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Maxine Yi Hwa Lee

University at Buffalo School of Law (Student)

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A Life Preserver for Battered Immigrant Women: The 1990 Amendments to the Immigration Marriage Fraud Amendments

MAXINE YI HWA LEE*

I. INTRODUCTION

In 1986, Congress enacted the Immigration Marriage Fraud Amendments (IMFA)¹ to prevent immigrants from entering into fraudulent marriages solely to gain legal entry into the United States. Under this law, an immigrant who married a U.S. citizen or permanent resident was given conditional permanent resident status² and could petition with her citizen spouse for removal of the condition before the end of two years.³ Recognizing that marriages might fail within the first two years or that sponsoring spouses might refuse to file the joint petition with the immigrating spouse, Congress provided two types of waivers to the joint petition requirement: first, for extreme hardship,⁴ and second, for marriages entered into in good faith and terminated for good cause.⁵ However, these waivers failed to clearly address situations involving domestic violence. "Due to a lack of clarity in the IMFA, a battered foreign spouse may be forced to choose between remaining in an abusive relationship or facing possible deportation to a country that is no longer his or her home."⁶ Ironically, immigration laws provided an-

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1. Pub. L. No. 99-639, 100 Stat. 3537 (1986) (codified as amended at 8 U.S.C. § 1186a (Supp. II 1990)).

2. 8 U.S.C. § 1186a(a)(1) (1988). A conditional permanent resident is an alien who has been lawfully accorded the privilege of residing permanently in the United States as an immigrant, 8 C.F.R. § 216.1 (1991); 8 U.S.C. § 1101(20) (1988).

3. See *infra* note 63 and accompanying text.

4. 8 U.S.C. § 1186a(c)(4)(A) (1988).

5. 8 U.S.C. § 1186a(c)(4)(B) (1988), amended by 8 U.S.C. § 1186a(c)(4)(B) (Supp. II 1990).

6. 136 CONG. REC. H8642 (daily ed. Oct. 2, 1990) (statement of Rep. Slaughter) [hereinafter Slaughter statement].

other weapon, the threat of deportation, for batterers to wield against their alien spouses.⁷

Congresswoman Louise Slaughter introduced a bill to amend the IMFA⁸ to "provide immigrant spouses in a bona fide marriage, an escape from the beatings, the insults and the fear."⁹ This bill was passed by Congress and signed into law on November 29, 1990, as the Immigration Act of 1990 (hereinafter referred to as the 1990 Amendments).¹⁰ Section 701 of the 1990 Amendments creates a new category for waiver of the joint petition requirement. This waiver is available when the alien can show that the marriage was entered into in good faith and the alien spouse has been battered or subjected to extreme cruelty by his or her spouse.¹¹ The Act also amends the good faith/good cause waiver¹² and adds a new provision to protect applicant confidentiality.¹³

This Comment will examine the 1990 Amendments and their impact on the lives of conditional permanent residents who are victims of domestic violence. Part I describes the immigrant population intended as the beneficiaries of the 1990 Amendments, and explains why the Asians and Latins who comprise seventy percent of this immigrant group are especially in need of protection.¹⁴ Part II

7. The following situation is not uncommon:

An American citizen went to Hong Kong, married a woman there and brought her back to the U.S. where she now has conditional residency status. After three months of living with her husband in the U.S., he started physically abusing her and threatening her with a gun. The husband has promised he will petition for her permanent residency when the time comes but she lives in fear he will ultimately refuse to do this. The neighbors regularly call the police because of the severe abuse they witness yet the woman is unable to terminate the marriage because she has no resources of her own to begin the divorce proceedings and fears the risk of deportation should her application for an INS waiver be rejected.

Information Sheet from National Coalition Against Domestic Violence (May 17, 1989) (on file with author); see also Slaughter statement, *supra* note 6; *Family Unity and Employment Opportunity Immigration Act of 1990: Hearings on H.R. 4300 Before Subcomm. on Immigr., Refugees and Int'l Law, 101st Cong., 2d Sess. 851 (1990)* (joint statement of Asian Women's Shelter, California Women of Color Against Domestic Violence, Coalition for Immigrant and Refugee Rights and Services, Equal Rights Advocates, and San Francisco Domestic Violence Consortium) [hereinafter Joint Statement].

8. H.R. 2580, 101st Cong., 1st Sess. (1989). This bill was later incorporated into another immigration bill, the Family Unity and Employment Opportunity Act of 1990, H.R. 4300, 101st Cong., 2d Sess. (1990).

9. Slaughter statement, *supra* note 6.

10. Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended in scattered sections of 8 U.S.C.).

11. 8 U.S.C. § 1186a(c)(4)(C) (Supp. II 1990); see *infra* part III.A.

12. 8 U.S.C. § 1186a(c)(4)(B) (Supp. II 1990); see *infra* part III.B.

13. 8 U.S.C. § 1186a(c)(4) (Supp. II 1990); see *infra* part III.C.

14. U.S. IMMIGR. & NATURALIZATION SERV., STATISTICAL YEARBOOK OF THE INS,

analyzes the original provisions of IMFA and the problems that it created for battered spouses. Part III examines both the 1990 amendments to IMFA and the regulations implementing the new law.¹⁵ Finally, Part IV addresses the issues left unresolved, such as definitions, standards of proof, confidentiality, conflict between the INS regulations and congressional intent, and due process protections.

I. INTENDED BENEFICIARIES OF THE 1990 AMENDMENTS

A. *Domestic Abuse in the Immigrant Community*

How many immigrant women are battered each year? Who are these immigrant women who are the victims of domestic violence? Few statistics are available to answer these questions. Estimates can be made by examining the numbers of immigrants entering the United States as conditional permanent residents and comparing them with statistics on domestic abuse in the general population.¹⁶ The total number of conditional permanent residents who entered the U.S. in 1987 was 108,520.¹⁷ Assuming that one-fourth to one-half of all marriages contain some form of violence,¹⁸ thousands or even tens of thousands of conditional resident women may be victims of domestic violence.¹⁹

The extent of the abuse problem can also be determined by examining usage of hotlines and shelters serving the immigrant

1989, Table 21 [hereinafter STATISTICAL YEARBOOK].

15. 8 C.F.R. pt. 216.

16. Although there are no formal statistics on the numbers of immigrant women who are abused each year, the incidence of domestic violence against all women in the United States is shocking. A national crime survey studying the period from 1978 to 1982 found that an estimated 2.1 million women in the United States were victims of domestic violence at least once during an average one-year period. PATRICK A. LANGAN & CHRISTOPHER A. INNES, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PREVENTING DOMESTIC VIOLENCE AGAINST WOMEN 3 (1986). The FBI has reported that "a woman is battered every 15 seconds in the United States." Deena Jang, *Triple Jeopardy: The Plight of Battered Immigrant and Refugee Women*, IMMIGR. NEWSL., Vol. 19, No. 2, at 6, 6 (1990) (citing U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, REPORTS TO THE NATION ON CRIME AND JUSTICE 21 (1983)). In 1987, 30% of female murder/manslaughter victims were killed by either a husband or a boyfriend. Jorge Banales, *Abuse Among Immigrants*, WASH. POST, Oct. 16, 1990, at E5.

17. STATISTICAL YEARBOOK, *supra* note 14, Table F, at xxiii. The total number of immigrants admitted to the U.S. in 1987 was 607,516. *Id.* at Table 1, at 1. Therefore 18% of all immigrants admitted in 1987 were conditional permanent residents.

18. Joint Statement, *supra* note 7, at 852.

19. One may assume that because a large number of conditional residents are of Asian or Hispanic descent, a significant number of abused conditional residents are Asian and Latina women.

communities.²⁰ The New York Asian Women's Center received over 2,000 calls and assisted approximately 250 battered women in 1990.²¹ Between 1978 and 1985, the Los Angeles Center for the Pacific Asian Family served approximately 3,000 Asian clients.²² AYUDA Clinica Legal Latina in Washington, D.C., now serves over 200 Latina clients per year. Over the past six years, they have assisted approximately 800 battered Spanish-speaking women.²³ The San Francisco Family Violence Project assists at least fifty Asian victims of domestic violence per year.²⁴ Finally, in a study of 150 Korean immigrant women, sixty percent indicated that they had been abused.²⁵

The last indicator of the scope of the abuse problem is the number of immigrants seeking waivers. In 1989 the INS reported that 4,851 conditional residents filed waiver applications. Of these, 3,625 were under the good faith/good cause waiver and 1,226 were applications for an extreme hardship waiver.²⁶ Although no specific information is available on how many applications were founded on abuse, all of the statistical information taken together demonstrates a sizeable problem which Congress addressed by enacting the 1990 Amendments.

B. *Cultural and Economic Barriers*

Cultural values often compound the difficulties faced by immigrant women because they may instill a sense of tolerance for do-

20. However, these figures do not reflect the true extent of the problem of domestic violence in immigrant populations because a significant portion of the victims never report abuse or seek help. See *infra* part I.B for a discussion of cultural and economic barriers that often prevent immigrant women from seeking assistance.

