCIS could have interpreted the language in section 245(a) to implicitly waive the general language of section 212(a)(6)(A)(i) for several reasons. First, since the conflict between sections 245(a) and 212(a)(6)(A)(i) (vis-à-vis battered immigrants with approved VAWA self-petitions) is precisely the same conflict as that between sections 245(i) and 212(a)(6)(A)(i), General Counsel Martin's determination in the 245(i) context should have been equally applicable to section 245(a). This is particularly true because sections 245(a) and 245(i) contain identical admissibility requirements,[145] and because section 245(a) does not explicitly override any of the inadmissibility grounds enumerated in section 212.[146] In particular, neither of these provisions specifically state whether the qualified applicants under their respective sections are eligible to adjust despite having entered the country without inspection in violation of the unlawful presence ground of inadmissibility.[147] Moreover, just as it occurred in the 245(i) context, this creates an application conflict between 245(a) and 212(a)(6)(A)(i), since many approved VAWA self-petitioners entered the country without inspection and are therefore deemed inadmissible under 212(a)(6)(A)(i).[148]

Second, the guidelines for adjusting status under 245(i) support the proposition that the VAWA 2000 amendments to section 245(a) establish a mechanism akin to that of section 245(i). Persons seeking to adjust status under 245(i) are required to submit Supplement A to Form I-485, which is the

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INA § 212(a)(9)(B)(i) is eligible to adjust under 245(i)); Padilla-Caldera v. Gonzales, 426 F.3d 1294, 1298 (10th Cir. 2005) (finding that Congress intended section 245(i) "to provide an exception to the general rule that aliens who entered the country without inspection are ineligible to seek adjustment to lawful permanent status"); Perez-Gonzalez v. Ashcroft, 379 F.3d 783, 790 (9th Cir. 2004) ("§ 245(i) clearly contemplates that some aliens who have entered the country without legal admission can receive adjustment of status); Chan v. Reno, 113 F.3d 1068, 1071 (9th Cir. 1997) ("Generally, aliens who entered the country without inspection are ineligible to seek adjustment to lawful permanent status. Section 245(i) of the INA provides an exception to this general rule, permitting any alien who entered the country without inspection to seek adjustment of status upon the payment of an increased filing fee *if* they have an immigrant visa 'immediately available.'") (citation omitted).

145. Compare the parallel admissibility requirement at section 245(i) with section 245(a): INA section 245(i)(2) provides that the "Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if – (A) the alien is eligible to receive an immigrant visa and *is admissible to the United States for permanent residence.*" INA § 245(i) (emphasis added). Section 245(a) identically states that the status of "a VAWA self-petitioner may be adjusted by the Attorney General . . . to that of an alien lawfully admitted for permanent residence if . . . (2) the alien is eligible to receive an immigrant visa and *is admissible to the United States for permanent residence.*" INA § 245(a) (emphasis added).

146. *See* INA § 245(a).

147. *See id.* §§ 245(i), 245(a).

148. Many of the clients represented by the Institute who qualify for VAWA benefits entered the country without authorization and were therefore ineligible to adjust status under USCIS's previous interpretation of section 245(a) as amended by Congress in VAWA 2000.

adjustment of status form.[149] The instructions to Supplement A explain that a person does *not* need to submit this form "if you are applying for adjustment of status to that of LPR because you: . . . (D) Have an approved [VAWA self-petition] . . . and are applying for adjustment as . . . a battered or abused spouse or child."[150] This strongly suggests that VAWA self-petitioners do not need to submit Supplement A to adjust under section 245(i), since section 245(a) provides VAWA self-petitioners with an "independent" basis by which they can adjust status.

