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The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation?

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THE IMMIGRATION MARRIAGE FRAUD AMENDMENTS: SHAM MARRIAGES OR SHAM LEGISLATION?

JAMES A. JONES

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I. INTRODUCTION

The family, a central institution in our society, is threatened, disrupted, and undermined by domestic violence. Approximately ninety-five percent of this violence is inflicted by a man upon a

woman.¹ Every fifteen seconds,² or six million times per year,³ a woman is battered. Domestic violence transcends age, race, religion, cultural heritage, and socio-economic status, and immigrant women, like many others, are extremely vulnerable.⁴

Seeking to promote family unity, United States immigration policy confers certain advantages upon family-sponsored immigrants. For example, there is no restriction on the number of "immediate relatives" of U.S. citizens permitted to immigrate each year.⁵ The term "immediate relatives" means certain children, spouses, and parents of citizens of the United States.⁶ Furthermore, first and second preferences for applicants for the limited visas are given to immigrants who desire to enter the United States because of close family relationships.⁷ Unmarried sons and daughters of U.S. citizens are granted first preference under the system of family sponsorship.⁸ Spouses and unmarried sons and daughters of permanent resident aliens are granted second preference.⁹ Because of numerical limitations, spouses of permanent residents must wait an average of two years and three months before receiving a visa.¹⁰ In contrast, there is almost no waiting period for spouses of U.S. citizens.¹¹

1. See Immigration Act of 1989 (Part 3); Joint Hearings on S. 358 Before the Immigration, Refugees, and Int'l Law Subcomm. of the House Judiciary Comm. and the Immigration Task Force of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess. 852-53 (1990) [hereinafter Joint Hearings] (joint statement of Asian Women's Shelter et al.).

2. See *id.* at 852 (citing FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT OF JUSTICE, UNIFORM CRIME REPORTS FOR 1983 (1984)).

3. See H.R.J. Res. 178, 103d Cong. (1993) (enacted).

4. See Joint Hearings, *supra* note 1, at 853; Maxine Yi Hwa Lee, A Life Preserver for Battered Immigrant Women: The 1990 Amendments to the Immigration Marriage Fraud Amendments, 41 BUFF. L. REV. 779, 781-82 (1993) (estimating the extent of abuse against immigrant women by correlating statistics on domestic violence in general with statistics on immigrant entrance, statements from hotline shelters catering to immigrant communities, and the number of conditional resident spouses seeking waivers).

The following example illustrates the problems facing battered immigrant women:

Katrina came to the U.S. three years ago with her mother and her American husband whom she had married in the Philippines. Katrina is undocumented, but her two year old daughter is a U.S. citizen. As an undocumented woman married to a U.S. citizen, Katrina's legal residency depends upon her husband's willingness to verify the "legitimacy" of their marriage in an interview with the INS. Katrina's husband has beaten her repeatedly during the past two years and recently he forced her mother to move out of the house and move in with a friend. Katrina finally sought help from a battered women's shelter but soon returned to her husband when he threatened to report her to the INS and have her deported.

Joint Hearings, *supra* note 1, at 858.

5. See 8 U.S.C. § 1151(b) (1994).

6. See *id.* § 1151(b)(2)(A)(i).

7. See *id.* § 1153(a).

8. See *id.* § 1153(a)(1).

9. See *id.* § 1153(a)(2).

10. See Margaret M.R. O'Herron, Note, Ending the Abuse of the Marriage Fraud Act, 7 GEO. IMMIGR. L.J. 549, 552 (1993).

11. See Immigration Marriage Fraud: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 2 (1985)

Under the system of family sponsorship, either a U.S. citizen or an alien who is a lawful permanent resident (LPR) may file a petition with the Immigration and Naturalization Service (INS) to obtain immigration status for his or her spouse.¹² Before 1986, the INS merely interviewed applicants who desired residence to determine the validity of the marriage.¹³ If the immigration officer determined that the marriage was entered into in good faith, the immigrant beneficiary qualified for unconditional permanent residence.¹⁴

In 1986, Congress passed the Immigration Marriage Fraud Amendments (IMFA) to counter the perceived problem of immigrants entering into sham marriages to receive priority immigration status.¹⁵ Part II of this Comment reviews the history of the IMFA. Part III highlights the IMFA's unintended consequences. Part IV examines the Immigration Act of 1990, which was designed, in part, to correct flaws in the IMFA. Part V discusses the problems left unresolved by the 1990 Act. Part VI examines the Violent Crime Control and Law Enforcement Act of 1994, which also was designed, in part, to correct flaws in the IMFA. Part VII discusses the problems still left unresolved by the 1994 Act. Part VIII offers suggestions for reforming U.S. immigration policy to eliminate the unintended negative consequences of the IMFA. Finally, Part IX concludes that because of its continued disastrous impact on alien spouses, the IMFA should be repealed.

II. IMMIGRATION MARRIAGE FRAUD AMENDMENTS OF 1986

A. Policy Behind Enactment

Congress enacted the IMFA to balance the competing policies of promoting family reunification and preventing marriage fraud.¹⁶ The outcry for reform was tremendous. During debate on the matter, one congressman noted: "Because spouses of U.S. citizens and permanent resident aliens are . . . given special consideration under our immigration laws, many aliens who would not otherwise be allowed to live in the United States find it expedient to enter into a fraudulent marriage."¹⁷ INS surveys estimated that as many as thirty per-

[hereinafter IMF Hearings] (statement of Sen. Alan K. Simpson). "By virtue of a simple ceremony taking only a few minutes, marriage to a United States citizen confers 'most favored alien' status on the beneficiary and almost instantly results in immigrant status as no visa number . . . is necessary." *Id.* at 7 (statement of INS Commissioner Alan C. Ndson).