21. Marvina Howe, *Battered Spouses Find a Way to Escape an Immigration Trap*, N.Y. TIMES, Aug. 25, 1991, at A40. In 1987, the Center handled 700 cases. JoAnn Lum, *Battered Asian Women*, RICE, Mar. 1988, at 50, 52.

22. Nilda Rimonte, *Domestic Violence Among Pacific Asians*, in MAKING WAVES 327, 327 (Asian Women United of California ed., 1989).

23. Telephone Interview with Leslye Orloff, Director, AYUDA Clinica Legal Latina (Feb. 12, 1992) [hereinafter Orloff Interview].

24. *Racism/Sexism: Their Combined Influence on Violence Against Asian Women*, at 41, 42 (1986) (from proceedings of "Break the Silence: A Conference on Anti-Asian Violence," held May 10, 1986 in Berkeley, CA) [hereinafter *Racism/Sexism*].

25. Raul Ramirez, *Violence at Home Grips Alien Women*, S.F. EXAMINER, Mar. 10, 1991, at A1.

26. Letter from Bonnie Derwinski, Acting Director, Congressional & Public Affairs, Immigration and Naturalization Service, to Rep. Louise M. Slaughter (Oct. 19, 1989), reprinted in 66 INTERPRETER RELEASES 1428, 1428 (1989) [hereinafter INS Letter to Slaughter]. As of the date of the letter, forty percent (1452) of the good faith/good cause waivers were approved and forty-three percent (533) of the extreme hardship waivers were granted; 1663 good faith/good cause waivers and 566 extreme hardship petitions were still pending with the Service. *Id.* at 1429.

mestic abuse.²⁷ For instance, in many Asian cultures, Confucianism requires women to obey their husbands.²⁸ A Korean saying considers "women and dried fish . . . alike. You have to beat them at least once a day to keep them good."²⁹ A study of battered Mexican women indicates that many Latinas believe their husbands have the right to physically abuse them.³⁰ Many immigrant women are not even aware that domestic violence is considered a crime in the United States and do not know that they may take legal action against their abuser.³¹

Although some women may turn to their ethnic communities for support, these communities are often reluctant to recognize that domestic violence is a problem within their community or in society as a whole.³² Battered women may not seek help from available outside agencies for two reasons. First, they may have little knowledge of social service agencies and other outside institutions available to assist them.³³ Second, they may fear bringing shame on themselves and their families. For instance, Asian women believe that a failed marriage brings shame to the entire family, not just to the individ-

27. See generally Banales, *supra* note 16, at E5; N.Y. Asian Women's Center, Inc., Testimony for U.S. Comm'n on Civil Rights, Round Table Conf. on Asian Civil Rights Issues for the 1990's, at 3 (on file with author) [hereinafter Eng Testimony].

28. Lum, *supra* note 21, at 51. "[T]he traditional belief that a woman is a man's property, and that a man has certain rights in his home, [may lead him to] conclude that 'I can hit my wife—she's my property and this is my house.'" Maria Choy, *Battered*, ASIAN WK., Dec. 5, 1986, at 12.

29. Lum, *supra* note 21, at 51; see also Sun Bin Yim, *Korean Battered Wives: A Sociological and Psychological Analysis of Conjugal Violence in Korean Immigrant Families*, in KOREAN WOMEN IN A STRUGGLE FOR HUMANIZATION 171, 175, 176, 188-89 (Harold Hakwon Sunoo & Dong Soo Kim eds., 1978).

30. KAREN N. JACQUES, PERCEPTIONS AND COPING BEHAVIORS OF ANGLO-AMERICAN AND MEXICAN IMMIGRANT BATTERED WOMEN: A COMPARATIVE STUDY 288 (1981) (unpublished Ph.D. dissertation, United States International University). The study, however, raises a question as to the validity of the view that domestic violence is more acceptable in Latin American cultures. *Id.* But see Banales, *supra* note 16, at E5, in which a Latin American woman testified that she had not been mistreated even though "she had been punched, kicked, dragged by the hair and restrained in her bedroom under threat of knives and guns." She thought that this treatment was normal behavior to resolve a marital dispute; see also MYRNA M. ZAMBRANO, MEJOR SOLA QUE MAL ACOMPAÑADA: FOR THE LATINA IN AN ABUSIVE RELATIONSHIP 152-53 (1985) (explaining that a Latina wife who disobeys or is disrespectful to her husband may be viewed as selfish and self-centered and as not keeping the family's interest in mind).

31. Lum, *supra* note 21, at 51; THE FAMILY VIOLENCE PREVENTION FUND, ISSUE PAPER ON DOMESTIC VIOLENCE CASES INVOLVING IMMIGRANT AND REFUGEE COMMUNITIES: THE RESPONSE OF THE COURTS 8, 9 (Dec. 1991) [hereinafter ISSUE PAPER].

32. Choy, *supra* note 28, at 12.

33. Lum, *supra* note 21, at 51; Eng Testimony, *supra* note 27, at 3; JACQUES, *supra* note 30, at 291; U.S. COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S 179 (1992) [hereinafter CIVIL RIGHTS REPORT].

ual.³⁴ They are raised with the attitude that revealing private matters to outsiders humiliates the entire family.³⁵ Asian women who violate these restrictions may be viewed harshly by the community and are often excluded from social and family events. Thus, obtaining assistance from an outside source or leaving an abusive relationship can result in the victim being isolated or even ostracized from family and community at a time when their support is most needed.³⁶

In many instances, the husband's family may also abuse the wife or act as his ally to force the woman "to conform to traditional role expectations,"³⁷ pressuring the wife to remain in the abusive relationship.³⁸ Women who immigrate to the United States without their own families may be especially vulnerable to domestic violence.³⁹ The problem is particularly acute for wives of American servicemen and mail-order brides who are often isolated, do not live near their ethnic communities, and lack a support network of

34. Eng Testimony, *supra* note 27, at 3; Deanna Hodgin, 'Mail-Order' Brides Marry Pain to Get Green Cards, WASH. TIMES, Apr. 16, 1991, at E1; see also Pat Eng & Suzanne Messing, *Shelter Asian Women*, NEW DIRECTIONS FOR WOMEN, Sept.-Oct. 1987, at 3 (an Asian woman who is beaten is viewed by her community as not properly pleasing her husband); Choy, *supra* note 28, at 12 (Asian women feel they must "sav[e] face" and are ashamed to reveal domestic problems to a stranger).

This notion that domestic violence should not be disclosed to outsiders is also prevalent in Latin cultures, where "cultural values of modesty, respect and indirectness in communication discourage women from openly raising their concerns even in that intimate circle." Angela Ginorio & Jane Reno, *Violence in the Lives of Latina Women*, WORKING TOGETHER, Feb. 1985, at 4.

35. Eng Testimony, *supra* note 27, at 3; Tracy A. Lai, *Asian Women: Resisting the Violence*, WORKING TOGETHER TO PREVENT SEXUAL AND DOMESTIC VIOLENCE, June 1985, at 1, 3; see also Blesilda Ocampo, *Some Battered Wives Suffer 'Cycle of Abuse'*, ASIAN WK., Aug. 25, 1989, at 22 (asserting that Filipino women who leave their husbands are viewed as failures and "[t]o fail . . . is experienced as personally distressing and as a reflection on one's family name").

36. Eng Testimony, *supra* note 27, at 3; Lum, *supra* note 21, at 51.

For many Asian women, the family is considered the major source of support. "Tradition requires the individual to turn [for help] first to her immediate family and then beyond in widening concentric circles: to the extended family, to the community, and last to an agency that is perceived as culturally hospitable and linguistically accessible." Rimonte, *supra* note 22, at 330. Researchers have also noted that the presence of an extended family may act as a buffer preventing marital abuse. The lack of the mediating influence of relatives may allow problems between the couple to create intense stress, and violence may be used to respond to such pressures. Yim, *supra* note 29, at 185-86.

37. Yim, *supra* note 29, at 185; Eng Testimony, *supra* note 27, at 3.

38. Rimonte, *supra* note 22, at 330; Hodgin, *supra* note 34, at E1; see also Choy, *supra* note 28, at 12 (referring to "an incident where a woman would not divorce her abusive husband because she could not obtain her in-laws' permission").

39. Eng Testimony, *supra* note 27, at 4; see also Wendy Lim, *Is INS Hindering Abused Wives?*, NEWSDAY, July 8, 1991, at 21 (abused immigrant women may have no family support and few friends in a new country).

friends and relatives who could assist them.⁴⁰

Even when abused immigrant women do seek assistance, limited English skills may act as an impenetrable barrier. Many shelters and hotlines do not have staff who speak foreign languages, and staff workers may be unfamiliar with foreign cultures.⁴¹ Some shelters will not even accept battered women who cannot speak English.⁴² Even if translators are available, women may be reluctant to use them for fear that confidentiality is not guaranteed and that their families will be exposed to gossip.⁴³

Immigrant women may be afraid to report abuse to the police because of a distrust of law enforcement officials and government authorities.⁴⁴ Also, because of their precarious immigrant status, many women are reluctant to draw attention to themselves for fear of deportation.⁴⁵ This mistrust and lack of understanding of American institutions prevent abused immigrants from trying to obtain assistance to end the violence.

