CHAPTER 11

IMMIGRATION ISSUES

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INTRODUCTION

In 2015, Massachusetts was home to an estimated 1.1 million immigrants who represent 16.1 percent of the state's population. U.S. Census Bureau, 2015 American Community Survey. Approximately one-half of the state's immigrant population are naturalized citizens, and Massachusetts has the seventh highest lawful permanent resident (LPR) population in the country, estimated at 300,000, and an undocumented population estimated at 210,000. American Immigration Council, "Immigrants in Massachusetts," Fact Sheet, https://tinyurl.com/ydz6lvzs.

With such a significant immigrant population in the Commonwealth, immigration issues inevitably become intertwined with family law issues. While a litigant's immigration status should rarely have an impact on a domestic relations case, the timing and outcome of a domestic relations case can have serious consequences for a noncitizen. A divorce that comes at the wrong time can result in the denial of a petition for lawful status or even the loss of lawful status that has already been granted. For low-income clients and victims of domestic violence, important decisions regarding child support, if and when to seek a restraining order, whether to bring criminal charges, and other issues may have to be made in the course of family law proceedings. These decisions may have an impact on the immigration status of the parties. Therefore, a basic knowledge of immigration law is more and more important for family law practitioners.

This chapter is intended to provide a basic overview of some of the most common family-related issues that arise in immigration law and to make a few suggestions for practitioners when presented with a domestic relations case involving immigration in order to ensure the best outcome for the client. Immigration law is complex and continuously changing. A great deal of irreparable damage can be done by well-meaning but inappropriate immigration advice. If a client appears to have an immigration issue, the family law practitioner should consult with an immigration specialist or have the client do so before he or she proceeds with any nonemergency action, especially a divorce.

Practice Note

The dynamics of domestic violence can, in some circumstances, make pursuing family law remedies dangerous for an immigrant survivor. Practitioners should safety plan with survivors around their immigration status and the potential consequences of taking action in the face of a partner who may seek retribution by contacting U.S. Immigration and Customs Enforcement (USICE). Further, some immigration practitioners may be unfamiliar with these dynamics of domestic violence and with creative ways to access immigration remedies available to survivors. If a case involves domestic violence, make sure to speak with an immigration practitioner familiar with this area of law.

Extreme Caution

Never suggest that a client go to the Citizenship and Immigration Services for assistance, as the client could be detained or placed in proceedings to remove him or her from the United States.

Unlike other chapters of this manual, this chapter does not include sample forms. Because of the voluminous and complicated paperwork involved in almost any application for immigration benefits, it is impractical to provide truly useful samples here. For detailed technical information, see Austin T. Fragomen, Jr. et al., *Immigration Procedures Handbook*, published annually by Thomson Reuters. *See also* Sarah B. Ignatius & Elizabeth Stickney, *Immigration Law and the Family* (Thomson Reuters).

SOURCE OF LAW

The Constitution allocates complete control over U.S. immigration policy to the federal government. State courts and agencies have no authority to determine immigration status or to grant or withhold it, although states can condition eligibility for benefits and programs on immigration status. A number of federal agencies are involved in regulating the immigration laws of the United States, including

- the U.S. Department of Homeland Security (DHS), which houses, in part, three federal subagencies:
  - U.S. Citizenship and Immigration Services (USCIS), which is responsible for the administration of immigration and naturalization adjudication functions and establishing immigration services policies and priorities;

  - U.S. Immigration and Customs Enforcement (USICE or ICE), which enforces immigration and customs laws within the United States; and
  - U.S. Customs and Border Protection (USCBP), which enforces immigration and customs laws at the U.S. border and ports of entry;
- the Department of Justice, which houses the Executive Office for Immigration Review (the EOIR, consisting of the Immigration Court and the Board of Immigration Appeals (BIA)); and
- the Department of State, which oversees embassies and consulates abroad that issue visas to aliens wishing to visit or immigrate to the United States.

Immigration is governed by the Immigration and Nationality Act (INA), codified at Title 8 of the U.S. Code. (The common practice is to cite to sections of the INA, not to the Code.) Regulations for USCIS and the EOIR are at Title 8 of the Code of Federal Regulations; State Department regulations are at Title 22; and other related regulations are scattered throughout the Code of Federal Regulations. Published BIA decisions are binding on the USCIS and the immigration courts throughout the country. Depending on the type of case, BIA decisions can be appealed to the federal District Court or to the Circuit Court of Appeals. Finally, various policy memos issued by agencies within the Department of Homeland Security, such as USCIS and USICE, provide guidelines and policies that are binding upon DHS officers.

DETERMINING YOUR CLIENT'S STATUS

People reside in the United States in a variety of immigration statuses. The first step in assisting a client is to determine his or her status.

A "U.S. citizen" was born in the United States, was born overseas to at least one U.S.-citizen parent, or was naturalized. U.S. citizens are the only people with an absolute right to enter and live in the United States. A citizen is not subject to immigration law.

A "lawful permanent resident" (LPR) has a green card, or immigrant visa, which gives him or her the right to permanently live and work in the United States and travel to and from the United States as long as no laws are violated. Generally, an LPR can be deported or removed only if he or she is convicted of a crime, although he or she can be denied admission to the United States under certain circumstances if he or she leaves and tries to reenter. Most LPRs are eligible to apply for citizenship after five years of continuously residing in the United States in LPR status. If LPR status was obtained through marriage to a U.S. citizen, the wait is only three years. In some cases, LPR status is conditional.

A "refugee" or "asylee" must be found to have suffered past persecution, or have a well-founded fear of persecution, in his or her country of origin on account of his or her political opinion, race, religion, national origin, or membership in a particular social group. After one year of holding refugee or asylee status, he or she may apply for LPR status.

A "nonimmigrant" can hold one of a wide variety of nonimmigrant visas. By definition, a nonimmigrant has demonstrated to a consulate abroad that he or she intends to return to his or her home country after a temporary stay in the United States to visit, work, or study. Nonimmigrant visas are lettered, beginning with "A" and going all the way to "S." The most common are "B" (tourist or visitor visas) and "F" and "J" (student visas). See INA § 101, 8 U.S.C. § 1101, for a complete list. The visa letter is usually followed by a number; "1" is the principal visa holder and "2," "3," and "4" are dependents and sometimes household employees of the principal visa holder. For example, a graduate student would generally have a "J-1" visa. His or her spouse and children would have "J-2" visas.

A nonimmigrant is not authorized to work in the United States unless specifically given permission to do so, either because he or she has a nonimmigrant work visa, such as an "H" visa, or because he or she has applied for and received employment authorization. Working without authorization is a violation of the terms of the visa; the visa holder then becomes "out of status" and may be deported. Any other violation of the terms of the visa, such as attending a different school or working for a different employer, also causes the visa holder to become "out of status." This is true even if the visa is still facially valid and USCIS does not know about the violation.

A nonimmigrant visa is a multicolored stamp or a machine-readable sticker placed in the passport. It may be good for a year or indefinitely; it may authorize just one entry or it may allow multiple entries. The visa authorizes the

holder only to present himself or herself at the border and request entry; it does *not* determine how long the holder is authorized to remain in the United States. When a nonimmigrant enters the United States, he or she is given an I-94 card that states the authorized length of the visit. The standard authorized visit is six months. If the I-94 card has expired, the visa holder has "overstayed" and is removable. Some students get I-94s with the notation "D/S" on them. This stands for "duration of status" and allows the student to remain until he or she finishes school.