12. See 8 U.S.C. § 1154(a)(1)(A)(i), (a)(1)(B)(i) (1994).

13. See O'Herron, *supra* note 10, at 552.

14. See *id.*

15. See Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended at 8 U.S.C. §§ 1154, 1184, 1186a (1994)).

16. See H.R. REP. NO. 99-906, at 6 (1986), reprinted in 1986 U.S.C.C.A.N. 5978, 5978.

17. 132 CONG. REC. H27,015 (daily ed. Sept. 1, 1986) (statement of Rep. Romano L. Mazzoli).

cent of all spousal petitions involved marital fraud.¹⁸ According to the INS commissioner, marriage fraud posed a significant threat to the integrity of the immigration system¹⁹ because marriage was the easiest and most frequently used means of obtaining permanent resident status.²⁰

B. Conditional Status

Under the IMFA, a woman petitioning as an immigrant spouse is admitted as a “conditional” resident alien after her initial petition is approved.²¹ The conditional status is contingent upon her ability to maintain a valid, two-year marriage.²² The INS can terminate the conditional status before the completion of the two-year period if the marriage is determined to be a sham used to confer a beneficial immigration status upon the alien.²³ To initiate removal of the conditional status, both the alien spouse and the citizen are required to file a petition for removal of conditional status²⁴ within ninety days of the second anniversary of the alien spouse obtaining the conditional status.²⁵ The alien spouse can be deported if the U.S. citizen does not file the petition in time or attend—along with the alien spouse—a personal interview with the INS.²⁶ An exception allows the couple to demonstrate “good cause” for any late filing of the petition.²⁷

After a petition for removal is properly filed, the INS interviews the couple to determine if the marriage is bona fide.²⁸ If the petition is granted, the conditional status is removed and the alien becomes an LPR on the second anniversary of the marriage.²⁹ If the INS finds the marriage was “entered into for the purpose of procuring an alien’s

18. See H.R. REP. NO. 99-906, at 6, reprinted in 1986 U.S.C.C.A.N. 5978, 5978. This estimate, however, was at best misleading. See discussion *infra* Part VIII.A.

19. See IMF Hearings, *supra* note 11, at 6 (statement of INS Commissioner Alan C. Nelson).

20. See *id.* at 7.

21. See 8 U.S.C. § 1186a(a)(1) (1994).

22. See *id.* § 1186a(b)(1).

23. See *id.* § 1186a(b)(1)(A)(i); 8 C.F.R. § 216.3(a) (1997). The IMFA grants the power to make this decision to the Attorney General, see 8 U.S.C. § 1186a(b)(1); however, the Attorney General has delegated to the INS the authority to administer and enforce the IMFA and all other immigration laws, see 8 C.F.R. § 100.2(a). Thus, for simplicity’s sake, this Comment refers to the INS when the immigration law in question specifies the Attorney General.

24. See 8 U.S.C. § 1186a(c)(1)(A) (1994).

25. See *id.* § 1186a(d)(2)(A).

26. See *id.* § 1186a(c)(2)(A).

27. See *id.* § 1186a(d)(2)(B).

28. See *id.* § 1186a(c)(1)(B); cf. 8 C.F.R. § 216.4(b)(1) (1997) (requiring the regional service center director “to determine whether to waive the interview required by the Act. If satisfied that the marriage was not for the purpose of evading the immigration laws, the regional service center director may waive the interview and approve the petition.”).

29. See 8 U.S.C. § 1186a(c)(3)(B) (1994).

entry as an immigrant,"³⁰ "has been judicially annulled or terminated,"³¹ or was the result of a consideration paid to the resident to file the petition to gain a beneficial immigration status for the alien, the INS must terminate the resident status of the alien.³² Such a termination renders the alien subject to deportation proceedings.³³

C. Hardship Waiver

The INS has discretionary power under the IMFA to grant a hardship waiver that removes the conditional basis of the permanent residency status if certain conditions are met.³⁴ As originally enacted, the hardship waiver provision required the immigrant woman to prove that extreme hardship would result from deportation,³⁵ or that the marriage had been entered into in good faith, the marriage had been terminated by her for good cause, and she had not been at fault in failing to meet the requirements of the petition to remove the conditional status.³⁶ However, whether the waiver is ultimately granted is at the discretion of the INS.³⁷ In determining hardship, the INS can only consider evidence developed during the time the alien was under conditional status.³⁸ Originally, an alien who was denied removal of conditional residency was not entitled to an appeal, but could merely request a review of the final decision during deportation proceedings.³⁹

III. SHORTCOMINGS OF THE IMFA

A. Good Faith Requirement

The hardship waiver provision's still-existing requirement that a marriage be entered into in good faith⁴⁰ discourages immigrant women from escaping abusive spouses. For example, even if the marriage was entered into in good faith from the immigrant wife's perspective,⁴¹ the husband can easily fabricate an allegation that

30. *Id.* § 1186a(b)(1)(A)(i).

31. *Id.* § 1186a(b)(1)(A)(ii).

32. *See id.* § 1186a(b)(1)(B).

33. *See id.* § 1186a(b)(2).

