

ACCESS TO JUSTICE
FOR REFUGEE AND MIGRANT WOMEN AND CHILDREN
A U.S. PERSPECTIVE

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Historical Perspective – U.S. East Coast

Europeans and Britons were the first large group of non-indigenous people to come to the Atlantic Coast of North America, populating the coastal areas from Nova Scotia and New Brunswick (now parts of Canada) south to what is now the state of Georgia.¹ This group were largely either looking for a home free of religious persecution or looking for economic opportunity. When they had become established enough in the New World to be economically self-sufficient the colonies south of what is now Canada, chafing under British rule and British taxes, waged a war for independence that lasted almost a decade. In the late 1700s Britain gave up her claims to her 13 North American colonies and the United States of America was born.

After the initial (pre independence) migrations others came to the east coast. First Germans and Scandinavians in large numbers, followed by Irish throughout the period from about 1830 to 1900. Largely poor and uneducated, they lived in tenement houses in the port cities in subsistence conditions. The poverty in which they lived brought disease, depression and sometimes despair. Husbands abandoned families to escape their circumstances, migrating west to look for work. The justice system had no remedies for the ills of these immigrants and help came, if at all, from their religious institutions (church charities) and from extended family members if there were any. Many came not speaking English and they had no access to educational opportunities and so many lived their lives depending upon their immediate immigrant community or their American schooled children for contact with the outside world.

¹ The area south of what is now Georgia was explored and colonized by Spain and was Spanish territory into the 1800s.

This second wave of immigrant groups were followed by a third, consisting of large numbers of Italians and Eastern European Jews from about 1900 through the end of the Second World War. They moved into the dirty, airless tenements and lived in the same sad conditions as their predecessors. But these groups, seeing the need for some organized help, began forming "Societies". The societies would be formed by people who had migrated from the same town, village, or rural area and were identified by the name of their home town or village. Members would contribute weekly what small sums they could to form a pool of funds so that if a wage earner died or ran off, or became too ill to work his wife and children would not go hungry or be unable to bury their dead. Access to the legal system was unthinkable to these groups. The Italians had come from a largely feudal system where only the wealthy had access to the courts; the Jews had come from a system of discrimination that would make resort to the court useless. And neither group came speaking English. Domestic violence in these groups was dealt with by the families of the abused or by the priest or rabbi who served the local community.

After World War two the East coast cities experienced yet another wave of immigration; this one largely from Spanish and Portuguese speaking people, followed by large numbers of Asians (principally from Viet Nam and Cambodia). As before, the Spanish and Portuguese speakers and Haitians (from Latin, Central, and South America and the Portuguese islands – Azores and Cape Verde and from the island of Haiti) came mostly looking for economic opportunity. The Viet Nameese and Cambodians came initially because of political repression and fear of reprisal from the Communist regimes that took power after the American military pulled out in the 1970s. These groups were also not English speaking and depended upon relatives and their immediate immigrant community for assistance.

But in the interim between the pre-World War Two immigrations and the "new" wave coming in the 60s and 70s, sociologists and other social scientists had changed American thinking about the status of women, the protection of women from family abuse, and whether or not society as a whole should intervene in family affairs for the welfare of these immigrant women and children. Over time the English "Rule of Thumb"² had mercifully been eradicated; it had become unacceptable for a husband to abuse his wife and/or children; to force his wife to have sexual relations; or to confine her liberty. Eventually even the Federal Government recognized the right of an immigrant woman to petition in her own right for resident status or citizenship, even if she had initially entered the country sponsored by her husband.

² Under English Common Law, a man could physically discipline his Wife with a rod so long as its circumference did not exceed the circumference of his thumb.

With this change in ways of thinking and social mores, services for both immigrant and non-immigrant women began to appear; first through private initiatives and then through State and local governments.