In addition to cultural barriers, economic difficulties often prevent immigrant spouses from leaving an abusive relationship. Many immigrant women lack the marketable skills necessary to find higher-paying employment which would enable them to live independently. As a result, many work in restaurants, garment factories and other commercial businesses that typically pay below minimum wage.⁴⁶ The inability to speak English may further limit their employment choices to jobs available within the ethnic community. Any decision to leave the community and seek shelter would thus result in the complete loss of livelihood.⁴⁷ With few financial resources,

40. JAPANESE AMERICAN CITIZENS LEAGUE, MAIL-ORDER ASIAN WOMEN CATALOGUES 5 (1985); *Racism/Sexism*, *supra* note 24.

41. Lum, *supra* note 21, at 51; JACQUES, *supra* note 30, at 291; Eng Testimony, *supra* note 27, at 5; ZAMBRANO, *supra* note 30, at 131; CIVIL RIGHTS REPORT, *supra* note 33, at 174-75.

42. Eng Testimony, *supra* note 27, at 5; Orloff Interview, *supra* note 23; CIVIL RIGHTS REPORT, *supra* note 33, at 175.

43. Lai, *supra* note 35, at 3; Hodgins, *supra* note 34, at E1.

44. Eng Testimony, *supra* note 27, at 6. "In New York City's Asian communities, for example, a history of police brutality cases leaves the communities with distrust for the police." *Id.* For Latinas, the styles of interaction employed by police officers may be viewed as offensive or intrusive. "The ambivalence toward the 'system' is partly due to a belief that reporting abuse may be more harmful than the abuse itself. . . . Explicit questions by the police or advocates may be considered too forward." Ginorio & Reno, *supra* note 34, at 2; *see also* ISSUE PAPER, *supra* note 31, at 8-9 (explaining that many immigrant women may have experienced police abuse in their home countries); *Racism/Sexism*, *supra* note 24, at 42.

45. Lum, *supra* note 21, at 51; Ocampo, *supra* note 35, at 22.

46. Eng Testimony, *supra* note 27, at 5; Rimonte, *supra* note 22, at 331; JACQUES, *supra* note 30, at 280-81.

47. Eng Testimony, *supra* note 27, at 5; Lum, *supra* note 21, at 51.

escape from a violent situation may leave an immigrant woman and her children helpless and poverty-stricken.⁴⁸

II. IMMIGRATION MARRIAGE FRAUD AMENDMENTS OF 1986

The number of immigrants entering the United States each year has been restricted since the passage of the Quota Act of 1921.⁴⁹ This Act reversed a long-standing policy of open immigration and "imposed an annual ceiling" on the number of new arrivals who would be admitted into the country.⁵⁰ This restrictive policy has remained in place, with various modifications.⁵¹ The Immigration Act of 1965 created an exception to the quota policy for "immediate relatives of United States citizens," including spouses.⁵² This exception, created as the result of a policy choice to promote family unity,⁵³ provided a way for immigrants to avoid the long wait for a visa application subject to the quota system.⁵⁴ By virtue of marriage, the alien spouse is "catapult[ed] . . . to the top of the INS files, legitimately queue-jumping everyone in the preference categories."⁵⁵

However, according to testimony and studies conducted by the Immigration and Naturalization Service (INS), an estimated thirty percent of all marriage-based immigration petitions may involve some type of fraud.⁵⁶ Aliens have been entering into sham mar-

48. Rimonte, *supra* note 22, at 331.

49. Act of May 19, 1921, 42 Stat. 5.

50. 2 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 30.01 [1] (1992).

51. The Immigration Act of 1924, 43 Stat. 153, and the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1101 (1988)), were the successors of the original Quota Act. The 1952 Act was subsequently amended by the Immigration Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. § 1151 (1988)). For a general outline of these developments, see GORDON & MAILMAN, *supra* note 50.

52. 79 Stat. 911, § 201(a)-(b) (codified as amended at 8 U.S.C. § 1151(a)-(b) (Supp. II 1990)).

53. 2 GORDON & MAILMAN, *supra* note 50 at § 36.01; Karen L. Rae, *Alienating Sham Marriages for Tougher Immigration Penalties: Congress Enacts the Marriage Fraud Act*, 15 PEPP. L. REV. 181, 200 (1988).

54. Note that the exception applies only to the spouses of U.S. citizens. 8 U.S.C. § 1151(b)(2)(A)(i) (Supp. II 1990). Aliens who marry permanent residents are still subject to worldwide quotas, and a certain number of visas are set aside for this category each year. 8 U.S.C. § 1153(a)(2) (Supp. II 1990). However, given the current two and a half year backlog for such visas, few aliens enter the U.S. by this route. See BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, VISA BULL., Jan. 1992, at 2.

55. Rae, *supra* note 53, at 185.

56. *Immigration Marriage Fraud: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 7 (1985) [hereinafter *Marriage Fraud Hearing*] (statement of Alan C. Nelson, Comm'r, Immigr. & Naturalization Serv.). See also H.R. REP. NO. 906, 99th Cong., 2d Sess. 6(1986); S. REP. NO. 491, 99th Cong., 2d Sess. 2, 6 (1986).

riages⁵⁷ with American citizens for the sole purpose of obtaining the favored immigration status granted to spouses. Until recently, the INS had few procedures at its disposal to detect sham marriages. The general policy was to evaluate the parties' intent by conducting separate interviews of the husband and wife, looking for discrepancies in their responses.⁵⁸ Asserting that this procedure was ineffective in protecting against marriage fraud,⁵⁹ the INS urged Congress to enact the Immigration Marriage Fraud Amendments.⁶⁰ These Amendments were aimed at resolving the problem of sham marriages more effectively.

A. Provisions of IMFA

1. *In General.* In 1986 IMFA established a new procedure for aliens immigrating to the United States by virtue of a marriage to a citizen or permanent resident. IMFA defines an "alien spouse" as

The figures produced by the INS were challenged by several lawyers. *Marriage Fraud Hearing, supra*, at 78 (statement of Jules E. Coven, President, Am. Immigr. Law. Ass'n). The INS has since admitted that the 30% figure had no statistical foundation. The estimate had been a projection by a regional office that 30% of their marriage petition cases would need to be investigated for fraud. However, the figure did not indicate how many marriages were actually fraudulent. Charles Gordon, *The Marriage Fraud Act of 1986*, 4 GEO. IMMIGR. L.J. 183, 184 (1990); see also 66 INTERPRETER RELEASES 1011-12 (1989).

57. A sham marriage can be defined as "a marriage contracted for the sole purpose of evading the numerical restrictions that otherwise limit immigration into the United States." Vonnell C. Tingle, *Immigration Marriage Fraud Amendments of 1986: Locking in by Locking out?* 27 J. FAM. L. 733, 734-35 (1988-89); see also *Bark v. INS*, 511 F.2d 1200 (1975) (holding that marriage is a sham if parties did not "intend to establish a life together at the time they were married"); Charles Wheeler, *Until INS Do Us Part: A Guide to IMFA*, IMMIGR. BRIEFINGS, Mar. 1990, at 1, 5; Rae, *supra* note 53, at 182.

These fraudulent marriages can be characterized as one of two types: "contract" marriages and "unilateral" marriages. In a "contract" marriage, an agreement is made between both parties, usually involving a fee and the understanding that the marriage is to be dissolved after the alien receives permanent resident status. In a "unilateral" marriage, the citizen spouse is duped and is unaware of the true intentions of the alien spouse. After receiving immigrant status, the alien will often abandon the citizen spouse. Tingle, *supra* at 735-36; Rae, *supra* note 53, at 183. Note that the term "citizen spouse" may refer to either a United States citizen or a permanent resident. For purposes of this article, no distinction will be made.

58. See Rae, *supra* note 53, at 188-90 for a discussion of the use of the marriage fraud interview by the INS and the ineffectiveness of this procedure. The INS could also subject the couple to "postmarital supervision." Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238, 1241-42 (1986).

59. H.R. REP. NO. 906, 99th Cong., 2d Sess. 9 (1986).

60. See Tingle, *supra* note 57, at 741. Several commentators have noted that this law was enacted during the waning hours of the congressional session with very little debate on the bill. See *House Passes Four Immigration Bills*, 63 INTERPRETER RELEASES 856 (1986); *Congress Passes Marriage Fraud and Consular Efficiency Bills*, 63 INTERPRETER RELEASES 907 (1986); Wheeler, *supra* note 57, at 1; Rae, *supra* note 53, at 190-91.

one who enters a marriage "less than 24 months before the date the alien obtains [immigrant] status by virtue of such marriage."⁶¹ However, instead of receiving permanent resident status, as is the case with all other immigrants, the alien spouse is given a two-year conditional permanent resident status.⁶² At the end of the two-year period, the alien and citizen spouses must file a joint petition for removal of the condition,⁶³ showing that the marriage was not entered into solely for immigration purposes and has not been judicially annulled or terminated.⁶⁴ The alien and citizen spouses are then required to appear for a personal interview.⁶⁵ If the petition is granted, the conditional basis is removed, and the alien spouse is given lawful permanent resident status.⁶⁶ However, if the petition is denied, the INS will terminate the conditional permanent resident status and will commence deportation proceedings.⁶⁷ Additionally, the INS may terminate the conditional residency status at any time if the agency discovers that the marriage is fraudulent.⁶⁸

2. *Waiver Procedures.* The IMFA provides for a waiver procedure when the alien spouse is unable to file the joint petition or meet the requirements of the petition.⁶⁹ A waiver may be granted where the alien establishes that either 1) extreme hardship would result from deportation, or 2) the marriage had been entered into in good faith but had been terminated by the alien spouse for good

61. 8 U.S.C. § 1186a(g)(1) (1988).