34. *See id.* § 1186a(c)(4).

35. *See id.* § 1186a(c)(4)(A) (Supp. IV 1986).

36. *See id.* § 1186a(c)(4)(B), amended by Immigration Act of 1990, Pub. L. 101-649 § 701(a), 104 Stat. 4978, 5085 (striking out the requirement that the marriage be terminated by the alien spouse for good cause); *see also* discussion *supra* Part IV.B.

37. *See* 8 U.S.C. § 1186a(c)(4) (1994).

38. *See id.*

39. *See* 8 C.F.R. § 216.5(f) (1994); *cf. id.* § 204.2(c)(3) (1997) (granting a notice and full hearing options for aliens denied self-petitions).

40. *See* 8 U.S.C. § 1186a(C)(4)(B) (1994).

41. There also are cases in which both parties entered into the marriage in good faith, but one or both eventually realized that it was a mistake. For example, suppose that the

would discredit and rebut his wife's good faith allegations, simply as a vindictive and retaliatory measure to burden her petition for waiver.

B. Initiation of Divorce Requirement

In its original form, the hardship waiver did not apply in a divorce unless the immigrant spouse initiated the divorce.⁴² Thus, the spouses would race to the courthouse to attempt to be first to file for divorce.⁴³ The immigrant spouse was at a disadvantage in this race because initiating divorce proceedings could anger the battering spouse, causing an escalation of abuse. Also, the immigrant spouse often could not afford legal representation or even find adequate representation because of language barriers.⁴⁴

C. Termination for Good Cause Requirement

Originally, the hardship waiver was not available in a divorce unless the marriage was terminated for good cause.⁴⁵ In states with no-fault divorce laws, it was not always possible for an immigrant woman to show that the marriage was terminated for good cause because specific facts could not be alleged when filing for a divorce.⁴⁶ Thus, under the IMFA in its original form, immigrant women in these states had difficulties creating a record showing that divorce proceedings were initiated for good cause.⁴⁷

D. Applicability If Initial Petition Is Not Filed

Currently, the hardship waiver provision only exempts the joint filing requirements to have the conditional status removed, and does not protect an alien whose spouse never filed the initial petition to

parties ceased to cohabit because one physically abused the other. In that case, one can say that the abused spouse made a mistake. Such a mistake, however, would not constitute an act of fraud or a sham marriage. See IMF Hearings, *supra* note 11, at 33 (statement of Deputy Ass't Sec'y of State for Visa Services Vernon D. Penner, Jr.).

42. See 8 U.S.C. § 1186a(c)(4)(B) (Supp. IV 1986) (requiring that the marriage be "terminated . . . by the alien spouse . . ."), amended by Immigration Act of 1990, Pub. L. 101-649 § 701(a), 104 Stat. 4978, 5085 (striking out the requirement that the marriage be terminated by the alien spouse); see also H.R. REP. NO. 723(I), at 51 (1990), reprinted in 1990 U.S.C.C.A.N. 6710, 6731 (listing numerous factors that interfere with a battered spouse's ability to initiate a divorce); discussion *supra* Part IV.B.

43. See O'Herron, *supra* note 10, at 554.

44. See Deena Jang, Triple Jeopardy: The Plight of Battered Immigrants and Refugee Women, 19 IMMIGR. NEWSL. 6, 6 (1990).

45. See 8 U.S.C. § 1186a(c)(4)(B) (Supp. IV 1986) (requiring that the marriage be terminated "for good cause"), amended by Immigration Act of 1990, Pub. L. 101-649 § 701(a), 104 Stat. 4978, 5085 (striking out the requirement that the marriage be terminated for good cause); see also discussion *supra* Part IV.B.

46. See O'Herron, *supra* note 10, at 554.

47. See *id.*

establish conditional residency.⁴⁸ An alien may be under the belief that she is waiting to file for the final interview, and only then realize that she is in the United States illegally because the initial petition for conditional residency has not been filed. Thus, before subsequent amendments to the IMFA allowed the alien spouse to self-petition for conditional residency,⁴⁹ any alien in this position, or one who was told by the spouse that an initial petition was never filed, was very reluctant to come forward because of the risk of immediate deportation.

E. Withdrawal of Initial Petition

An abusive spouse, whether a U.S. citizen or a conditional permanent resident, can withdraw the initial petition for permanent residency at any time before the end of the two year conditional period.⁵⁰ Thus, before the IMFA was amended to allow self-petitioning,⁵¹ the battering husband could use both the threat not to file the initial petition and the threat of withdrawing the petition once it was filed to coerce the immigrant wife into meeting his demands, including, but not limited to, abandoning the petition for removal of the conditional status.⁵²

Instead of offering protection, the IMFA, in its original form, aggravated already pernicious domestic situations for immigrant women by providing their assailants with control over whether they would be permitted to remain in the United States. "The already considerable barriers to escaping the abusive spouse become seemingly insurmountable to a woman who is waiting for the lapse of the two year period in order to complete the process of immigrating legally."⁵³ Thus, the original IMFA provisions inadvertently provided a framework under which battered immigrant spouses had the choice of either remaining in abusive marriages until the conditions of their resident status were removed, or leaving and risking deportation if

48. See 8 U.S.C. § 1186a(c)(4) (1994); see also Michelle J. Anderson, A License to Abuse: The Impact of Conditional Status on Female Immigrants, 102 YALE L.J. 1401, 1416-17 (1993). Even though the hardship waiver still does not apply if the initial petition for conditional permanent residency is not filed, this problem is mitigated by allowing battered alien spouses to self-petition for conditional residency. See discussion *supra* Part VI.A.

49. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 40701, 108 Stat. 1796, 1953-55 (codified at 8 U.S.C. § 1154(a)(1)(A)(iii) (1994)); see also discussion *supra* Part VI.A.

50. See 8 C.F.R. § 205.1 (a)(3)(i)(A) (1997).

51. See Violent Crime Control and Law Enforcement Act § 40701, 108 Stat. at 1953-55; see also discussion *supra* Part VI.A.

52. See O'Herron, *supra* note 10, at 557.

53. Joint Hearings, *supra* note 1, at 854 (statement of Asian Women's Shelter et al.).

the abusive sponsoring spouse withdrew the petition or the alien's waiver request was denied.⁵⁴

IV. THE IMMIGRATION ACT OF 1990

In 1990, Congress amended the IMFA by enacting the Immigration Act of 1990 (IMMACT).⁵⁵ Supporters of women's rights and immigration reform had high expectations for the new amendments' ability to cure the problems created and perpetuated by the IMFA.⁵⁶

A. Battered Spouse Waiver

Under the IMMACT, a battered spouse waiver is granted at the discretion of the INS, provided the immigrant spouse demonstrates that she entered into the qualifying marriage in good faith, either she or her child was battered or subjected to extreme cruelty during the marriage, and she was not at fault in failing to file the joint petition and scheduling the personal interview.⁵⁷ Congress intended

54. See Sandra D. Pressman, *The Legal Issues Confronting Conditional Resident Aliens Who Are Victims of Domestic Violence: Past, Present, and Future Perspectives*, 6 MD. J. CONTEMP. LEGAL ISSUES 129, 134 (1995); see also 136 CONG. REC. H8642 (daily ed. Oct. 2, 1990) (statement of Rep. Louise M. Slaughter) (concluding that the vagueness of the IMFA places a battered immigrant woman in the dilemma of facing an abusive husband or risking deportation to a country that has ceased to be her home).

55. Pub. L. No. 101-649, 104 Stat. 4978 (1990).

The independent waivers do not address the issue of battered spouses and children. . . . In addition, many states have no-fault divorce laws which make it impossible for an alien spouse to establish that the marriage was terminated for good cause. . . . Present law does not ensure that a battered alien spouse or child will not be forced to remain in an abusive relationship for fear of deportation. . . . The Committee believes that the creation of a battered spouse/child waiver and changes to the good faith/good cause waiver will clarify Congressional intent.

H.R. REP. NO. 723(I), at 51 (1990), reprinted in 1990 U.S.C.C.A.N. 6710, 6731.

The purpose of this provision is to ensure that when the U.S. citizen or permanent resident spouse or parent engages in battering or cruelty against a spouse or child, neither the spouse nor child should be entrapped in the abusive relationship by the threat of losing their legal resident status.

Id. at 78.

56. See Immigration Act of 1989 (Part 1): Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the House of Representatives Comm. on the Judiciary, 101st Cong. 301 (1989) (statement of Nicholas DiMarzio, Executive Director, Migration and Refugee Services, U.S. Catholic Conference); *id.* at 665-68 (statement of Rep. Louise M. Slaughter); *id.* at 679-80 (letter submitted by Karen King, Ass't Director, Younger Women's Club).

57. See 8 U.S.C. § 1186a(c)(4)(C) (1994). The INS implementing regulations specify that

the phrase "was battered by or was the subject of extreme cruelty" includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor) or forced prostitution shall be considered acts of violence.

that “[e]vidence to support a battered spouse/child waiver can include, but is not limited to, reports and affidavits from police, medical personnel, psychologists, school officials, and social service agencies.”⁵⁸ The House Report on the IMMACT explains that the INS’s denial of a waiver is limited to “rare and exceptional circumstances such as when the alien poses a clear and significant detriment to the national interest.”⁵⁹ Notwithstanding congressional intent, the INS has balanced the need for simple evidentiary requirements with the need to protect the borders of the United States from fraudulent entry.⁶⁰ Consequently, the INS regulations require that a battered spouse or child suffer physical abuse or be a victim of “extreme mental cruelty” to obtain relief under the statute.⁶¹

While the evidentiary requirements for establishing physical abuse track congressional intent,⁶² the INS heightened the evidentiary requirement for mental abuse by requiring a supporting evaluation by a professional recognized in the field.⁶³ This requirement is premised on the notion that INS officials are not competent to evaluate mental health testimony given by “unlicensed” or “untrained” experts.⁶⁴ On the other hand, these same officials are permitted to evaluate evidence of untrained experts as proof of physical abuse.⁶⁵

The battered spouse waiver is available regardless of the present marital status of the petitioner.⁶⁶ Additionally, the waiver is available for conditional residents who are still in the United States after termination of their conditional status or after a court has ordered deportation.⁶⁷

B. Elimination of the Good Cause and Initiation Requirements

The IMMACT removed from the hardship waiver provision the requirement that the immigrant spouse prove the marriage was

8 C.F.R. § 216.5(e)(3)(i) (1997).

58. H.R. REP. NO. 723(I), at 79 (1990), reprinted in 1990 U.S.C.C.A.N. 6710, 6759.

59. *Id.* at 63.

