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# NOTES

## Giving Battered Immigrant Fiancées a Way Out of Abusive Relationships

### PROPOSED AMENDMENTS TO THE IMMIGRATION AND NATIONALITY ACT

#### INTRODUCTION

Ayana is an Ethiopian woman who fell in love with Jason, a United States Citizen (USC) from New York City.<sup>1</sup> They met at the hotel where Ayana worked while Jason was vacationing in Addis Ababa. During their courtship, which lasted several years, Ayana bore three children over the course of Jason's many visits to her country. In 2010, Jason filed a petition for a K Visa, which allowed Ayana, along with her children, to leave her home in Ethiopia and move to the United States as Jason's fiancée.<sup>2</sup> In order to obtain the visa, Ayana and Jason were required to show

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<sup>1</sup> This is a hypothetical real-world situation, using pseudonyms, which reflects the facts of real clients' stories from my work as an Edward V. Sparer Public Interest Law Fellow at African Services Committee in New York City during the summer of 2011.

<sup>2</sup> The K-1 Visa allows a foreign fiancée to immigrate to the United States in order to marry her intended USC spouse. The K-2 Visa is granted to derivative beneficiaries, such as Ayana's children, who move with the K-1 Visa holder as intended immigrants. SARAH IGNATIUS & ELISABETH S. STICKNEY, NAT'L LAWYERS GUILD, IMMIGRATION LAW AND THE FAMILY § 8:26 (2011); *see also id.* § 9:54 n.3 ("The visa itself is known as the K visa. The principal receives a K-1 visa; derivative beneficiaries receive K-2 visas."). This note will refer generally to the principal K-1 Visa beneficiary, like Ayana, as a "K Visa holder."

A K Visa holder can be a man (fiancé) or a woman (fiancée) who is engaged to be married. *Fiancé Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/fiance> (last visited Sept. 26, 2012); *Fiancée Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/fiancee> (last visited Sept. 26, 2012). I will generally use the feminine term fiancée to refer to abused K Visa holders, since the majority of them are women. However, when a specific usage is pertinent for illustrative purposes, I will use one term or the other (e.g. Ayana's fiancé, Jason vs. Jason's fiancée, Ayana).

evidence of their relationship, as well as their intent to marry within ninety days of Ayana's arrival in the United States.<sup>3</sup>

Unfortunately, shortly after she moved into Jason's apartment in New York City, Ayana was surprised to find that Jason was not the man she had fallen in love with. He started abusing Ayana and using drugs in front of their children, he strictly controlled the family's finances, and he even threatened to have her deported if she did not obey him. Since Ayana spoke almost no English, was unfamiliar with her new surroundings, and had very little money of her own, she felt isolated and completely dependent upon Jason. Moreover, because she feared deportation, she was reluctant to contact the police to report the violence that Jason used to control her.

Although unfamiliar with the intricacies of U.S. immigration law, Ayana knew that she would risk overstaying her visa if she failed to marry Jason within the K Visa's ninety-day window. She was aware that, ultimately, refusing to marry Jason would result in forfeiting her right to apply for permanent residency in the United States as an immediate relative of a USC.<sup>4</sup> However, Ayana knew that staying in this abusive relationship would be unhealthy for her and her children, so she made the brave decision to leave Jason and seek refuge in a domestic violence shelter. Once there, she was able to find legal assistance with the child custody proceedings Jason had initiated against her, in which he raised Ayana's lack of valid immigration status as a reason to grant him custody of the children.<sup>5</sup> Yet despite the legal support Ayana

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<sup>3</sup> See *infra* notes 27-33, describing the evidentiary requirements of the K Visa.

<sup>4</sup> A K-1 Visa holder is only eligible to adjust to conditional permanent resident status on the basis of marriage to the USC who petitioned for the K Visa. IGNATIUS & STICKNEY, *supra* note 2, § 8:26; see also *Markovski v. Gonzales*, 486 F.3d 108, 111 (4th Cir. 2007) ("[T]he language of the statute itself is not ambiguous and bars beneficiaries of the K-1 Visa from adjusting status on any basis other than marriage to the petition sponsor."); *Kalal v. Gonzales*, 402 F.3d 948, 949 (9th Cir. 2005) ("A K-1 Visa is issued for the sole purpose of facilitating a valid marriage between an alien and a [USC], and that marriage must take place within ninety days of entry." (citing 8 U.S.C.A. §§ 1101(a)(15)(K)(i), 1184(d)(1) (West 2012))).

<sup>5</sup> This should serve as an illustration of how an abusive USC partner might use the abused immigrant's status as a tool to exert control over her. "An abusive husband may easily use his spouse's immigration status, or lack thereof, as a means of control and repression." Katerina Shaw, Note, *Barriers to Freedom: Continued Failure of U.S. Immigration Laws to Offer Equal Protection to Immigrant Battered Women*, 15 CARDOZO J.L. & GENDER 663, 665 (2009). This "means of control" can be even more severe when it concerns an abused immigrant fiancée who has not yet married her abusive partner. But even for those like Ayana in child custody proceedings, the relevance of her immigration status may be left to the discretion of the Family Court under the "best interests of the child" standard, and Ayana may nevertheless be given full custody of the children if she is deemed the more suitable parent despite her lack of

received, she had few options, if any, to adjust her immigration status; by not marrying Jason, she had relinquished the legal basis to adjust her immigration status to conditional permanent residency.<sup>6</sup> This example illustrates an all-too-frequent conundrum that beleaguers K Visa holders who are abused by their intended spouses.<sup>7</sup> Although Congress has enacted numerous measures intended to protect battered immigrants,<sup>8</sup> such measures have focused on battered immigrant *wives* of USCs or lawful permanent residents (LPRs), whereas abused immigrant *fiancées* have been left out in the cold.

For example, the Violence Against Women Act of 1994 (VAWA) was intended to “permit[] battered immigrant women to leave their batterers without fearing deportation.”<sup>9</sup> Among other protections, VAWA created—by amending the Immigration and Nationality Act (INA)<sup>10</sup>—what is known as the “VAWA self-petition,” which allows abused spouses of USCs and LPRs to file for adjustment of immigration status—to that of permanent residency—on their own behalf, rather than relying on their abusive spouses to sponsor their applications for adjustment of status.<sup>11</sup> Unfortunately, VAWA’s self-petition provision does not permit abused women who travel to the United States on fiancée visas to file self-petitions unless they have married their intended spouses, since marriage is the basis for adjustment of status.<sup>12</sup> Instead, their options are limited: (1) return to their home countries;<sup>13</sup> (2) remain in the United States illegally; (3)

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valid immigration status. Although she *could* win the child custody battle, she would still lack legal status and would remain subject to deportation.

<sup>6</sup> See *supra* note 4.

<sup>7</sup> Although, presumably, immigrant men as well as women may be abused by their partners, for the purposes of this note, and for editorial ease, it will be assumed that the hypothetical abused partner is a woman. “Approximately 95% of all domestic violence victims are women.” *Timm v. Delong*, 59 F. Supp. 2d 944, 951 (D. Neb. 1998) (quoting H.R. REP. NO. 103-395, at 26 (1993)). “Unlike most violence against men, most violence against women takes place within family or intimate relationships.” Sally F. Goldfarb, *The Supreme Court, The Violence Against Women Act, and the Use and Abuse of Federalism*, 71 *FORDHAM L. REV.* 57, 106 n.309 (2002). Perhaps this underscores a need to address the plight of abused immigrant men, who may be overlooked. Nevertheless, the focus of this note is on abused immigrant K Visa holders, most of whom are women.

<sup>8</sup> See, e.g., discussion *infra* Part II.

<sup>9</sup> *Hernandez v. Ashcroft*, 345 F.3d 824, 841 (9th Cir. 2003) (alteration in original) (citing H.R. REP. NO. 103-395, at 25 (1993)) (internal quotation marks omitted).

<sup>10</sup> See 8 U.S.C.A. § 1101 (West 2012).

<sup>11</sup> 8 U.S.C.A. § 1154(a)(1)(A)(v)(I)(cc) (West 2011).

<sup>12</sup> See *supra* note 4.

<sup>13</sup> This option may be very dangerous for some women, because of the lack of domestic violence law enforcement in other countries, for example, as discussed *infra* notes 42-48 and accompanying text.

proceed with the marriage to an abusive partner; or (4) seek some other less desirable and more arduous avenue to legal immigration status, such as a U Visa or T Visa.<sup>14</sup> If the K Visa holder does not marry her abusive fiancé during the K Visa's ninety-day window—and instead leaves him to escape the abuse—a devastating cascade of events will ensue: her visa will expire, she will no longer possess legal immigration status, and she will be precluded from self-petitioning under VAWA.<sup>15</sup> Worst of all, she will be subject to removal from the United States.<sup>16</sup>

The exclusion of abused fiancées from VAWA self-petitions, and the lack of adequate immigration relief alternatives, creates a perverse incentive for battered women to remain with their batterers in order to receive immigration benefits.<sup>17</sup> This is the same incentive that the VAWA self-petition was designed to eliminate among vulnerable immigrant populations; in particular, the self-petition was intended to empower women to extricate themselves from abusive relationships without fearing a violation of immigration law. As noted by the U.S. Court of Appeals for the Ninth Circuit:

Congress's goal in enacting VAWA was to eliminate barriers to women leaving abusive relationships. . . . The notion that Congress would require women to remain with their batterers in order to be eligible for the forms of relief established in VAWA is flatly contrary

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<sup>14</sup> Both of these types of visas, as well as other types of immigration relief, and their drawbacks for K Visa holders, are discussed *infra* at Part III. These other avenues to relief are less desirable in comparison to the self-petition because they do not provide immediate adjustment of status to lawful permanent residence. In addition, their evidentiary requirements may make these forms of relief more arduous to obtain, as discussed *infra* at Parts III.B and III.C.

<sup>15</sup> 8 U.S.C.A. §§ 1154, 1255(d); *see also* Markovski v. Gonzales, 486 F.3d 108, 110 (4th Cir. 2007) (“On its face, subsection (d) [of § 1255 of the Immigration and Nationality Act (INA)] prohibits an alien who arrived on the K-1 fiancé visa from adjusting his status on any basis whatever save for the marriage to the K-1 visa sponsor.”); AUSTIN T. FRAGOMEN, JR. ET AL., IMMIGRATION PROCEDURES HANDBOOK § 20:5 (2012).

<sup>16</sup> *See, e.g.*, Kalal v. Gonzales, 402 F.3d 948 (9th Cir. 2005) (denying petition for review of Board of Immigration Appeals' decision that summarily affirmed an immigration judge's removal order, where alien failed to marry her petitioning USC fiancé and instead married another after the ninety-day marriage period had lapsed).

<sup>17</sup> The benefits that may be available to fiancées who marry their abusers and subsequently file self-petitions include eligibility to adjust status to become an LPR, to be authorized to work, and to receive certain public assistance. *See* IGNATIUS & STICKNEY, *supra* note 2, §§ 8:24, 8:42; U.S. Dep't of Health & Human Servs., *Domestic Violence Fact Sheet: Access to HHS-Funded Services for Immigrant Survivors of Domestic Violence*, HHS.GOV, <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/origin/domesticviolencefactsheet.html> (last updated Aug. 22, 2012).

to Congress's articulated purpose in enacting [the cancellation of removal provision].<sup>18</sup>

Few would doubt that protecting abused immigrant fiancées—some of the most vulnerable members of our society—is a noble cause, yet even a modest proposal for immigration reform is naturally met by some resistance. Foremost among concerns is that offering new forms of immigration relief to K Visa holders could increase opportunities for fraud, both by those initially applying for K Visas—who may lack genuine intent to marry their USC petitioners—and by those claiming abuse once they arrive in the United States.<sup>19</sup> However, instances of such fraud are rare,<sup>20</sup> and moreover, current evidentiary requirements in the K Visa application and VAWA self-petition process provide ample deterrents to combat fraud.<sup>21</sup> Most importantly, the need to protect abused K Visa holders, who are currently relegated to a state of legal limbo, is profound enough to warrant added protections.<sup>22</sup>

This note, for the first time in the academic literature, examines the failure of U.S. immigration laws to adequately protect battered immigrant fiancées and proposes legal amendments to ameliorate this problem. Part I describes the fiancée visa (K Visa) process and highlights the unique position in which abused immigrant fiancées find themselves in relation to U.S. immigration law. Part II provides a historical overview of the VAWA self-petition and related provisions in U.S. immigration law that were devised to protect battered immigrants. Part III outlines potential relief currently available to abused K Visa holders and addresses the inadequacies of

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<sup>18</sup> *Hernandez v. Ashcroft*, 345 F.3d 824, 841 (2003). The court referred to section 244(a)(3) of the INA, which details the procedures for “suspension of deportation,” now known as “cancellation of removal.” See 8 U.S.C.A. § 1229(b) (West 2008); see also NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, 1 IMMIGRATION LAW & DEFENSE § 8:17 (2012) [hereinafter 1 IMMIGR. L. & DEF.] (discussing “cancellation of removal for certain nonpermanent residents”).

<sup>19</sup> See, e.g., *Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. (2000) [hereinafter *H.R. 3083 Hearing*], available at [http://commdocs.house.gov/committees/judiciary/hju66253.000/hju66253\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju66253.000/hju66253_of.htm); *infra* Part IV.A. Additional concerns include the increased number of immigrants who may benefit from expanding protections, as well as the fact that providing additional relief to K Visa holders would treat them more like married self-petitioners than temporary nonimmigrants. See *H.R. 3083 Hearing, supra*, at 36, 39.

<sup>20</sup> See, e.g., James A. Jones, Comment, *The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation?*, 24 FLA. ST. U. L. REV. 679, 698-700 (1997); see also *infra* notes 189-91 and accompanying text.