62. 8 U.S.C. § 1186a(a)(1) (1988). Other than the conditional nature of their immigration status, conditional permanent residents have the same rights, privileges and responsibilities as other permanent residents. 8 C.F.R. § 216.1 (1991).

63. The petition must be filed during the 90-day period before the second anniversary of the alien spouse's lawful admission into the country. 8 U.S.C. § 1186a(d)(2)(A) (1988). Late petitions will only be accepted if good cause and extenuating circumstances are established. 8 U.S.C. § 1186a(d)(2)(B) (1988). Failure to file the joint petition by the appropriate deadline will result in automatic termination of conditional resident status and the commencement of deportation proceedings. 8 U.S.C. § 1186a(c)(2)(A) (1988); 8 C.F.R. § 216.4.

64. 8 U.S.C. § 1186a(d)(1)(A)(i) (1988). The petition must also attest that no fee or consideration (except for attorney's fees) was paid for filing the petition. 8 U.S.C. § 1186a(d)(1)(A)(ii) (1988).

65. 8 U.S.C. § 1186a(c)(1)(B) (1988). The Attorney General may waive the interview requirement or deadline. 8 U.S.C. § 1186a(d)(3). If either party fails to appear at the interview without good cause, the INS may terminate the conditional resident status of the alien spouse. 8 U.S.C. § 1186a(c)(2)(A)(ii) (1988).

66. 8 U.S.C. § 1186a(c)(3)(B) (1988).

67. 8 U.S.C. § 1186a(c)(3)(C) (1988). The alien spouse may request a review of this determination as part of the deportation proceeding. 8 U.S.C. § 1186a(c)(3)(D) (1988).

68. 8 U.S.C. § 1186a(b)(1) (1988).

69. The conditional resident must file INS Form I-752, the Application for Waiver of Requirement to File Joint Petition for Removal of Conditions. 8 C.F.R. § 216.5(a).

cause.⁷⁰ The conditional resident must also demonstrate that she was not at fault in failing to file the joint petition and appear for a personal interview.⁷¹

a. Extreme Hardship Waiver. An alien spouse may qualify for a waiver of the joint petition requirement if she can demonstrate that deportation would cause extreme hardship.⁷² In practice, this waiver may be difficult to obtain because of the criteria used in determining what constitutes "extreme hardship." The statute requires that the INS take into account only those circumstances occurring during the period that the alien was a conditional resident.⁷³ Any conditions existing before the conditional resident was admitted, such as a pre-existing medical condition or prior adverse conditions in the home country, would not be considered.

b. Good Faith/Good Cause Waiver. The second ground for a waiver of the joint petition requirement was the good faith/good cause waiver. The alien spouse was required to show that 1) the marriage had been entered into in good faith, 2) the alien spouse terminated the marriage for good cause, and 3) the alien spouse was not at fault for failing to file the joint petition and appear for a personal interview.⁷⁴ The waiver was only available if the marriage was legally terminated or if divorce proceedings had been formally initiated.⁷⁵ Mere separation without legal formality could not qualify for the good faith waiver.⁷⁶ Additionally, the alien spouse had to

70. 8 U.S.C. § 1186a(c)(4) (1988), amended by 8 U.S.C. § 1186a(c)(4) (Supp. II 1990). The waiver petition should also be filed when the joint petition cannot be completed, as in the case of annulment of the marriage, divorce, death of the citizen spouse or refusal of the citizen spouse to join in filing the joint petition. 8 C.F.R. § 216.4(a)(1).

71. 8 U.S.C. § 1186a(c)(4)(B) (1988), amended by 8 U.S.C. § 1186a(c)(4) (Supp. II 1990).

72. 8 U.S.C. § 1186a(c)(4)(A) (Supp. II 1990).

73. 8 U.S.C. § 1186a(c)(4) (1988); 8 C.F.R. § 216.5. The Board of Immigration Appeals has listed ten criteria that it considers relevant in determining whether an alien's hardship is extreme enough to merit suspension of deportation. These include: the alien's age, family ties in the U.S. and home country, length of residence in the U.S., current health conditions, current economic and political conditions in the home country, occupation and work skills, immigration history, position in the community, whether the alien is of special assistance to the U.S. or community and whether there are alternate means of adjusting status. Wheeler, *supra* note 57, at 9 (citing *Matter of Anderson*, 16 I. & N. Dec. 596 (1978)).

74. 8 U.S.C. § 1186a(c)(4)(B) (1988), amended by 8 U.S.C. § 1186a(c)(4) (Supp. II 1990).

75. See Letter from Lawrence Weinig, Deputy Assistant Commissioner, Adjudications, Immigration and Naturalization Service, to Andrew W. Ansara, Director, Immigration & Citizenship Services Center, in 67 INTERPRETER RELEASES 430, 431 (1990) (petitioner in "process of obtaining a divorce . . . not precluded from filing an I-752 waiver application").

76. Thus, an alien spouse who fled an abusive relationship but who could not afford to initiate formal divorce proceedings, could not obtain a good faith waiver.

initiate the divorce; if the citizen spouse initiated the divorce, the alien spouse would not qualify for the waiver.⁷⁷

B. *Problems for Battered Spouses*

Prior to the 1990 Amendments, it was unclear whether the joint petition waiver requirements protected victims of domestic violence. While the regulations did not specifically cite domestic violence as an example of good cause, the INS stated that "the 'good faith/good cause' waiver appears to have been designed especially for the battered spouse."⁷⁸ However, the INS subsequently indicated that a good faith/good cause waiver would be limited to "situations where the alien made a good faith effort to establish a bona fide marriage, but the actions of the citizen . . . were so *egregious* as to necessitate the alien leaving the marriage."⁷⁹ Practitioners questioned whether this meant that the spouse would have to stay in the marriage and attempt to resolve the violent situation in order to qualify for a waiver.⁸⁰ Effectively, this would place the INS in a position of evaluating how much abuse must be endured before a spouse could legitimately flee the relationship.

Other problems in obtaining a good faith/good cause waiver arose because IMFA required the marriage to be "terminated by the alien spouse for good cause."⁸¹ First, this required that the alien spouse be the moving party in a divorce in order to qualify for a waiver and created a "race to the courthouse," in which each party endeavored to be the first to commence a divorce action. The alien spouse would be at a natural disadvantage in this contest because she may be unfamiliar with the legal system, may lack the resources to initiate a divorce proceeding, or may not be aware that she needs to file first to protect her immigrant status.⁸² Thus, even if an alien spouse had legitimate grounds for seeking a divorce, such as abuse, the arbitrary requirement that the alien spouse had to be the first to

77. Letter from Lawrence Weing, Deputy Assistant Commissioner, Adjudications, Immigration and Naturalization Service, to Michael A. Bander, Esq., in 65 INTERPRETER RELEASES 1338 (1988); *INS Responds to Marriage Fraud Questions*, 67 INTERPRETER RELEASES 314 app. I at 340 (INS senior examiner's responses to questions concerning implementation of IMFA) [hereinafter *INS Responds*].

78. INS Letter to Slaughter, *supra* note 26, at 1429.

79. INS Responds, *supra* note 77, at 314. This comment appeared in a draft response to a practitioners' question. *Id.*

80. *Id.* at 314-15.

81. 8 U.S.C. § 1186a(c)(4)(B) (1988), amended by 8 U.S.C. § 1186a(c)(4) (Supp. II 1990).