A "parolee" is a person who has been allowed to physically enter the United States, usually for humanitarian reasons, but has not legally made an entry. A parolee will generally have an I-94 card with the date parole status expires.

Temporary protected status (TPS) is a temporary immigration status granted to foreign nationals from countries designated by the secretary of the DHS. The secretary may designate a country for TPS due to the following temporary conditions in the country:

- ongoing armed conflict (such as civil war);
- an environmental disaster such as an earthquake or a hurricane, or an epidemic; or
- other extraordinary and temporary conditions.

Immigrants who are granted TPS are eligible for an employment authorization document, also known as a work permit, and may travel outside of the United States. Immigrants will lose their TPS status once the secretary of the DHS terminates the TPS designation for their country of origin. Temporary protected status recipients may, however, apply for other forms of immigration relief while residing in the United States.

"Deferred action" is a discretionary determination, made by either USCIS or a federal judge, to defer the removal of an immigrant who is otherwise removable. For example, under the 2012 Deferred Action for Childhood Arrivals (DACA) program, certain immigrants who arrived in the United States prior to their sixteenth birthday were eligible to petition the U.S. government for a determination of "deferred action" if they met certain eligibility requirements. Similarly, immigrant survivors of domestic violence who are married to abusive U.S.-citizen or LPR spouses may self-petition for a deferred action determination under the Violence Against Women Act (VAWA). Individuals who receive a deferred action determination may be eligible for an employment authorization document, also known as a work permit.

An "undocumented person," sometimes referred to as an "illegal alien," is an immigrant with no legal status in the United States because he or she

- entered without inspection, i.e., crossed the border illegally;
- entered on a nonimmigrant visa, e.g., a tourist visa, and stayed longer than authorized or otherwise violated the terms of the visa; or
- was ordered removed by an immigration judge and never departed from the United States.

Practice Note

Determining a noncitizen's exact immigration status can be complicated and involves a careful examination of documents. If you or your client has any questions about the client's status, consult an immigration practitioner. Some domestic abusers will hide their partner's immigration documents or give them false information about their status. A domestic violence survivor may need help to determine exactly what his or her status is.

Under immigration law, a "child" is generally defined as an unmarried person who is under the age of twenty-one years. A child may include a stepchild, if the parents married before the child turned eighteen, and an adopted child under certain circumstances. There is a distinction between a "child" and a "son" or "daughter," who is, by definition, over the age of twenty-one. There are some complicated rules regarding when a child born out of wedlock, whether or not legitimized, qualifies as a child or as a son or daughter. See INA § 101 for definitions of these and other terms. Any child born on U.S. soil is a U.S. citizen regardless of the status of the parents. However, in order to petition for a parent, a U.S.-citizen child must be at least twenty-one years old.

Practice Note

The courts have held that a U.S.-citizen child does not have a constitutional right to live with his or her parents in the United States. The mere fact that deporting the child's parent would cause the child either to be separated from his or her parents or to be expatriated is not enough to prevent deportation.

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) changed some important terms in immigration law. The traditional words "deportable" and "excludable" correspond more or less with the new terms "removable" and "inadmissible," and the grounds for each are roughly the same, with a few important changes. See INA §§ 237 and 212, 8 U.S.C. §§ 1227 and 1182, respectively, for a full list of the grounds for each.

An "A-number" is an eight- or nine-digit number prefaced by the letter "A." The DHS assigns A-numbers to most immigrants who have had contact with USCIS, USCBP, or USICE. An immigrant retains the same "A-number" throughout the immigration process. However, for the most part, immigrants who enter the United States on B-2 tourist visas are not issued an A-number unless they adjust their status from the tourist visa or are placed in removal proceedings before an Immigration Court. In any correspondence with USCIS or the Immigration Court regarding the matter, it is crucial to reference the A-number as USCIS will not be able to locate the case without it.

TRADITIONAL FAMILY-BASED IMMIGRATION

Family reunification has always been a primary goal of U.S. immigration policy. Although thousands of people immigrate based on petitions filed by employers or with refugee/asylee status each year, the majority of immigrants immigrate based on a family relationship with a person who already has status in the United States.

Who May Petition? Who May Benefit from a Petition?

The person with status (the petitioner) may file a visa petition for his or her relative (the beneficiary). The system is divided into two main types of relationships, each with a number of subcategories. *See* INA §§ 201, 203. Each year, U.S. citizens may petition for an unlimited number of immediate relatives, defined as

- parents if the citizen is over twenty-one,
- spouses, and
- unmarried children under the age of twenty-one.

An additional limited number of visas are distributed each year in the following categories, known as preferences:

- first preference—unmarried son or daughter of U.S. citizen (remember that a son or daughter is by definition over twenty-one);
- second preference—spouse and unmarried children under the age of twenty-one of LPR; unmarried son or daughter of LPR;
- third preference—married son or daughter of U.S. citizen regardless of age;
- fourth preference—sibling of U.S. citizen.

Only these family relationships qualify. Aunts, uncles, cousins, grandparents, and other family members cannot petition for each other.

The Spousal Relationship

The mere fact that a marriage is legal under the laws of the jurisdiction in which it took place is not sufficient for immigration purposes. In general, clients who want to petition for a spouse should be aware that USCIS and the consulate will look closely at the relationship, especially if there is anything unconventional about it. The couple may be asked to produce evidence that the marriage was entered into in good faith—i.e., not solely to obtain immigration benefits. With exceptions for victims of domestic violence, discussed below, a person wishing to immigrate based on a spousal relationship must be married to the petitioner throughout the process, until the immigrant visa or green card is actually issued. For the duration of the process, the petitioner will retain total control over the petition. The petitioner will decide whether and when to file the petition and, until the visa is actually issued, can withdraw it without explanation.

Practice Note

Many victims of domestic violence believe that they must remain with the spouse who is abusing them in order to obtain status and are unaware of various laws that help victims of violence apply for immigration benefits both when they are living with the abusive spouse and after they separate from the spouse. For

that reason, family lawyers should be aware of and able to explain the exceptions to the general rule. For more, see "Immigration and Domestic Violence," below.

In order to prove a valid marital relationship for immigration purposes, any party to the marriage who has been previously married will have to submit documentation proving that the prior marriage was legally terminated by death or divorce. Many complications can arise regarding foreign divorces; in some cases, you may need to assist a client who is seeking to immigrate or have a visa petition approved with obtaining a declaratory judgment from the Probate and Family Court recognizing the divorce.

A proxy marriage that has not been consummated is not a marriage for immigration purposes, nor is a polygamous or incestuous marriage.

Congress and USCIS have put significant effort into discouraging sham marriages—i.e., marriages entered into simply for immigration purposes. Knowingly entering into a marriage for the purpose of circumventing immigration laws is a federal crime punishable by up to five years in prison and $250,000 in fines. It also makes the immigrant spouse permanently ineligible to immigrate and makes an LPR spouse removable. An immigrant who obtains LPR status through marriage and then divorces, remarries, and seeks to petition for the new spouse within five years of immigrating will be scrutinized and will be required to prove by clear, convincing, and unequivocal evidence that the original marriage was entered into in good faith.