<sup>21</sup> See *infra* Part IV.A.

<sup>22</sup> For a more thorough discussion of counter-arguments, see *infra* notes 184-95.

those remedies. Finally, Part IV offers practical solutions to the troubling legal position of abused immigrant fiancées like Ayana. Ultimately, this note argues that Congress should amend the INA to allow abused immigrant fiancées to file self-petitions for adjustment of immigration status, or alternatively, that certain requirements of the U Visa<sup>23</sup> should be relaxed in order to allow abused fiancées to safely and effectively seek lawful adjustment of their immigration status.

#### I. THE K VISA PROCESS AND THE UNIQUE POSITION OF K VISA HOLDERS IN RELATION TO U.S. IMMIGRATION LAW

Before coming to the United States, Ayana, like other K Visa holders, was in a unique position in relation to U.S. immigration law because she planned to immigrate to the United States but was not yet eligible to do so, since the basis for permanent residency—her marriage to Jason—had yet to take place.<sup>24</sup> Moreover, Ayana was “technically ineligible to enter . . . on a temporary nonimmigrant visa” because of her intent to become a permanent resident.<sup>25</sup> The K Visa solves this problem by granting fiancées “a nonimmigrant visa which recognizes the beneficiary’s intent to immigrate based on her planned marriage.”<sup>26</sup>

However, obtaining a K Visa is no simple task. First, the K Visa applicant (i.e., the prospective immigrant) must be engaged to a USC who files a petition form I-129F for her visa application.<sup>27</sup> After the petition is approved, U.S. Citizenship and Immigration Services (USCIS)<sup>28</sup> will conduct a background

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<sup>23</sup> The U Visa is available to immigrant victims of certain qualifying crimes who are, have been, or are likely to be helpful in the investigation or prosecution of those crimes. 8 U.S.C. § 1101(a)(15)(U)(i) (2006). In particular, this note will argue that the “law enforcement certification” requirement—which is difficult for many abused fiancées to satisfy—should be lifted for K Visa holders. *See infra* Parts III.B and IV.B.

<sup>24</sup> IGNATIUS & STICKNEY, *supra* note 2, § 14:5.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; *see also* 3A AM. JUR. 2D *Aliens and Citizens* § 912 (2012).

A K-1 visa holder is not an immigrant, but rather, as relevant here, is a person who “is the fiancée or fiancé of a citizen of the United States and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission.”

Kalal v. Gonzales, 402 F.3d 948, 950 (9th Cir. 2005) (quoting 8 U.S.C. § 1101(a)(15)(K)(i)).

<sup>27</sup> Only USCs, not LPRs, are eligible to petition for their immigrant fiancées to receive K Visas. IGNATIUS & STICKNEY, *supra* note 2, § 14:7; *see also* 22 C.F.R. § 41.81 (2006). For more detailed information on the K Visa process and required forms, see U.S. Citizenship & Immigration Servs., *I-129F, Petition for Alien Fiancé(e)*, USCIS.GOV, [www.uscis.gov/i-129f](http://www.uscis.gov/i-129f) (last updated July 25, 2012).

<sup>28</sup> USCIS is the office within the U.S. Department of Homeland Security (DHS) which “oversees lawful immigration to the United States.” *About Us*,

check of the petitioner and forward the application to the consulate in the applicant's country.<sup>29</sup> There, the K Visa applicant must apply for the visa and submit to an interview with a consular official, where she must provide a sworn statement that she intends to marry her USC petitioner fiancé within ninety days of her admission into the United States.<sup>30</sup> An applicant will be denied a K Visa "unless there is satisfactory evidence that the parties 'have a bona fide intention to marry, and are legally able and actually willing to conclude a valid marriage in the United States within a period of ninety days after the alien's arrival.'"<sup>31</sup>

To adequately demonstrate their mutual intent to marry, the couple must show that they have met within the two years before the petition was filed.<sup>32</sup> To this end, the couple may provide evidence such as "affidavits, trip itineraries, plane ticket stubs, letters, phone bills, photographs taken of the couple together, and any other evidence which would corroborate the personal meeting."<sup>33</sup> The K Visa expires ninety days after the fiancée's admission into the United States, under the expectation that the immigrant fiancée will marry the USC petitioner within that period of time.<sup>34</sup> Once the fiancée marries the petitioner, and prior to their second anniversary, she can apply to adjust her immigration status to conditional permanent residency.<sup>35</sup> If,

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USCIS.GOV, <http://www.uscis.gov/aboutus> (last updated Sept. 12, 2009); *see also Department Components*, DHS.GOV, <http://www.dhs.gov/departments-components> (last visited Sept. 23, 2012); *U.S. Dep't of Homeland Sec. Organizational Chart*, DHS.GOV, <http://www.dhs.gov/xlibrary/assets/dhs-orgchart.pdf> (last visited Sept. 23, 2012). DHS subsumed the Immigration and Naturalization Service (INS) in 2003, after passage of the Homeland Security Act of 2002, whereby USCIS assumed the immigration services (i.e. visa adjudication) functions of INS. Patricia Medige, *Immigration Issues in a Security-Minded America*, COLO. LAW., Mar. 2004, at 11-13 (U.S. Customs and Border Patrol (CBP) and Immigration Customs and Enforcement (ICE) assumed the inspection and enforcement functions of INS, respectively.); *Who Joined DHS*, DHS.GOV, <http://www.dhs.gov/who-joined-dhs> (last visited Sept. 25, 2012).

<sup>29</sup> IGNATIUS & STICKNEY, *supra* note 2, § 14:7.

<sup>30</sup> 22 C.F.R. § 41.81(a)(2); IGNATIUS & STICKNEY, *supra* note 2, § 14:7.

<sup>31</sup> *Kalal*, 402 F.3d at 950 (quoting 8 U.S.C. § 1184(d)).

<sup>32</sup> IGNATIUS & STICKNEY, *supra* note 2, § 14:6. However, this requirement may be waived "only if it is established that compliance would result in extreme hardship to the petitioner or that compliance would violate strict and long-established customs of the K-1 beneficiary's foreign culture . . ." 8 C.F.R. § 214.2(k) (2011).

<sup>33</sup> IGNATIUS & STICKNEY, *supra* note 2, § 14:6.

<sup>34</sup> *Id.* § 14:7.

<sup>35</sup> *Id.* § 14:9. Although the INS proposed a regulation that would prohibit adjustment to conditional residency status after a marriage exceeds two years, it is currently unclear whether the fiancée may adjust after the two-year anniversary. *Id.* § 14:9 n.3. But once conditional permanent residence is granted, the K Visa applicant and her spouse must file a Form I-751 to remove the conditional status of permanent residency within ninety days prior to the two year anniversary of the award

however, they fail to marry during the ninety-day period, she will be prevented from adjusting her immigration status<sup>36</sup> and will ultimately risk removal from the United States.<sup>37</sup>

These requirements present a special problem for K Visa holders who find themselves in abusive relationships before marrying their USC petitioners.<sup>38</sup> If the relationship becomes abusive during the ninety-day window and before the marriage occurs, the immigrant fiancée will find herself in quite a predicament: if she decides not to marry her fiancé, she will be unable to obtain the immigration benefits of marriage and she will either become an out-of-status alien,<sup>39</sup> be required to return home, or be forced to seek another form of immigration relief. On the other hand, she may be inclined to stay with her abusive fiancé in order to avail herself of the

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of conditional permanent resident status, and failure to timely do so without good cause will result in termination of such status and the initiation of removal proceedings. 8 C.F.R. § 216.4(a)(1), (a)(6) (2009). If all goes as planned, however, a K Visa applicant will eventually be able to adjust her status to lawful permanent residence and become a naturalized citizen, provided she is otherwise admissible pursuant to the INA.

<sup>36</sup> 8 U.S.C.A. § 1255(d) (West 2011); IGNATIUS & STICKNEY, *supra* note 2, § 14:5. But “[u]nder VAWA 2005, a K visa holder can change status to that of a T or U-Visa.” *Id.* For a discussion of these remedies and why they are currently inadequate to protect abused immigrant fiancées in all cases, see *infra* Part III.

<sup>37</sup> IGNATIUS & STICKNEY, *supra* note 2, § 14:7 n.23. “If she does not marry within that time, the beneficiary fiancé(e) becomes removable.” *Id.*

<sup>38</sup> As in the case of “mail order brides,” where “it is not uncommon, after the fiancée has arrived on her K Visa and married the petitioning U.S. citizen, for the relationship to become an abusive one,” *id.* § 14:16, abuse does arise *prior* to marriages for some K Visa holders. Often this relationship will develop in person when the USC is courting the alien fiancée while abroad, rather than in a “mail order bride” scenario. In these situations, it is also not uncommon for “sex tourists” to court women and then become abusive and domineering once they bring the women to the United States. The USC may abuse the fiancée and then refuse to marry her, thereby using the K Visa holder’s resulting lack of immigration status as a means of holding power over her. E-mail and Telephone Interview with Andrea Panjwani, Supervising Attorney, African Servs. Comm. (Aug. 26, 2011) [hereinafter Panjwani Interview] (on file with author).

Additionally, although the International Marriage Broker Regulation Act of 2005 (IMBRA) addressed some problems in the “mail order bride” industry—including limiting the number of K Visa petitions that may be filed by the same USC and creating a database to track repeat K Visa petitioners—IMBRA does not fully address the problems that face K Visa beneficiaries who enter their engagements through ordinary (in-person courtship) methods, but then find themselves in abusive relationships. See Christina Del Vecchio, Note, *Match-Made in Cyberspace: How Best to Regulate the International Mail-Order Bride Industry*, 46 COLUM. J. TRANSNAT’L L. 177, 200-01 (2007).

<sup>39</sup> The term “out of status” means that she will no longer have valid immigration status and will be considered undocumented. See *Out of Status Definition, Glossary of Visa Terms*, U.S. DEPT OF STATE, [http://travel.state.gov/visa/frvi/glossary/glossary\\_1363.html](http://travel.state.gov/visa/frvi/glossary/glossary_1363.html) (last visited Sept. 25, 2012).

VAWA self-petition after the marriage is concluded.<sup>40</sup> Given that the self-petition was specifically designed to remove abused immigrant spouses' incentive to remain with their abusive spouses solely in order to obtain immigration benefits, the strict requirements of the K Visa—absent a safety valve similar to the VAWA self-petition—have produced a counterintuitive result.<sup>41</sup> An immigrant fiancée should not be encouraged by the immigration laws to proceed with a marriage to an abusive partner. Yet that is exactly the situation women like Ayana are facing.

Some may argue that Ayana—or any abused K Visa holder—can simply return to her country of origin since she did not marry her fiancé within requisite ninety days. However, returning home could be dangerous for several reasons.<sup>42</sup> For example, if an abused K Visa holder is deported, she would be more vulnerable to future violence at the hands of her abusive partner, who could follow her and take advantage of the paucity of legal protections and remedies available to domestic violence victims in her home country.<sup>43</sup> This is why some scholars have noted that immigration policy should not be based upon “the erroneous belief that deportation [will] bring an end to the domestic violence.”<sup>44</sup> Additionally, many women “face severe social stigma if they [are] forced to return to their countries of origin after divorcing or separating from their husbands.”<sup>45</sup> In some situations, such women may be forced to endure “political persecution, war, torture, jail, extreme poverty, disease, entrenched gender discrimination, or death.”<sup>46</sup>

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<sup>40</sup> This scenario assumes an element of shrewdness on the part of the immigrant fiancée, or could arise in a case where the fiancée encounters a lawyer or an acquaintance who gives her advice about her immigration options.

<sup>41</sup> See *supra* notes 9, 17-18, and accompanying text.

<sup>42</sup> Aside from being risky, returning home can also be problematic if the abused immigrant has had children with the USC and if she is deemed the more suitable parent, which is likely to be the case if her fiancé is abusive, as seen in Ayana's custody battle. See *supra* note 5 and accompanying text. Indeed, it may be against public policy to remove an abused K Visa holder from the United States if it would result in “constructive deportation” of a USC child. See generally Jessie M. Mahr, Note, *Protecting Our Vulnerable Citizens: Birthright Citizenship and the Call for Recognition of Constructive Deportation*, 32 S. ILL. U. L.J. 723 (2008) (arguing that “constructive deportation” of USC children should be acknowledged, despite courts' reluctance to do so, because, they reason, an alien parent who is ordered deported may simply leave a USC child—who has a right to remain in the United States—behind).

<sup>43</sup> Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 104, 133 (2001).

<sup>44</sup> *Id.* at 104.

<sup>45</sup> *Id.* at 135.

<sup>46</sup> *Id.* at 136.

It is not difficult to understand why a battered immigrant who returned home because she refused to proceed with the marriage would be similarly stigmatized.<sup>47</sup> This danger is magnified in certain countries from which fiancées emigrate, where cultures may view a woman as married once she leaves the country to live with her husband-to-be.<sup>48</sup>

Nor should it be overlooked that the deportation of abused K Visa holders may result in a “chilling effect on other immigrant victims of domestic violence, making them reluctant to seek any help from the justice system.”<sup>49</sup> It would be just as troubling if the law coerced future K Visa holders to endure abuse and marry their abusers in order to avoid deportation and avail themselves of other immigration benefits, such as the VAWA self-petition. Regrettably, however, the promise of VAWA—to allow immigrant women who suffer domestic violence to free themselves from their abusers without fearing legal penalties—is still inaccessible to Ayana and many other battered K Visa holders.

