

Basic Immigration Law and Vocabulary¹

Understanding how the immigration laws work will help you assist noncitizens seeking safety and security from abusive family members. This section will provide basic information on immigration law and information on immigration laws that specially benefit noncitizens who suffer domestic violence. It will suggest ways the judiciary can help victims overcome barriers, as well as fears that inhibit taking the steps necessary to gain safety.

Overview of the Immigration System and Laws

The immigration system, its laws, and its regulations are complex and change frequently. What was true today may not be true tomorrow. To ensure you have current information, develop a working relationship with a local immigration expert who can answer your questions about how to help noncitizens you may encounter. Alternatively, the National Immigration Project is available to provide such advice.

To avoid unwittingly jeopardizing those you wish to help, you should be familiar with basic immigration rules.

Basic Rules

1. *Refer noncitizens to immigration law experts, not to U.S. Citizenship and Immigration Services (USCIS, formerly INS).*

A noncitizen should always speak with an immigration law expert before speaking to immigration officials, either by telephone or in person. Noncitizens who are victims of domestic violence should speak with an expert in both immigration law and domestic violence. If noncitizens go to CIS by themselves, CIS may arrest them and deport them before they have the chance to talk to a lawyer. This is because most CIS officers view “enforcement,” meaning deporting people, as their primary job. Many CIS officers do not believe that explaining immigration options is part of their job, and most will readily admit this.

2. *Notify noncitizens of their rights in encounters with USCIS, Border Patrol, or ICE*

In 1996, Congress passed a law making it very easy for immigration authorities to swiftly deport (now called “remove”) people from the U.S. This applies even to people who have the right to be in the U.S. Noncitizens should know they have the following rights, and you can help them by informing them of these rights:

- * the right to speak to an attorney before answering any questions or signing any

¹Excerpt from “Barriers Faced by Noncitizen Survivors of Domestic Violence,” from the website of the National Immigration Project, www.nationalimmigrationproject.org; edited and updated by Valerie Hink, 4/30/2004.

documents (they should NEVER sign documents without first speaking to an immigration attorney);

- * the right to a hearing with an Immigration Judge;
- * the right to have an attorney represent them at that hearing and in any interview with USCIS or ICE (but unlike in criminal proceedings, the noncitizen has no right to an attorney paid for by the U.S. government; the noncitizen must obtain free legal services or pay for a private attorney); and
- * the right to request release from detention, by paying a bond if necessary.

The noncitizen's immigration status is irrelevant. All noncitizens have these rights. **Noncitizens must assert these rights, however. If they do not assert these rights they can be deported without seeing either an attorney or a judge.** Leaving the U.S. in this way may have serious consequences for the noncitizen's ability to later enter or to gain legal immigration status in the U.S. in the future.

3. *Advise noncitizens to talk to an immigration expert before traveling outside the U.S.*

Anyone who is not a U.S. citizen may be barred from coming back into the U.S. if they fall into certain categories of people barred from entering. This includes some lawful permanent residents (people with "green cards") and applicants for lawful permanent residence who go abroad. Some noncitizens who have been in the U.S. without INS permission may be permanently barred from re-entering or from gaining legal status in the U.S. if they leave. In addition, some noncitizens who leave the U.S. and come back in with INS permission ("advance parole") may be swiftly removed from the U.S. if they end up in immigration proceedings.

4. *Tell noncitizens with questions about their immigration status to talk to an immigration attorney or advocate with expertise in domestic violence.*

These materials give you some basic information about immigration status and domestic violence, but you should only use this information to help noncitizens understand their options. Do not tell noncitizens you know what their immigration status is or how they can change that status. The U.S. immigration system is confusing and complicated, and the risks of bad advice are too great.

Unfortunately, many attorneys do not know how domestic violence affects eligibility for immigration status; so do not assume that just because someone is an attorney, or even an immigration attorney, he or she will know how to help battered immigrants. Many attorneys lack sensitivity to noncitizens that have suffered abuse, and even more are unfamiliar with the possible options available to battered noncitizens. After reading these materials, you may know more than some immigration advocates about domestic violence and immigration. Please share these materials with immigration and domestic violence counselors you consult.

Learning the System: Basic Immigration Concepts

1. Noncitizen

“Noncitizen” means any person in the U.S. who is not a U.S. citizen, whether the person has legal immigration documents or not.

2. Undocumented

Generally, the undocumented are noncitizens who either entered the U.S. without INS permission, or whose legal immigration documents have expired since they entered. These people are often called “illegal aliens,” although simply being in the U.S. without documents is not a crime.