60. “The service has balanced the need to make compliance with the evidentiary requirements for the waiver as simple as possible against the need to ensure that unscrupulous aliens do not take advantage of the waiver to obtain immigration benefits to which they are not entitled.” Battered and Abused Conditional Resident, 56 Fed. Reg. 22,635, 22,636 (1991).

61. 8 C.F.R. § 216.5(e)(3) (1997).

62. See *id.* § 216.5(e)(3)(iii); see also H.R. REP. NO. 723(I), at 79.

63. See 8 C.F.R. § 216.5(e)(3)(iv) (1997). INS recognizes licensed clinical social workers, psychologists, and psychiatrists. See *id.* § 216.5(e)(3)(vii).

64. *Id.* § 216.5(e)(3)(iv).

65. See *id.* § 216.5(e)(3)(iii); see also H.R. REP. NO. 723(I), at 79.

66. See 8 C.F.R. § 216.5(e)(3)(ii) (1997) (“The conditional resident may apply for the waiver regardless of his or her marital status.”).

67. See *id.*

terminated for good cause.⁶⁸ This change is a recognition that the no-fault divorce laws of many states make it difficult for battered spouses to show good cause.⁶⁹ Also, the IMMACT eliminated the requirement that the immigrant spouse initiate the divorce.⁷⁰ No longer can the citizen spouse prevent the conditional resident alien from filing a waiver by being the first to file for divorce.⁷¹ The conditional resident need only prove that she entered into the marriage in good faith, the marriage was terminated by means other than death, and she was not at fault in the failure to file a timely petition.⁷²

C. Confidentiality Provision

A confidentiality provision was included in the IMMACT to prevent the battering spouse from inflicting more abuse upon the alien spouse because of information disclosed in the waiver application.⁷³ The regulations require a court order for the release of any of the information regarding the waiver application, but permit any of the information to be used to enforce immigration regulations or as evidence in criminal proceedings.⁷⁴

V. PROBLEMS LEFT UNRESOLVED BY THE IMMIGRATION ACT OF 1990

A. Discretionary Nature of the Hardship and Battered Spouse Waivers

The INS's power to grant a hardship waiver or a battered spouse waiver is discretionary.⁷⁵ Without a guarantee that a waiver will be granted if all the requirements are met, unpredictability will result.⁷⁶ Thus, many aliens will view the waiver process as lacking integrity, and may, out of discouragement, choose not to file for a waiver at all.⁷⁷

B. Good Faith Requirement

The IMMACT failed to change the requirement that an immigrant woman prove that she entered into the marriage in good

68. See Immigration Act of 1990, Pub. L. 101-649, § 701(a)(2), 104 Stat. 4978, 5085.

69. See H.R. REP. NO. 723(I), at 51.

70. See Immigration Act § 701(a)(2), 104 Stat. at 5085.

71. See discussion *supra* Part III.B.

72. See 8 U.S.C. § 1186a(c)(4)(B) (1994).

73. See *id.* § 1186a(c)(4)(C) ("The [INS] shall, by regulation, establish measures to protect the confidentiality of information concerning any abused alien spouse or child, including information regarding the whereabouts of such spouse or child.").

74. See 8 C.F.R. § 216.5(e)(3)(viii) (1997).

75. See 8 U.S.C. § 1186a(c)(4) (1994).

76. See O'Herron, *supra* note 10, at 557.

77. See *id.*

faith.⁷⁸ Under this provision, the U.S. citizen or LPR spouse can, out of spite, rebut the battered spouse's truthful assertion that the marriage was entered into in good faith.⁷⁹ If this perjury is successful in preventing the abused spouse from meeting the burden of proof, the battered spouse then would be ineligible for a hardship waiver.⁸⁰

C. Definitions of "Physical Battery" and "Extreme Mental Cruelty"

The definitions of "physical battery" and "extreme mental cruelty" in the INS regulations are underinclusive:

The . . . [regulation] offers a single definition for both physical battering and extreme mental cruelty. While the definition includes many types of abuse, it has several glaring omissions. For example, the definition should be expanded to include "neglect" and "deprivation"—categories of abuse that include failure to properly provide for the child or spouse, deprivation of economic resources, or medical deprivation. These are criminal offenses in many states, and are certainly types of abuse from which conditional resident spouses and children should be encouraged to escape without risking deportation.⁸¹

Furthermore, while assigning a single definition to both physical battery and extreme mental cruelty, the regulations give each different evidentiary requirements.⁸² Physical battery may be supported by nonexpert testimony,⁸³ while extreme mental cruelty must be supported by an expert recognized by the INS.⁸⁴ "If an applicant submits evidence sufficient to meet the physical abuse test, but the INS determines the applicant has suffered extreme cruelty instead, the consequences may be a loss of legal status."⁸⁵ To cure this problem, the INS should define "physical battery" and "extreme mental cruelty" unambiguously.

D. Problems of Proving Battery or Extreme Cruelty

Practitioners have indicated that the INS evidentiary requirements implementing the IMMACT are virtually impossible for many abused aliens to satisfy.⁸⁶ "[S]uch restrictive documentation requirements create an access problem which undermines the protec-

78. See 8 U.S.C. § 1186a(c)(4)(B) (1994).

79. See O'Herron, *supra* note 10, at 556.

80. See *id.*

81. Martha F. Davis & Janet M. Calvo, INS Interim Rule Diminishes Protection for Abused Spouses and Children, 68 INTERPRETER RELEASES 665, 668 (1991).