## II. HISTORY OF U.S. PROTECTIONS FOR BATTERED IMMIGRANT WOMEN

U.S. immigration policy has been revised to protect battered immigrants numerous times since the early 1900s, yet abused immigrant fiancées have often been excluded.<sup>50</sup> The prevalence of domestic violence in the United States, particularly violence that affects immigrant women, sheds some light on the dire need for such protections. When VAWA was first under consideration in 1993, congressional findings indicated that “in 1991 at least 21,000 domestic crimes against women were reported to police every week,” and that in addition to this astonishing rate, “domestic violence crimes [were] vastly under reported.”<sup>51</sup> A 2000 study estimated that during their lives, nearly one-third of women in the United States suffer physical abuse by their husbands or other males they live

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<sup>47</sup> For an example, see *N. v. Sweden*, App. no. 23505/09, HUDOC (July 20, 2010), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99992> (Eur. Ct. H.R.), discussed *infra* notes 175-78 and accompanying text.

<sup>48</sup> See *infra* note 175 and accompanying text.

<sup>49</sup> Orloff & Kaguyutan, *supra* note 43, at 104.

<sup>50</sup> See, e.g., *infra* note 184 and accompanying text (discussing the proposed amendment to the Battered Immigrant Women Protection Act of 1999, H.R. 3083, which would have permitted abused K Visa holders to file VAWA self-petitions).

<sup>51</sup> Orloff & Kaguyutan, *supra* note 43, at 109.

with.<sup>52</sup> At that time, it was also estimated that “approximately 4.8 million intimate partner rapes and physical assaults [were] perpetrated against women annually.”<sup>53</sup> Although the “annual incidence of domestic violence has decreased by 53 percent” since the passage of VAWA in 1994, “domestic and sexual violence remain a significant and widespread problem.”<sup>54</sup> A more recent survey in 2010 indicated that more than one-third of women and one-quarter of men “in the United States have experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime.”<sup>55</sup> Today, virtually one-quarter of women in the United States “report experiencing *severe* physical violence by an intimate partner . . . .”<sup>56</sup> Not surprisingly, in light of these statistics, U.S. Surgeons General have underscored domestic violence as the most significant threat to women’s health in the United States.<sup>57</sup>

Because of their unique position as dependents of their abusers for legal immigration status, many immigrant women comprise an especially at-risk segment of society.<sup>58</sup> For example, one study of female Latina and Filipina immigrants found that 48 percent of those surveyed reported an increase in domestic violence after they arrived in the United States.<sup>59</sup> Additionally, in a separate study, 9 percent of the female respondents said that the abuse did not start until after they had immigrated.<sup>60</sup> A full quarter of those respondents said that they decided not to leave their abusive partners because of their immigration status and fears of deportation.<sup>61</sup> Another study, conducted by the National Institute of Justice, showed that 65 percent of the

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<sup>52</sup> *Id.*; see also FAMILY VIOLENCE PREVENTION FUND, INTIMATE PARTNER VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES 10 (2009).

<sup>53</sup> Orloff & Kaguyutan, *supra* note 43, at 97.

<sup>54</sup> S. REP. NO. 112-153, at 2 (2012).

<sup>55</sup> MICHELE C. BLACK ET AL., NAT’L CTR. FOR INJURY PREVENTION & CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 2 (2011).

<sup>56</sup> S. REP. NO. 112-153, at 3 (emphasis added).

<sup>57</sup> Orloff & Kaguyutan, *supra* note 43, at 109 (citing S. REP. NO. 103-138, at 41-42 (1993)).

<sup>58</sup> Shaw, *supra* note 5, at 665 (citing Giselle Aguilar Hass et al., *Battered Immigrant and U.S. Citizen Spouses*, LEGAL MOMENTUM, Apr. 24, 2006, at 2-3, available at <http://www.legalmomentum.org/assets/pdfs/wwwbattereddimmsanduscspouses.pdf>); see also FAMILY VIOLENCE PREVENTION FUND, *supra* note 52, at 12.

<sup>59</sup> Shaw, *supra* note 5, at 665 (citing Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. POVERTY L. & POL’Y 245, 250 (2000)).

<sup>60</sup> Hass et al., *supra* note 58, at 3 (discussing a survey conducted by AYUDA in the District of Columbia).

<sup>61</sup> *Id.*

women surveyed said that their abusers threatened them with deportation following their arrival to the United States.<sup>62</sup>

Troubling congressional findings that preceded the passage of VAWA in 1994 indicated that “[d]omestic battery problems can become 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.”<sup>63</sup> At the time, the House Report also stressed that “[c]urrent law fosters domestic violence in such situations by placing full and complete control of the alien spouse’s ability to gain permanent legal status in the hands of the citizen.”<sup>64</sup> While USC and LPR spouses are no longer given “full and complete control” over their spouses’ immigration status because of the VAWA self-petition, current law still affords abusive USCs a great deal of control over their immigrant *fiancées*’ ability to obtain permanent legal status.<sup>65</sup>

For women and their children who have immigrated to the United States, the dangers of abusive relationships are often more acute.<sup>66</sup> For example, between 34 and 49.8 percent of immigrant women in the United States fall prey to domestic violence.<sup>67</sup> This number spikes to 59.5 percent where only those immigrant women who are married are concerned.<sup>68</sup> Further exacerbating the negative effects of domestic violence against immigrant women, many simply do not attempt to avail themselves of healthcare, law enforcement, or social services because of language and cultural barriers.<sup>69</sup> These circumstances may help to explain why domestic violence against immigrant

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<sup>62</sup> *Id.* Disturbingly, some USC’s will actually engage in a form of immigration fraud in order to exert control over their immigrant partners, by having the immigrant travel to the United States on a K Visa although they are already married. *Id.* at 4.

<sup>63</sup> H.R. REP. NO. 103-395, at 26 (1993).

<sup>64</sup> *Id.*

<sup>65</sup> See discussion *supra* Part I.

<sup>66</sup> Orloff & Kaguyutan, *supra* note 43, at 110. *But see* FAMILY VIOLENCE PREVENTION FUND, *supra* note 52, at 11 (“According to a survey of literature . . . available research indicates that [intimate partner violence] is not more prevalent, and may be less prevalent, among immigrant and refugee population groups than others.”).

<sup>67</sup> Karyl Alice Davis, Comment, *Unlocking the Door by Giving Her the Key: A Comment on the Adequacy of the U-Visa as a Remedy*, 56 ALA. L. REV. 557, 557 (2004) (citing *H.R. 3083 Hearing*, *supra* note 19, at 58 (statement of Leslye Orloff, Director, Immigrant Women Program, NOW Legal Defense and Education Fund)).

<sup>68</sup> *Id.*

<sup>69</sup> FAMILY VIOLENCE PREVENTION FUND, *supra* note 52, at 11-12, 50-51; Davis, *supra* note 67, at 558; see also S. REP. NO. 112-153, at 12 (2012) (“The abusers of undocumented immigrants often exploit the victims’ immigration status, leaving the victim afraid to report the abuse to law enforcement and fearful of assisting with the investigation and prosecution of associated crimes.”).

women occurs more often than is reported.<sup>70</sup> In fact, a Department of Justice study found that just over 30 percent of *documented* immigrants officially report abuse.<sup>71</sup> It is unsurprising, then, to find that undocumented immigrants who fear deportation report abuse at even lower rates, falling as low as 14 percent.<sup>72</sup>

It is difficult to obtain data on the prevalence of abuse against K Visa holders, perhaps because “a battered spouse [or fiancée] may be deterred from taking action to protect himself or herself, such as filing for a civil protection order, filing criminal charges, or calling the police, because of the threat or fear of deportation.”<sup>73</sup> This disinclination to act may stem from an abused immigrant’s limited knowledge of English, a lack of savvy regarding the legal system and protections available to her, financial dependence on an abusive partner, or cultural isolation.<sup>74</sup> An abused immigrant fiancée may be even more reluctant than an abused immigrant spouse to take official action because she stands on shakier ground in relation to U.S. immigration law, without the availability of the VAWA self-petition. Now that the self-petition exists, as counterintuitive as it may seem, a battered K Visa holder like Ayana has an

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<sup>70</sup> Davis, *supra* note 67, at 558 (“[S]tatistics likely underestimate the number of victims.”); see also FAMILY VIOLENCE PREVENTION FUND, *supra* note 52, at 11 (describing the limited availability of data).

<sup>71</sup> Juliette Terzieff, *More Services Reach Abused Immigrant Women*, WOMEN’S ENEWS (Aug. 11, 2005), <http://www.womensenews.org/story/domestic-violence/050811/more-services-reach-abused-immigrant-women>. Among all females in the United States as of 2008, the Bureau of Justice Statistics found that “49% of the intimate partner violence against [them] was reported to police.” SHANNAN CATALANO ET AL., BUREAU OF JUSTICE STATISTICS FEMALE VICTIMS OF VIOLENCE 2 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fvv.pdf>.

<sup>72</sup> See Terzieff, *supra* note 71.

<sup>73</sup> H.R. REP. NO. 103-395, at 26 (1993); see also Laura Jontz, Note, *Eighth Circuit to Battered Kenyan: Take a Safari—Battered Immigrants Face New Barrier When Reporting Domestic Violence*, 55 DRAKE L. REV. 195, 197 (2006) (confirming that data on the prevalence of abuse is difficult to obtain because many incidents go unreported).

I have been unable to locate data for statistics relating specifically to abused immigrant fiancées. Of course, it is possible that the incidence of domestic violence against immigrant fiancées is lower than for immigrant spouses, perhaps because domestic violence may not develop early in the relationship and it may increase in frequency and severity as the relationship progresses beyond marriage. Nevertheless, it can be presumed that such violence toward immigrant fiancées does occur at fairly high rates. For example, applying the aforementioned rates of domestic violence among immigrant women—the lowest rate of 34 percent, for example—to the 30,445 K-1 immigrant fiancées admitted to the United States in 2010, it appears that approximately 10,351 K Visa holders could have experienced abuse in that year alone. DEPT OF HOMELAND SEC., 2010 YEARBOOK OF IMMIGRATION STATISTICS 66 tbl. 25: Nonimmigrant Admissions by Class of Admission: Fiscal Years 2001 to 2010 (2011), available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois\\_yb\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf).

<sup>74</sup> See Hass et al., *supra* note 58, at 2.

even greater incentive to remain with her abuser until marriage; then, at least, she could file a self-petition and gain LPR status without further relying on her abusive partner.

A. *Pre-VAWA Policies*

Prior to the enactment of VAWA, immigration law in the United States gave USC and LPR spouses complete control over their immigrant spouses' legal status.<sup>75</sup> The doctrine of coverture, for example, a "legislative enactment of the common law theory that the husband is the head of the household," essentially stripped women of their legal existence once they were married.<sup>76</sup> In U.S. immigration law, this tradition informed policies whereby American women automatically acquired their husbands' citizenship—and lost their U.S. citizenship—upon marriage to a foreigner.<sup>77</sup> While the doctrine of coverture was repealed by subsequent laws—such as the Immigration and Nationality Act of 1952, which made immigration law gender-neutral and thus gave women the ability to sponsor their alien husbands' lawful immigration status<sup>78</sup>—the laws concerning the conferral of legal immigration status on immigrant spouses were "still rooted in the coverture mentality."<sup>79</sup> Virtually all of the power remained in the hands of the USC or LPR spouse, because the immigrant spouse's status depended on the voluntary sponsorship of the citizen or LPR spouse.<sup>80</sup> And since women comprise the greater proportion of domestic violence victims, immigrant fiancées, and immigrant spouses, they are the most dependent on the sponsorship of

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<sup>75</sup> Orloff & Kaguyutan, *supra* note 43, at 99.

<sup>76</sup> *Id.* at 100 (citing S. REP. NO. 81-1515, at 414 (1951)) (internal quotation marks omitted); *see also* Ryan Lilienthal, Note, *Old Hurdles Hamper New Options for Battered Immigrant Women*, 62 BROOK. L. REV. 1595, 1602 n.31 (1996) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*442 (1783) (alteration in original) (emphasis omitted)):

By marriage, the husband and wife are one person in the law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called . . . a feme-covert, . . . is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture.

<sup>77</sup> Orloff & Kaguyutan, *supra* note 43, at 100.

<sup>78</sup> *Id.* at 101.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

their partners and are most dramatically affected by a spouse's refusal to sponsor their adjustment of status.<sup>81</sup>

This disparity in power, prior to VAWA, ensured “that the immigrant spouse [was] faced with an impossible choice: either remain in an abusive relationship or leave, become an undocumented immigrant[,] and be potentially deprived of home, livelihood and perhaps child custody.”<sup>82</sup> While these dire circumstances have been mitigated by more modern laws protecting battered immigrants,<sup>83</sup> major impediments remain for battered immigrant fiancées living in the United States on K Visas, due to their ineligibility to self-petition.

The Immigration Marriage Fraud Amendments of 1986 (IMFA)<sup>84</sup> actually enhanced petitioning USC and LPR spouses' control over their immigrant spouses by creating a presumption that all immigration marriages were fraudulent until proven otherwise, and by preventing alien spouses from becoming LPRs without their petitioning spouses' sponsorship.<sup>85</sup> However, IMFA did provide the U.S. Attorney General with discretionary power to grant LPR status to an immigrant spouse, independent of her husband's sponsorship, if she demonstrated “extreme hardship or good faith/good cause.”<sup>86</sup> Yet both of these provisions were still fraught with difficulty for immigrant spouses because domestic violence was generally not interpreted as adequate grounds for either waiver.<sup>87</sup>

The 1990 Battered Spouse Waiver was an early congressional attempt specifically designed to protect battered immigrants.<sup>88</sup> While it provided some benefits to abused immigrant spouses, such as allowing those who had already obtained conditional resident status to gain LPR status without relying on their spouses for a joint petition,<sup>89</sup> the “battered spouse

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* (internal quotation marks omitted).

<sup>83</sup> See *infra* Parts II.B, III.B, and III.C (describing the VAWA self-petition, U Visa, and T Visa, respectively).

<sup>84</sup> Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1986).