Finally, the legislative history shows that Congress specifically intended its VAWA 2000 amendments to section 245(a) to function the same way section 245(i) does with respect to the illegal entry ground of inadmissibility under section 212(a)(6)(A)(i).[151] Senator Kennedy made this clear when he explicitly stated on the Senate floor that the purpose of the VAWA 2000 amendments was to restore and expand "vital legal protections *like 245(i) relief*."[152] In a letter to the INS Commissioner in 2002, Senator Kennedy reiterated that Congress deliberately modified section 245(a) in VAWA 2000 to establish an analogous mechanism to that of 245(i)—a mechanism that would enable VAWA self-petitioners to obtain status in the U.S. without having to go abroad to apply for a visa at their home country's U.S. Consulate.[153] He reasoned that "[i]f Congress had intended to narrowly limit the class of approved self-petitioners eligible to adjust under VAWA 2000 amendments to INA § 245(a) to only those who met the exceptions to INA § 212(a)(6)(A), we would have explicitly stated so in the legislation."[154]

In conclusion, had USCIS interpreted the language of INA section 245(a) in accordance with the statutory scheme of VAWA and had it considered the similarities between sections 245(a) and 245(i) instead of interpreting section 245(a) in a vacuum, USCIS would likely not have adopted its erroneous policy on VAWA self-petitioners.

IV
INCONGRUENT AND UNJUST RESULTS

In addition to ignoring Congress's intent and misinterpreting the law,

149. USCIS, Instructions for Supplement A to Form I-485, Adjustment of Status Under Section 245(i), *available at* http://www.uscis.gov/files/form/i-485supainstr.pdf.

150. *Id.*

151. *See* 146 CONG. REC. S10163, at S10170 (daily ed. Oct. 11, 2000) (statement of Senator Kennedy).

152. *Id.*

153. *See* Senator Kennedy's 2002 Letter to INS, *supra* note 98 ("When Senator Abraham and I (the Senate co-sponsors of the legislation) stated during Senate consideration of the legislation that *we were creating a new adjustment provision similar to INA § 245(i)*, we assumed that INS would apply the legal and policy logic contained in the Martin memo to adjustments of status under the new provisions.") (emphasis added).

154. *Id.*

USCIS's previous policy created incongruent and unjust results that did not reflect VAWA's purpose. Under USCIS's previous interpretation of section 245(a), battered immigrants who entered the country without inspection were placed in deferred action status indefinitely without the possibility of adjusting their status, unless they underwent consular processing. If USCIS had taken into account these illogical and unfair results, USCIS likely would not have adopted its previous policy.

A. Indefinite Deferred Status

Once a VAWA petition is approved, the Vermont Center often grants deferred status to unlawfully present VAWA self-petitioners.[155] The initial deferred action is usually granted for a period of about fifteen months and must be renewed if the self-petitioner wants to maintain her deferred action status.[156] Generally, self-petitioners are in deferred action until a visa becomes available and they become eligible to adjust. This could take many years depending on their country of origin and the year they filed the VAWA petition.[157]

Under USCIS's previous interpretation of section 245(a), an approved self-petitioner, who entered the country without authorization and who did not qualify to adjust under 245(i) or the battered exception under section 212(a)(6)(A)(ii), could not adjust her status unless she went through consular processing.[158] This meant that the self-petitioner was likely to be in deferred action indefinitely because she was ineligible to adjust under any of the immigration provisions.[159]

With deferred action only, the approved self-petitioner is not entitled to many of the protections and benefits that LPRs enjoy. For example, self-petitioners risk USCIS refusing to extend deferred action, leaving petitioners completely unprotected from removal.[160] Simply stated, the self-petitioner's status is in legal limbo and at the mercy of USCIS.[161] This is an unjust and absurd result that was never intended by Congress when it passed VAWA 1994 and amended the INA section 245(a) in VAWA 2000.[162]

USCIS's previous interpretation of section 245(a) also created another incongruent result: it permitted self-petitioners who entered unlawfully to petition for classification as a battered spouse, but not for adjustment of status. This is an odd result because persons who are permitted to file immigrant visa petitions are generally allowed to file for adjustment of status under sections

155. *See supra* notes 31-32 and accompanying text.
156. Interview with Eleonore Zwinger, *supra* note 7.
157. *See id.*
158. *See* INA §§ 245(a), 245(i), 212(a)(6)(A)(ii).
159. *See id.*
160. *See* USCIS, *supra* note 2.
161. *See id.*
162. *See supra* notes 70-91 and accompanying text.