82. See 8 C.F.R. § 216.5(e)(3)(i) (1997).

83. See *id.* § 216.5(e)(3)(iii).

84. See *id.* § 216.5(e)(3)(iv).

85. Davis & Calvo, *supra* note 81, at 668.

86. See Lee, *supra* note 4, at 797-98.

tive intent of the waiver.”⁸⁷ Many battered immigrant women may not have access to the professionals required by the INS.⁸⁸ Additionally, when they flee their homes, they are more likely to find refuge with friends and family than with licensed professionals in battered women’s shelters.⁸⁹ Furthermore, the notion that INS officials are not competent to evaluate evidence of extreme mental cruelty provided by anyone other than professionals recognized in the field⁹⁰ is inconsistent with other immigration provisions. To illustrate, INS officials determine whether an alien seeking political asylum has a “well-founded fear of persecution.”⁹¹ Moreover, an asylum petitioner’s uncorroborated testimony alone may be enough to support a showing of such a fear.⁹²

The evidentiary requirements are also problematic because they focus on the mental state of the abuse victim instead of the acts and omissions of the abuser.⁹³ The mental condition of the abused spouse may reveal little of the internal trauma she experienced because some women may be able to cope with or hide their feelings better than others.⁹⁴ As a result, a professional examination may reveal little of the real abuse the spouse has experienced, while the testimony of lay witnesses such as clergy, shelter workers, and others can provide better evidence to prove extreme cruelty.⁹⁵ “By focusing on the victim’s subjective perception rather than objective evidence of abusive behavior, the INS has created the proof problem that it now claims justifies the need for professional affidavits.”⁹⁶

E. Inadequacy of Confidentiality Provision

The intended protective function of the IMMACT’s confidentiality provision is inadequate because they provide the INS with too much discretion in instituting measures to protect confidentiality.⁹⁷ While the regulations implementing the confidentiality provision state, “Any information provided under this part may be used for the purposes of enforcement of the [Immigration and Nationality] Act or in any criminal proceeding,”⁹⁸ they do not require the petitioning

87. *Id.* at 798 (quoting Letter from Rep. Louise M. Slaughter to Richard Sloan, Director of Policy Directives and Instructions Branch, INS (June 7, 1991)).

88. See Davis & Calvo, *supra* note 81, at 668.

89. See *id.*

90. See 8 C.F.R. § 216.5(e)(3)(iv) (1997).

91. *Id.* § 208.13(b)(2)(i).

92. See *id.* § 208.13(a).

93. See *id.*

94. See Davis & Calvo, *supra* note 81, at 669.

95. See *id.*

96. *Id.*

97. See 8 U.S.C. § 1186a(c)(4)(C) (1994).

98. 8 C.F.R. § 216.5(e)(3)(viii) (1997).

spouse or the battering spouse to be the subject of or the defendant in the criminal proceeding.⁹⁹ Thus, any federal or state law enforcement officer may access the information without any showing of need.¹⁰⁰ These weaknesses may discourage many battered immigrants from coming forward.

F. The Need for Pre-Deprivation Notice and Post-Deprivation Hearings

Although the INS regulations implementing the IMMACT do not permit an appeal from the decision on an application for waiver, the alien can seek a review of the decision in deportation proceedings.¹⁰¹ Nevertheless, under the three-prong due process test set forth by the U.S. Supreme Court in *Mathews v. Eldridge*,¹⁰² a battered alien spouse deserves more process than is provided for in the regulations. Under the *Mathews* test, the INS should determine the process due by weighing (1) the private interest affected by the government's actions; (2) the risk of erroneous deprivation from the government's current procedure; and (3) the value of additional procedures.¹⁰³

The interest at stake is great. If the waiver is denied, the alien loses documentation and her ability to work, and is subject to arrest and deportation.¹⁰⁴ The risk of erroneous deprivation is also great. The abused alien may be unable to support her allegations if the adjudicating officer only hears evidence documented by professionals approved by the INS.¹⁰⁵ Finally, more process, complete with pre-deprivation notice and post-deprivation hearings, would not overburden the government because the INS already undertakes interviews of conditional resident applicants in some circumstances.¹⁰⁶

VI. VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994

After passage of the IMMACT, opportunities remained for abusive spouses to use immigration laws and procedure as weapons

99. See *id.*

100. See *Davis & Calvo*, *supra* note 81, at 669.

101. 8 C.F.R. § 216.5(f) (1997); cf. *id.* § 204.2(c)(3)(iii) (allowing the right to appeal self-petitions that are denied); see also discussion *supra* Part VI.D.

102. 424 U.S. 319 (1976).

103. See *id.* at 336.

104. See *Davis & Calvo*, *supra* note 81, at 670.

105. See 8 C.F.R. § 216.5(e)(3)(iv) (1997) (“[A]ll waiver applications based upon claims of extreme mental cruelty must be supported by the evaluation of a professional recognized by the service as an expert in the field.”); see also *Davis & Calvo*, *supra* note 81, at 669 (“[A] professional’s affidavit may reveal nothing about the woman’s abuse while her own affidavit and affidavits of witnesses, government authorities, clergy or others may clearly establish that she was subject to extreme cruelty . . .”).