Derivative Status

The spouses and children of preference beneficiaries get derivative status and can be included in the petition. However, a separate petition must be filed for each immediate relative of a U.S. citizen. The time it takes for each separate member of the family to receive a visa may not be the same. Moreover, when a child abroad is awaiting a visa, problems may arise if the child reaches age twenty-one or marries. These complicated rules are beyond the scope of this manual.

The Process for Obtaining Lawful Permanent Residence

Obtaining lawful permanent residence for a relative is a two-step process. *See* INA §§ 204, 245.

Step One—Filing the Petition

First, the petitioner must file a petition with USCIS. This relatively simple step consists in most cases of completing the appropriate immigration forms and attaching proof of the requisite relationship and sending these to USCIS with the filing fee.

When USCIS approves the petition, the agency will forward it to the State Department for further processing.

The mere fact that a visa petition has been approved does not bestow any lawful status on the beneficiary. A beneficiary illegally present in the United States remains illegally present and can be deported if caught, with potentially serious consequences to any future ability to immigrate. A beneficiary overseas will have to remain overseas until the visa is issued.

Step Two—Applying for the Visa

The beneficiary must then apply for the visa. When this happens depends on the category of the petition. If the beneficiary is an immediate relative of a U.S.-citizen petitioner, such as a spouse or a child, there is no wait for a visa. However, all other beneficiaries, such as spouses and children of LPRs, must wait for their priority date to become current before they can apply for a visa. As soon as the petition is approved, the beneficiary can apply for the visa; sometimes the two steps can be done simultaneously. Since there are a limited number of visas for each country per year in each category, the current wait ranges from one year to as long as twenty years, depending on the preference category. Beneficiaries are placed on the waiting list based on the "priority date," the date the petition was filed, regardless of when it was ultimately approved. To find out where someone is on the waiting list, you can call the State Department at (202) 647-6575 or check under "Visa Bulletin" on the State Department's website at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html.

When the State Department reaches the beneficiary's "priority date" on the waiting list, the visa becomes "current" or available. The beneficiary can then apply for it and have an interview at a U.S. consulate overseas, usually the one closest to his or her home. If the application is approved, the visa will be issued and the beneficiary will be allowed to immigrate to the United States as an LPR. Some people who are already in the United States when their visa becomes current can go through a process called "adjustment of status" here in the United States instead of traveling overseas for consular processing.

Extreme Caution

The 1996 immigration reform law, IIRAIRA, placed drastic restrictions on eligibility for both adjustment-of-status and consular processing, especially for people who have ever been in the United States illegally (called unlawful presence). Even if a client's approved visa petition has become current and he or she has been scheduled for an interview at a consulate, he or she should consult with an immigration specialist prior to departing the United States to determine whether there are any immigration-related risks associated with the client's departure. In some cases, an immigrant may be required to obtain a waiver for immigration-related problems prior to leaving the United States. Once the client has left the United States, he or she will not be able to return legally without the visa, so an error could result in permanent separation from family members if the client's application is denied. Also, as of this writing, new policies for "extreme vetting" were implemented by consular offices, thus causing delays in processing and increased scrutiny of all applications.

Fiancé/e Visas

A U.S. citizen who wishes to bring an alien to the United States to marry may petition for a fiancé/e visa. A fiancé/e visa is a nonimmigrant "K" visa. *See* INA § 101(A)(15)(K). The parties must prove

- that both parties are legally free to marry and
- in most cases, that they have met in person at least once in the preceding two years.

Once the visa has been issued, the fiancé/e may travel to the United States and the couple must marry within ninety days. The beneficiary must then apply for an adjustment of status in the United States. Any minor children of the fiancé/e may be included as derivative beneficiaries.

Conditional Permanent Residence (CPR)

If an alien receives permanent residence through marriage to a U.S. citizen and the marriage is less than two years old on the day the alien spouse enters the United States with an immigrant visa or adjusts status, the immigrant spouse will receive conditional permanent resident (CPR) status. Any derivative children will also obtain conditional status. *See* INA § 216.

Practice Note

A client who has a green card with an expiration date two years after entry is a CPR and must file a joint petition with his or her spouse within three months before the expiration date of the card unless he or she qualifies for a waiver, as discussed below. Alternatively, if the client's green card is valid for ten years, the client has full LPR status and need do nothing further.

Two years after the alien spouse receives CPR status, the couple must go through another procedure, called removal of conditional status. The only issue in a removal of conditional status case is whether the marriage is bona fide. The couple submits a joint petition to remove the conditions along with supporting documentation demonstrating the good faith of the marriage, such as birth certificates of children, evidence of shared finances and shared residence, affidavits of friends and family, etc. Some petitions are decided based on the papers submitted, and, in some cases, the couple will be called in for an interview with a USCIS officer. If the joint petition is approved, the conditions will be removed and the alien spouse will receive full LPR status; if the application is denied, the alien spouse will be placed in removal proceedings and will have an opportunity to present his or her case to an immigration judge. While it is important that the petition to remove conditions on status be filed on time, there are some options available if it is not.

Noncitizens are not expected to have better relationships than citizens. If a marriage entered into in good faith does not work out and the couple breaks up before the two-year anniversary date for removal of conditions on status, the alien spouse can request a waiver of the joint petition for any or all of the following three reasons:

- He or she entered into the marriage in good faith, but during the marriage the alien spouse or the spouse's child was battered or subjected to extreme cruelty committed by the U.S.-citizen or LPR spouse.
- He or she entered into the marriage in good faith, but the marriage ended by annulment or divorce.
- His or her deportation or removal would result in extreme hardship.

See "Immigration and Domestic Violence," below, for more on the battered spouse waiver of the joint petition.

Widow and Widower Petitions

If a U.S. citizen dies before filing a visa petition for an alien spouse, the spouse can file the petition for himself or herself within two years of the U.S.-citizen spouse's death if

- the marriage was at least two years old when the U.S.-citizen spouse died and
- the alien spouse does not remarry before receiving the visa.

See INA § 201(b)(2)(A)(i).

Potential Immigration Problems for Noncitizen Clients

Public Charge

Since the earliest days of immigration regulation, would-be immigrants have been required to convince the visa-issuing authority that they are not likely to become a public charge if they are allowed to immigrate to the United States. "Public charge" is a term used by U.S. immigration officials to refer to an immigrant who is "likely to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense." *See* "Public Charge" on the USCIS webpage at http://tinyurl.com/yao4rco. Immigrants deemed likely to become a "public charge" are inadmissible and cannot become LPRs of the United States.

> **Practice Note**
> Victims of domestic violence petitioning under VAWA or for a U visa are exempt from proving that they will not become a public charge. Therefore, victims may seek public benefits for themselves if they are eligible, or for their children, without harming their chances of obtaining VAWA or U visa immigration relief. For more information, see the National Immigrant Women's Advocacy Project's guidance on this issue at https://tinyurl.com/yb5g434s.

An immigration officer will look at the totality of the circumstances to determine if someone is likely to become a public charge, and must consider a number of factors such as age, health, family status, assets and resources, financial status, and education and skills. The receipt of cash benefits in the past will not automatically mean that an immigrant is likely to remain a public charge in the future. Furthermore, USCIS does not consider the immigrant's receipt of noncash benefits, such as Supplemental Nutrition Assistance Program (SNAP) benefits, public housing, MassHealth, and WIC benefits, when making a public charge determination.

