

POLICY BRIEF:
**THE ROLE OF THE CATEGORICAL APPROACH IN ASSISTING VICTIMS OF
DOMESTIC VIOLENCE AND OTHER CRIMES APPLY FOR U NONIMMIGRANT
STATUS AND VAWA SELF-PETITIONS**

**Center for Battered Women's Legal Services
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The purposes of this policy brief is to illustrate the impact of the categorical approach on affirmative applications for relief filed on behalf of immigrants who are the victims of domestic violence and other crimes. As immigration attorneys with the Center for Battered Women's Legal Services, the largest provider of services exclusively to domestic violence victims in New York and one of the largest such providers in the country, we deal with these issues firsthand when assisting thousands of immigrants, mostly women, who are victims of domestic violence and other gender-based crimes as they seek to stabilize their precarious immigration status through affirmative applications for immigration relief (in addition to defensive applications in removal proceedings).

Background of Common Forms of Affirmative Relief for Immigrant Victims of Domestic Violence and Other Crimes

Immigrants who are the victims of domestic violence and other violent crimes are often placed in a more vulnerable position due to their lack of citizenship status. Immigrants without status are often told by their abusers that they will be deported if they report the abuse to police. Because the most common way to gain lawful permanent residency is through a petition by an immediate relative—often the spouse—many immigrants feel trapped in a situation of domestic violence. As a result, Congress has amended the Immigration and Nationality Act (“INA”) to create other avenues of relief for immigrants who are the victims of domestic violence and other crimes. These avenues provide immigrants with the means to come forward and apply for immigration relief affirmatively with U.S. Citizenship and Immigration Services. We believe that access to such relief is crucial to ensuring stability for immigrant victims of domestic violence and other crimes.

Two of the most common affirmative applications for relief our clients seek are those for U nonimmigrant status and for relief under the Violence Against Women Act (“VAWA”). Relief under U nonimmigrant status allows victims of certain enumerated crimes, including most violent crimes and domestic violence, to attain a visa, work lawfully in the United States, and eventually be able to apply for lawful permanent residency and thereafter citizenship. Relief under VAWA allows the survivor of domestic violence who is or was married within a specified time to a U.S. citizen or lawful permanent resident to self-petition (i.e., petition without their spouse's support) for lawful permanent residency. See INA §§ 101(a)(15)(U) (U nonimmigrant status); 204(a)(1)(A) and (B) (VAWA self-petitioning). A successful VAWA self-petitioner will have lawful permanent residency and thus will later be able to file for citizenship.

The Impact of Criminal Convictions on Access to Affirmative Relief

Both of the aforementioned forms of immigration relief, along with almost every form of affirmative and defensive relief, have bars related to criminal convictions, some subject to waivers. For example, an applicant for U nonimmigrant status must not be “inadmissible” to the United States INA §212(d) (14). An applicant for a VAWA self-petition must have “good moral character” for a three-year period preceding the application. *See* INA § 204(a)(1)(C); 8 C.F.R. § 204.2(c)(2)(v). Thus, if she has a conviction that falls into a ground barring good moral character, such as a “crime involving moral turpitude” or an “aggravated felony,” then she will not be able to self-petition under VAWA unless she can show that the conviction was connected to the battery or extreme cruelty. *See* INA § 204(a)(1)(C); 8 C.F.R. § 204.2(c)(2)(v).

Some of our clients have had interactions with the criminal justice system that have resulted in a conviction. The conviction may or may not be related to the abuse they have faced—whether low-level theft offenses (shoplifting and other petty theft crimes are not uncommon), assault (domestic violence victims who try to defend themselves may be arrested along with the abuser), or other crimes. As attorneys who meet with immigrant victims of domestic violence and other gender-based crimes while they are still attempting to determine whether it safe for them to flee from that situation, we often must make definitive and accurate determinations about whether those victims are eligible for some form of immigration relief and what risks our clients may face if they decide to pursue these forms of relief.

The Categorical Approach and Access to Relief

Until recently, it has been undisputed that the so-called “categorical approach” applies to the assessment of whether a conviction for certain crimes triggers a statutory bar to relief. Under this categorical approach, we look to the statute under which our client was convicted. If this statute is broader in its description of the crime than are the potential grounds of inadmissibility, then we look to the record of the conviction (the charging documents, the plea transcript or jury findings, and the judgment of guilt) to determine if the conviction is a “crime involving moral turpitude” or “aggravated felony.” Certainly many of our clients with convictions that do not fall into these categories may still be denied immigration relief as a matter of discretion (since the government can ultimately decide whether or not to grant any discretionary form of relief), but the categorical approach at least lets us determine whether our clients meet a basic threshold of eligibility for a specific form of immigration relief.