106. See 8 C.F.R. § 216.5(d) (1997) (allowing the INS to require waiver applicants to appear at interviews).

against their battered alien spouses and children. In response, Congress passed the Violent Crime Control and Law Enforcement Act of 1994 (Crime Act),¹⁰⁷ Title IV of which contained specific provisions regarding immigrant women and children.¹⁰⁸ These provisions resolve some of the deficiencies in the IMMACT by (1) allowing alien spouses and children to self-petition for conditional permanent residency¹⁰⁹ and (2) allowing for the suspension of deportation proceedings in the case of an alien who is subject to deportation but has been battered or subjected to extreme cruelty by a citizen or LPR spouse.¹¹⁰ These new provisions and their implementing regulations should limit the ability of an abusive parent or spouse to use immigration laws as a tool to continue battering and inflicting extreme cruelty on their immigrant wives or children.

A. Self-Petitioning

The Crime Act permits an alien spouse to file a petition herself for classification as an immediate relative or second preference based upon the marriage to the citizen or LPR spouse, respectively.¹¹¹ Under the INS regulations implementing the Crime Act, the self-petitioner must (1) be the spouse of a citizen or LPR of the United States; (2) be eligible for immigrant classification as an "immediate relative" or "child" of a U.S. citizen or LPR; (3) be presently residing in the United States; (4) have once resided in the United States with the citizen or LPR spouse; (5) have been battered by or subjected to extreme cruelty perpetrated by the citizen or LPR while married to the citizen or LPR; (6) be a person of good moral character; (7) be a person whose deportation would result in extreme hardship to him/herself or a child; and (8) be a person who entered into the marriage in good faith.¹¹² This self-petitioning mechanism promises to remove the leverage the citizen or LPR spouse once had as the only person authorized to file the initial petition for conditional residence on behalf of the alien spouse.¹¹³

107. Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified in scattered sections of 8 U.S.C., 18 U.S.C., and 42 U.S.C.). The House of Representatives initially proposed a bill with provisions specifically intended to protect immigrant women from the inadequacies of the IMMACT. See Violence Against Women Act of 1993, H.R. 1133, 103d Cong. §§ 241-43. However, the Senate version of this bill did not contain similar provisions. See Janet M. Calvo and Martha F. Davis, *Congress Nears Approval of Legislation to Protect Abused Aliens*, 70 INTERPRETER RELEASES 1665, 1669 (1993). Legislators then combined these bills to draft the final conference version that appears in the Crime Act. See *id.*

108. See Crime Act §§ 40701-03, 108 Stat. at 1953-55.

109. See 8 U.S.C.A. § 1154(a)(1)(A)(iii)-(iv), (a)(1)(B)(ii)-(iii) (West Supp. 1996).

110. See *id.* § 1254(a)(3).

111. See *id.* § 1154(a)(1)(A)(iii).

112. See 8 C.F.R. § 204.2(c)(1)(i) (1997).

113. See discussion *supra* Part III.D.

1. Marriage Requirement

The regulations require the self-petitioning spouse to be married to the citizen or LPR spouse at the time he or she files the petition.¹¹⁴ In cases where divorce or nullification occurs between the time the battered spouse files the petition and the time the petition is approved, however, the approval will stand despite the legal termination of the marriage.¹¹⁵ Nevertheless, if the self-petitioner remarries before becoming an LPR, the remarriage will result in denial of the petition.¹¹⁶ The remarriage demonstrates that the spouse does not need the “protections of section 40701 of the Crime Bill to equalize the balance of power in the relationship with the abuser.”¹¹⁷ These rules are intended to place control of the self-petitioning process in the hands of the petitioning spouse.¹¹⁸

2. Residence Requirement

To meet the residency requirement of the regulations, an alien must have resided with the abusive spouse in the United States.¹¹⁹ However, no time limit exists regarding how long the alien has to live with the citizen or LPR spouse.¹²⁰ Presumably, one week is sufficient. In addition, the alien must reside in the United States at the time the petition is filed.¹²¹ The residence requirements are liberally structured to allow the alien to escape an abusive home and not risk becoming ineligible for relief under this section.

3. Requirements for Battery or Extreme Cruelty

To meet the requirements for battery or extreme cruelty, the abuse must have occurred during the self-petitioner's marriage to the abuser.¹²² The alien or the alien's child must have been the subject of the abuse.¹²³ Any other abusive acts do not qualify under this provision, unless it can be established that the acts were deliberately used to perpetuate extreme cruelty against the alien or the

114. See 8 C.F.R. § 204.2(c)(1)(i)(A) (1997).

115. See *id.* § 204.2(c)(1)(ii) (“After the self-petition has been properly filed, the legal termination of the marriage will have no effect on the decision made on the self-petition.”).

116. See *id.* (“The self-petitioner's remarriage, however, will be a basis for the denial of a pending self-petition.”).

117. See 61 Fed. Reg. 13,061, 13,062 (1996).

118. See *id.*

119. See 8 C.F.R. 204.2(c)(1)(v) (1997).

120. See *id.*; see also 61 Fed. Reg. 13,061, 13,065 (“A qualified self-petitioner may have moved to the United States only recently, made any number of trips abroad, or resided with the abuser in the United States for only a short time.”).

121. See 8 C.F.R. § 204.2(c)(1)(v) (1997).

122. See *id.* § 204.2(c)(1)(vi).

123. See *id.*

alien's child.¹²⁴ Although the regulations list different types of qualifying abuse,¹²⁵ other abusive acts that may not initially appear violent may qualify under the provision because they demonstrate an overall pattern of violence.¹²⁶ Moreover, abusive acts that occurred during time periods not covered under the provision may be included with the petition to demonstrate a pattern of abuse and violence and to bolster claims that the abuse actually occurred.¹²⁷ In short, the regulations regarding battery and extreme cruelty loosen some of the tighter restrictions of the IMMACT and the IMFA.