Under current law, a U.S. citizen or an LPR who wants to petition for a qualified immigrant relative must demonstrate that the petitioner has an income equivalent to 125 percent of the poverty level for a family unit that includes everyone dependent on the petitioner plus all beneficiaries. The petitioner demonstrates his or her income by signing and providing USCIS with the required affidavit of support on USCIS Form I-824. The affidavit of support is legally enforceable against the petitioner or the government agency that provides benefits to the beneficiary for as long as ten years after the immigration. *See* INA §§ 212(a)(4), 213A. This means that many low-income people are unable to petition for their family members even if they have never received cash assistance or any other public benefits.

Example

Vladimir is a U.S. citizen with two children from his first marriage who live with him. He marries Ludmila and wants to petition for her and her child. Vladimir will have to show income equal to 125 percent of the poverty level for five people: himself, Ludmila, and three children.

Health Issues

Immigrants applying for LPR status must undergo a medical exam conducted by a doctor designated as a "civil surgeon" by USCIS or the U.S. Department of State. During the medical exam, the immigrant will be tested for a variety of health conditions including, in part, the following:

- a number of communicable diseases, such as tuberculosis (As of January 4, 2010, USCIS removed human immunodeficiency virus (HIV) infection from the list of "communicable diseases of public health significance"; therefore, immigrants who are infected with HIV are now eligible to become LPRs as long as they do not have other inadmissibility issues.);
- physical or mental disorders that may pose a threat to the immigrant or others, including but not limited to a history of suicidal ideations;
- drug abuse or drug addiction, even where there are no resulting criminal charges against the immigrant; and
- proof that the intending immigrant has had a series of required vaccinations.

Immigrants who have been diagnosed with a "disease of public health significance," or suffered from any of the conditions listed above, may be ineligible to become LPRs of the United States. A waiver of these health-related issues is available to the family members of U.S. citizens and LPRs. *See* INA § 212(g). However, USCIS imposes an additional fee, which may be cost-prohibitive for some families, for immigrants seeking a waiver of health-related grounds. (As of November 2017, the current USCIS filing fee for the requisite waiver is $930.)

Criminal Issues

The petitioner's criminal record is generally not an issue, but the beneficiary who has been convicted of certain crimes may be denied a visa and/or may be ineligible to become an LPR. In addition, a beneficiary may be denied a visa if a USCIS or consular official has reason to believe that he or she has been affiliated with gangs or involved in drug trafficking, even if he or she has never been charged with or convicted of a crime. Furthermore, under U.S. immigration law, persons who have been convicted of crimes involving moral turpitude or who admit to acts that constitute the elements of crimes involving moral turpitude, are inadmissible. The definition of a crime involving moral turpitude varies, in part, from state to state. USCIS may rely on any statements containing an admission including but not limited to statements contained in evidence submitted in the course of a Probate and Family Court proceeding. In Massachusetts, a criminal matter that is dismissed after a "continued without a finding" disposition is considered an admission under immigration law, as it requires the defendant to admit that there is sufficient evidence for a reasonable jury to find the defendant guilty. Family law practitioners working with immigrant clients who have potential criminal issues should encourage their clients to consult with an immigration practitioner and, if there is an ongoing criminal case, with the Committee for Public Counsel Services Immigration Impact Unit. See INA § 212(a)(2) for a complete list of the crimes that make an immigrant inadmissible.

Practice Note

While the grounds for inadmissibility do not specifically list crimes of domestic violence or violations of a restraining order, domestic assault has been found to be a crime of moral turpitude, and thus a conviction might make the person inadmissible. Also, conviction of a crime of domestic violence, stalking, child abuse, or violation of a restraining order will make a noncitizen removable. *See* INA § 237(a)(2). See also "Removal of Abusive Spouses or Intimate Partners," below.

Employment Authorization and Social Security Numbers

In 1986, Congress passed the Immigration Reform and Control Act (IRCA), which created a new employer-sanctions provision that made it illegal for an employer to hire an alien not authorized to work in the United States. As a result, employers are required to check the identity and immigration status of every new person hired. One result of this provision is that undocumented immigrants, especially the unskilled, are vulnerable to abuse and

exploitation by those employers willing to hire them. It may also be difficult for a noncustodial parent who has no employment authorization to comply with a court-ordered job search or child-support order in a divorce or paternity case; conversely, the custodial parent could be even more dependent on whatever child support he or she can obtain if he or she lacks a work permit.

An immigrant cannot apply solely for employment authorization, but authorization can be issued upon application for a number of other types of immigration relief or soon thereafter. For example, a self-petitioning spouse of an LPR can get employment authorization when his or her self-petition is approved even if he or she must wait several years for the actual visa. An applicant for adjustment of status can get employment authorization when he or she files the application. An applicant for political asylum can get employment authorization if the application remains undecided after six months. There have also been a number of specific programs that provide "deferred action" or "temporary protected status," which involve temporary permission to live and work in the United States, though as of this writing, these programs are being phased out by the current administration.

Using a fake Social Security number to work can have serious immigration and criminal consequences, so immigrant clients must be advised to avoid working without permission if possible, and must be made aware of the potential consequences if they do so. Again, a consultation with an immigration specialist may be appropriate.

However, in a family law case, if someone is working, the income information must be disclosed fully, though the manner in which the person is working need not be. In fact, in a deposition or a trial, you should be prepared to answer the question about what documents a client is using to work. Your client may have a Fifth Amendment right against self-incrimination, and you must advise him or her of this if necessary.

Everyone applying for a Social Security number must show proof of immigration status. Immigrants who are authorized to work, but are not LPRs, receive a card that states on the front of the card that the bearer is authorized to work only with permission from USCIS. Many undocumented immigrants use legitimate numbers issued to other people or made-up numbers with or without an actual card. This kind of fraud has serious consequences. Many others work for cash. As of this writing, undocumented immigrants may run a business; though, again, some of these laws may change.

Practice Note

Where financial statements and other forms request a Social Security number, the form should be left blank unless the person is using a genuine number actually issued to him or her. If a probation officer (also known as a family service officer) asks for a number (sometimes requested as part of a CORI check), the officer should be told that the client does not have one. Any further inquiry should be gently deflected as irrelevant and possibly intimidating to the client.

IMMIGRATION AND THE PROBATE AND FAMILY COURT

In general, the immigration status of the parties to a proceeding in Probate and Family Court is irrelevant. Immigrants, even undocumented immigrants, are entitled to the protection of the courts and the benefit of the laws, just like everyone else. Nevertheless, many immigrants, even those with LPR status, have to be reassured that the court is not interested in their immigration status and will not report them to USICE if they try to get divorced, adopt a child, or get a restraining order.

Unfortunately, despite the fact that judges and other court personnel rarely ask about immigration status, an advocate cannot assure a fearful undocumented immigrant that USICE will not find out about him or her. It is not unusual, especially in cases involving domestic violence, for the spouse who is lawfully in the United States to use the threat of removal against the unlawfully present spouse. If USICE receives a tip that someone is present in the United States illegally, they may act on it regardless of the motivation of the reporter.

Practice Note

Family law practitioners should keep abreast of current changes in immigration laws and USICE priorities in order to better advise clients of their risk. For example, as of this writing, USICE is conducting arrests at or near courthouses, whereas this practice was uncommon in past years. Still, these arrests are typically at or near criminal courthouses, so in Massachusetts, those family courts that are separate from and not near criminal courts may be less likely to have USICE presence.

