

The continuing evolution of immigration law to address issues of domestic violence

By Cindy G. Buys

Violence against women is present in every country, but it is even greater where women suffer more economic disadvantages. Moreover, when social disadvantages are added to economic disadvantages, women are placed in the most vulnerable position. Laws that trap women in abusive relationships can increase the likelihood of domestic violence. Over the last decade, U.S. immigration law and policy has evolved to address the plight of victims of domestic violence and to ameliorate immigration laws that may trap non-U.S. citizen women in abusive relationships. This essay explores some of those changes.

One initial comment: Because most victims of domestic violence are female, I refer to the victim as "she" and the abuser as "he." However, the Immigration and Nationality Act (INA) is written in gender-neutral terms.

Marriage-based Immigration:

Immigrants are persons who intend to reside in the United States on a permanent basis. They are known in immigration law as lawful permanent residents (LPRs). One common method of becoming an LPR is to marry a U.S. citizen or LPR. Due to a concern over fraudulent marriages, the INA provides that marriage to a U.S. citizen or LPR entitles the foreign spouse to become U.S. LPR on a conditional basis for the first two years of the marriage pursuant to § 216(a)(1) of the INA, 8 U.S.C. 1186a(a)(1). As a general rule, the U.S. citizen or LPR spouse files the immigrant visa petition (USCIS Form I-130) for the foreign spouse, thus giving the U.S. citizen or LPR spouse control over whether and when the immigrant visa petition is filed.

If the couple is still married after two years, they must jointly petition the U.S. Citizenship and Immigration Services (CIS) to have the conditional status removed, at which point the foreign spouse becomes an LPR. After three more years, the foreign spouse can apply for naturalization to U.S. citizenship. INA § 319(a); 8 U.S.C. § 1430(a). If, however, the couple divorces within two years of the marriage, the foreign spouse loses her or his conditional LPR status. INA §

216(b)(1)(A)(ii); 8 U.S.C. § 1186a(b)(1)(A)(ii).

In a situation where the foreign spouse is being subjected to battery, she may be reluctant to leave the marriage for at least two years for fear of losing her immigration benefits. In recognition of this problem, the statute was amended in 1990 to give the Attorney General discretion to remove the conditional basis of the permanent resident status for a person who cannot file the joint petition at the end of two years in certain circumstances, including a situation where "the qualifying marriage was entered into in good faith by the alien spouse and during the marriage the alien spouse or child was battered by or was subjected to extreme cruelty perpetrated by his or her spouse . . . and was not at fault in failing to meet the [joint petition] requirements." INA § 216(c)(4); 8 U.S.C. § 1186a(b)(4)(C). In such cases, the battered spouse may petition individually to have the condition removed and to become an LPR without conditions. Thus, the battered spouse is no longer dependent on the abuser for her immigration status.

Self-Petitions: Where there is an abusive relationship, the US citizen or LPR spouse may take advantage of his control over the immigration process by refusing to file the initial immigrant visa petition for the foreign spouse, or by threatening to report the foreign spouse to the CIS. (Even if the foreign spouse has lawful immigration status, many immigrants do not realize that their abusers cannot take that status away). In addition, if a U.S. LPR spouse engages in criminal activity (including battery), he may lose his LPR status and be removed from the U.S. As a result, many battered immigrant spouses are afraid to report the abuse to the police or other authorities for fear that one or both spouses will lose their immigration status. To address these issues, Congress amended the INA in 1994 to make it possible for battered foreign spouses to self-petition for LPR status under INA § 204; 8 USC § 1154. To qualify for the self-petition process, the self-petitioner

must demonstrate that she entered into a good-faith marriage with a U.S. citizen or LPR, the U.S. citizen or LPR spouse abused the self-petitioning spouse during the marriage, the self-petitioner lived with the abuser, and the self-petitioner is of good moral character. If the self-petition is approved, the battered immigrant spouse will be allowed to adjust her status to that of an LPR and will be given employment authorization.

Nonimmigrants: Nonimmigrants are persons who come to the United States temporarily, e.g., for business or pleasure or as a student. It is important to note that derivative beneficiaries of non-immigrant visas, (e.g., the wife of a student visa holder), cannot self-petition for LPR status. In such cases, the victim's immigration status is dependent upon that of her spouse.

Therefore, the victim cannot petition to stay in the U.S. apart from the abuser. Until very recently, the victim's only option if she wanted to leave the relationship is to return home. This option may not be very attractive in cultures where women are dependent on their husbands and families for support and are seen as a failure if they leave their marriages, regardless of the reason.