<sup>85</sup> Orloff & Kaguyutan, *supra* note 43, at 101-02.

<sup>86</sup> *Id.* at 102 (citing 8 U.S.C. § 1186a(c)(4) (1994) (internal quotation marks omitted)).

<sup>87</sup> *Id.* at 103.

<sup>88</sup> See Orloff & Kaguyutan, *supra* note 43, at 105 (noting that the battered spouse waiver “was the first piece of legislation that recognized domestic violence as a problem experienced by immigrant wives dependent on their spouses for immigration status” (citing Immigration Act of 1990, Pub. L. No. 101-649, § 701, 104 Stat. 4978 (1990) (codified as amended at 8 U.S.C. § 1186a(c)(4) (1994)))).

<sup>89</sup> *Id.* at 105-06.

waiver” still stipulated that an immigrant spouse could not in the first instance become a conditional resident without her spouse’s initial sponsorship.<sup>90</sup> This perpetuated immigrant spouses’ dependence on their abusive husbands, and it thus preserved the control that abusive spouses had over their immigrant spouses.

*B. Violence Against Women Act of 1994 (VAWA) and Subsequent Revisions*

The Violence Against Women Act of 1994 (VAWA)<sup>91</sup> did much to solve this problem. In addition to the broader goals of enhancing protection for battered women nationwide and providing funding for law enforcement and domestic violence service providers,<sup>92</sup> VAWA offered shelter via laws specifically designed to help immigrant women who are abused by USC or LPR spouses.<sup>93</sup> Representing a significant paradigm shift for battered immigrant spouses, VAWA included the “self-petition” provision,<sup>94</sup> which allows an abused immigrant spouse to file for LPR status without her abusive spouse’s sponsorship.<sup>95</sup>

1. Congressional Intent of VAWA 1994

The VAWA 1994 legislation was lauded as “an essential step in forging a national consensus that our society will not tolerate violence against women.”<sup>96</sup> Congress passed the Act as “a comprehensive statutory enactment designed to address ‘the escalating problem of violent crime against women,’ as part of the larger Violent Crime Control and Law Enforcement Act of 1994 . . . .”<sup>97</sup> The self-petition was intended, in part, to “permit[] battered immigrant women to leave their batterers without fearing deportation.”<sup>98</sup> This helped to alleviate the plight of

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<sup>90</sup> *Id.* at 107.

<sup>91</sup> 8 U.S.C. § 1154 (2006).

<sup>92</sup> Orloff & Kaguyutan, *supra* note 43, at 108.

<sup>93</sup> *Id.* at 109.

<sup>94</sup> 8 U.S.C. § 1154(a)(1)(A)(iii)(I).

<sup>95</sup> Orloff & Kaguyutan, *supra* note 43, at 114.

<sup>96</sup> *Id.* at 109 (quoting S. REP. NO. 103-138, at 41-42 (1993)).

<sup>97</sup> *Doe v. Doe*, 929 F. Supp. 608, 610 (D. Conn. 1996) (citing S. REP. NO. 103-138, at 38 (1993)).

<sup>98</sup> *Hernandez v. Ashcroft*, 345 F.3d 824, 841 (9th Cir. 2003) (alteration in original) (citing H.R. REP. NO. 103-395, at 25 (1993)) (internal quotation marks omitted); see also Pub. L. No. 106-386, 114 Stat. 1464, 1518 (2000) (noting congressional findings that “the goal of the immigration protections for battered immigrants included in the Violence Against Women Act of 1994 was to remove immigration laws as a barrier that kept battered immigrant women . . . locked in abusive relationships”).

abused immigrant spouses by removing the incentive to remain with their abusive spouses to obtain the benefits of sponsorship based on marriage.<sup>99</sup>

Underscoring the need for the self-petition, at least one scholar has noted a study where 72.3 percent of USC and LPRs who batter their immigrant spouses never file the immigration papers.<sup>100</sup> Before VAWA, an abusive USC or LPR could still exert control over his spouse's immigration status, even embracing the ability to have her deported, all the while remaining free from prosecution for domestic violence he perpetrated against her.<sup>101</sup>

## 2. Eligibility to Self-Petition Under VAWA

VAWA codified that a spouse of an abusive USC or LPR may file a self-petition for adjustment of immigration status by showing that she: (1) married a USC or LPR in good faith, (2) had been battered or suffered "extreme cruelty" at the hands of her spouse, (3) resided with the abusive spouse, and (4) was a person "of good moral character."<sup>102</sup> Under VAWA 1994, the battered spouse also had the burden of showing that deportation would result in "extreme hardship."<sup>103</sup> In order to reduce the burden on battered immigrant spouses, Congress included a requirement that "any credible evidence" be accepted in adjudicating self-petitions and "battered spouse waiver" cases.<sup>104</sup>

## 3. VAWA 2000

When Congress reauthorized VAWA in 2000,<sup>105</sup> it amended numerous provisions of VAWA to remove barriers

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<sup>99</sup> Nonetheless, the self-petition avenue to lawful permanent residency is unavailable to abused fiancées.

<sup>100</sup> Orloff & Kaguyutan, *supra* note 43, at 111; *see also* Dutton et al., *supra* note 59, at 259 (noting that those abusive USC and LPR spouses who did file immigration documents often waited for nearly four years or longer to do so).

<sup>101</sup> Orloff & Kaguyutan, *supra* note 43, at 113.

<sup>102</sup> *Id.* at 114; *see also* 3A AM. JUR. 2D *Aliens & Citizens* § 461 (2011); FRAGOMEN ET AL., *supra* note 15, § 13.1. The protections afforded to battered immigrants, including the right to self-petition if the statutory elements are satisfied, are gender-neutral and extend to both men and women. 8 C.F.R. § 204.2(c) (2001); *see also* Orloff & Kaguyutan, *supra* note 43, at 114.

<sup>103</sup> Shaw, *supra* note 5, at 671. This "extreme hardship" provision was repealed by VAWA 2000, discussed *infra* at Part II.B.3.

<sup>104</sup> Orloff & Kaguyutan, *supra* note 43, at 116 (internal quotation marks omitted). In the 2009 fiscal year, 6374 VAWA petitions were approved and 1671 were denied. 1 IMMIGR. L. & DEF., *supra* note 18, § 4:58.

<sup>105</sup> Battered Immigrant Women Protection Act of 2000 (BIWPA), Pub. L. No. 106-386 § 1501, 114 Stat. 1464 (2000).

and loopholes, and to more accurately implement the congressional intent behind the law.<sup>106</sup> For example, VAWA 2000 abrogated the requirement that abused spouses show “extreme hardship” that would result from deportation, and it permitted women who divorced their abusive spouses or who were widowed to file self-petitions within two years of the divorce or the batterer’s death.<sup>107</sup> It further allowed for the filing of self-petitions by battered spouses whose LPR spouses had been stripped of their immigration status (e.g., for certain criminal convictions), so long as abused spouses filed self-petitions within two years of their spouses’ loss of status.<sup>108</sup>

Significantly, VAWA 2000 created the U Visa, a new visa category designed to afford protection and legal status to immigrant victims of crime who are, have been, or are likely to be helpful in prosecuting the crimes perpetrated against them.<sup>109</sup> The tremendous importance of the U Visa lies in its provision of legal status to battered immigrants who are undocumented or who are ineligible to self-petition under VAWA because they are not married to their abusers.<sup>110</sup> The U Visa is therefore ostensibly available to abused K Visa holders such as Ayana,<sup>111</sup> yet certain pitfalls of the U Visa process make it an unenviable or even unobtainable form of immigration relief for battered immigrant fiancées.<sup>112</sup>

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<sup>106</sup> See, e.g., *id.* § 1502(b):

The purposes of this title are—

- (1) to remove barriers to criminal prosecutions of persons who commit acts of battery or extreme cruelty against immigrant women and children; and
- (2) to offer protection against domestic violence occurring in family and intimate relationships that are covered in State and tribal protection orders, domestic violence, and family law statutes.

<sup>107</sup> Shaw, *supra* note 5, at 672.

<sup>108</sup> See *id.*

<sup>109</sup> 8 U.S.C.A. § 1101(a)(15)(U) (2011); see also Deanna Kwong, Note, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II*, 17 BERKELEY WOMEN’S L.J. 137, 150-51 (2002); Shaw, *supra* note 5, at 672. For further discussion of the U Visa as a remedy for K Visa holders, see *infra* Part III.B.

<sup>110</sup> Shaw, *supra* note 5, at 672.

<sup>111</sup> See Mary B. Clark, *Falling Through the Cracks: The Impact of VAWA 2005’s Unfinished Business on Immigrant Victims of Domestic Violence*, 7 U. MD. L.J. RACE, RELIG., GENDER & CLASS 37, 51 (2007) (“The creation of the U Visa is an extremely important advance for the rights of battered immigrant women as it offers protection to female domestic violence victims who are ineligible for VAWA self-petitions because of their abuser’s lack of a marital relationship or lawful immigration status.”).

<sup>112</sup> See *infra* Part III.B.

VAWA 2000 extended protection further still, enabling an abused immigrant spouse to file a self-petition if her marriage is legally invalid due to her husband's act of bigamy, of which she was unaware.<sup>113</sup> This ensures that such an abused immigrant—despite having a marriage to a USC or LPR that is legally void because of the USC or LPR's previously existing legal marriage to another partner—would not be precluded from filing a VAWA self-petition.<sup>114</sup> While this was not the case under VAWA 1994, today, provided that she is otherwise eligible, a battered immigrant spouse may still file a self-petition even if her marriage was technically illegal owing to her abuser's bigamous practices.<sup>115</sup>

#### 4. VAWA 2005

VAWA's third implementation, in 2005,<sup>116</sup> provided additional protections to abused immigrant women because, even after VAWA 1994 and VAWA 2000, several shortcomings remained in the legislation's protection of battered immigrants.<sup>117</sup> Among other innovations, VAWA 2005 amended the U Visa provisions to provide greater protections for family members of U Visa applicants who may obtain lawful status derivatively,<sup>118</sup> and it offered additional remedies for abused immigrants in removal hearings, such as the "motion to reopen."<sup>119</sup> Although the self-petition remained unavailable to abused K Visa holders, VAWA 2005 placed certain limitations on K Visa petitioners (i.e., USC fiancés) designed to protect the immigrant beneficiaries of the visas.<sup>120</sup> For instance, the USC petitioner

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<sup>113</sup> Clark, *supra* note 111, at 48.

<sup>114</sup> See IGNATIUS & STICKNEY, *supra* note 2, § 4:36 ("Until the passage of VAWA 2000, it was imperative that the marriage creating the relationship between the noncitizen and the abuser be legally valid at the time that the noncitizen filed her self-petition . . .").

<sup>115</sup> *Id.* Although the term "intended spouse" appears at first glance to include K Visa holders, alas it does not. A fuller discussion of the bigamy exception in the self-petition provision appears *infra* at Part IV.A.

<sup>116</sup> Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2964 (2006).

<sup>117</sup> See generally Clark, *supra* note 111.

<sup>118</sup> *Id.* at 56.

<sup>119</sup> *Id.* at 54-55. If granted, a motion to reopen provides for "a new determination [in immigration court] based on new material evidence which was not available and which could not have been discovered prior to and presented at the original hearing." 1 IMMIGR. L. & DEF., *supra* note 18, § 9:13.

<sup>120</sup> Clark, *supra* note 111, at 54-55. Although Clark states that "relief is available to women who have been brought to the United States on K Fiancé Visas" in a section titled "Relief for K Fiancé Visa Self-Petitioners," *id.*, it is unclear what is meant by "relief." Clark's article does not provide a citation for the above proposition. Additionally, since K Visa holders are not eligible to self-petition under VAWA, see *supra* Part II.B.2, it

applying for a K Visa on behalf of his immigrant fiancée must disclose criminal convictions, must wait two years between petitions (if he becomes engaged to another individual), and cannot apply for more than two K Visas in ten years without the immigrant fiancée receiving notification from the Department of Homeland Security (DHS) that hers is the USC's third petition.<sup>121</sup>

While VAWA has been critical in relieving immigrant women from the perils associated with domestic violence, U.S. immigration law nevertheless provides unequal treatment to different categories of abused immigrants.<sup>122</sup> Indeed, many abused K Visa recipients are condemned to a legal “no-(wo)man’s-land,” where they are unable to access the remedies afforded to spouses of USCs or LPRs.

### C. VAWA Reauthorization in 2012

In 2011, Senator Patrick Leahy (D-Vt.) introduced the Violence Against Women Reauthorization Act of 2011<sup>123</sup> in the U.S. Senate. The Senate passed the bill by a bipartisan 68-to-31 vote, but the House of Representatives subsequently passed a competing bill, H.R. 4970, by a 222-to-205 vote along party lines.<sup>124</sup> While the first version of the Senate bill would have provided additional protections to K Visa holders—such as a broader definition of background information about USC fiancé petitioners that the Secretary of Homeland Security must provide to prospective K Visa beneficiaries<sup>125</sup>—the amended bill removed those protections<sup>126</sup> and failed to provide the panoply of

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seems that Clark’s title for the section is a misnomer as she refers to other types of relief aside from the self-petition. Clark does, however, outline restrictions on K Visa petitioners that are designed to protect K Visa beneficiaries. Clark, *supra* note 111, at 54-55.

<sup>121</sup> Clark, *supra* note 111, at 54-55; Olga Grosh, Note, *Foreign Wives, Domestic Violence: U.S. Law Stigmatizes and Fails to Protect “Mail-Order Brides,”* 22 HASTINGS WOMEN’S L.J. 81, 101 (2011). Some of these requirements derive from the International Marriage Broker Regulation Act of 2005 (IMBRA), Pub. L. No. 109-162 §§ 831, 832(a)(2)(A), 119 Stat. 3066 (2006), which was also passed along with VAWA 2005.