82. Conversely, the citizen spouse may file for divorce first as a means of intimidating the alien spouse. Thus, inability to obtain a good faith waiver, which may be the only means for the alien spouse to stay in the United States, becomes a powerful weapon for the abusing spouse.

file negated the availability of the good faith waiver.⁸³

Second, the regulations stated that findings of fault in a divorce decree shall not be considered conclusive evidence of good cause.⁸⁴ The alien spouse was required to provide additional information to show good cause for the divorce,⁸⁵ and the INS would then make its own determination of good cause. One commentator noted, "it can be argued that in ignoring a state court's conclusion of fault in a divorce action, the Service is . . . treading in the area of domestic relations where it has no expertise or authority to act."⁸⁶

If the battered spouse decided to leave her husband but was unable to file for divorce, she would not have been eligible for the good faith/good cause waiver as the marriage would not have been "terminated."⁸⁷ Instead, she would have had to apply under the extreme hardship waiver which requires a showing that the alien spouse would suffer extreme hardship because of the deportation.⁸⁸ The INS has indicated that domestic violence does not constitute grounds for an extreme hardship waiver, because hardship from the violence would not be aggravated by the alien spouse's departure.⁸⁹ The individual would have to prove other extenuating conditions that had arisen since her arrival in the United States.⁹⁰

83. Commentators advised that where divorce was even being contemplated by the parties, the alien spouse should immediately initiate divorce proceedings rather than risk being precluded from a good faith/good cause waiver. 2A GORDON AND MAILMAN, *supra* note 50, at § 42.04[5][a]; Wheeler, *supra* note 57, at 10. If the alien spouse could not qualify for the good faith/good cause waiver, her only solution would be to apply for an extreme hardship waiver. See FRAGOMEN, DEL REY & BERNSEN, *Special Considerations When a "Conditional Resident" Is Separated or Divorced*, 9 IMMIGR. L. REP. 61, 64 (1990); Wheeler, *supra* note 57, at 10.

84. 8 C.F.R. § 216.5(e)(2)(iii) (1991). Additionally, many states grant divorces under no-fault decrees, for irreconcilable differences or after a certain period of separation. See, e.g., CAL. FAM. CODE § 2310 (West Supp. 1993) (recognizing irreconcilable differences as grounds for divorce); OHIO REV. CODE ANN. § 3105.01 (Anderson 1989 & Supp. 1991) (granting divorce when husband and wife have lived apart for one year and recognizing "incompatibility" as grounds for divorce). The regulations stated that a no-fault decree was inconclusive in showing good cause. 8 C.F.R. § 216.5(e)(2)(iii). Thus, in no-fault states, the petitioner would have to find ways to flesh out the divorce record or else furnish additional documentation showing good cause. Tingle, *supra* note 57, at 748.

85. Wheeler, *supra* note 57, at 10.

86. Tingle, *supra* note 57, at 748.

87. It should be noted that a joint petition could still be filed, even though the parties were separated, if the citizen spouse was willing to cooperate. However, since the parties must prove that the marriage was not entered into for immigration purposes, this may be difficult to establish where the parties have separated amicably. See FRAGOMEN, DEL REY & BERNSEN, *supra* note 83; INS Responds, *supra* note 77, at 338-39.

88. 8 U.S.C. § 1186a(c)(4)(A) (Supp. II 1990).

89. INS Letter to Slaughter, *supra* note 26, at 1429.

90. See *supra* note 73 and accompanying text for a list of factors that the INS might consider.

III. THE IMMIGRATION ACT OF 1990

Recognizing the plight of abused alien spouses, Congress created a battered spouse waiver as part of the 1990 Amendments. The new law enables immigrant spouses to escape domestic violence without the fear of deportation. The House Judiciary Committee stated the purpose of the Amendments as follows:

Present law does not ensure that a battered alien spouse or child will not be forced to remain in an abusive relationship for fear of deportation. Immigrant and family law attorneys, refugee service agencies, and battered women's advocates agree that current provisions of the IMFA do not go far enough in ensuring the safety and protecting the legal rights of immigrants in situations of domestic violence. The Committee believes that the creation of a battered spouse/child waiver and changes to the good faith/good cause waiver will clarify Congressional intent.⁹¹

In addition to creating a this waiver, the 1990 Amendments eliminated the requirement, within the good faith/good cause waiver, that the alien spouse be the moving party in a divorce proceeding. The law also added a confidentiality provision to prevent the release of applicants' addresses and other information without their consent.

A. *Battered Spouse Waiver*

To qualify for the battered spouse waiver, the alien spouse must demonstrate that she entered the marriage in good faith and was battered or subjected to extreme cruelty by the citizen spouse.⁹² The INS has defined "battering" or "extreme cruelty" as including, but not limited to:

[B]eing the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor) or forced prostitution shall be considered acts of violence.⁹³

91. H.R. REP. NO. 723, 101st Cong., 2d Sess., pt. 1, at 51 (1990) [hereinafter House Judiciary Report].

92. Immigration and Nationality Act § 701(a)(4), 8 U.S.C. § 1186a(c)(4)(C) (Supp. II 1990). The waiver may also be used when a child has been battered or subjected to extreme cruelty. Congress intended that the conditional resident spouse be able to protect the abused child without fear that the citizen spouse may refuse to file the joint petition to remove the conditional status. The alien spouse should be allowed to waive the joint petition requirement since both the child and the parent would suffer extreme hardship if the alien parent were required to leave the country while the child had to remain in the U.S. with the abusing parent. Slaughter statement, *supra* note 6. This Note will not discuss how the legislation applies to abused children, but will focus solely on battered spouses.

93. 8 C.F.R. § 216.5(e)(3)(i) (1991).

To make the requisite showing under the law, Congress intended that supporting evidence could include, but not be limited to, "reports and affidavits from police, medical personnel, psychologists, school officials, and social service agencies."⁹⁴ Denial of waiver requests was to be limited to "rare and exceptional circumstances."⁹⁵ However, the INS has promulgated regulations containing more stringent requirements. In issuing the interim regulations, the INS stated that it had attempted to balance the need for easily-met evidentiary requirements against the need to prevent aliens who do not qualify from taking advantage of the battered spouse waiver. The INS felt that its rule "allows battered conditional residents to establish eligibility, yet is stringent enough to prevent misuse of the benefit."⁹⁶

The agency adopted the suggestions of the House Judiciary Committee regarding the evidence necessary to show physical abuse.⁹⁷ However, the regulations impose a stricter standard as to what evidence will establish "extreme mental cruelty." Without explanation, the regulations use the narrower term "extreme mental cruelty" instead of the statutory "extreme cruelty."⁹⁸ Recognizing that INS officials are not in a position to evaluate testimony from unlicensed individuals regarding applicants' mental conditions, the regulations require that evaluations be performed by trained professionals who are recognized by the INS as experts in the field.⁹⁹ The only professionals so recognized are licensed clinical social workers, psychologists and psychiatrists.¹⁰⁰ These stringent requirements contradict congressional intent to limit the Attorney General's

94. House Judiciary Report, *supra* note 91, at 79; see INS Letter to Slaughter, *supra* note 26, at 1429-30.

95. House Judiciary Report, *supra* note 91, at 79. An example of a rare and exceptional circumstance is when the alien "poses a clear and significant detriment to the national interest." *Id.*

96. 56 Fed. Reg. 22,636 (1991).

97. 8 C.F.R. § 216.5(e)(3)(iii). The regulations further provide that the INS "must be satisfied with the credibility of the sources of documentation submitted in support of the application." *Id.*

98. 8 C.F.R. § 216.5(e)(3). Congresswoman Slaughter has objected to use of the term "extreme mental cruelty" and states that Congress deliberately chose the term "extreme cruelty" because it was intended to include more than just mental abuse. Thus, the terminology used by the INS is inconsistent with the statutory language and congressional intent. Letter from Louise M. Slaughter, Member of Congress, to Richard Sloan, Director of Policy Directives and Instructions Branch, Immigration and Naturalization Service 1-2 (June 7, 1991) (on file with author) [hereinafter Slaughter Letter of June 7, 1991].

99. 8 C.F.R. § 216.5(e)(3)(iv).

100. 8 C.F.R. § 216.5(e)(3)(vii). In states that do not license clinical social workers, an individual will be considered to be a licensed professional "if he or she is included in the Register of Clinical Social Workers published by the National Association of Social Workers or is certified by the American Board of Examiners in Clinical Social Work." *Id.*

discretion.¹⁰¹

The regulations further allow for waiver of the joint petition requirement even if the marriage has not been terminated.¹⁰² Whether divorced, separated or still residing with the citizen spouse, the alien spouse may qualify for the waiver as long as she can provide the requisite proof of battering. An immigrant woman without adequate resources to terminate her marriage or leave her household need no longer fear losing her immigrant status.

The regulations permit both conditional residents and former conditional residents to apply for this waiver.¹⁰³ This retroactive application of the law will allow individuals whose cases have been adjudicated under the old requirements to benefit from the change in the law. They may now move to reopen their cases so that any evidence of battering may be reconsidered under the revised standard. However, former conditional residents who have already departed the country will not be permitted to reopen their cases under the new law.¹⁰⁴

B. *Changes to the Good Faith / Good Cause Waiver*

The good faith/good cause waiver was amended to eliminate the requirement that the marriage be terminated "by the alien spouse for good cause."¹⁰⁵ Congress noted that no-fault divorce laws made it difficult for alien spouses to establish good cause for termination of a marriage,¹⁰⁶ and the citizen spouse could prevent the alien spouse from qualifying for the waiver by filing first for divorce.¹⁰⁷

An alien spouse must still prove that (1) the marriage was entered into in good faith, (2) the marriage has been terminated, and (3) the alien spouse was not at fault in failing to file a timely petition.¹⁰⁸ However, she will no longer have to race to the courthouse to file for divorce. Even if the citizen spouse initiates the divorce proceedings, the alien spouse will not be precluded from qualifying because the marriage must no longer be terminated "by the alien spouse." Additionally, since the good cause requirement was eliminated, she will no longer have to worry about whether the grounds

101. See *infra* parts IV.A and B.

102. 8 C.F.R. § 216.5(e)(3)(ii).