Access to the Justice System Today

Today in the United States a woman is assaulted or beaten every 9 seconds. Domestic violence is the leading cause of injury to women – more than car accidents, muggings and rapes combined. Based upon reports from 10 countries between 55 percent and 95 percent of women who had been physically abused by their partners had never contacted non-governmental organizations, shelters or the police for help. These statistics are dramatically higher for non-English speakers, both for lack of language skills and for reasons of local customs and expectations in their countries of origin.

But there are now in place a number of organizations in the United States that provide education, outreach services, free legal representation and presences in immigrant communities. Some of these are part of an initiative that is called RISE (Refugee and Immigrant Safety and Empowerment). Some serve specific language groups (such as Cape Verdeans, Spanish speakers, Haitian Creole speakers, Chinese and other south Asians such as Pakistanis and Indians). Some serve all immigrants, including teens, elders, people with disabilities, battered women and children exposed to battering, people suffering from economic abuse. Some provide social adjustment services such as language education, family counseling, referral services to social agencies, job training programs, translation services, and the like.

While there is still fear and reluctance on the part of many immigrant women and children to seek out social services outreach groups have had some success in educating these women about their rights, obtaining free or low-cost legal assistance for them, and helping them to understand that they do not have to tolerate abusive situations or fear losing their immigration status as a result of reporting abuse and seeking legal protection from it.

The Legal Framework for Immigrants Who Come Without VISAS

A. Violence Against Women Act

The Violence Against Women Act was first enacted in 1994 and significantly strengthened with enactment of the Violence Against Women Reauthorization Act of

2013.³ The 2013 Act, among other things, expanded protections for gays and lesbians and also for non-Native Americans who are tried by tribal courts on reservations, and protections for battered indigenous Indian women.

The 2013 Act⁴ [LN1] amends the Immigration and Naturalization Act to expand the definition of non-immigrant U-Visa⁵ to include victims of stalking. It also makes the child of an alien VAWA petitioner eligible for lawful permanent resident alien status under his/her parent's petition if that petition is successful.⁶ And it grants an exclusion to any alien who is a VAWA petitioner, a U-Visa applicant, or a battered spouse or child from the requirement that he/she not be a public charge.⁷ [LN2]

VAWA further amends the Immigration and Naturalization Act to provide that if a child who is under 21 and unmarried when his or her parent petitions and he or she turns 21 during the pendency of the petition process, he or she will still be eligible, and also extends the waiver of the 2-year waiting period for permanent resident status to a battered spouse.⁸

VAWA protections are critical for family lawyers to understand and apply where appropriate. A VAWA candidate may self-petition for adjustment of status without notice to or reliance upon the status of an abusive family member. Protections are available even if the self-petitioner made an illegal entry into the United States and would otherwise be inadmissible under INA section 212(a)(6)(A)(i). [LN3]⁹ Protections are available to the minor children of petitioners as well.

B. Deferred Action for Childhood Arrivals

Beginning on June 15, 2012, foreign nationals without lawful status who came to the United States before reaching their sixteenth birthday and had continuously resided in the United States since at least June 15, 2007 and were physically present in

³ Pub. L. No. 113-4, 127 Stat. 54 (Mar. 7, 2013) (codified as amended in scattered sections of 18 and 42 U.S.C.).

⁴ Title VIII Protection of Battered Immigrants, Section 801; 8 USC 1101(a)(15)(U)(iii)

⁵ Aliens who are victims of certain crimes.

⁶ Title VIII Protection of Battered Immigrants Section 803; USC 1154(1)(2)

⁷ Title VIII Protection of Battered Immigrants Section 804; 8 USC 1182(A)(4)

⁸ Title VIII Protection of Battered Immigrants Section 805; 8 USC 1184(p)

⁹ Hamar, Nawal A., Social Science Research Documents the Need for VAWA Self Petitions and U Visas, National Immigrant Women's Advocacy Project, American University

the United States when making an application, were either in school or obtained a high school diploma, or were honorably discharged from any branch of the military, had not been convicted of a felony, significant misdemeanor, or three or more misdemeanors, and did not otherwise pose a threat to national security or public safety were entitled to request deferred action against removal from the United States (DACA).^[LN4]¹⁰