3. Visa

A visa is the document the U.S. gives to a noncitizen to enter the U.S. A person may get a visa from USCIS or from a U.S. consular official in another country. Visas for people who are in the U.S. temporarily are called nonimmigrant visas. Visas for people who plan to stay in the U.S. are immigrant visas. Most people with immigrant visas will eventually get a card that identifies their immigration status.

4. U.S. Citizenship and Immigration Services (USCIS) (formerly part of INS)

In March 2003, the agency formerly known as the Immigration and Naturalization Service (INS), which was part of the U.S. Department of Justice, was reorganized into three new agencies in the new Department of Homeland Security. The new benefits-granting agency of the former INS is called U.S. Citizenship and Immigration Services (USCIS). The USCIS has offices all over the country, which process immigration applications of all kinds, including applications for citizenship, lawful permanent residence, immigrant visas, extensions of visas, and many more. USCIS has a very limited role in the enforcement of immigration laws.

Most enforcement functions of the former INS have been assigned to other two agencies: (1) Immigration and Customs Enforcement (ICE), which includes the Border Patrol, Customs Agents, and the immigration Trial Attorneys (now known as Assistant Chief Counsel) who represent the U.S. government in Immigration Court; and (2) Customs and Border Protection (CBP). These new agencies enforce U.S. immigration and customs laws, and they have the power to “remove “ (formerly called “exclude” or “deport”) noncitizens from the U.S. ICE and CBP agents have police-like power to detain, search, question, and arrest people they suspect of having violated the immigration laws. Whatever the agents find out about a noncitizen may be used to remove the noncitizen, in some cases without a hearing.

5. Consular Officers

Consular officers at U.S. embassies abroad have the authority to grant and deny requests for immigrant and nonimmigrant visas. They are part of the U.S. Department of State. Consular Officers have an enormous amount of discretion in making their decisions and no court in the U.S. may review their decisions, except in very unusual circumstances.

6. Removal (Formerly Called Exclusion and Deportation)

Removal is the process by which ICE can stop noncitizens from entering the U.S. or require them to leave the U.S. ICE may prevent noncitizens from entering the U.S. if they find they are “inadmissible,” as defined by the immigration statute. USCIS also applies the rules on inadmissibility to noncitizens who seek lawful permanent residence, and noncitizens who are found inadmissible may be unable to receive lawful permanent resident status.

ICE also may remove people it finds in the U.S. Under the 1996 immigration law, undocumented noncitizens inside the U.S. may now be removed for being “inadmissible” or “deportable.” The rules on deportability are somewhat different than the rules on inadmissibility.

7. Expedited Removal

Starting in April 1997, low-level CIS officers were given authority to remove many noncitizens encountered at the border or at ports of entry without a hearing before an immigration judge. This process is called “expedited removal.” The process has come under severe criticism for wrongfully removing people eligible to enter the U.S., especially asylum seekers, who are people fleeing persecution in their home countries.

8. Immigration Proceedings

Noncitizens inside the U.S. generally have the right to an immigration hearing before being removed. It is important for noncitizens arrested by the Border Patrol or by ICE to assert their right to a hearing, because immigration proceedings are like trials. An immigration judge presides over the hearing, a government attorney represents the ICE, and the noncitizen has the right to a lawyer, although not at the government’s expense. Some rules about evidence and procedure apply in immigration proceedings. The Board of Immigration Appeals (BIA) reviews all appeals from immigration judge decisions. The federal courts have some power to review BIA decisions.

Kinds of Immigration Status

Although Congress created special routes to immigration status for certain battered noncitizens in the Violence Against Women Act (VAWA), there may be other ways noncitizens you encounter may qualify for legal immigration status in the U.S. In addition, some may already have status and not realize it. A primary purpose of this section is to demonstrate that the immigration system is complicated and that people not well versed and up-to-date in

immigration law are not qualified to determine who is documented or undocumented, or who may or may not be eligible to apply for a particular type of immigration status or benefit. The following list is far from exhaustive. This information will provide you with some background, but always remember to refer noncitizens to immigration law experts for information and advice on their personal immigration status and options.

1. U.S. Citizenship

Anyone born in the U.S., its territories and certain possessions (Puerto Rico, Guam and the Virgin Islands, for instance) are citizens. This includes children born in the U.S. to undocumented parents. Children of U.S. citizens who are born elsewhere also may be U.S. citizens. Everyone else must “naturalize” to become a citizen, usually after a required period of lawful permanent residence.