103. *Id.*

104. INS IMMACT Wire #45 (Mar. 20, 1991) in *INS Implements Marriage Fraud Amendments of Immigration Act of 1990*, 68 INTERPRETER RELEASES 435, 438 (1991).

105. 8 U.S.C. § 1186a(c)(4)(B) (1988), amended by 8 U.S.C. § 1186a(c)(4)(B) (Supp. II 1990).

106. House Judiciary Report, *supra* note 91, at 51.

107. *Id.*

108. 8 U.S.C. § 1186a(c)(4)(B) (Supp. II 1990); 8 C.F.R. § 216.5(a)(2).

for divorce are satisfactory.¹⁰⁹ A divorce initiated by either party on any grounds, including one initiated under a no-fault law, will satisfy the requirements for a waiver of the joint petition requirement.

Finally, the INS will apply the amended law to all new and pending applications seeking the good faith waiver.¹¹⁰ Individuals with pending applications who had not filed for the good faith waiver may amend their applications if they can now qualify. The INS also indicated that the amendment will be applied retroactively and that motions to reopen proceedings will be decided on the basis of the new provisions.¹¹¹ Applicants previously denied waiver of the joint petition requirement who are currently facing deportation proceedings may file motions to reconsider in light of the amendment.

C. Confidentiality Provisions

Abused immigrant women who have left their husbands may be in imminent danger of harm because abusers often seek out and terrorize their spouses.¹¹² Consequently, it is necessary to protect the confidentiality of information submitted by battered alien spouses. Without some assurance that the application process would not disclose their whereabouts to their abusing spouses, many applicants might be afraid to take advantage of the waiver.

The 1990 Amendments attempted to address the confidentiality issue. Section 701(a)(5) directs the Attorney General to establish measures to ensure the confidentiality of any information containing the spouse's address or location.¹¹³ The Attorney General now requires that agency officials send any written communications to the mailing address provided by an applicant, and not to the applicant's actual place of residence, if an alternate address has been provided.¹¹⁴ This should prevent INS communications from being mistakenly sent to or opened by the citizen spouse.¹¹⁵ The regulations

109. See *supra* text accompanying notes 84-86.

110. INS IMMACT Wire #45, *supra* note 104, at 438.

111. *Id.*

112. 56 Fed. Reg. 22,636 (1991); see Martha F. Davis & Janet M. Calvo, *INS Interim Rule Diminishes Protection for Abused Spouses and Children*, 68 INTERPRETER RELEASES 665, 669. One study found that "up to 50% of wives who left their abusive husbands were sought out and further terrorized. . . . In situations where the abuser has warned the victim not to leave, choosing to do so may escalate the very danger from which she is trying to escape." *Id.*; see Angela Browne, *Assault and Homicide at Home: When Battered Women Kill*, in 3 ADVANCES IN APPLIED SOCIAL PSYCHOLOGY 57, 73 (Michael J. Saks & Leonard Saxe eds., 1986).

113. 8 U.S.C. § 1186a(c)(4) (Supp. II 1990).

114. See INS Immact Wire #45, *supra* note 104, at 438.

115. If this policy is not followed, there is also the risk that the alien spouse may not receive the information if the citizen spouse controls the mail or if the alien spouse is not

further specify that, before information is released to anyone other than the applicant or government officials, a court order or written consent of the applicant must be obtained.¹¹⁶

IV. PROBLEMS NOT ADEQUATELY ADDRESSED BY THE 1990 AMENDMENTS

The 1990 Amendments enable battered immigrant women to leave a violent relationship without risk of losing their immigrant status. However, there are still numerous concerns regarding provisions in the INS regulations. These include problems with the definitions of "battering" and "extreme mental cruelty," evidentiary standards required by the INS, the confidentiality provisions, and due process protections for the applicants. There is also a growing concern for conditional residents who have become undocumented, thus falling outside the protections of the law.

A. *Definitions of Battering and Extreme Cruelty*

The definitions of battering and extreme cruelty¹¹⁷ are both incomplete in scope and ambiguous in relation to the proof requirements outlined in the regulations.¹¹⁸ The definitions include many types of abuse, but there are several glaring omissions. For example, neglect and deprivation are not included. These terms encompass such forms of abuse as failure to properly care for a child or spouse, failure to provide adequate medical care, and deprivation of economic resources.¹¹⁹ In many states, such conduct constitutes a criminal offense, and "are certainly types of abuse from which conditional resident spouses and children should be encouraged to escape without risking deportation."¹²⁰ Furthermore, a parent who is not principally responsible for the neglect may still be prosecuted in some states as an aider and abettor. This situation forces an alien spouse to choose between potential prosecution and further injury to their child or loss of immigration status.¹²¹

Congresswoman Slaughter has suggested that the definitions should be expanded to include "psychological abuse such as intimidation, degradation, confinement or participation in illicit activity

longer residing at the permanent address.

116. 8 C.F.R. § 216.5(e)(3)(viii). The regulations authorize this information to be used by the government for enforcement purposes and in any criminal proceeding. *Id.*

117. 8 C.F.R. § 216.5(e)(3)(i).

118. *See supra* part III.A.

119. Davis & Calvo, *supra* note 112, at 668.

120. *Id.*

121. National Immigration, Refugee and Citizenship Forum, Action Alert, at 2-3 (May 24, 1991) (on file with author) [hereinafter Action Alert].

such as drug abuse; [and] economic abuse such as denial of resources necessary for support of the spouse or child."¹²² By promulgating a narrower standard of abuse than Congress intended, the INS has effectively denied relief to some intended beneficiaries of the law.

Another problem is that the INS has assigned a single definition to both battering and extreme cruelty. This makes it "impossible to discern what is 'physical abuse' for purposes of the waiver application and what abuse would fall into the category of 'extreme mental cruelty.'"¹²³ For example, the phrase "was battered by or was the victim of extreme cruelty" includes "being the victim of any act or threatened act of violence."¹²⁴ For purposes of this definition, sexual abuse, including rape and molestation, are considered "acts of violence."¹²⁵ However, the INS has established different evidentiary standards for physical abuse and for extreme mental cruelty, creating confusion as to the required types of evidence an applicant must submit.¹²⁶ For example, physical sexual abuse could fall under the definition of physical abuse, so that reports from police, health personnel and social service agencies are sufficient documentation. However, sexual abuse could also be considered extreme mental cruelty, and evaluations from a licensed expert would be required.

Because of this failure to define physical abuse and extreme mental cruelty separately, the applicant runs the risk of not providing the correct types of evidence, thereby losing her immigrant status. The INS should specify more clearly which acts are considered physical abuse and which are considered extreme mental cruelty. Alternatively, it should amend the regulations so that the evidentiary standards are consistent.

B. *Standards of Proof and Evidentiary Requirements*

The regulations require an evaluation of a licensed clinical social worker, psychologist or psychiatrist to prove extreme mental cruelty.¹²⁷ Immigration lawyers have objected to this stringent requirement because it will be nearly impossible for many immigrant

122. Letter from Louise M. Slaughter, Member of Congress, to John Schroeder, Assistant Comm'r for Adjudication and Naturalization, Immigration and Naturalization Service 1 (Mar. 15, 1991) (on file with author) [hereinafter Slaughter Letter of Mar. 15, 1991].

123. Davis & Calvo, *supra* note 112, at 668.

124. 8 C.F.R. § 216.5(e)(3)(i).

125. *Id.*

126. 8 C.F.R. § 216.5(e)(3)(iii)-(iv); see also Davis & Calvo, *supra* note 112, at 668.

127. See *supra* notes 99-101 and accompanying text.

women to obtain this evidence.¹²⁸ According to Congresswoman Slaughter, "such restrictive documentation requirements create an access problem which undermines the protective intent of the waiver."¹²⁹ Most battered women's shelters and domestic violence programs in the United States do not have a psychiatrist, psychologist or licensed clinical social worker on staff to provide the required evaluations.¹³⁰ If women who are able to enter battered women's shelters do not have access to the required professionals, it is even less likely that abused women who are unable to leave their husbands or who flee to relatives or friends will be able to obtain the necessary professional evaluations.¹³¹ Even if they are able to contact a qualified professional, immigrant women may not be able to afford the professional fees.¹³²

In addition, there is some controversy about whether social workers, psychologists and psychiatrists are trained to recognize and evaluate the signs of domestic abuse. A study involving 362 members of the American Association of Marriage and Family Therapy showed that an extremely high percentage of the respondents failed to recognize and address the evidence of domestic violence.¹³³ In fact, the study showed that "psychologists are signifi-

128. Davis & Calvo, *supra* note 112, at 668; Slaughter Letter of June 7, 1991, *supra* note 98, at 2; Action Alert, *supra* note 121, at 4.