Immigration Status and Custody

Immigration status by itself should not be a factor in custody cases and to date there have been no Massachusetts appellate cases that have dealt with the issue. Under the Massachusetts divorce statute, the "happiness and welfare of the children shall determine their custody." G.L. c. 208, § 31. When immigration status is raised by an opposing party, it is important to fully flesh out the alleged connection between the parent's immigration status and the best interest of the child. If it is merely speculative that a parent "might" be removed because he or she is undocumented, the court should instead be asked to focus on traditional factors such as who has been the primary caretaker during the relationship and who is better able to care for the child's needs. For in-depth information on family law and custody, see http://niwaplibrary.wcl.american.edu/topic/family-law.

If one parent is to be removed (i.e., deported), it may raise serious removal issues regarding the children; a custodial parent being removed may be unable to get permission to take the children with him or her, since doing so would mean cutting off parenting time for the other parent or the other parent may successfully argue that it is not in the child's best interest to live in another country with the parent being removed. The standard for removal of the child from the Commonwealth is the same as in any other case. If the primary caretaker is being removed, the main argument on his or her behalf may be that the real advantage to the child is to maintain a strong bond to his or her primary caretaker and, if the child is a U.S. citizen, that the child may travel back and forth to the United States to visit the noncustodial parent. All other arguments that one would make in a removal case or a child custody case should also be made.

Practice Note

If a parent knows that he or she is likely to be removed and that the other parent will object, the parent being removed should consider filing affirmatively for removal of the child while the immigration case is pending. It is possible, but unlikely in the current climate, that a parent would be granted a stay of removal for the purposes of arguing his or her custody case in family court.

Immigrant Parents and Child Support

Immigration status may be a legitimate consideration in some cases where child support is at issue. For example, if the custodial parent is undocumented, he or she may be unable to support the children because he or she is not eligible for employment in the United States. Conversely, the parent from whom child support is sought may be unable to pay because he or she is not eligible for employment. As discussed in the section above addressing employment authorization, it may be difficult for a noncustodial parent who has no employment authorization to comply with a court-ordered job search or child-support order in a divorce or paternity case; conversely, the custodial parent could be even more dependent on whatever child support he or she can obtain if he or she lacks a work permit.

If you believe the noncustodial immigrant parent is working, it may be difficult to prove the amount of income that an individual is currently earning. This is true in cases where the noncustodial parent is either self-employed or paid cash directly and is not on a payroll. You will need to employ the same legal tools available to you when the opposing party is legally permitted to work in the United States and is underreporting income, including but not limited to subpoenaing suspected employers, propounding discovery requests regarding income and expenses, and depositions.

However, in cases where you know that the noncustodial undocumented immigrant parent is not working, you may try imputing income to that parent based on the argument that, while the immigration laws restrict employers from hiring immigrants without proper work authorization, it is not illegal for an immigrant to earn an income through self-employment. For example, it is permissible for immigrants to run their own business or work as independent contractors without employment authorization. The success of your argument will depend, as always, on the particular judge and the facts specific to your case.

Practice Note

If you work with an immigrant who is not receiving sufficient child support to support himself or herself, refer the person to someone who specializes in government benefits, such as your local legal services provider. The rules on immigrant eligibility for government benefits are complex and are often wrongly applied by the agencies that administer the benefits.

Passports for U.S.-Citizen Children

The U.S. Department of State Bureau of Consular Affairs requires both parents of a U.S.-citizen child to consent and be physically present at the time of the child's application for a U.S. passport. Both parents' presence is required at the passport office regardless of whether the child's parents are married. In cases where both parents are not available to be present at the time of the child's application, the absent parent may provide a notarized signature consenting to the child's passport application. There are waivers available in cases where it is not safe for both parents to be physically present together. For example, the passport office will accept Probate and Family Court orders regarding custody, Chapter 209A abuse prevention orders, and other documents that support the need for a waiver.

For parents who have concerns that their child will be abducted from the United States by the other parent or another person, the Department of State has the Children's Passport Issuance Alert Program (CPIAP). According to the Department of State website,

> this program allows the Department of State's Office of Children's Issues to contact the enrolling parent(s) or legal guardians(s) to verify whether the parental consent requirement for minor passport issuance has been met when a passport application has been submitted for an enrolled child. In addition, upon a child's enrollment in the CPIAP, we may alert the enrolling parent(s) or legal guardian(s) of a pending passport application and past passport issuances for the child.

For more information, visit the helpful website of the Department of State passport section at https://travel.state.gov/content/travel/en/passports.html.

THE IMPACT OF DIVORCE

Depending on its timing, a divorce may have a devastating effect on an alien's efforts to obtain lawful permanent status or other status allowing him or her to remain in the United States. In other circumstances, a divorce may not have a negative impact. It is important to check with an immigration practitioner if you are unsure of the potential impact of divorce on the client.

If both spouses are either U.S. citizens or LPRs, they can divorce without any negative consequences to either spouse's status. This also applies if one spouse is a CPR, but in those circumstances, if the spouses are still friendly, they may choose to delay the divorce and file jointly to remove conditions on the immigrant spouse's legal residence. See "Conditional Permanent Residence," above, and "Immigration and Domestic Violence," below. If one spouse is a citizen or an LPR who has filed for the other spouse but the visa has not yet been issued, the alien spouse will not be able to obtain the visa once the divorce has been granted. If the couple has physically separated but remained legally married, the proper question at the time of the adjustment or consular interview is whether the parties entered into the marriage in good faith, not whether the marriage is viable at the time of the interview.

> **Practice Note**
> It may take intensive advocacy to get USCIS or the consulate to apply the law correctly and the fact that the couple has separated is certainly something that they may consider in determining whether the marriage was entered into in good faith.

If one spouse is in valid nonimmigrant status, such as a visa for research scholars or a work visa, and the other spouse's status is derivative, the derivative spouse will lose status upon divorce, since he or she is entitled to status only due to his or her relationship with the principal visa holder. The derivative spouse will then become removable if he or she has no other way of obtaining status. The same problem arises if one spouse has applied for political asylum and the other spouse is included.

If both spouses are undocumented, there is obviously no effect on the immigration status of either spouse if they divorce. If one spouse obtains lawful status after the divorce, the other will not benefit, but undocumented children should be able to benefit from future changes in the status of either parent.

IMMIGRATION AND DOMESTIC VIOLENCE

Immigration issues often arise in cases involving domestic violence. Depending on the immigration status of the parties, or the lack thereof, these issues can play a significant role in the outcome of the case. For example, an undocumented battered woman may be extremely reluctant to pursue relief from the courts because she fears that she will end up being deported and separated from her children or because she fears that an undocumented batterer may be deported, denying a significant source of support or a father for the children. On the other side, in some cases, the threat of deportation may stop the abuse; in other cases, the actual deportation of a batterer may offer extra protection to the victim. Safety planning around a victim's legitimate fears of what might happen with court involvement, either due to the abuser's actions (e.g., calling ICE), common court procedures (e.g., performing criminal records checks on the parties), or a court actor's deed (e.g., a judge ordering that a victim's U visa petition be turned over in discovery) is an essential part of representation of immigrant victims of violence. For some, avoidance of Probate and Family Court may be the best route to safety.

A variety of ways of obtaining LPR status may be available to a battered woman who is not a U.S. citizen, depending on her marital status, current immigration status, and other factors. The statute, of course, is gender-neutral, but this chapter refers to the battered alien as female because the vast majority of these cases involve battered women.