<sup>122</sup> Shaw, *supra* note 5, at 664.

<sup>123</sup> S. 1925, 112th Cong. (2011); S. REP. NO. 112-153 (2012).

<sup>124</sup> Bill Summary & Status of S. 1925, 112th Cong. (2011), available at [http://thomas.loc.gov/cgi-bin/bdquery/z?d112:S.1925](http://thomas.loc.gov/cgi-bin/bdquery/z?d112:S.1925;); Bill Summary & Status of H.R. 4970, 112th Cong. (2012), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR04970:@@R>.

<sup>125</sup> See S. 1925, 112th Cong. § 808 (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s1925is/pdf/BILLS-112s1925is.pdf>.

<sup>126</sup> See S. 1925, 112th Cong., as amended, available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s1925rs/pdf/BILLS-112s1925rs.pdf>. The bill passed by the House, however, did contain similar provisions. See H.R. 4970, 112th Cong. § 803 (2012).

safeguards that K Visa holders like Ayana need. The House bill would enact even more stringent policies affecting abused immigrants.<sup>127</sup> Concurrently, in a disturbing development for Ayana and her similarly situated “sisters,” Congressman Lamar Smith (R-Tex.) and other House Republicans introduced the HALT Act,<sup>128</sup> which could subject undocumented immigrants to detention and possible removal if they report domestic violence.<sup>129</sup> This would be a surprising departure from congressional efforts to protect battered immigrants, even those who do not possess legal immigration status.<sup>130</sup> The HALT Act could hinder such efforts to provide adequate protection for battered immigrant women and discourage reporting of domestic violence. Accordingly, if a VAWA reauthorization bill is passed, it should

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<sup>127</sup> See, e.g., *Delay on Domestic Violence*, Editorial, N.Y. TIMES, July 24, 2012, at A20, available at <http://www.nytimes.com/2012/07/24/opinion/delay-on-violence-against-women-act.html>. (“The [House] bill did not include new protections for . . . immigrant . . . victims contained in the Senate measure. It also rolled back protections for immigrant women, including for undocumented immigrants who report abuse and cooperate with law enforcement.”); see also Ramsey Cox, *Senate Democrats Tell Speaker Boehner to Adopt Their Domestic Violence Bill*, HILL: FLOOR ACTION BLOG (July 24, 2012, 5:08 PM), <http://thehill.com/blogs/floor-action/senate/239837-senate-democrats-request-speaker-boehner-adopts-their-version-of-vaaw>.

<sup>128</sup> Hinder the Administration’s Legalization Temptation (HALT) Act, H.R. 2497, 112th Cong. (2011), available at <http://thomas.loc.gov/cgi-bin/t2GPO/http://www.gpo.gov/fdsys/pkg/BILLS-112hr2497ih/pdf/BILLS-112hr2497ih.pdf> [hereinafter HALT Act]. The companion bill in the Senate is S. 1380, 112th Cong. (2011), available at <http://thomas.loc.gov/cgi-bin/t2GPO/http://www.gpo.gov/fdsys/pkg/BILLS-112s1380is/pdf/BILLS-112s1380is.pdf>. As of November 17, 2012, neither bill had been passed out of its committee. The HALT Act would temporarily suspend certain forms of immigration relief, such as inadmissibility waivers, cancellations of removal, and designations of Temporary Protected Status, until January 21, 2013.

<sup>129</sup> See Kase Wickman, *Bill Would Penalize Immigrants Who Report Domestic Violence*, RAW STORY (Oct. 12, 2011, 12:27 PM), <http://www.rawstory.com/rs/2011/10/12/bill-would-penalize-immigrants-who-report-domestic-violence>. Opponents of the HALT Act argued that it would affect battered undocumented immigrants because it would suspend the form of relief known as deferred action, which may be used as an alternative to removal of undocumented immigrants who report abuse. Marcos Restrepo, *Two Bills Would Expand, Diminish Govt. Protection for Abused Women*, AM. INDEP. (Oct. 12, 2011, 9:26 AM), <http://americanindependent.com/198582/two-bills-would-expand-diminish-govt-protection-for-abused-women>. However, the bill does provide an exception which would allow a grant of deferred action for aliens “to be tried for . . . crime[s], or [as] . . . witnesses at trial,” “for any other significant law enforcement . . . purpose,” or “for a humanitarian purpose where the life of the alien is imminently threatened.” HALT Act, *supra* note 128, § 2(f). These exceptions might be applicable to battered immigrants who report domestic violence—if they were assisting law enforcement or if the abuse put their lives in imminent danger—but it would depend on how DHS interprets the law and how it chooses to exercise discretion case-by-case. Regardless, the HALT Act seems unlikely to pass at this time due to a lack of bipartisan support.

<sup>130</sup> For a more detailed discussion of the U Visa, which provides some protection to documented *and* undocumented immigrants who are victims of certain crimes, see *infra* Part III.B.

include the amendments proposed below, which would confer the protections that abused K Visa holders deserve.

In a statement at a recent U.S. Senate hearing discussing the reauthorization of VAWA, Senator Leahy said that despite the progress made in the seventeen years since the passage of VAWA in 1994:

[O]ur country still has a long way to go. . . .

. . . [A]s we look toward reauthorization of [VAWA], we have to continue to ensure that the law evolves to fill unmet needs. . . . We . . . [must prioritize] our response to the high rates of violence experienced by . . . immigrant women.<sup>131</sup>

Indeed, the law should evolve to fill the unmet needs of K Visa holders who are abused before marriage. The proposals I outline below in Part IV would be significant advancements in this process.

#### *D. Recent Steps to Eliminate Discrimination in Immigration Law*

In 2011, Senator Leahy also introduced Senate Bill 821 in an effort to “eliminate discrimination in the immigration laws,” by amending the INA to allow same-sex “permanent partners of [USCs] or [LPRs] to obtain [LPR] status in the same manner as spouses . . . .”<sup>132</sup> Although this bill could be

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<sup>131</sup> *The Violence Against Women Act: Building on Seventeen Years of Accomplishments: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 112-132, at 2 (2011) (statement of Sen. Leahy, Chairman, S. Comm. on the Judiciary), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3d9031b47812de2592c3baeba61af68b&wit\\_id=3d9031b47812de2592c3baeba61af68b-0-1](http://judiciary.senate.gov/hearings/testimony.cfm?id=3d9031b47812de2592c3baeba61af68b&wit_id=3d9031b47812de2592c3baeba61af68b-0-1).

<sup>132</sup> Uniting American Families Act of 2011, S. 821, 112th Cong. (2011), available at <http://thomas.loc.gov/cgi-bin/t2GPO/http://www.gpo.gov/fdsys/pkg/BILLS-112s821is/pdf/BILLS-112s821is.pdf>. Specifically pertinent to this note is the provision which provides that:

Section 101(a) (8 U.S.C. [§] 1101(a)) [would be] amended—

(1) in paragraph (15)(K)(ii), by inserting “or permanent partnership” after “marriage”; and

(2) by adding at the end the following:

“(52) The term ‘permanent partner’ means an individual 18 years of age or older who—

“(A) is in a committed, intimate relationship with another individual 18 years of age or older in which both individuals intend a lifelong commitment;

“(B) is financially interdependent with that other individual;

construed to allow fiancées in same-sex relationships with USCs or LPRs to adjust their status to become LPRs themselves, it would still exclude abused heterosexual K Visa holders because they would likely be able to “contract with [their partners] a marriage cognizable under [the] Act,”<sup>133</sup> even if they do not intend to marry their fiancés on account of abuse. Interestingly, although passage of Senate Bill 821 would “eliminate discrimination” by allowing same-sex partners to obtain immigration benefits via “permanent partnerships,”<sup>134</sup> it appears that an abused same-sex partner could more easily avail herself of the VAWA self-petition—even if she had been living with her partner for less than ninety days, provided the bill’s other requirements are satisfied—whereas an abused opposite-sex partner in the United States on a K Visa would be precluded from doing so unless she married her petitioning fiancé.<sup>135</sup> This result would seem contrary to VAWA’s aim to disincentivize battered partners from remaining with abusers, as well as Senate Bill 821’s promise of ending immigration law’s discrimination.

### III. INADEQUATE REMEDIES CURRENTLY AVAILABLE TO BATTERED FIANCÉE VISA HOLDERS

Although adjustment of immigration status, and thus the VAWA self-petition, is unavailable to a K Visa holder “if not married to and adjusting on the basis of the original petitioner,”<sup>136</sup> there are other potential avenues to lawful immigration status for abused immigrant fiancées.<sup>137</sup> However,

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“(C) is not married to, or in a permanent partnership with, any individual other than that other individual;

“(D) is unable to contract with that other individual a marriage cognizable under this Act; and

“(E) is not a first, second, or third degree blood relation of that other individual.[”]

*Id.* § 2.

<sup>133</sup> *See id.* (proposed definition “(D)” of the term “permanent partner”).

<sup>134</sup> *Id.* pmbl.

<sup>135</sup> *See id.* This is not to argue that S. 821 should not be passed, but only to point out the disparate application that the bill would have on abused K Visa holders as compared to those same-sex partners that would be protected by the bill.

<sup>136</sup> LAURA L. LICHTER, *Adjustment of Status, Admissibility and Waivers of Inadmissibility*, A.L.I.-A.B.A. CLE SN039, at 217, 222 (2008); *see also supra* Parts I and II.

<sup>137</sup> USCIS publishes a pamphlet designed to inform abused immigrants of their rights. U.S. CITIZENSHIP & IMMIGRATION SERVS., INFORMATION ON THE LEGAL RIGHTS AVAILABLE TO IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE IN THE UNITED STATES AND

these alternatives—which include different types of visas and defensive immigration court pleadings—provide inadequate relief for abused K Visa holders. This section will detail each type of relief and its inadequacies in turn.

### A. *Cancellation of Removal*

If Ayana chooses to remain in the United States without valid immigration status and is subsequently placed in removal proceedings, she may be eligible for non-LPR “cancellation of removal.”<sup>138</sup> However, Ayana could avail herself of this form of relief *only* after she shows that she has maintained continuous physical presence in the United States for at least ten years, has been a “person of good moral character” during that time, has not been convicted of certain criminal offenses, and that her removal from the country would result in “exceptional and extremely unusual hardship” to a spouse, parent, or child who is a USC or LPR.<sup>139</sup> It is clearly unreasonable to expect that a K

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FACTS ABOUT IMMIGRATING ON A MARRIAGE-BASED VISA FACT SHEET, *available at* <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543ff6d1a/vgnextoid=8707936ba657d210VgnVCM100000082ca60aRCRD&vgnextchannel=8a2ff6d26d17df110VgnVCM1000004718190aRCRD> (last updated Jan. 1, 2011) [hereinafter USCIS PAMPHLET]. In the section concerning the immigration rights of victims of domestic violence, USCIS lists three remedies: VAWA self-petitions, cancellation of removal, and U Visas (for victims of crime). However, the pamphlet notes that because of inadequate knowledge of immigration laws, and due to language barriers and cultural isolation, “immigrants are often afraid to report acts of domestic violence to the police or to seek other forms of assistance. Such fear causes many immigrants to remain in abusive relationships.” *Id.*; see also Grosh, *supra* note 121, at 103 (discussing the Government Accountability Office’s report on USCIS’s implementation of provisions of IMBRA, particularly USCIS’s failure to make its pamphlet available to women in languages other than English and through media other than the Internet). “More importantly, the pamphlet does not state explicitly that a victim of domestic violence will not be deported if she seeks help from the police or immigration authorities.” *Id.* Perhaps the USCIS pamphlet does not make such a stipulation because deportation *is* possible when undocumented immigrants report abuse, especially if they apply for relief—such as a U Visa—that is subsequently denied.

<sup>138</sup> 8 U.S.C. § 1229b(b) (2006). Cancellation of removal is a form of relief from removal (deportation) that allows recipients to remain in the United States and immediately grants them lawful permanent residency. See 1 IMMIGR. L. & DEF., *supra* note 18, § 8:17.

<sup>139</sup> 1 IMMIGR. L. & DEF., *supra* note 18, § 8:17. Continuous physical presence generally means that the applicant has not left the United States for more than 90 days during a single trip or 180 days in aggregated departures. *Id.* The showing of “exceptional and extremely unusual hardship” must be in relation to the alien’s spouse, parent, or child (i.e., *not* the alien herself) and must be “substantially beyond that which ordinarily would be expected to result from the alien’s deportation.” *Id.* (citing H.R. CONF. REP. NO. 828, 104th Cong. (1996)) (internal quotation marks omitted). *Cf.* 8 U.S.C. § 1229b(a) (LPR Cancellation), which provides a more lenient standard—such as maintaining LPR status for at least five years and continuous physical presence for seven years, and does not require a showing of hardship to a spouse, parent, or child—

Visa holder—who is abused within ninety days of her arrival—would surreptitiously remain in the United States for ten years, without legal status or work authorization, and in constant fear of being discovered by ICE, to simply raise this defense to deportation after removal proceedings have been initiated against her. And this form of relief is completely unavailable to K Visa holders who do not have a USC or LPR spouse, parent, or child.

Another type of defensive relief known as “VAWA cancellation”<sup>140</sup> may be available, but this could only be based on Ayana having a child in common with a USC or LPR abuser and that child having suffered abuse at the USC or LPR parent’s hands.<sup>141</sup> Since VAWA cancellation is based on abuse of the child and does not concern itself with abuse of the immigrant fiancée, Ayana would again be unable to seek lawful status unless Jason has also abused her children. Even if Ayana were eligible for VAWA cancellation, she would have to perform a juggling act if she seeks to defensively raise it in immigration court: she would have to continuously stay in the United States, hoping that removal proceedings are not initiated against her until after three years pass.<sup>142</sup> Moreover, K Visa holders who have no children in common with their abusers would be altogether barred from pleading VAWA cancellation in immigration court. Evidently, cancellation of removal is anything but a viable remedy for most K Visa holders.