"U" Nonimmigrant Visas: In 2000, Congress created a new nonimmigrant "U" visa for noncitizens who have "suffered substantial physical or mental abuse as a result of having been a victim of criminal activity," which is defined to include domestic violence. INA § 101(a)(15)(U); 8 U.S.C. § 1101(a)(15)(U). The victim may be, but does not need to be, related to the abuser. The noncitizen must be helpful to law enforcement in investigating or prosecuting the criminal activity. The U visa is valid for three years and gives the visa holder work authorization. After three years of continual presence in the U.S., a U visa holder may adjust his or her status to that of an LPR. This visa may solve the problem of the derivative beneficiary of a nonimmigrant visa. Unfortunately, as of this writing, the CIS has not issued regulations to establish an application process nor any application forms.

However, the CIS has issued policy memoranda, which state that U visa applications should be filed with the Vermont Service Center, which will assess whether to place the applicant in deferred action status pending issuance of the regulations. See e.g., William R. Yates, Associate Director of Operations, Centralization of Interim Relief for U Nonimmigrant Status Applicants, Memorandum for Director, Vermont Service Center (Oct. 8, 2003), available at <<http://www.nationalimmigrationproject.org/domestic-violence/uvisas/u%20centralization.pdf>>.

Asylum: To be granted asylum in the U.S., a person must demonstrate that he or she has been persecuted or has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion if returned to his or her country of origin or nationality. INA § 101(a)(42). Thus, as currently written, the statute does not expressly mention persecution on account of gender as a basis for asylum. However, both the CIS and the courts agree that gender may form the basis of a particular social group. Further, developing case law and policy suggests that women who are victims of domestic violence in countries where the police and courts have refused to intervene may constitute a persecuted social group within the

meaning of the statute.

The pending test case in this area is *Matter of R.A.*, involving a Guatemalan woman who suffered serious abuse by her husband for 10 years. After Guatemalan police and the judicial system refused to intervene, R.A. fled to the United States to seek asylum. R.A. was granted asylum by an immigration judge (IJ) and the former Immigration and Naturalization Service appealed. The Board of Immigration Appeals (BIA) overturned the IJ's decision in 1999. *In re R.A.*, Interim Decision 3403 (BIA 1999). Former Attorney General Janet Reno then voided the BIA's decision and the Department of Justice (DOJ) proposed new guidelines on asylum which would allow domestic abuse to be a ground of asylum in certain circumstances. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (2000) (to be codified at 8 C.F.R. pt. 208) (proposed Dec. 7, 2000). In February 2004, the new Department of Homeland Security (DHS) requested that the Attorney General remand *Matter of R.A.* to the BIA with instructions to summarily grant asylum without opinion. Brief for DHS at 2-3, *Matter of R.A.* (U.S. DOJ before the Attorney General) (Feb. 19, 2004) (File No. A 73 753 922), available at <http://www.uchastings.edu/cgrs/documents/legal/dhs_brief_ra.pdf>. In the alternative, the DHS requested that

the Attorney General not render a decision until the proposed guidelines on asylum are published as a final regulation. The DHS stated that it "plans to finalize [the rule] promptly, in cooperation with DOJ." *Id.* at 5. Thus, advocates for victims of domestic abuse seeking asylum in the U.S. should watch for the issuance of a final rule amending the definition of asylum in the near future.

In sum, immigration law and policy has changed significantly over the past decade to better address the plight of immigrant victims of domestic violence. However, these laws and policies continue to evolve and there are concerns that the remedial nature of the statute may be undermined if the CIS adopts narrow interpretations of the statute. Therefore, it will be important to continue to monitor this developing area of law and to remind responsible government officials of the special problems faced by victims of domestic violence which these statutory provisions are intended to ameliorate.

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Memorandum of French Labour Law

By Sandra Vreedenburg

In the United States, a merger, acquisition or transfer of a business can present complicated employee-related issues. In the international context, these challenges multiply.

In France, the employer-employee relationship is governed by the following regulations:

1. French Labour Code
2. Collective Bargaining Agreements: negotiated at regional or national level between trade unions and employers; they can bind employers who were not a party to the negotiations if they belong to a particular industry or sector covered by the agreements
3. Collective Company Agreements:

4. Practices: rules applicable within the company
5. Internal regulations: cover discipline, hygiene and security; for companies with over 20 employees
6. Employment contracts: applies to all residents of France, working in France; the contracts must be in French; specify duration of probationary and notice periods, compensation, work schedule and hours²

One of the European Union's objectives has been to promote corporate transparency through which employees have access to information about proposed corporate activities.³ As such, it passed the Acquired Rights Directive which requires both the seller and

buyer to provide notice to the Member State, in this case, France, 30 days prior to the transfer.⁴ This notice must include information about consultation with the employee representatives known as the works council in France.⁵ This means that the works council must receive notice of the proposed transfer before the 30-day period.⁶

France implemented the Acquired Rights Directive in its Labour Code.⁷ The following is a summary of the applicable Code sections of which you should be aware.

Article 122-12 of the French Labour Code states:

If the legal status of the employer should come to be modified, be it by assignment,