Safety Planning for Encounters with Immigration Officers

As of this writing, the DHS has increased enforcement of U.S. immigration laws. As a result of this policy, in Massachusetts there has been an increase in the number of undocumented immigrants who are encountering ICE officers at their homes, in their workplaces, at local courthouses, and in other public places. In many cases, ICE officers will detain other immigrants as they seek out specific individuals. In addition, there are instances when ICE may respond to reports from abusive partners who report the location of their undocumented partners. Sometimes these reports are made by abusers to retaliate against immigrant victims who report them to the police and/or in response to the immigrant's attempts to end the abusive relationship. In all of these scenarios, an encounter with an ICE officer may lead to the detention of the immigrant for some period of time. The length of the ICE detention will vary from case to case. In some matters, the person may be detained for a couple of hours. However, it is also possible that an immigrant will be detained for longer and may ultimately be removed from the United States.

It is important for family law practitioners working with undocumented immigrants to understand the level of risk facing their clients. Immigrant clients need to be prepared for the likelihood of an ICE encounter. Immigrants should know that they enjoy the same constitutional right to remain silent that U.S. citizens enjoy. In addition, immigrants may not be subject to a warrantless search of their homes by ICE officers. Unfortunately, immigrants do not have a right to legal representation in their immigration proceedings. However, undocumented clients should be encouraged to consult with an immigration practitioner so they may understand their civil rights and determine whether they are eligible for immigration relief. Many legal services agencies hold legal clinics where immigrant clients may receive a free consultation and learn more about how to respond to immigration officers during an ICE encounter.

It is important that clients who have children in their custody be able to easily access relevant documents establishing legal custody, such as Probate and Family Court and/or Chapter 209A abuse prevention orders and the child's birth certificate. These clients should develop an emergency plan that includes a discussion about who will care for their children in the event that the client is taken into ICE custody. As of this writing, a comprehensive "family preparedness packet" for both immigrant families and practitioners is available from MassLegalHelp in both English and Spanish. The family preparedness packet may be found at https://tinyurl.com/yat6rctm.

Practice Note

Clients who are victims of a crime, such as domestic violence or sexual assault, should have copies of relevant Chapter 209A orders, police reports, and criminal dockets easily available to them to present to ICE officers during an encounter. In 2011, the ICE director issued guidance to ICE officers which provides, in part, that ICE officers should, in the absence of serious adverse factors, exercise their discretion favorably for the victim when determining whether to detain her. (ICE Memo, "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs," dated June 27, 2011.) As of this writing, this ICE policy guidance remains in effect. In addition, there are laws that prohibit immigration officers from taking adverse action against a victim of domestic violence based solely on information given to ICE by an

abuser. If a victim feels that she or he was targeted by ICE because of an abuser's contact with ICE, she should say this repeatedly to the arresting officers and to her attorney.

Removal of Conditional Status

As discussed above in "Conditional Permanent Residence," some people who immigrate through marriage to a U.S. citizen get a special form of permanent residence called conditional permanent residence. Normally, the conditions on the status must be removed two years after the CPR status is granted by filing a joint petition in which both parties to the marriage document that the marriage was entered into in good faith. However, the CPR spouse can request a waiver of the joint-petition requirement and get the conditions on her status removed without involving the U.S.-citizen spouse-batterer if she proves that she entered into the marriage in good faith *and* that

- the marriage has been terminated;
- the CPR spouse was subjected to battering or extreme cruelty by the U.S.-citizen spouse during the marriage; or
- deportation would result in extreme hardship to the CPR spouse or her children.

See INA § 216.

The CPR spouse can request one or all of these waivers. If the waiver is approved, the CPR spouse will be granted LPR status. If the waiver is denied or if the CPR spouse fails to file the request for a waiver, she can be placed in removal proceedings.

If there is no domestic violence involved and the alien spouse is seeking a waiver based solely on the termination of the marriage, the marriage must actually be terminated.

Practice Note

In these cases, the family law practitioner may want to speed up the divorce process, although USCIS might grant a request to hold their decision on the waiver until the judgment of divorce has issued.

In a case involving a domestic violence or extreme cruelty waiver, documentation of the abuse will be important. The family law practitioner can help create that documentation by collecting copies of relevant police reports, restraining orders, criminal dockets, and hospital records, and making sure that the battered woman gets appropriate services from a domestic violence service agency or a counselor. However, if none of these services exist, a client's affidavit alone may suffice.

Practice Note

Whether or not a spouse should file a police report or obtain a restraining order are decisions that should be made by the spouse, depending on her feelings of safety. While official records documenting the abuse are helpful in immigration cases, they are not needed, and an immigration case can be won with a client's detailed affidavit alone or with the client's affidavit along with corroboration from other sources (e.g., affidavits of friends, neighbors, etc.). A lawyer should never tell a domestic violence victim that she should start a criminal or court process unless the domestic violence victim wants to do so in order to protect her safety.

There does not need to be physical violence in order for a spouse to file for a waiver if that spouse was subjected to extreme cruelty, a term that includes the patterns of coercive control that may or may not include some instances of threatened or actual violence.

> Extreme cruelty provides an inquiry into an individual's experience of mental or psychological cruelty, an alternative measure of domestic violence that can also be assessed on the basis of objective standards. . . . [E]xtreme cruelty simply provides a way to evaluate whether an individual has suffered psychological abuse that constitutes domestic violence.

Hernandez v. Ashcroft, 345 F.3d 824, 834–35 (9th Cir. 2003). For example, a client comes to you and explains that her husband has never hit her, but he monitors her daily activities, prevents her from studying English or seeking a job, insults and demeans her, yells in her face, and displays the phone number for ICE's tip hotline on the

refrigerator. This client is likely to be suffering from extreme cruelty, especially if this behavior is psychologically frightening or harmful to her.

It is always advisable to request all waivers for which the client qualifies. However, if a CPR spouse who is a victim of domestic violence is reluctant to go forward with a divorce for whatever reason, that decision obviously should be left to her. Her decision can be explained in the immigration petition.

Self-Petitioning Under VAWA

Prior to 1994, undocumented immigrants married to abusive U.S. citizens or LPRs were entirely dependent on their spouse to initiate the immigration process on the immigrant spouse's behalf. As a result, the abuser's control over an undocumented spouse's ability to obtain lawful immigration status became a powerful weapon. This weapon was used to keep immigrant spouses dependent upon their abusers and living in fear. Fortunately, under VAWA, Congress created a self-petition process for undocumented women and men married to abusive U.S. citizens or LPRs. This process enables an immigrant to submit a self-petition to USCIS rather than relying on an abusive spouse to start the petition process on the immigrant's behalf. The self-petition process is confidential and does not require any notice to the abusive U.S.-citizen or LPR spouse. In order to self-petition, the immigrant spouse must submit evidence of following:

- The abusive spouse is or was a U.S. citizen or an LPR (with some exceptions).
- She is (or was) the spouse of a U.S. citizen or an LPR, or the parent of a child who was abused by the self-petitioner's LPR or U.S.-citizen spouse.
- The LPR or the U.S. citizen subjected the self-petitioner to battery and/or extreme cruelty during their marriage.
- She entered into the marriage in good faith.
- She is currently residing in the United States (with some exceptions).
- She resided with the abuser at some point.
- She is a person of good moral character.

See INA § 204.