245(a) or 245(i).[163] This is especially true with victims of domestic violence, given that Congress amended section 245(a) to ensure that battered immigrants were permitted to adjust their status without having to leave the country.[164]

The U.S. Supreme Court has repeatedly held that when the literal reading of a statutory term would "compel an odd result," courts "must search for other evidence of congressional intent to lend the term its proper scope."[165] Such an approach is consistent with the Court's position that looking beyond the text for guidance "is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress's intention."[166]

When Congress amended section 245(a) in VAWA 2000, it did not contemplate the fact that USCIS would interpret it to preclude approved VAWA self-petitioners from adjusting status. In fact, the vulnerability to removal of battered immigrants is precisely what Congress intended to remedy.[167] Congress recognized that VAWA 1994 had only created a mechanism for victims to file an application to be classified as battered immigrant spouses, but did not create a mechanism for them to obtain lawful permanent residency while living in the U.S.[168] The Battered Immigrant Women Protection Act of 2000 was enacted to solve this problem by exempting undocumented battered women from the admissibility requirement of section 245(a)(2).[169]

B. Consular Processing

Under USCIS's previous interpretation, if approved self-petitioners did not want their immigration status to be in limbo with deferred action, the other alternative to gaining LPR status was through consular processing.[170] Once again, they found themselves in another "Catch-22" situation.[171]

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163. *See* INA §§ 245(a), 245(i).

164. *See supra* note 88 and accompanying text.

165. Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 454 (1989); *see also* Fed. Deposit Ins. Corp. v. Phila. Gear Corp., 476 U.S. 426, 432 (1986); Watt v. Alaska, 451 U.S. 259, 266 (1981).

166. *Public Citizen*, 491 U.S. at 455.

167. 146 CONG. REC. S10163, S10219 (daily ed. Oct. 11, 2000) (statement of Senator Abraham) ("In this bill, we establish procedures under which a battered immigrant can take all the steps he or she needs to take to become a lawful permanent resident without leaving this country. Right now, no such mechanism is available to a battered immigrant, who can begin the process here but must return to his or her home country to complete it.").

168. *See id.*

169. *See supra* notes 54-57 and accompanying text.

170. *See* 146 CONG. REC. at S10219 (statement of Senator Abraham).

171. Self-petitioners had to choose between being in legal limbo in the U.S. or losing the legal protections afforded to domestic violence victims if they returned to their home country for consular processing. *Id.*; *see also* Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigration Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 131-32 (2002).

1. Dangers of Returning to Home Country

Consular processing was not a viable option for many battered immigrants. If they had been forced to return to their countries of origin, approved VAWA self-petitioners would have been subjected to various hardships and dangers.[172] For example, they would have lost the protections provided by U.S. court orders and law enforcement, since restraining orders are not valid outside the U.S.[173] As a result, self-petitioners would have been vulnerable to abuse because this allowed the U.S. citizen or LPR spouse to travel abroad to take advantage of the victim's lack of legal protection.[174] Further, the self-petitioner also faced potential abuse by the family of the batterer residing in the self-petitioner's home country for reporting the abuse and sending the batterer to jail.[175]

In addition, returning to their home country most likely meant that self-petitioners would not have access to adequate medical and counseling services.[176] Victims of domestic violence and their children often suffer both physical and mental problems as a result of abuse.[177] In 2000, Senator Kennedy explained that it is crucial for self-petitioners to obtain permanent residency in the U.S. because they have the support and protection of family and access to the domestic violence counseling they need.[178] If self-petitioners had been required to travel abroad for months or maybe years to obtain LPR status, this would have disrupted the professional treatment they were likely receiving in the U.S., causing tremendous emotional damage and making it harder for them to rebuild their lives.[179]

Perhaps the most compelling motivation for not returning to their home country was that VAWA self-petitioners who are parents of U.S.-born children would have been compelled to leave those children in a temporary place safe from the abuser.[180] This meant that they were going to be separated from their children for an indefinite period of time.[181] Most self-petitioners, therefore, would have likely taken their children with them to their home country, sometimes at the risk of "violat[ing] a court order awarding the abusive spouse

172. *See* Orloff & Kaguyutan, *supra* note 171, at 133.