### B. *U Visas for Victims of Crimes, Including Domestic Violence*

Congress created the U Visa as part of the Battered Immigrant Women Protection Act of 2000 (also known as

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for granting cancellation of removal to certain LPRs. All forms of cancellation of removal are discretionary and involve a “balancing of equities” concerning the respondent’s life. IGNATIUS & STICKNEY, *supra* note 2, § 12:67. “Positive equities” that would warrant a favorable exercise of discretion “include family ties in the United States,” “hardship” if removed, and a pattern of employment; negative factors include a lack of rehabilitation (if the respondent has a criminal record) and a lack of ties to the community. *Id.*

<sup>140</sup> See Cecilia Olavarria & Moira Fisher Preda, *VAWA Cancellation of Removal*, in *BATTERED IMMIGRANTS AND IMMIGRATION RELIEF 1* (Nov. 2004), available at [http://www.legalmomentum.org/assets/pdfs/www3\\_4\\_vawa\\_cancellation\\_of\\_removal.pdf](http://www.legalmomentum.org/assets/pdfs/www3_4_vawa_cancellation_of_removal.pdf).

<sup>141</sup> See 8 U.S.C. § 1229b(b)(2)(A)(i); 1 IMMIGR. L. & DEF., *supra* note 18, § 8:23. Cancellation of removal under VAWA has more lenient evidentiary requirements than LPR or non-LPR cancellation, such as a three-year continuous presence standard. 8 U.S.C. § 1229b(b)(2)(A)(i).

<sup>142</sup> See generally IGNATIUS & STICKNEY, *supra* note 2, § 4:57.

VAWA 2000),<sup>143</sup> in order to provide relief to immigrant victims of crime and battered immigrant women “who are not married to a citizen or permanent legal resident and who have been victims of a crime.”<sup>144</sup> As a “new and somewhat untested visa classification,”<sup>145</sup> a U Visa grants legal immigration status to “victims of certain serious crimes who have suffered substantial physical or mental harm and can document cooperation with law enforcement.”<sup>146</sup> The provision specifically enumerates “domestic violence” as a category of victimization worthy of a U Visa.<sup>147</sup>

In order to obtain a U Visa, an abused K Visa holder (or other immigrant victim of a qualifying crime) must show that she (1) “has suffered substantial physical or mental abuse as a result of having been a victim of [domestic violence, among other things],” (2) “possesses information concerning the criminal activity,” (3) “has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, . . . prosecutor, . . . [or] judge, to [USCIS], or to other . . . authorities investigating or prosecuting the criminal activity,” and (4) that “the criminal activity . . . violated the laws of the United States or occurred in the United States . . . or the territories and possessions of the United States . . . .”<sup>148</sup>

Once a U Visa is granted, it gives the recipient legal nonimmigrant status, valid for four years,<sup>149</sup> and it allows the recipient to pursue LPR status after three years.<sup>150</sup> However, the U Visa recipient’s adjustment of status is contingent upon a determination by the Secretary of Homeland Security that it “is

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<sup>143</sup> Lauren Gilbert, *Family Violence and U.S. Immigration Law: New Developments*, in 01-03 IMMIGRATION BRIEFINGS 1 & n.2 (citing Pub. L. No. 106-386, 114 Stat. 1464); see also *supra* Part II.B.3.

<sup>144</sup> Davis, *supra* note 67, at 566 (citing BIWPA, 114 Stat. 1464).

<sup>145</sup> SUZANNE B. SELTZER ET AL., N.Y. ANTI-TRAFFICKING NETWORK LEGAL SUBCOMM., IMMIGRATION RELIEF FOR CRIME VICTIMS: THE U VISA MANUAL A-iv (2010); see also Shaw, *supra* note 5, at 672 (noting that issuance of U Visas did not begin until 2007); Press Release, USCIS, USCIS Publishes New Rule for Nonimmigrant Victims of Criminal Activity (Sept. 5, 2007), available at [http://www.uscis.gov/files/pressrelease/U-visa\\_05Sept07.pdf](http://www.uscis.gov/files/pressrelease/U-visa_05Sept07.pdf).

<sup>146</sup> SELTZER ET AL., *supra* note 145, at A-iv.

<sup>147</sup> 8 U.S.C. § 1101(a)(15)(U)(i), (iii) (2006); Davis, *supra* note 67, at 566 n.89 (citing BIWPA, Pub. L. No. 106-386, 114 Stat. 1464). S. 1925, the proposed reauthorization of VAWA discussed *supra* at Part II.C, would add “stalking” to the list of qualifying crimes that would make a victim eligible for a U Visa. S. REP. NO. 112-153, at 12 (2012).

<sup>148</sup> 8 U.S.C. § 1101(a)(15)(U)(i). The third clause in particular presents a problem for many battered immigrants because law enforcement certification can be difficult to obtain and rarely given, not least because many battered immigrants are afraid to contact the police for fear of deportation. Panjwani Interview, *supra* note 38.

<sup>149</sup> SELTZER ET AL., *supra* note 145, at A-2 (citing 8 C.F.R. § 214.14(g) (2009)).

<sup>150</sup> *Id.* (citing 8 U.S.C. § 1255(m)).

justified on humanitarian grounds, to ensure family unity, or is in the public interest.”<sup>151</sup> This requirement reveals at least one drawback to the U Visa remedy for abused K Visa holders: in contrast to the VAWA self-petition, U Visa applicants must clear significant administrative hurdles, while “VAWA self-petitioners can obtain lawful permanent residency once a visa becomes available.”<sup>152</sup>

While certainly beneficial for K Visa holders and other immigrant victims of violence who are able to satisfy its requirements, another inadequacy of the U Visa for immigrant fiancées is the stringent policy of requiring law enforcement certification that the victim is, has been, or will likely be helpful in investigating or prosecuting a crime.<sup>153</sup> A U Visa application will be denied outright if the applicant lacks certification.<sup>154</sup> A VAWA self-petition, conversely, does not require law enforcement certification and may be granted based on “any credible evidence.”<sup>155</sup> Disconcerting for Ayana is that these certifications can be difficult to obtain, depending on the availability of evidence of abuse and whether or not the battered partner was brave enough to report abuse to the police.<sup>156</sup> What is more, law enforcement certification for U Visas is discretionary, whereby the agency may refuse to provide certification even if the applicant has been critically helpful in investigating or prosecuting the crime.<sup>157</sup>

Applicants who are not represented by counsel may have even greater difficulty because “some agencies may lack

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<sup>151</sup> *Id.* at A-23 (quoting 8 C.F.R. § 245.24(b)(6)) (internal quotation marks omitted).

<sup>152</sup> *Id.* at A-9.

<sup>153</sup> Notably, the VAWA self-petition does not contain a similar certification requirement.

<sup>154</sup> See DEPT OF HOMELAND SEC., OMB NO. 1615-0104, INSTRUCTIONS FOR FORM I-918, PETITION FOR U NONIMMIGRANT STATUS 4 (2010) [hereinafter INSTRUCTIONS FOR FORM I-918], available at <http://www.uscis.gov/files/form/i-918instr.pdf>; see also Tahja L. Jensen, Comment, *U Visa “Certification”: Overcoming the Local Hurdle in Response to a Federal Statute*, 45 IDAHO L. REV. 691, 698-99 (2009).

<sup>155</sup> Orloff & Kaguyutan, *supra* note 43, at 116 (internal quotation marks omitted); see also *supra* note 104 and accompanying text.

<sup>156</sup> Panjwani Interview, *supra* note 38; see also Clark, *supra* note 111, at 50 (“Obtaining certification may present a challenge in some cases where the police choose not to arrest the abuser or press charges. Further, many advocates could face challenges if their client chooses to drop the charges against her batterer or even refuses to testify in court.”).

<sup>157</sup> See Jensen, *supra* note 154, at 701 (“An agency’s decision to provide a certification is entirely discretionary; the agency is under no legal obligation to complete a Form I-918, Supplement B, for any particular alien.” (quoting INSTRUCTIONS FOR FORM I-918, *supra* note 154, Supp. B) (internal quotation marks omitted)).

understanding about U Visas and the role of certification.”<sup>158</sup> Additionally, the abusive partner will usually have to be arrested before law enforcement certification will be issued,<sup>159</sup> or the abused fiancée may need to show other evidence such as a temporary restraining order. Oftentimes, a battered immigrant woman will not be aware of these evidentiary requirements and, irrespective of her level of knowledge, will be afraid to even report domestic violence for fear that her abuser will have her deported or that the violence will increase.<sup>160</sup> Thus, the requirement of law enforcement certification is often unsatisfied because abused immigrant women are so unlikely to appeal to law enforcement for help.<sup>161</sup>

Because of these evidentiary difficulties, many lawyers and advocates suggest that other types of evidence, such as the victim’s testimony or that of community members, should be accepted.<sup>162</sup> Unfortunately, though, “immigration law has continued to focus on official reports in order to establish abuse. As a result of the subjective nature of the qualification process, no law, including the U-visa, allows women to leave abusive relationships without the fear of deportation.”<sup>163</sup> In part, this is because an out-of-status immigrant who applies for a U Visa will be notifying USCIS of her unlawful presence. Thus, if her visa application is denied, she will be removable. Additionally, because of the tenuous nature of their immigration status, K Visa holders are less likely than other battered immigrants—especially spouses, who can self-petition as a last resort—to seek assistance from law enforcement.<sup>164</sup> The short, ninety-day

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<sup>158</sup> SELTZER ET AL., *supra* note 145, at A-15.

<sup>159</sup> Panjwani Interview, *supra* note 38; *see also* Sarah M. Wood, Note, VAWA’s *Unfinished Business: The Immigrant Women Who Fall Through the Cracks*, 11 DUKE J. GENDER L. & POL’Y 141, 150 (2004) (“[I]f law enforcement decides not to press criminal charges against the batterer or decides that the battered woman’s testimony is not reliable, she will be left in the same position that she would have feared in the absence of the U visa.”).

<sup>160</sup> *See generally* USCIS PAMPHLET, *supra* note 137; *see also supra* Part II.

<sup>161</sup> For example, “[a] survey of Latina immigrants in the District of Columbia found that 21.7% listed fear of being reported to immigration as their primary reason for remaining in abusive relationships.” Davis, *supra* note 67, at 570-71; *see also supra* note 137.

<sup>162</sup> Davis, *supra* note 67, at 572.

<sup>163</sup> *Id.* (emphasis omitted) (footnote omitted). Davis argues for independent visa status for H-4 Visa holders (spouses accompanying immigrant workers to the United States) as an alternative to the U Visa because of the troubles abused spouses would face in obtaining law enforcement certification. *Id.* at 572-73 (“In contrast to the U-visa, independent visa status would not require a victim to contact the police or to prosecute the batterer in order to remain legally in the country or to work.”).

<sup>164</sup> *See, e.g.*, Anna Hanson, Legislative Note, *The U-Visa: Immigration Law’s Best Kept Secret?*, 63 ARK. L. REV. 177, 183 (2010) (“Even applying for a U-visa is a frightening proposition for an undocumented immigrant. Undocumented victims who

timeframe that immigrant fiancées have to marry their partners is already a cause for concern for fiancées who may have doubts after arrival, let alone when abuse arises within that time. A K Visa holder who knows that her immigration status depends upon her marriage to her abusive fiancé will be inclined to proceed with the marriage despite the harm. Sadly, as in the case of immigrant brides who arrive through marriage brokers, many battered K Visa holders have “everything to gain from entering into this arrangement and staying in it, no matter what the circumstances.”<sup>165</sup>

### C. *T Visas for Victims of Trafficking*

T Visas are available to victims of severe forms of trafficking.<sup>166</sup> While this visa category takes more creative framing by practitioners to ensure that their clients can satisfy its requirements, it may be applicable to abused K Visa holders who have been brought to the United States by their fiancés through force, fraud, or coercion for the purposes of “sex trafficking” or “involuntary servitude.”<sup>167</sup> While “sex trafficking” pertains specifically to using the person for purposes of a commercial sex act, the statute also permits relief for those who are trafficked for “labor or services,” including “involuntary servitude,” and it defines coercion as: “threats of serious harm to or physical restraint against any person; any scheme . . . intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of the legal process.”<sup>168</sup> Domestic violence can arguably be

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identify themselves to immigration authorities but do not receive U-visas are in immediate danger of deportation.”); *see also supra* Part I.

<sup>165</sup> Grosh, *supra* note 121, at 105.

<sup>166</sup> 8 C.F.R. § 214.11(a) (2009). The T Visa was established by the Trafficking Victims Protection Act of 2000 (TVPA). SUZANNE B. SELTZER ET AL., N.Y. ANTI-TRAFFICKING NETWORK LEGAL SUBCOMM., IDENTIFICATION AND LEGAL ADVOCACY FOR TRAFFICKING SURVIVORS A-iv (3d ed. 2009). Eligibility requires that a T Visa applicant show that she:

[1] is or has been a victim of a severe form of trafficking in person; [2] is physically present in the United States due to trafficking; [3] has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking in persons (if they are over 18); and [4] would suffer extreme hardship involving unusual and severe harm if removed from the United States.

*Id.* at A-11.

<sup>167</sup> *See* 8 C.F.R. § 214.11(a); SELTZER ET AL., *supra* note 166, at A-2, A-12.