The benefit of the categorical approach has always been that we can provide some definitive and accurate assessment of eligibility for our clients, using documents that specify the precise offenses of which our clients are convicted. We know what to provide to U.S. Citizenship and Immigration Services to establish eligibility, and we are better able to prepare our clients on the role their convictions may play in determinations about their immigration status.

The erosion of the categorical approach into a more fact-based inquiry would thus fundamentally undermine our ability to provide these assessments and services to our clients. The outcome of the Supreme Court's decision in *Nijhawan v. Attorney General* (addressing the categorical approach in fraud aggravated felony cases) and Attorney General Holder's review of the recent decision in *Matter of Silva-Trevino* (addressing the categorical approach in crimes involving moral turpitude cases) may greatly compromise our ability to fully advise our clients as to the risks and options available to them if they were to leave their abuser, and therefore have a serious impact on our work.

For example, we often must make determinations about whether an offense is a "crime involving moral turpitude." In one recent case, we were representing a woman who was the victim of severe domestic violence at the hands of her husband. We were trying to assess her eligibility for a U visa and had to determine whether she needed to make a separate application for a waiver of her two convictions involving shoplifting charges. To make this determination under current Second Circuit law, which applies the traditional categorical approach that has been used for years, our review was appropriately limited to the state penal code under which our client was convicted and to the record of conviction (the charging documents, the plea transcript or jury findings and the judgment of guilt) to determine, ultimately, that a waiver was not needed. However, if an underlying factual inquiry is permitted, we would have needed to talk to our client in much more depth about the underlying facts and possibly seek out witnesses, police reports, and other information to make what would otherwise be a straightforward assessment. This client's convictions had occurred years before, and given the trauma she had suffered since her convictions, our client had trouble even remembering the circumstances of her arrests. Being required to engage her in a more detailed factual inquiry would result in precisely the type of time-intensive and ultimately unpredictable assessment that our clients cannot afford when seeking relief and stability in their immigration status.

While the "crime involving moral turpitude" inquiry is by far the most common one we need to make for our clients, we also have to determine if certain convictions are "aggravated felonies." This is often the most serious of inquiries given the mandatory and permanent consequences that stem from having been convicted of an aggravated felony under immigration law. In one recent case, we had to determine whether a conviction fit into the "fraud or deceit" aggravated felony category, which includes convictions for offenses involving fraud in which the loss to the victim exceeds \$10,000. We were representing a woman who was the victim of domestic violence at the hands of her United States Citizen husband, with whom she has a young son. She came to our office to determine whether there may be a way for her to lawfully remain in the United States and not have to leave the United States with her child. Our client had, years before, been convicted of selling counterfeit goods. This conviction greatly concerned us, both because of the aggravated felony bar to the "good moral character requirement" for VAWA-self petitioners, and because the aggravated felony bar would preclude her from any defensive relief if she were placed in removal proceedings. To make this determination under current Second Circuit law, which applies the traditional categorical approach that has been used for years, we only needed to look at the statute and the

record (in this case, the plea transcript and entry of guilt) to determine that the aggravated felony bar did not apply to our client, which made her eligible to obtain a VAWA self-petition, and become a United States Lawful Permanent Resident. However, if an underlying factual inquiry is permitted as to the loss amount, we would need to talk to our client in much more depth about the underlying facts alleged as part of any restitution and possibly seek out experts in loss calculations of the sort involved in her case to show that the loss was not related to her convicted conduct. This type of assessment is so fundamentally different from the work that any of us as immigration lawyers would normally do that it is unclear how we could make those assessments fairly and accurately for our clients.

Conclusion

The categorical approach has played a central role to our work in providing our clients with the best possible assessment of how their prior convictions might affect their ability to seek relief and gain stability after experiencing domestic violence and other traumatic crimes. These are precisely the types of assessments that we need to do quickly and with relative certainty as to result, particularly given the time-sensitive and often dangerous situations our clients face while their immigration status is uncertain.

For more information about these issues, please contact Julie Dinnerstein, Co-Director of the Immigration Intervention Project at the Center for Battered Women's Legal Services by phone at (718) 575-4530 or by mail at the Center for Battered Women's Legal Services, NYC Family Justice Center – Queens 126-02 82nd Avenue Kew Gardens, NY 11415-1225.