Naturalized U.S. citizens cannot be removed from the U.S. unless they obtained citizenship by fraud or other illegal means. They do not need INS authorization to work and they may file petitions for lawful permanent residence for their spouses, parents, children (both married and unmarried), and siblings.

2. Lawful Permanent Residence

Lawful permanent residents (LPR’s) are noncitizens that make the U.S. their home, have authorization to work in the U.S. and have the most stable immigration status. They may serve in the U.S. military but they cannot vote. They must follow certain guidelines when they travel or stay outside the U.S., and they may still be removed for certain reasons, including particular criminal convictions or immigration violations. After five years (and in some cases, three years), lawful permanent residents may become citizens (“naturalize”) by taking a test and fulfilling other requirements. Lawful permanent residents should have Resident Alien Cards, often called “green cards.” Lawful permanent residents may file petitions for lawful permanent residence for their spouses and unmarried children.

Lawful permanent resident status is granted for life, although the Resident Alien card has an expiration date ten years after the date of issuance. After ten years, LPR’s must file a simple application to replace their cards, but they do not need to reapply for the status of lawful permanent resident.

3. Conditional Residence

A noncitizen who applies for lawful permanent resident status based on marriage to a U.S. citizen or lawful permanent resident is initially granted “conditional resident” status if he or she has been married for less than two years on the date they were granted lawful residence. Although conditional residents are lawful permanent residents, their status expires two years from the date it is granted, unless they file another petition together with their spouses (a “joint petition”) to request “to remove the condition” prior to the expiration date on the conditional

resident card. A conditional resident should have a Permanent Resident Card with “CR” stamped on it. This card allows them to work.

In some cases, including domestic violence situations, a conditional resident may have to file the petition to remove the condition without the signature of his or her spouse. If the spouse does not join the conditional resident in filing the petition, the conditional resident must file the petition with a request for a waiver. CIS may grant waivers to conditional residents who are divorced from their spouses, who are abused by their spouses, or who would suffer extreme hardship if they had to leave the U.S.

4. NACARA & Haitian Adjustment

In 1997, Congress passed the Nicaraguan Adjustment and Central American Relief Act (NACARA). This allows certain nationals (and their family members) of Nicaragua, Cuba, El Salvador, Guatemala, the former eastern bloc countries and the former republics of the Soviet Union to file special petitions for immigration status. In 1998 Congress also created a special route to status for certain nationals of Haiti. The rules for eligibility and the procedures for applying vary within each program; local agencies specializing in helping these populations are the best source of information on gaining status under these new laws. Congress recently added special provisions to these laws allowing family members abused by the primary applicants to apply on their own for permanent legal status under NACARA.

5. The Diversity Program or “Lottery”

Periodically, Congress creates special temporary programs that provide opportunities for people from certain countries to apply for lawful permanent residence without the normal waiting period. Those who may apply for status this way are chosen by a lottery. Generally, the application periods for these lotteries are very short.

6. Asylum, Refugee Status, Withholding of Removal and the Convention against Torture

Asylum and refugee status are available to noncitizens who show that they have suffered persecution in the past, or have a “well founded fear” of future persecution in their homelands, based on race, religion, nationality, political opinion or membership in a social group. Recently, the BIA and some federal courts have recognized persecution based on gender as a valid basis for an asylum claim. In some cases, domestic violence may qualify as gender-based persecution.

Refugees are persons who applied for and were granted refugee status before they came to the U.S. Those who apply for protection as refugees while they are inside the U.S. are termed asylum applicants. If they win asylum, they become asylees. Some asylum applicants are granted “withholding of removal” (formerly withholding of deportation) instead of asylum. People who can't qualify for asylum or withholding of removal may ask for protection under the Convention against Torture (CAT). Asylees and refugees are eligible to become lawful permanent residents after a year. Those granted withholding of removal or CAT protection are

not eligible for lawful permanent residence.

7. Cancellation of Removal

Cancellation of removal is available to noncitizens in immigration proceedings who can show that (1) they have been continuously present in the U.S. for ten years; (2) that removing them will cause “exceptional and extremely unusual hardship” to a U.S. citizen or lawful permanent resident spouse, child or parent; and (3) that they are of good moral character. A special form of cancellation of removal is available to certain abused noncitizens, which requires only three years of continuous presence. “Special rule” cancellation of removal is described in the next section. When an immigration judge grants cancellation of removal, the applicant also receives lawful permanent residence.