Note that USCIS's definition of abuse is broader than the definition of abuse under the Abuse Prevention Act, G.L. c. 209A, § 1. Family law practitioners should err on the side of referring clients to immigration specialists if the client reveals any form of mistreatment by the spouse, including controlling and insulting behavior. Also know that immigrants may submit their self-petition while they are still married to and/or living with their abuser. There is no requirement that the self-petitioner be living apart and in the process of divorcing from the abusive spouse in order to begin the self-petition process. However, self-petitioners who do separate from and divorce their abusers have two years from the date the divorce judgment becomes final, or absolute, to timely submit their self-petition to USCIS.

The self-petition takes the place of only the first step in the visa petition process. It is designed to obviate the need for involvement by the batterer, who would normally be the petitioner. Unlike the first step in the regular process, a self-petition is a complicated one, involving a lengthy affidavit from the self-petitioner and extensive documentation of the factors listed above. An approved self-petition comes with a priority date just like a regular family petition and, if the batterer is an LPR, the self-petitioner may still have to wait years for the actual visa but will be granted employment authorization while waiting.

Practice Note

In some instances, the documents collected from the abuser by the family law practitioner may be helpful to the immigrant's self-petition process. For example, tax returns, bank statements, and other documents exchanged pursuant to Supp. Prob. Ct. R. 410, Mandatory Self Disclosure, may provide evidence that the parties resided together and/or had a good faith marriage.

Once USCIS approves the immigrant's self-petition and the time comes for her to adjust status to legal permanent residence, she will have the same burden as other immigrants of proving that she is admissible. However, there are more waivers available for self-petitioners. In addition, some requirements are changed. For example, the public charge provision does not apply.

Cancellation of Removal

A cancellation of removal is another form of relief available to battered immigrant women and men who are in removal or deportation proceedings before the Immigration Court. The requirements are similar to those for VAWA self-petitioners, as discussed above in "Self-Petitioning Under VAWA." An applicant for VAWA cancellation of removal must establish the following before the Immigration Court:

- She has been battered or subjected to extreme cruelty by a U.S.-citizen or LPR spouse.
- She has been physically present in the United States for three years before applying.
- She would suffer extreme hardship, or her child or parent would suffer extreme hardship, if the applicant were removed.
- She has been a person of good moral character during the period of physical presence.
- She is not inadmissible for crimes or on security and terrorism grounds or deportable for marriage fraud, crimes, failure to register, falsification of documents, or security and terrorism grounds.
- She has not been convicted of an aggravated felony as defined under INA § 101(a)(43).

See INA § 240A.

A grant of cancellation of removal by an immigration judge results in lawful permanent residence for the immigrant. However, only a judge can grant cancellation, and a denial results in an order of removal. The public-charge and other grounds for inadmissibility do not apply in a cancellation case. An eligible immigrant who is in removal proceedings should be referred to an immigration attorney, as these are difficult cases to present and win in Immigration Court.

Asylum: Persecution in the Form of Domestic Violence

An undocumented immigrant who has been subjected to persecution in the form of domestic violence in his or her country of origin may be eligible for asylum in the United States. Asylum is a process that protects immigrants who have been persecuted, or who have a well-founded fear of future persecution, in their country of origin on account of their political opinion, religion, national origin, race, or membership in a particular social group. USCIS and the Immigration Courts have recognized that women from certain countries, who are unable to leave their abusive marriage or domestic relationship, may be eligible for asylum based on their membership in a particular social group. Immigrants seeking asylum will have to show, among other things, that a reasonable person in her position would fear that she would be subjected to persecution by the batterer in her home country and that the authorities in her country of origin are unable or unwilling to protect her. If she is granted asylum, the immigrant is eligible for an employment authorization document and to petition for her children and spouse as long as her spouse is not her abuser. Furthermore, she will be eligible to apply for lawful permanent residence after the one-year anniversary of the granting of asylum.

Practice Note

Immigrants seeking protection in the form of asylum must file their asylum application with USCIS or the Immigration Court within one year of their arrival in the United States. In some extraordinary or changed circumstances, there may be an exception allowed for this one-year rule. Given the specialized nature and risks involved with asylum law, it is imperative that the client be referred to an immigration specialist.

U Visas for Victims of Crime

There are many immigrant victims of domestic violence who are in an intimate relationship with a person who is abusing them, but that person cannot file an immediate relative petition for the immigrant. These victims of domestic violence may qualify for a U visa.

The U visa was created by Congress in 2000 for the purpose of protecting victims of serious crime who report the crime and assist in its investigation and prosecution. In fact, the U visa is not limited to victims of domestic violence, so a family law practitioner may want to screen all non-LPR or U.S.-citizen clients and refer them as appropriate.

The U visa is a temporary visa, but it provides the immigrant with several important benefits, as follows:

- a four-year temporary visa to lawfully remain in the United States;
- authorization to be legally employed and be issued a Social Security number; and
- the ability to file derivative U visa petitions on behalf of other relatives (depending on the age of the petitioner, these relatives may include unmarried children under the age of twenty-one, children who currently reside outside the United States, a nonabusive spouse, parents, or siblings under age eighteen).

Equally important, after three years in U visa status and continuously residing in the United States, U visa holders may apply to adjust their status from U visa to LPR.

The U visa is also one of the few remedies an immigrant may apply for if she or he has a prior removal or deportation order.

To qualify for a U visa, the applicant must

- have suffered substantial physical or mental abuse as a result of having been a victim of certain criminal activity;
- possess information concerning the criminal activity and has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution; and
- have a certification from a federal, state, or local law enforcement official, prosecutor, judge, or other authority investigating criminal activity, verifying her helpfulness in the investigation or prosecution of the criminal activity.

Where the direct victim of the crime is under the age of twenty-one, the immigrant child may file a U visa petition for himself or herself and also a derivative U visa petition on behalf of his or her nonabusive immigrant parents. If the direct victim is a child who is a U.S. citizen, the nonabusive parent may file a U visa petition for himself or herself as an indirect victim of crime. The parent must prove that he or she was helpful to the investigation and prosecution.

The criminal activity must be one of a series of crimes specifically mentioned in the law or similar activity. It includes

- rape,
- incest,
- domestic violence,
- sexual assault,
- abusive sexual contact,
- hostage taking,
- kidnapping, and
- unlawful criminal restraint,

among numerous other crimes. The criminal activity must have occurred in the United States or its territories or possessions or have violated the laws of the United States. 8 C.F.R. § 214.14.

Practice Note

For a person to qualify for a U visa, there does not need to be a specific criminal charge of assault and battery on a family or household member under G.L. c. 265, § 13m, nor does the statute need to specifically refer to domestic violence. USCIS has approved U visa petitions based on G.L. c. 209A, § 7, violation of a G.L. c. 209A order; G.L. c. 265, § 13A, assault and battery; and many other sections as crimes of domestic violence. The crime need not have been committed by the intimate partner. USCIS has approved U visa petitions where the petitioner and her boyfriend were attacked by the boyfriend's ex-girlfriend.

As a family law practitioner, you should consult with or refer your client to an immigration attorney who will broadly consider your client's eligibility for a U visa when considering the specific crimes at issue in your client's case.

Practice Note

Often when the abuser is known to the victim, the victim only obtains a restraining order against the perpetrator. A restraining order alone, as of this writing, does *not* qualify someone for a U visa.