129. Slaughter Letter of June 7, 1991, *supra* note 98, at 2; see Action Alert, *supra* note 121, at 4.

130. Letter from Joan Zorza, Senior Attorney, National Battered Women's Law Project, to Gene McNary, Comm'r, Immigration and Naturalization Service 1 (May 13, 1991) (on file with author). According to the letter, Ms. Zorza's office had contact with over 2000 domestic violence programs in the past year. Their research revealed that the "overwhelming majority" of these programs do not have licensed professionals on staff. Even the best funded state coalitions did not employ such professionals, and some were even "prohibited from having any person work out of their shelter who charged money." *Id.*

Despite this apparent unavailability, the INS maintains that "clinical social workers are found in all sectors of the country, including the most rural and least affluent," and that the National Association of Social Workers advised that these individuals have special training in diagnosing mental difficulties. Letter from Bonnie Derwinski, Director, Congressional & Public Affairs, Immigration & Naturalization Service, to Louise M. Slaughter, Member of Congress 2 (Apr. 29, 1991) (on file with author). The INS also contacted the Deputy Director of the House of Ruth in Washington, D.C. and was told that the program has a qualified professional on duty and that "most social 'help' agencies have a clinical social worker on staff." *Id.*

131. Davis & Calvo, *supra* note 112, at 668.

132. See *supra* text accompanying notes 46-48; see also Action Alert, *supra* note 121, at 4 (asserting that additional professional evaluations required by the INS should be at the Service's expense).

133. Michele Harway & Marsali Hansen, *Therapists Recognition of Wife Battering: Some Empirical Evidence*, FAM. VIOLENCE BULL., Fall 1990, at 16. "Only 23% of those addressing conflict identified it as violence or battering. . . . Not one respondent indicated that lethality was a concern, in spite of the fact that this was the eventual outcome of one

cantly less likely than all other mental health professionals to address the conflict in their conceptualization of the case. . . . Psychologists also were significantly less likely to describe the family conflict as violence."¹³⁴ This study suggests that the professionals designated by the INS as experts are not adequately trained to recognize extreme mental cruelty.

Other types of proof should be admitted to show extreme mental cruelty. For instance, the INS should accept affidavits from the battered spouse, from friends or neighbors, reports from domestic violence shelters, clergy, community agency workers, and state or local employees.¹³⁵ Prior to the 1990 Amendments, the INS did not require corroborative evidence from licensed professionals in immigration adjudications.

The INS routinely accepts declarations and letters as credible evidence in other immigration adjudications [U]seful parallels can be drawn to the INS regulations and legal precedents developed for evidence in political asylum cases. In asylum cases, the applicant is also a victim of fear or violence and is rarely in a position to document extensively the treatment by his or her persecutors. Nonetheless, the INS, the Board of Immigration Appeals, and the federal courts have concluded that an asylum applicant's own uncorroborated testimony, when unrefuted and credible, may be in and of itself sufficient evidence of the requisite 'well-founded fear of persecution.' The INS evidentiary standards for battered spouse/child waivers should be similarly expansive.¹³⁶

Additionally, if the INS requires some form of licensing, the list of experts that are recognized by the INS should be expanded to include "any health worker or counsellor who is licensed in the alien's home jurisdiction, any worker who provides health or counselling services within an organization (such as a domestic violence shelter) that is itself licensed, and clergy and religious workers."¹³⁷ Information from these sources could still be evaluated by the INS for credibility and would assist the Service in its determination of the application's validity. More importantly, this information is

of the cases." *Id.* at 17.

134. *Id.* at 17.

135. Slaughter Letter of June 7, 1991, *supra* note 98, at 2; see also Davis & Calvo, *supra* note 112, at 669.

136. Letter from Louise M. Slaughter, Member of Congress, to Gene McNary, Comm'r, Immigration & Naturalization Service 3 (Apr. 3, 1991) (citations omitted) (on file with author); see Davis & Calvo, *supra* note 112, at 669; Action Alert, *supra* note 121, at 3. Additionally, in determining "extreme hardship" under IMFA, INS officials do not require additional information to verify an applicant's testimony as to "extreme hardship." Davis & Calvo, *supra* note 112, at 669.

137. Action Alert, *supra* note 121, at 5. It is important to allow evaluations by clergy and shelter personnel as these will often be the only sources of corroborating evidence available to the abused spouse.

readily accessible and would provide a more realistic means to prove abuse.

C. Confidentiality Provisions

The confidentiality provisions of the 1990 Amendments and the implementing regulations do not go far enough to truly protect the battered alien spouse. For example, the amendments authorize the use of application information by the government for enforcement purposes and in any criminal proceeding.¹³⁸ Currently, information may be accessed by any federal or state law enforcement officer without any procedural safeguard. Information should be released only when officials can demonstrate a legitimate need for the information, such as when they are investigating fraud in the application process for a waiver.¹³⁹ A better option would be to require a court order or written consent of the applicant before any information could be released to state and federal governmental bodies (other than the INS) for law enforcement purposes.¹⁴⁰

Furthermore, the INS should require each office to develop procedures to ensure confidentiality of its files. To a degree this requirement is mandated by the statute, which instructs the Attorney General to establish internal procedures to protect the alien spouse's confidentiality.¹⁴¹ One example of a desirable procedure is that battered spouse waiver files be segregated and sealed within the office, with access limited to only those officials with a legitimate need to use the files.¹⁴²

D. Due Process Protections

The 1990 Amendments and implementing regulations did not introduce any additional procedural safeguards for adjudicating waiver applications. Although Congress indicated that the Attorney General was only given discretion to deny waiver requests in extraordinary circumstances,¹⁴³ very few procedures currently exist to

138. 8 U.S.C. § 1186a(c)(4) (Supp. II 1990).

139. Slaughter Letter of June 7, 1991, *supra* note 98, at 2; Action Alert, *supra* note 121, at 5.

140. Letter from The Network for the Rights of Immigrant Women, American Immigrant Lawyers Ass'n, & National Battered Women's Law Project, to Patricia Cole, Assistant General Counsel, Immigration and Naturalization Service 3 (Apr. 24, 1991) (on file with author) [hereinafter Network Letter to INS]; Davis & Calvo, *supra* note 112, at 670.

141. 8 U.S.C. § 1186a(c)(4).

142. A directive to this effect had been included in INS IMMACT Wire #45, *supra* note 104, at 437-38. However, this provision was not included in the regulations and should be added to allay the fears of battered spouses.

143. See *supra* note 95 and accompanying text.

protect the alien spouse.

The regional service center director may require that the alien appear for an interview; however, this interview is at the agency's discretion.¹⁴⁴ The alien must be given written notice of any adverse decision, including the reasons for denial.¹⁴⁵ If the application is denied, the alien must surrender his or her immigration papers. An order to show cause will then be issued, commencing deportation proceedings.¹⁴⁶ No appeal is permitted, except for a review of the decision during deportation proceedings.¹⁴⁷

Additionally, the standard of review for deportation proceedings involving a conditional resident alien is "by a preponderance of the evidence."¹⁴⁸ This is a lesser standard than the "clear, convincing and unequivocal evidence" standard that the Supreme Court has held applicable to all other deportation cases.¹⁴⁹ Thus, even in deportation proceedings, an alien spouse will not receive procedural safeguards comparable to all other immigrants.¹⁵⁰

In a wire to its field offices, the INS stated that all denials of battered spouse waivers "must be forwarded to [Central Office Adjudications] for review until further notice."¹⁵¹ However, this central office review was omitted in the regulations and was not replaced by other review procedures. To provide additional procedural safeguards for the alien spouse, decisions made by the field offices should not be final, and a pre-termination hearing should be provided.¹⁵² The applicant should be given the opportunity to present

144. 8 C.F.R. § 216.5(d) (1991). Note that if the director requires an interview, and the alien fails to appear as directed, the application shall be denied. *Id.*

145. 8 C.F.R. § 216.5(f).

146. *Id.*

147. *Id.*

148. 8 U.S.C. § 1186a(3)(D) (1988); *see also* Memorandum from the Office of the General Counsel, Immigration and Naturalization Service, to Jack Penca, Regional Counsel, Eastern Region (Dec. 3, 1991) in 69 INTERPRETER RELEASES 627, 628-29.

149. *See* Woodby v. I.N.S., 385 U.S. 276, 286 (1966); 2 IMMIGRATION LAW SERVICE § 17:164 at 173 (Timothy Travers et al. eds., 1985); 2 GORDON & MAILMAN, *supra* note 50, at § 72.04[13][b].

150. There is no explanation given in the legislative history as to why this standard of review was lessened for conditional residents.

151. IMMACT Wire #45, *supra* note 104, at 437.

152. In determining the constitutionality of this provision and assessing the due process requirement, one must balance the governmental interest in preventing fraud against the individual's interest in remaining in the United States and not losing her immigration status. Furthermore, given the high burden of proof that is placed on the applicant and the ambiguous definitions of physical abuse and extreme mental cruelty, there is a great risk of erroneous deprivation. *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

While it may be argued that a conditional resident has the right to de novo review during a deportation hearing, this is insufficient to ensure procedural due process. *Cf.* 3 GORDON & MAILMAN, *supra* note 50, at § 72.04[3]-[5] (explaining that, in deportation hearings, due process requires that the alien be given notice of the charges against him,

her case orally, confront adverse information against her and provide additional evidence and witnesses who can support her application.¹⁵³ These requirements would ensure that alien spouses receive their constitutionally guaranteed protections.