173. *See id.*

174. *See id.*

175. *See* 146 CONG. REC. at S10220 (statement of Abraham) ("Martin's family in Nigeria blames [Yaa] for Martin's conviction. They have called her from there and threatened to have her deported because she 'brought shame' to the family. They also know where she lives in Nigeria and they have threatened to hurt her and kidnap the children if she comes back.").

176. *See* Orloff & Kaguyutan, *supra* note 171, at 136.

177. *See id.*

178. 146 CONG. REC. at S10170 (statement of Senator Kennedy).

179. *See* Orloff & Kaguyutan, *supra* note 171, at 136.

180. *See* Deborah Weissman, *Protecting the Battered Immigrant Woman*, 68 FLA. BAR J. 81, 82 (1994).

181. *See* Orloff & Kaguyutan, *supra* note 171, at 134.

visitation of their children."[182] Even worse, leaving would have been at the risk that an abusive spouse would have succeeded in bringing parental kidnapping charges against the self-petitioner had she taken her children out of the U.S.[183]

2. Barriers to Returning to the United States

All of these risks are exacerbated by the vagaries of consular processing and by INA section 212(a)(9)(B), which makes unlawful presence in the U.S. a ground of inadmissibility.[184]

a. Problems with Consular Processing

One of the most significant problems with consular processing for VAWA self-petitioners is that consular officers abroad are not adequately trained on how to adjudicate adjustment petitions of approved VAWA self-petitioners.[185] Untrained consular officers may try to re-open and re-evaluate the self-petitioners' approved VAWA petitions even though the petitions were already adjudicated by the Vermont Center.[186]

Unlike consular officers, immigration adjudicators at the Vermont Center are especially trained on issues on domestic violence and on how to handle VAWA petitions.[187] They understand, for example, that a domestic violence victim may stay with her abuser because of her abuser's power and control over her.[188] Untrained consular officers, on the other hand, "may fail to credit a battered woman's testimony because they cannot believe she would have stayed in the relationship if such abuse were occurring."[189]

More importantly, immigration decisions made in the U.S. are subject to both administrative agency and judicial review.[190] If a VAWA self-petition is denied, the applicant can appeal to the Board of Immigration Appeals (BIA) and then to the federal courts, since BIA decisions are subject to federal judicial review.[191] By contrast, decisions made by consular officers at embassies and consulates abroad are not reviewable.[192] If a consul denies the visa to a self-petitioner, she is unable to appeal to any agency or court.[193] As Michael Maggio, an immigration attorney, explained it,

182. *Id.*
183. *See id.*
184. INA § 212(a)(9)(B)(i) (2007), 8 U.S.C. 1182 (2000).
185. *See* Orloff & Kaguyutan, *supra* note 171, at 136.
186. *See id.* at 136-37.
187. *See id.* at 138-39.
188. *See id.* at 138.
189. *Id.* at 138.
190. *See id.* at 137.
191. *See* U.S. Dep't of Justice, *Executive Office of Immigration Review: Board of Immigration Appeals*, http://www.usdoj.gov/eoir/biainfo.htm (last visited May 25, 2008).
192. Michael Maggio, Larry S. Rifkin, & Sheila T. Starkey, *Immigration Fundamentals for International Lawyers*, 13 AM. UNIV. INT'L L. REV. 857, 870 (1998).
193. *See id.*

> [T]here is no meaningful administrative review of [a consul's] decision. You cannot appeal it. You can go to the consul's boss informally, and depending on the consulate you can go back perhaps every day and apply again and again, but there is no review of that decision and, indeed, decisions of consular officers are judicially non-reviewable.[194]

Without judicial review of consuls' decisions, self-petitioners are disabled from appealing their cases even if the consuls misinterpreted the requirements VAWA self-petitioners must satisfy to become LPRs.[195]

b. Danger Created by the Three- or Ten-Year Bar

Section 212(a)(9)(B)(i)(1) provides that any alien who has been unlawfully present in the U.S. for more than 180 days but less than one year is inadmissible for three years.[196] When the person has been in the U.S. for a year or more, she is inadmissible for ten years.[197] These bars to re-entry are triggered when the undocumented person travels outside of the U.S.[198]