DACA status did not and does not grant or provide lawful status to anyone and is a protection against removal for only a period of two years (subject to renewal).^[LN5] If DACA is granted to an individual he/she may be eligible to receive work authorization.¹¹

On September 5, 2017, DACA was rescinded by executive order ^[LN6]but due to several recent court decisions the U.S. Customs and Immigration Service (USCIS) is currently accepting requests for renewal of status.¹²

To request DACA renewal a person must be at least 15 years of age unless removal proceedings have already begun or there is a removal order, in which case the renewal applicant can be younger than 15. An applicant for renewal must be under age 31 in all cases.^[LN7]¹³

DACA applicants must be able to prove that they came to the United States before their sixteenth birthday, prove that they are not lawful immigrants, prove that they were present in the United States on June 15, 2012 and continuously resided in the United States, prove that they meet the educational requirements or were in the United States military and were honorable discharged.

Applicants who do not meet the criteria are referred to U.S. Immigration and Customs Enforcement (ICE) for removal proceedings if the Department of Homeland Security determines that there are criminal offenses involved, or there is

¹⁰ Consideration of Deferred Action for Childhood Arrivals; US Citizen and Immigration Services, www.uscis.gov/archive

¹¹ Consideration of Deferred Action for Childhood Arrivals; US Citizen and Immigration Services, www.uscis.gov/archive

¹² DACA remains unavailable to anyone who had never been granted DACA status before September 5, 2017.

¹³ Consideration of Deferred Action for Childhood Arrivals; US Citizen and Immigration Services, www.uscis.gov/archive

evidence of fraud, or there are threats to national security or public safety. USCIS has a stated policy of not referring individual cases to ICE otherwise.[LN8]

C. Refugee Status

The term “refugee” is a defined term under the United States Immigration and Nationality Act (INA).¹⁴ A refugee is a person who is not in his or her own country and who is unable or unwilling to return to his or her country because of either “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular group, or political opinion, or nationality, membership in a particular social group, or political opinion or, if the president so determines, is in his or her country of nationality and has either “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular group, or political opinion, or nationality, membership in a particular social group, or political opinion.”¹⁵

A person who has been forced to abort a pregnancy or to undergo involuntary sterilization or who has been persecuted for failure or refusal to undergo such a procedure or for other “resistance to a coercive population control program” also falls within the ambit of the Act. Forced marriage or the threat of forced marriage is also considered a criterion.[LN9]

A person who qualifies for refugee status may be eligible to adjust his other status and receive legal permanent residency, and later U.S. citizenship.

D. Asylum Status

The term “asylum” differs from the term “refugee” in that an asylum seeker is a person who meets the definition of “refugee” but who is already in or at the border of the United States. If a person is granted asylum he or she is protected from being returned or removed, may get authorization to work in the United States, may request permission to travel, and may petition to bring in family members. After one year an asylee may apply for permanent resident alien status. After four more years he or she may apply for citizenship. An application for asylum is also a request for withholding of removal.

¹⁴ 101(a)(42) INA GIVE STATUTE

¹⁵ This definition comes originally from the United Nations 1951 Convention and the 1967 Protocol and was then incorporated into the INA as part of the Refugee Act of 1980. ADD CITES

There are two categories of asylum. Affirmative asylum applies to a person who is not in removal proceedings and, until adjudicated, will not be removed. Defensive asylum applies to persons who are actually in removal proceedings and an application is filed with the immigration judge; it is in essence a defense against removal.

An asylum seeker has the burden of proof that he or she meets the definition of “refugee.” Although asylum seekers are generally very vulnerable people (children, single mothers, victims of violence or torture, etc.) they may be detained while their applications are being considered, sometimes for considerable periods of time. The decision to detain an asylum seeker while an application is pending is entirely within the discretion of the Department of Homeland Security (DHS) and USCIS.