E. *Failure to Address Undocumented Women*

Under certain circumstances, alien spouses may be undocumented immigrants¹⁵⁴ or may become undocumented by fleeing an abusive relationship and failing to file the appropriate petitions. Even though undocumented aliens are in the United States illegally, they are still entitled to certain rights and privileges. For example, all persons within the jurisdiction of the United States, including illegal aliens, have the right "to make and enforce contracts, to sue, be parties, give evidence, and [receive the] full and equal benefit of all laws and proceedings for the security of persons and property."¹⁵⁵

Although the 1990 Amendments did not specifically refer to undocumented women, the regulations indicate that the INS will permit both conditional residents and *former* conditional residents to apply for the battered spouse waiver.¹⁵⁶ This implies that a former conditional resident, now undocumented, may apply for a battered spouse waiver if she can show that 1) her marriage was entered into

an opportunity to be heard and to cross-examine witnesses, and a decision based on substantial evidence presented at the hearing).

Furthermore, in other revocation proceedings, immigrants are given due process protections. For example, rescission proceedings are often used against immigrants who fraudulently marry permanent residents. In rescission proceedings, an alien is given significant due process protections, including: notice of intention to rescind, the right to request a hearing, to present evidence and to be represented by counsel. The government has the burden of proving ineligibility by clear, convincing and unequivocal evidence. The judge must issue an oral or written decision and the alien has the right to appeal. 2 GORDON & MAILMAN, *supra* note 50, at § 51.06[4][a]. None of these protections are provided to conditional residents whose status is terminated.

153. Network Letter to INS, *supra* note 140, at 3; Davis & Calvo, *supra* note 112, at 670.

154. Undocumented immigrants are individuals who are present in the United States illegally. Affected immigrants include those who originally entered the U.S. as conditional permanent residents but who failed to file the petition to remove the condition. Also included are those immigrants who entered the U.S. legally on nonimmigrant visas and subsequently married U.S. citizens or permanent residents, but failed to change their immigrant status. When their prior status expired, these individuals became undocumented.

155. 42 U.S.C. § 1981 (1988); *see* Martinez v. Fox Valley Bus Lines, Inc., 17 F.Supp. 576, 577 (N.D. Ill., 1936). Several courts have also held that undocumented aliens are entitled to protection under labor and employment laws. *See, e.g.,* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891-94 (1984); EEOC and Castrejon v. Tortilleria "La Mejor," 758 F.Supp. 585 (E.D. Cal.1991).

156. 8 C.F.R. § 216.5(e)(3)(ii) (1991).

in good faith, 2) she was battered or a victim of extreme cruelty, and 3) she was not at fault in failing to meet the joint petition requirement.¹⁵⁷

The regulations create more ambiguities than they resolve. It is not clear how the INS will interpret "not at fault" for purposes of the third requirement. Because of the situation that led to the woman's undocumented status, timely petition for a waiver may have been impossible. Furthermore, even though undocumented women experience many of the same difficulties as other abused immigrant women, their problems are exacerbated by the fear of detection and deportation.¹⁵⁸

If the citizen spouse refused to file the joint petition, the immigrant woman may still be considered at fault despite circumstances that were beyond her control. Although the INS has discretion to grant or deny waiver applications, the law and regulations do not provide any guidance for dealing with the unique problems of undocumented women. It is also not clear if the reference to "former conditional residents who have not departed the country" refers only to women whose applications have been denied and are in deportation proceedings, or if it may also apply to illegal aliens who have not submitted the required application. The INS should clarify the

157. *Id.*

158. *See supra* part II. "Fear of deportation permeates all aspects of the undocumented woman's life." CHRIS HOGELAND & KAREN ROSEN, COALITION FOR IMMIGRANT & REFUGEE SERVICES, IMMIGRANT WOMEN'S TASK FORCE, DREAMS LOST, DREAMS FOUND: UNDOCUMENTED WOMEN IN THE LAND OF OPPORTUNITY 2 (1990). Even if a battered undocumented woman is able to overcome her fear of deportation, her status may block access to services. For many years in New York City, only four shelters would accept illegal aliens; other shelters were reimbursed by the Human Resource Administration only for clients who are eligible for welfare, and undocumented women could not obtain public assistance. N.Y. Asian Women's Center, Inc., Testimony for New York City Council Committee on Women, Dec. 7, 1989, at 1 (on file with author); *see also* Jang, *supra* note 16, at 8 ("Most shelters do not discriminate against undocumented women. Some, however, will not house [them] because of funding restrictions."); Vivienne Walt, *Immigrant Abuse: Nowhere to Hide*, NEWSDAY, Dec. 2, 1990, at 8 (stating that federal programs do not allow illegal aliens to receive public assistance, and Legal Services Corporation lawyers cannot provide legal assistance to undocumented women).

Furthermore, it is extremely difficult for undocumented women to find employment since the passage of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. § 1324a (1988 & Supp. II 1990)). Because employers are required to see documentation of an individual's legal status before hiring, undocumented women are precluded from legally working. The only employment available to them is either "underground" or in domestic jobs, such as childcare, housekeeping and elderly care. HOGELAND & ROSEN, *supra* at 10-11. They often are exploited because minimum wage and other employment requirements are ignored by employers who know that they will not complain. *See id.* Thus, unstable economic conditions can entrap undocumented women in violent relationships to a much greater extent than they do other immigrant women.

meaning of "not at fault" by amending the regulations so that an undocumented alien spouse who did not meet either of the waiver requirements may now move to reopen her case and take advantage of the new battered spouse waiver. Under the current regulations, an undocumented woman should not risk applying for the new battered spouse waiver because there is a significant danger of an adverse interpretation by the INS which could result in her deportation.

CONCLUSION

*Congress has thrown these victims a life preserver, but they have to be able to swim in order to reach it safely.*¹⁵⁹

The 1990 Amendments and implementing regulations are significant because the law no longer coerces abused spouses into staying in violent relationships for fear of losing their immigration status. Ambiguities in IMFA and the accompanying regulations had prevented many abused conditional residents from leaving their spouses. In order to qualify for a waiver to the joint petition requirement, alien spouses had to show either extreme hardship or good cause for terminating their marriages.

The most important change in the law has been the addition of a battered spouse waiver. Any conditional resident who can show that she has been battered, regardless of her marital status, is eligible to apply for this waiver. An abused spouse no longer has to find the resources to terminate her marriage or leave her husband in order to receive permanent residency. Additionally, the good faith/good cause waiver was amended so that good cause for termination of the marriage is no longer required and either party can commence divorce proceedings.

Despite the potential of the 1990 Amendments, the implementing regulations have created problems. The INS seems to take a stance that many conditional residents will attempt to fabricate stories of abuse in order to take advantage of this new waiver. This presumption of fabrication contradicts legislative intent in implementing restrictive evidentiary requirements and changing the statutory terminology of "extreme cruelty" to "extreme mental cruelty." Congress indicated that a wide variety of evidence should be accepted to show battering and that the Attorney General would have only limited discretion to deny waivers. The lack of clarity in the definitions of physical abuse and extreme mental cruelty creates

159. Nancy A. Fellom, *Fear and Loathing in America: Alien Spouses Held in Hostage under Threat of Deportation Are Rescued from Abusive Partners by Amendments to Immigration Act*, RECORDER, Aug. 15, 1991, at 4.

further confusion about what types of evidence are sufficient. The INS has also failed to fully develop procedures to ensure confidentiality, which contradicts congressional intent to protect the whereabouts of battered spouses. Finally, neither the legislation nor the regulations provide adequate due process protections for those seeking to remove their conditional status. The only opportunity that a conditional permanent resident has to obtain a hearing is during the deportation proceeding, after the residency status has expired or already been terminated.

Even if the law and regulations were clarified and strengthened, there is much that the law does not and perhaps even cannot do to improve the lives of abused immigrants. Cultural barriers, such as the belief that abuse is acceptable, isolation from family and community, inability to speak English, and feelings of shame all prevent many immigrant women from leaving abusive relationships and utilizing battered women's shelters or other social services. They also may not seek help because of their economic situations and lack of financial resources. Finally, the law does not adequately address the problems of undocumented abused women, who are often trapped in abusive relationships because of their fear of deportation.

For many battered immigrant women in the United States, the 1990 Amendments to the Immigration Marriage Fraud Amendments go a long way to help them escape their lives of abuse. While there are significant gaps and ambiguities in the protection offered by the amendments, the new law does offer hope to abused immigrant women. Although it may take a great deal of courage and assistance for many of these women to use the new law, the benefits offered are a significant improvement over the old law. Now attorneys and shelter workers can provide real choices for battered conditional residents who wish to obtain permanent residency and establish their lives in the United States.