Petitions for a U visa are submitted to the VAWA unit at the USCIS Vermont Service Center. The petition is reviewed and approved based on the documents provided to USCIS. USCIS does not interview the petitioning victim. There is no definite time period, or deadline, after the crime occurs when the victim must petition for a U visa; however, a U visa petition may not be filed without a U visa certification. A law enforcement agency (LEA) such as

- a police department,
- a district attorney's office,
- the Department of Children and Families,
- the transit police,
- the Department of Labor, or
- a judge

must certify, using USCIS Form I-918B, that the victim has been helpful to the investigation and prosecution of criminal activity. If a parent or guardian is applying as an indirect victim, the certification must be in the parent's or guardian's name.

Practice Note

While U visas are invaluable as a tool to assist victims of crime, as of this writing, it is taking approximately three years from the time a U visa petition is submitted until it is adjudicated. There is no mechanism for the petitioner to obtain an employment authorization document while he or she waits for adjudication. It is still important to apply for a U visa, as it might be a factor in staying removal if a petitioner is detained by USICE, and it may eventually lead to permanent immigration status. However, given the lengthy amount of time it takes USCIS to adjudicate a U visa petition, it does not provide an immediate immigration benefit to a victim of crime.

A U visa nonimmigrant may adjust his or her status to LPR if he or she meets the following requirements:

- he or she has been physically present in the United States for a continuous period of at least three years since the date of admission as a U nonimmigrant;
- he or she did not unreasonably refuse to provide assistance in a criminal investigation or prosecution;
- his or her continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest; and
- the applicant has not engaged in genocide or Nazi persecutions.

Upon approval of adjustment of status, the Immigration Service may adjust the status of the principal's spouse or child if the adjustment is necessary to avoid extreme hardship.

Special Immigrant Juvenile Status

An undocumented juvenile who has been abused, neglected, and/or abandoned by one or both parents may be eligible to obtain legal permanent residency by petitioning USCIS for special immigrant juvenile status (SIJS). Immigrant youth who are single and under the age of twenty-one years are eligible to petition for SIJS. To become eligible to petition for SIJS, the immigrant must first obtain a predicate order known as a "special findings of fact and rulings of law" from a state court having jurisdiction over the juvenile's care and custody. In Massachusetts, both the Juvenile Court and the Probate and Family Court have the requisite jurisdiction to enter the predicate orders for immigrant juveniles seeking SIJS.

The state court predicate order must include the following provisions:

- The juvenile, who is single and under the age of twenty-one, has been abandoned, abused, or neglected by one or both parents.

- The juvenile is dependent on the state court or has been placed by the court into the custody of a state agency or an individual.
- The state court has determined that reunification with one or both of the child's parents is not a viable option for the child due to abuse, neglect, and/or abandonment.
- The state court has determined that it is not in the best interest of the child to be returned to his or her home country or the home country of his or her parents.

See INA § 101(a)(27)(J). The immigrant juvenile's care and custody must be at issue in an underlying Juvenile Court or Probate and Family Court action. However, a complaint in equity in the Probate and Family Court may be the only cause of action available in cases where the juvenile is between the ages of eighteen and twenty-one. In 2016, the Supreme Judicial Court held that "the Probate and Family Court has jurisdiction, under its broad equity power, over youth between the ages of eighteen and twenty-one for the specific purpose of making the special findings necessary to apply for SIJ status pursuant to the [Immigration and Nationality Act]." *Recinos v. Escobar*, 473 Mass. 734, 739 (2016). Be aware that, under the current immigration law, immigrants who obtain SIJS are precluded from ever petitioning USCIS on behalf of either parent.

Practice Note

The state court having jurisdiction over the care and custody of the child will make a determination about the abuse, neglect, and/or abandonment of the juvenile based on Massachusetts law. In some cases, the death of one or both parents may be deemed an abandonment of the juvenile by the deceased parent. It is important for family law practitioners to keep the SIJS benefit in mind when working with clients who have undocumented children as the child may be eligible to petition for this form of relief, especially when the client has no form of immigration relief available.

Removal of Abusive Spouses or Intimate Partners

All immigrants—including those who have LPR status—are subject to being removed from the United States on a number of bases, which are listed in INA § 237. If an immigrant is undocumented, that in and of itself is sufficient to remove him or her from the United States. Besides removal due to lack of documentation, the statute also provides for removal due to marriage fraud and failure to remove conditions on status. The criminal provisions are most likely to have an impact in cases involving domestic violence. These include the following:

- conviction of one crime of moral turpitude within five years of immigration (or ten years in some cases) if a sentence of one year or longer may be imposed;
- conviction of two crimes of moral turpitude at any time after admission;
- conviction of an aggravated felony (the term "aggravated felony" is defined in INA § 101(a)(43); the list of crimes considered aggravated felonies has been greatly expanded in recent years and now includes almost all felonies);
- conviction of any controlled-substances violation except a single offense of simple possession of 30 grams or less of marijuana;
- being a drug abuser or addict, regardless of whether ever convicted of a crime;
- conviction of almost any firearms offense;
- conviction of a crime of domestic violence, stalking, violation of a restraining order, or child abuse, neglect, or abandonment;
- being found to have violated a restraining order; and
- miscellaneous crimes such as sabotage, espionage, etc.

Practice Note

Immigration law defines the terms "conviction" and "aggravated felony" in a more inclusive way than state law does. For example, a ruling of "continued without a finding," which is not a conviction in Massachusetts, is a conviction for immigration purposes. This area of the law is complex and errors can result, and have resulted, in LPRs who have lived in the United States almost their entire lives being deported to their home countries with no chance of legally reentering the United States.

The domestic-violence and restraining-order provisions that were added by IIRAIRA are generally well known. However, these provisions are sometimes misconstrued in the immigrant community. For example, obtaining a restraining order against a non–U.S. citizen does not, by itself, subject someone to deportation. In addition, immigrants who are convicted of domestic violence crimes are not always placed in removal proceedings before an Immigration Court. This is due in part to the fact that, in many District Courts around the Commonwealth, immigrants are not referred to the immigration service for removal. However, if an immigrant with a conviction has further involvement with the criminal justice system, he or she may be placed into Immigration Court proceedings.

It is also true that contact with the criminal justice system increases an immigrant's chances of being placed in removal proceedings. Undocumented immigrants with outstanding orders of removal or deportation from an Immigration Court will be automatically referred to the DHS if they are arrested and fingerprinted for any reason. ICE agents may take custody of the immigrant during the criminal process pursuant to an ICE detainer. In some cases, immigrants with ongoing criminal issues may be taken into custody by ICE agents who simply seek out immigrants both inside and outside local courthouses and at jails.

If you work with someone who is not a U.S. citizen and who is charged with a crime, it is essential that the person contact an immigration attorney for advice. A helpful resource in Massachusetts is the Immigration Impact Unit of the Committee for Public Counsel Services. *See* https://www.publiccounsel.net/iiu.

The overall effect of these well-intended changes in immigration law may have been to increase the reluctance on the part of victims to obtain restraining orders, enforce restraining orders, or bring criminal charges if the outcome will be not only criminal punishment but also the abuser's removal from the United States. Removal from the United States may have consequences unforeseen by lawmakers, such as the end of a parental relationship between the abuser and the children, the loss of child support or other income to the victim as well as to her family back home, and physical danger to the victim or her family back home if the abuser seeks revenge. As a result of all of these possible consequences, the victim must be the one to make the decision about whether to proceed with criminal charges, after weighing all of the pros and cons of doing so.

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