8. Temporary Protected Status (TPS)

The Attorney General of the U.S. may grant this status for a limited period of time to nationals of certain countries in turmoil. Over the years, TPS has been granted to nationals of Honduras, Nicaragua, El Salvador, Kuwait, Lebanon, Liberia, Somalia, Bosnia and Rwanda. Once the designated period of protection ends, the USCIS sends TPS recipients an immigration hearing notice, which means they must either obtain another immigration status or leave the U.S.

9. Nonimmigrants

Nonimmigrants have their permanent home in another country, and they have been granted nonimmigrant visas with specified expiration dates. Nonimmigrants who stay beyond the expiration dates on their visas become “undocumented.” There are many kinds of nonimmigrants, including visitors for business or pleasure, foreign students, and temporary workers and trainees and their spouses and children. In 2000, Congress created several new non-immigrant categories, including V visas for certain family immigrants who have waited over three years for an opportunity to apply for lawful permanent residence, T visas for certain victims of human trafficking, and U visas for victims of certain crimes. Many of those who qualify to receive visas in these new nonimmigrant visa categories may eventually gain lawful permanent residence

Routes to Lawful Permanent Residence

Most people with immigrant visas wish to become lawful permanent residents (LPR’s or “green card” holders) because LPR status is the most stable and long-term immigrant status. Once granted, lawful permanent resident status continues for life, if the LPR is not convicted of a serious crime or immigration violation that makes them deportable. LPR’s are also entitled to work, without having to reapply annually to USCIS for employment authorization. Most lawful permanent residents can become naturalized citizens after five years. Until they become citizens, however, USCIS or ICE can initiate proceedings to remove them, or prevent them from re-entering the U.S. after traveling abroad, if they are convicted of certain crimes or immigration

violations.

Noncitizens can become lawful permanent residents in many ways: through a relationship with a family member, through employment, through the “lottery,” or through another special program. Applying for lawful permanent residence through an employer is very complicated; applying through the lottery is relatively easy. Getting lawful permanent residence through a relative can be difficult or easy, depending on which relative “sponsors” (applies for) the noncitizen.

In the Violence Against Women Act (VAWA) Congress created a special route to lawful permanent residence for battered spouses and children of U.S. citizens or lawful permanent residents. Battered spouses and children are “self-petitioners,” and need not rely on their abusive relatives to sponsor them or to complete the application process. Otherwise, the process parallels the normal family immigration process. This section provides you with a basic outline of the family immigration process that may help you understand why VAWA applications can be complicated, and why the assistance of knowledgeable advocates and attorneys may be crucial.

1. Which family members are eligible to immigrate through a sponsoring relative?

U.S. citizens and lawful permanent residents can file immigration applications for their closest family members. Lawful permanent residents can petition to immigrate (or “sponsor”) only their spouses and unmarried children. U.S. citizens can “sponsor” their spouses and unmarried children as “immediate relatives.” U.S. citizens who are at least 21 years old may also sponsor their parents as “immediate relatives,” and they may sponsor their brothers, sisters, and married children under the quota, or “preference” system. Brothers, sisters, and married children of U.S. citizens must wait many years (sometimes over a decade) before their “priority date” (the date the sponsor filed the initial immigrant petition, called an I-130) becomes “current.” Only then can they file their applications for lawful permanent residence. The difference in waiting times depends on a complicated system for each category of immigrants.

2. How long will it take?

It used to be that immediate relatives spouses, children and parents of U.S. citizens received lawful permanent residence fairly quickly, in a matter of months. Now USCIS has so many pending applications for immediate relatives of U.S. citizens that applicants usually wait over a year for an interview. The waiting periods for spouses and children of lawful permanent residents have become much, much longer. They may have to wait as long as six to eight years or more until their “priority date” becomes “current,” and only then can they file the application for LPR status. After filing the application, they may have to wait an additional year or more for an interview. Because of these problems, Congress passed the “LIFE Act” in December 2000, that allows some of these applicants to live and work in the United States with nonimmigrant visas, called V visas, until they become eligible to file their applications for lawful permanent residence. These provisions of the LIFE Act, however, apply only to people who had filed applications before December 21, 2000 and who have already been waiting at least three years to

apply for lawful permanent residence.

USCIS and Congress are concerned about marriage fraud, believing that many noncitizens marry U.S. citizens or lawful permanent residents just to obtain legal immigration status. For this reason, applicants for lawful permanent resident status who were married for less than two years when they are granted LPR status are initially granted “conditional” resident status for a two-year period. They must file another petition with their spouse (or with a waiver of the joint filing requirement) to remove the condition within the 90 days prior to the expiration of their conditional resident status, and then wait for another interview before they receive [unconditional] lawful permanent resident status.