<sup>168</sup> SELTZER ET AL., *supra* note 166, at A-12 to A-13.

characterized in this way. As such, it may be possible for an experienced attorney to successfully argue that an abused K Visa holder like Ayana was trafficked, but this would require satisfying formidable evidentiary burdens like those confronting U Visa applicants.<sup>169</sup>

Another important consideration regarding the T Visa application process, and indeed for U Visas as well, is the applicant's immigration status. If a battered K Visa holder has left her abuser before entering into a marriage, and the ninety-day period has lapsed, she will be out of status.<sup>170</sup> At that point, initiating an affirmative visa application—such as a T or U Visa—can put her in danger of having removal proceedings initiated.<sup>171</sup> For these reasons, a T Visa is an impracticable remedy for most K Visa holders who are abused by their fiancés, at least after the ninety-day marriage window has closed.

#### D. *Asylum*

Asylum is available in the United States to those who satisfy the statutory definition of “refugee,” which requires, among other things, that an asylum-seeker establish “a well-founded fear of persecution [if returned to her country of origin] on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>172</sup> An abused K

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<sup>169</sup> See *id.* at A-13 to A-14 (“In order to establish that [a] client is a victim of a severe form of trafficking in persons, he or she must either submit an *endorsement from a law enforcement agency . . . or sufficient credible secondary evidence*, describing efforts to cooperate with law enforcement, as well as the nature and scope of any force, fraud, or coercion used against the victim. This may include, *inter alia*, evidence that *the USCIS has granted the alien’s continued presence* in the United States as a victim of trafficking.” (footnotes omitted)).

<sup>170</sup> See *supra* note 39.

<sup>171</sup> *Id.* at A-4 (“The validity of a T applicant’s immigration status is important because if an applicant is not in valid status, and he or she is being brought to the attention of USCIS or ICE, the applicant could be issued a Notice to Appear (NTA), and removal (deportation) proceedings may be commenced.”).

<sup>172</sup> 8 U.S.C.A. § 1101(a)(42) (West 2011). Withholding of removal is a similar form of relief based on the same five grounds of persecution, though it has a higher evidentiary standard—in that an applicant must show that persecution is “more likely than not” to occur, rather than the “reasonable possibility” standard for asylum which may be satisfied by showing a ten percent chance of persecution. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 421, 440 (1987); see also 3A AM. JUR. 2D *Aliens and Citizens* § 1140 (2012). Withholding also comes with fewer benefits; it only requires that an alien not be *refouled* (returned) to the country where she would be persecuted. See ANNA MARIE GALLAGHER ET AL., 2 IMMIGRATION LAW SERVICE 2D § 10:231 (2012). An alien who is granted withholding may be removed to a country where she would not be persecuted, and she may not apply for adjustment of status. *Id.* However, a withholding of removal grantee *can* obtain work authorization. *Id.* The Convention

Visa holder might venture applying for asylum on the grounds that she would be persecuted and stigmatized on account of her membership in a particular social group, but this would be an arduous and uncertain path to legal immigration status because the law is unsettled with respect to how domestic violence victims can fit into this nebulous category.<sup>173</sup> Unfortunately, although various social groups encompassing domestic violence victims have been proposed, “a particular social group that is viable for all battered women seeking asylum has not emerged.”<sup>174</sup> Difficulty arises both in terms of establishing the requisite “nexus” (i.e., that the persecution was “on account of” membership in the protected group) as well as attempting to define the social group.

Interestingly, the European Court of Human Rights (ECtHR) has suggested that women in countries like Afghanistan might face persecution and qualify as refugees because of their status as “women whose engagements to be married have been broken. Unless they marry, which is very difficult given the social stigma associated with these women, social rejection and discrimination continue to be the norm.”<sup>175</sup> This indicates that

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Against Torture (CAT) provides a last-resort form of relief—that an alien cannot be *refouled* if she would “more likely than not” face *torture* by the government or with government acquiescence, upon returning to the country of persecution. *See generally* 8 C.F.R. § 1208.18; 3A C.J.S. *Aliens* § 1392 (2012).

<sup>173</sup> *See, e.g.*, GALLAGHER ET AL., *supra* note 172, § 10:152; 1 IMMIGR. L. & DEF. *supra* note 18, § 13:40. The case of *Matter of R-A*, 24 I. & N. Dec. 629, 2008 WL 4419696 (B.I.A. Sept. 25, 2008), for example, involves an epic legal battle that finally ended in a grant of asylum for a Guatemalan woman who suffered severe domestic abuse by her husband. GALLAGHER ET AL., *supra* note 172, § 10:152; *After 14 Years, Rodi Alvarado Is Finally Granted Asylum*, THOMSON REUTERS, Dec. 21, 2009, *available at* 86 No. 48 INTERPRETER RELEASES 3074. The Board of Immigration Appeals (BIA) articulated its general standard for what constitutes a particular social group in *Matter of Acosta*: Members of the group must “share a common, immutable characteristic” that is “one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.” *Matter of Acosta*, 19 I. & N. Dec. 211, 233, 1985 WL 56042 (B.I.A. Mar. 1, 1985). After *Matter of R-A*, DHS proposed its own standard for how domestic violence victims can constitute a particular social group and be eligible for asylum. Brief of Dep’t of Homeland Sec. at 4 (B.I.A. Apr. 13, 2009), *available at* <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf>. However, this standard has not been accepted by the BIA, and while DHS may accept the argument that a domestic violence victim qualifies as a member of a particular social group, it remains unclear when the argument would be successful in Immigration Court or on appeal before the BIA.

<sup>174</sup> Marisa Silenzi Cianciarulo & Claudia David, *Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women*, 59 AM. U. L. REV. 337, 363 (2009). Cianciarulo and David discuss how violence escalates after leaving one’s abuser and argue for the recognition of a new social group: “women who have left severely abusive relationships.” *Id.* at 343 (internal quotation marks omitted).

<sup>175</sup> *N. v. Sweden*, App. no. 23505/09, 15, HUDOC (July 20, 2010), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99992> (Eur. Ct. H.R.).

there is hope for abused immigrant fiancées who bring cases before the ECtHR, but it is less clear that a U.S. Immigration Court would accept the argument that a woman would face persecution on account of her failed engagement.<sup>176</sup>

Despite the ostensible availability of this form of relief, however, the asylum process is fraught with difficulty because of its onerous standards, statutory bars, discretionary nature, and the unresolved status of how victims of domestic violence can qualify as a particular social group. If Ayana can demonstrate a well-founded fear of persecution based on one of the aforementioned grounds, she would be eligible for asylum and, if granted, would not require another form of relief to attain legal status.<sup>177</sup> However, a woman who enters the United States on a K Visa has already made evidentiary showings of her intent to immigrate and her good faith intent to marry the USC who petitioned for her K Visa, so applying for asylum would seem to represent a step in the wrong direction. Indeed, she was very close to maintaining legal status; the only hurdle that she failed to surmount was marrying her abuser.

Moreover, an abused K Visa holder deserves relief on a basis similar to that of a VAWA self-petitioner—the fact that she has been abused by her USC petitioning fiancé—irrespective of whether or not she has a legitimate fear of returning home. While other asylum seekers may be deserving of protection based on their fears of persecution, Ayana deserves protection because she suffered abuse at the hands of a citizen of the United States who petitioned for her admission in the first instance. Furthermore, affirmatively applying for asylum would put an out-of-status K Visa holder in the same predicament she would be in when applying for a U or T Visa: she would be alerting ICE and USCIS to her undocumented immigration status, thereby subjecting herself to potential removal from the United States. And because of the complex nature of asylum and removal

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(internal quotation marks omitted) (finding that deportation of an Afghani woman, who divorced her husband and remarried a Swedish man, would violate Article 3 of the European Convention on Human Rights because she would be subjected “to torture or to inhuman or degrading treatment or punishment”).

<sup>176</sup> See, e.g., *Vellani v. U.S. Att’y Gen.*, 296 F. App’x 870 (11th Cir. 2008) (upholding denial of asylum, withholding, and CAT relief for Pakistani woman whose fiancé refused to marry her because, although “honor killings” were prevalent in Pakistan, applicant failed to show that she could not avoid persecution by reasonably relocating to another part of the country).

<sup>177</sup> This is because an asylum grantee can adjust her immigration status to permanent residency after one year of physical presence as an asylum recipient in the United States. 8 U.S.C.A. § 1159 (West 2011).

proceedings, she would be at a severe disadvantage if she could not obtain legal counsel. Therefore, as with the potential forms of relief discussed above, asylum and its corollaries (withholding of removal and CAT protection) are all but unattainable for abused immigrant fiancées.

#### IV. PROPOSED SOLUTIONS TO REMOVE ABUSED IMMIGRANT FIANCÉES' INCENTIVE TO REMAIN WITH THEIR ABUSERS

Battered K Visa holders should not be coerced, by the law or by their abusers, to proceed with a marriage to an abusive partner, just as those who have already married their USC petitioner fiancés should not be compelled to remain in abusive marriages for immigration benefits. Nevertheless, Congress has chosen to provide relief only to this latter category of victims via the self-petition. In 2002, then-Senator Joseph Biden remarked that since the passage of VAWA, more than 12,000 applications had been approved for “battered immigrant women escaping abuse and establishing their own residency here . . . [and] there has been a 41 percent decrease in the rate of intimate partner victimization of women. . . . This is not the time to scale back our efforts.”<sup>178</sup> In order to remove the perverse incentive that compels some battered K Visa holders to remain with their abusers, I offer some amendments to U.S. immigration law that would allow them to achieve valid immigration status while freeing them from abusive relationships.

##### A. *Amend the INA to Allow Abused K Visa Holders to Self-Petition for Adjustment of Immigration Status*

*Dabaghian v. Civiletti*<sup>179</sup> helps to illustrate why a K Visa holder who does not marry her abusive fiancé within the ninety-day timeframe—and thus has not established the basis for adjusting her immigration status—should nonetheless be entitled to immigration relief. In that case, the Ninth Circuit Court of Appeals “set forth the federal rule regarding the validity of a marriage for purposes of conferring an immigration benefit: ‘If a marriage is not sham or fraudulent from its inception, it is valid for the purposes of determining eligibility’

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<sup>178</sup> *Leading the Fight: The Violence Against Women Office: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 107th Cong. (2002) (statement of Sen. Joseph R. Biden, Jr.).

<sup>179</sup> 607 F.2d 868 (9th Cir. 1979).

for benefits under the Immigration and Nationality Act.”<sup>180</sup> Since a K Visa recipient has already adduced evidence—which the U.S. government has accepted—establishing her intent to marry her USC fiancé and thus showing that the *intended* marriage was “not a sham or fraudulent from its inception,” she should not be precluded from attaining the immigration benefits that would have been available to her if her partner were not abusive and the marriage went forward as planned.

The dynamics ultimately dissuading Ayana from proceeding with the marriage are the control and abuse by her fiancé, who wooed her into leaving her home and migrating to the United States. In such cases, it is not the immigrant fiancée who is simply choosing not to marry the abusive fiancé, but the abuser who is making the intended marriage untenable. Significantly, in the VAWA self-petition, there already exists an exception to the requirement of a *bona fide* marriage whereby an immigrant fiancée who enters into a bigamous marriage unknowingly—that is, she held a good faith belief that her marriage was lawful, but it turned out to be an illegitimate marriage because of the USC or LPR’s already existing marriage to another—would still be eligible to self-petition even though the marriage was technically unlawful.<sup>181</sup>

In the hypothetical scenario outlined above,<sup>182</sup> Ayana fully intended to enter into a *bona fide* marriage when she left Ethiopia. She demonstrated this intent to the satisfaction of the U.S. government, which issued her a K Visa under the applicable immigration laws. Yet after her arrival to the United States, the abuse perpetrated upon her by her USC fiancé drove her to flee and caused her to refrain from marrying her abuser. Therefore, since it was her abuser’s actions—and not her own—that drove her from the relationship where she previously intended to conclude a *bona fide* marriage, the law ought to carve out a narrow exception for abused K Visa holders similar to the exception for VAWA self-petitioners whose marriages are invalid due to the bigamy of their abusers.

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<sup>180</sup> AUSTIN T. FRAGOMEN, JR. ET AL., 1 IMMIGRATION LAW & BUSINESS § 3:20 (2011) (quoting *Dabaghian*, 607 F.2d at 869).

<sup>181</sup> 8 U.S.C.A § 1154(a)(1)(A)(iii)(II) (West 2012) (pertaining to immigrants who marry bigamous USCs); *id.* § 1154(a)(1)(B)(ii)(II) (pertaining to immigrants who marry bigamous LPRs); *see also supra* Part II.B.3.

<sup>182</sup> *See supra* notes 1-23 and accompanying text.

Therefore, I propose that the VAWA self-petition provision, located at 8 U.S.C. § 1154(a)(1)(A)(iii)(II), be amended as follows<sup>183</sup>:

For purposes of subclause (I), an alien described in this subclause is an alien--

(aa) (AA) who is the spouse of a citizen of the United States;

(BB) who believed that he or she had married a citizen of the United States and with whom a marriage ceremony was actually performed and who otherwise meets any applicable requirements under this chapter to establish the existence of and bona fides of a marriage, but whose marriage is not legitimate solely because of the bigamy of such citizen of the United States;

*[(CC) who was admitted to the United States pursuant to a K-1 Visa as the fiancé(e) of a citizen of the United States but who failed to enter into a marriage because of that citizen's abuse; or]*

[DD] who was a bona fide spouse of a United States citizen within the past 2 years and--

(aaa) whose spouse died within the past 2 years;

(bbb) whose spouse lost or renounced citizenship status within the past 2 years related to an incident of domestic violence; or

(ccc) who demonstrates a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse;

(bb) who is a person of good moral character;

(cc) who is eligible to be classified as an immediate relative under section 1151(b)(2)(A)(i) of this title or who would have been so classified but for the bigamy of the citizen of the United States that the alien intended to marry; and

(dd) who has resided with the alien's spouse or intended spouse.