This ground of admissibility affected approved VAWA self-petitioners significantly. If the self-petitioner had decided to do consular processing to obtain LPR status, she would have triggered the bars; that is, she would not have been able to seek admission to the U.S. within three years if she had been illegally present in the U.S. for more than 180 days but less than a year.[199] Many self-petitioners, however, have been illegally present for a year or more, which means that they would have been barred for ten years from seeking admission and returning to the U.S.[200]

Three or ten years is a long time to separate self-petitioners from their children and to deny them the protection of the laws afforded to domestic violence victims in the U.S.[201] It is certainly a long time for a self-petitioner to live in fear that the LPR or U.S. citizen abusive spouse could travel to her home country and take advantage of her lack of legal protections afforded by U.S. laws.[202] The VAWA 2000 amendments were meant to benefit domestic violence survivors and not to subject them to these situations.[203]

Arguably, the bars should not have applied to self-petitioners because section 212(a)(9)(B) contains an exception for battered women and children.[204]

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194. *Id.*
195. *See* Orloff & Kaguyutan, *supra* note 171, at 137.
196. INA § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182 (2006).
197. *Id.* § 212(a)(9)(B)(i)(II).
198. *See id.*
199. *See id.* § 212(a)(9)(B)(i)(I).
200. *See id.* § 212(a)(9)(B)(i)(II).
201. *See* Orloff & Kaguyutan, *supra* note 171, at 134.
202. *Id.* at 133.
203. *See supra* notes 51-57 and accompanying text.
204. INA § 212(a)(9)(B)(iii)(IV).

However, just like the battered spouse and children exception in section 212(a)(6)(A)(ii), the exception in section 212(a)(9)(B) also requires a "substantial connection between the battery or cruelty" and the "violation of the terms of the alien's non-immigrant visa."[205] Most battered women were unable to meet the "substantial connection" requirement, especially when they accrued the time that triggers the bars even before they met their abusive husbands.

Moreover, although the unlawful presence ground of inadmissibility does include a waiver, in practice, it may have been nearly impossible for a battered immigrant to meet the requirements of the waiver. INA section 212(a)(9)(B) gives the Attorney General sole discretion to waive the three- or ten-year-bar "if it is established . . . that the refusal of admission to such immigrant alien would result in *extreme hardship to the citizen or lawfully resident spouse or parent* of such alien."[206] Satisfying this requirement was often practically impossible for self-petitioners because they were required to show extreme hardship to her U.S. citizen or LPR spouse—often her abuser.[207]

In order to obtain the waiver, the self-petitioner would have needed her abuser to claim, at her request, that he would have been subjected to extreme hardship if the three- or ten-year-bar applied to her.[208] This flatly contradicted Congress's intent to enable victims of domestic violence to obtain lawful permanent status *without* being dependent on the abusive spouse.[209]

CONCLUSION

With its recent interpretation of section 245(a), as issued in the April 11, 2008 memorandum, USCIS is fulfilling VAWA's promise to assist battered immigrants escape abusive relationships by allowing them to adjust their status in the U.S. However, had USCIS considered Congress's intent when it adopted its previous policy, which required all VAWA self-petitioners to be legally admissible, USCIS would not have interpreted INA section 245(a) so narrowly and misconstrued its language.

Moreover, USCIS could have avoided the incongruent and unjust results caused by its previous interpretation, such as the Catch-22 situation in which approved VAWA self-petitioners had to choose between remaining in the U.S. in permanent limbo and returning to their home country for many years, had it considered the impact its interpretation would have on VAWA self-petitioners in view of the realities of domestic violence.

Now that USCIS has rectified its erroneous policy, I applaud this decision and advise USCIS to take into account important factors, such as the legislative

205. *Id.*
206. *Id.* § 212(a)(9)(B)(v) (emphasis added).
207. *See id.*
208. *See id.*
209. 146 CONG. REC. S10163, S10185 (daily ed. Oct. 11, 2000) (statement of Senator Leahy).

history of a law, the statutory language, and the results caused by its interpretation, when construing other provisions of the INA. It is imperative that USCIS consider these factors to ensure that its interpretations are consistent with Congress's intent and the statutory scheme and to prevent any irrational and unjust results that could significantly impact the lives of persons seeking legal protection under the INA.