This note does not argue that the INA should be amended to allow *all* K Visa holders to adjust their status irrespective of the basis of marriage, but only that it should be narrowly amended to permit those K Visa holders who have been abused within the ninety-day statutory period to file self-petitions and subsequently adjust their status without being required to marry their abusive partners. Although this

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<sup>183</sup> The italicized language in brackets represents the proposed amendments. Related sections of the United States Code and the Code of Federal Regulations would likely need to be amended as well.

amendment would constitute a considerable leap in policy by allowing battered K Visa holders to self-petition and ultimately adjust their immigration status to that of lawful permanent resident, it is warranted because, as previously noted, the abuser is the cause of the failed engagement. An abused K Visa holder should not be motivated to proceed with the marriage to her abusive fiancé in order to be eligible to file a VAWA self-petition.

Indeed, incentivizing abused fiancées to complete their marriages is utterly antithetical to the intent of the self-petition and related provisions, which were enacted to enable abused immigrants to leave their abusers without fearing immigration consequences. Although Congress considered exempting battered K Visa holders from the exclusion on VAWA self-petitions in 1999 and opted not to pass that version of the bill,<sup>184</sup> this amendment deserves to be reconsidered. As the Ninth Circuit Court of Appeals noted in *Hernandez v. Ashcroft*, “[t]he notion that Congress would require women to remain with their batterers in order to be eligible for the forms of relief established in VAWA is flatly contrary to Congress’s articulated purpose in enacting section 244(a)(3).”<sup>185</sup>

Opponents of the 1999 provision that would have allowed abused K Visa holders to self-petition argued that “[a] person who fails to enter into marriage with the U.S. citizen . . . should be treated just like any other non-immigrant when the rationale for temporary admission no longer applies . . . .”<sup>186</sup> However, this argument fails to consider the fact that abuse by the USC petitioner is likely the precise reason an abused K Visa holder in Ayana’s situation would not enter into the intended marriage. She has already proven her intent to enter into the marriage to the satisfaction of the U.S. government,<sup>187</sup> and she has relied on the U.S. government’s

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<sup>184</sup> See *H.R. 3083 Hearing*, *supra* note 19, at 89 (prepared statement of Dan Stein, Exec. Dir., Fed’n for Am. Immigration Reform) [hereinafter Stein Statement] (noting that the ninety-day requirement for fiancée visas was instituted by the Immigration Marriage Fraud Act to prevent marriage fraud, and would thus be undermined by the amendment).

<sup>185</sup> 345 F.3d 824, 841 (9th Cir. 2003).

<sup>186</sup> *H.R. 3083 Hearing*, *supra* note 19, at 41 (prepared statement of Barbara Strack, Acting Exec. Assoc. Comm’r for Policy & Planning, Immigration & Naturalization Serv.).

<sup>187</sup> See, e.g., U.S. DEPT OF STATE, FOREIGN AFFAIRS MANUAL VOL. 9, DOCUMENTARY REQUIREMENTS 9 FAM 41.81 N4, available at <http://www.state.gov/documents/organization/87391.pdf>; IGNATIUS & STICKNEY, *supra* note 2, § 14:6.

criminal background check to ensure that her fiancé is a safe choice. Drawing the line between the married and the affianced is not warranted when the USC petitioner's abuse is what caused the planned marriage to collapse. If Ayana could satisfactorily demonstrate the existence of abuse through "any credible evidence"—the same standard that applies to VAWA self-petitions—the law should provide her with sufficient protections, notwithstanding her failure to proceed with the marriage.

Furthermore, concerns about marriage fraud should not motivate Congress to withhold reasonable protections from battered K Visa holders. Some would preclude Ayana from self-petitioning because, as one opponent argued, it would "undermine[] [the] anti-fraud measure" (i.e., the ninety-day marriage requirement) which "was adopted to prevent the fiance visa from being used for fraudulent entry."<sup>188</sup> Yet the anti-fraud argument overlooks a crucial fact: IMFA was based on flawed research from the start. IMFA was predicated upon an estimate that "as much as 30 percent . . . of the spouse relationships *may* be fraudulent."<sup>189</sup> However, the Immigration and Naturalization Service (INS) itself "conceded the invalidity of the survey" in subsequent litigation, because the survey was based on data from only three cities and it only concerned cases where officials merely *suspected* marriage fraud, rather than cases of actual fraud.<sup>190</sup>

While legislators may express valid concerns about fraudulent circumvention of immigration laws, it has not been shown that abused K Visa holders would exploit their positions as nonimmigrants. Moreover, it is unreasonable to presume that K Visa holders would fabricate abuse; rather, it would be more appropriate to place the burden on the government to prove fraud by a K Visa holder who has already undergone the visa application process.<sup>191</sup>

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<sup>188</sup> Stein Statement, *supra* note 184, at 89.

<sup>189</sup> Jones, *supra* note 20, at 699 (emphasis added) (quoting *Immigration Marriage Fraud: Hearings Before the Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary*, 99th Cong. 35 (1985) (statement of INS Comm'r Alan C. Nelson)) (internal quotation marks omitted). At the same hearing, American Immigration Lawyers Association president Jules Coven responded that he "would be extremely surprised to learn, if it could be shown statistically, that more than one or two percent of the 'green cards' issued annually on the basis of marriage involved fraud." *Id.*

<sup>190</sup> *Id.* (citing *Manwani v. INS*, 736 F. Supp. 1367 (W.D.N.C. 1990)); *see also Manwani*, 736 F. Supp. at 1373 (noting that "[t]he INS conceded and the evidence shows that the . . . survey is not a statistically valid study of the suspected or actual incidence of marriage fraud.").

<sup>191</sup> During the application process, the applicant must submit to an interview by consular officials and swear to or affirm her intent to enter into the planned

Indeed, reasonable means already exist for preventing fraudulent manipulation of this proposed amendment. For example, immigration law already contains provisions denying adjustment of status petitions for marriages “determined by the Attorney General to have been entered into for the purpose of evading the immigration laws . . . .”<sup>192</sup> In order to prevent fraud by K Visa holders who are not actually abused, Congress should simply add a clause addressing this specific concern; if it has been determined that a visa holder acquired the K Visa merely to evade the immigration laws, then she is ineligible to obtain the benefits of a self-petition. This can be enforced through the same process by which fraud is investigated in the K Visa application process: by interviewing the applicant.<sup>193</sup>

There are already measures to prevent fraudulent accusations of abuse in the self-petition process as well: “[The Department of Homeland Security] can rely on virtually any evidence that comes to its attention suggesting fraud. For example . . . [it can] investigate information provided by an alleged abuser and rely upon it if it can be corroborated.”<sup>194</sup> Since a K Visa holder has already established, to the satisfaction of the U.S. government, her good faith intent to marry her USC petitioning fiancé within ninety days of her arrival, adequate “safeguards against fraud” already exist.<sup>195</sup>

*B. Amend the U Visa Requirements to Provide a Reasonable Exception for Abused K Visa Holders*

Alternatively, the U Visa requirements should be relaxed for abused K Visa holders, specifically by removing the law enforcement certification requirement. This change would allow

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marriage within ninety days of arrival in the United States. *See supra* Part I for a discussion of the K Visa application process.

<sup>192</sup> 8 U.S.C. § 1154(c) (2006).

<sup>193</sup> In-person interviews were set forth in an amendment by Senator Chuck Grassley (R-Iowa) as a way to prevent fraud in VAWA self-petitions. *See* S. REP. NO. 112-153, at 45-46 (2012). *Cf.* IGNATIUS & STICKNEY, *supra* note 2, § 5:44 (describing interviews for married couples who are petitioning via form I-751 to remove the conditions on residence for the immigrant spouse).

<sup>194</sup> S. REP. NO. 112-153, at 12 n.31. This statement responds to “claims raised by a hearing witness and another U.S. citizen who claimed that she had been a victim of fraud when her non-U.S. citizen [male] spouse filed a VAWA self-petition.” *Id.*

<sup>195</sup> *See* Wood, *supra* note 159, at 155 (arguing that illegal immigration will not increase if protections are given to all battered immigrants regardless of marital status). “It is absurd to imagine that women will consciously enter abusive relationships in order to gain legal status or . . . fabricate evidence of abuse sufficiently credible to convince the [government]. The [immigration authorities] ha[ve] already erected numerous safeguards against fraud . . . .” *Id.*

the applicant to obtain the benefits of the U Visa, which include lawful immigration status for four years and the ability to file for adjustment of status after three years.<sup>196</sup> Moreover, the amendment could be achieved by adding a narrow exception for K Visa holders to allow them to obtain U Visas without meeting the same evidentiary requirements as other undocumented immigrants. This exception is justified because, as previously noted, a K Visa holder has already adequately evidenced her intent to marry her fiancé and complied with the law, at least until the point where abuse began. The reason for noncompliance—e.g., allowing the ninety-day period to lapse without proceeding with the marriage—is due to her fiancé’s abuse rather than a voluntary decision to violate the statute. Further illustrating the need for this exception is the fact that, as discussed above at Parts II and III.B, “abusers of undocumented immigrants often exploit . . . victims’ immigration status, leaving the victim afraid to report the abuse to law enforcement and fearful of assisting with the investigation and prosecution of associated crimes.”<sup>197</sup>

Therefore, I propose that the U Visa petitioning requirements, located within 8 U.S.C. § 1184(p)(1), be amended as follows<sup>198</sup>:

(1) Petitioning procedures for section 1101(a)(15)(U) visas

The petition filed by an alien under section 1101(a)(15)(U)(i) of this title shall contain a certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating criminal activity described in section 1101(a)(15)(U)(iii) of this title. This certification may also be provided by an official of the Service whose ability to provide such certification is not limited to information concerning immigration violations. This certification shall state that the alien “has been helpful, is being helpful, or is likely to be helpful” in the investigation or prosecution of criminal activity described in section 1101(a)(15)(U)(iii) of this title.

*[Exception: in the case of an alien who was admitted to the United States pursuant to a K-1 Visa as the fiancé(e) of a citizen of the United States but who failed to enter into a marriage because of that citizen’s abuse, certification shall not be required and the alien shall only be required to demonstrate any credible evidence of abuse, including but not limited to*

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<sup>196</sup> See *supra* Part III.B.

<sup>197</sup> S. REP. NO. 112-153, at 12. Among the proposed amendments explained in the Senate report are an expansion of the annual cap on U Visas and adding “stalking” to the list of qualifying crimes. *Id.*

<sup>198</sup> The italicized language in brackets represents the proposed amendments. Related sections of the United States Code and the Code of Federal Regulations would likely need to be amended as well.

*photographs, emergency room reports, police reports, affidavits, and victim and witness testimony.]*

This amendment to the U Visa requirements would enable an abused K Visa holder, such as Ayana, to obtain immigration relief by demonstrating abuse, rather than by requiring her to affirmatively report abuse to police and seek law enforcement certification—something a typical battered immigrant woman is unlikely to do and that could put her at risk of removal if she has already overstayed the K Visa without marrying her abuser.<sup>199</sup> Moreover, the law should be more concerned with empowering abused women to escape from relationships where domestic violence occurs, rather than focusing on the prosecution of abusers, to the extent those objectives are at odds with one another. Importantly, the VAWA self-petition does not require applicants to be helpful in investigating or prosecuting domestic violence; K Visa holders should not be made to do so simply because they would prefer not to marry their abusive fiancés. Accordingly, the proposed amendment is a reasonable alternative for abused K Visa holders, who would have a more viable incentive to leave their abusive USC fiancés.

#### CONCLUSION

As Congress considers reauthorization of the Violence Against Women Act, it should reflect upon the difficulties affecting abused immigrant fiancées like Ayana who enter the United States on K Visas and experience abuse within the first ninety days of their arrival. Congress should amend the Immigration and Nationality Act to permit women who enter the United States on valid K Visas to file VAWA self-petitions if they subsequently find themselves in abusive relationships with their fiancés, even if they do not ultimately marry their intended spouses. In the alternative, the U Visa provisions should be amended to provide abused K Visa recipients with an easier avenue to legitimate immigration status, without requiring them to report their abuse to the police or obtain law enforcement certification. Reporting abuse should be encouraged, but not required because of abused immigrants' understandable fears of deportation.

Battered K Visa holders like Ayana find themselves trapped in an intolerable position, where they must either remain

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<sup>199</sup> See *supra* Part III.B. Of course, applying for a U Visa could also put her at risk of removal—in the event her application is denied—since it would notify the authorities of her unlawful presence (assuming her K Visa has expired).

with their abusers to secure the immigration benefits associated with marriage, return to their home countries, reside in the United States illegally, or pursue more challenging avenues to legal immigration status. Unjustly, this puts more power in the hands of an abusive USC petitioner, who may still threaten his fiancée with deportation. It also unfairly forces the battered woman to choose between several untenable options, all because of the abuse that has been perpetrated upon her by a citizen of the United States. Obviously, these already dire circumstances are even worse for a battered K Visa holder who has children.

Ayana relied on the promises of her fiancé to treat her well and care for her and her children. She endured a long administrative process and demonstrated satisfactory evidence of her intent to enter into a marriage within ninety days of her arrival in the United States. Ayana and her children envisioned a better life. Instead, when she arrived in New York, she was beaten, treated cruelly, and left with nothing but difficult choices. This result is antithetical to VAWA's promise of enabling battered women to escape from their abusers, and for these reasons, the INA should be amended upon VAWA's reauthorization to allow for abused K Visa holders to attain legal immigration status without marrying their batterers. Ultimately, if abuse arises within the first ninety days of an immigrant fiancée's admission into the United States, immigration policy should not create the perverse incentive for her to proceed with her marriage to an abusive fiancé. In the balance between preventing immigration fraud and protecting battered immigrant women, the scales should not tip so far that the vulnerable fall to the wayside.

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