4. Evidentiary Requirements

Both the Crime Act and its implementing regulations direct the INS to consider any "credible evidence" relevant to the self-petition.¹²⁸ However, this provision gives the INS sole discretion to determine what evidence is credible and what weight to give that evidence.¹²⁹ Under the regulations, the battered spouse must provide documentary evidence of status including, but not limited to (1) the legal relationship to the citizen abuser; (2) the abuser's immigration or LPR citizenship status; (3) the self-petitioner and the abuser have resided together in the United States; (4) good moral character; and (5) a good faith marriage.¹³⁰

While any relevant credible evidence supporting the petition will be accepted, the self-petitioner is "encouraged to submit primary evidence whenever possible."¹³¹ Primary evidence of the abuser's U.S. citizenship or lawful permanent residence includes a birth certificate, a valid U.S. passport, statements issued by U.S. consular officials, and certificates issued by INS.¹³² In the event no primary evidence is available, the battered spouse must present secondary evidence such as a baptismal certificate, sworn affidavits, early school records, and census records.¹³³ In the event that neither primary nor secondary evidence is available, the INS will attempt to electronically verify the proper status of the spouse, child, and/or

124. See *id.*; see also 61 Fed. Reg. 13061, 13,065 (1996).

125. See 8 C.F.R. § 204.2(c)(1)(vi) (1997) ("Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence.").

126. See *id.*

127. See *id.* § 204.2(c)(2)(iv) ("[P]roof of non-qualifying abuse may only be used to establish a pattern of abuse and violence and to support a claim that qualifying abuse also occurred.").

128. See 8 U.S.C. § 1154(a)(1)(H) (West Supp. 1996); 8 C.F.R. § 204.2(c)(2)(i).

129. See 8 U.S.C. § 1154(a)(1)(H) (West Supp. 1996).

130. See 8 C.F.R. § 204.2(c)(2)(ii), (iii), (v), (vii) (1997).

131. *Id.* § 204.2(c)(2)(i).

132. See *id.* § 204.1(g)(1).

133. See *id.* § 204.1(g)(2).

abuser from information contained in computerized INS records.¹³⁴ However, if INS cannot discover sufficient information, it will review the petition based upon the information submitted by the self-petitioner.¹³⁵

Evidence of battering and extreme cruelty may be established by a broad array of sources. "Evidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel."¹³⁶ The INS will accept other forms of evidence and determine its credibility and probative value.¹³⁷

5. Procedural Safeguards

The INS provides due process with its preliminary and final decisions regarding the self-petitions. Unfavorable preliminary decisions are communicated to the petitioning alien in writing.¹³⁸ The alien is given the opportunity to supplement the application with additional information or arguments before the INS makes a final decision.¹³⁹ If the preliminary decision is adverse to the petitioner and "is based on derogatory information of which the petitioner is unaware, the self-petitioner will be offered an opportunity to rebut the derogatory information"¹⁴⁰ If the final decision is adverse, she will be notified of the basis for the decision and of the right to appeal.¹⁴¹ This provision should sufficiently meet the Mathews due process test.¹⁴²

B. Suspension of Deportation

Congress enacted the Crime Act provision allowing the INS to suspend deportation of battered immigrant spouses¹⁴³ because "[d]omestic battery problems can become terribly exacerbated in

134. See *id.* § 204.1(g)(3).

135. See *id.* Preliminary INS field-office instructions provided that more weight would be given to evidence contained in court records, medical reports, police reports, and other official documents. See INS Instructs on New Battered Spouse Provision in Crime Bill, 72 INTERPRETER RELEASES 178, 178 (1995).

136. 8 C.F.R. § 204.2(c)(2)(iv) (1997).

137. See *id.*

138. See 8 C.F.R. § 204.2(c)(3)(ii) (1997).

139. See *id.*

140. *Id.*

141. See *id.* § 204.2(c)(3)(iii).

142. See *supra* text accompanying note 103. Nevertheless, the relative lack of process regarding applications for hardship waivers, see discussion *supra* Part IV.F, still remains, see 8 C.F.R. § 216.5(f) (1997).

143. See 8 U.S.C.A. § 1254(a)(3) (West Supp. 1996).

marriages where one spouse is not a citizen, and the non-citizens [sic] legal status depends on his or her marriage to the abuser."¹⁴⁴ This provision responds to the situation in which

[a]busers generally refuse to file relative petitions for their closest family members because they find it easier to control relatives who do not have lawful immigration status. These family members are less likely to report the abuse or leave the abusive environment because they fear deportation . . .¹⁴⁵

To be eligible for suspension of deportation, the alien must (1) have been physically present in the United States for a continuous period of not less than three years; (2) have been battered or subject to extreme cruelty in the United States by a spouse who is a U.S. citizen or lawful permanent resident; (3) have been a person of good moral character during their time in the United States; and (4) be a person whose deportation would result in extreme hardship.¹⁴⁶ Thus, the batterer should not be able to use the threat of deportation to coerce the alien into remaining in an abusive relationship.

VII. PROBLEMS LEFT UNRESOLVED BY THE CRIME ACT

Despite the improvements contained in the Crime Act, three major barriers to freeing immigrant women from abusive relationships still remain in place: (1) the absence of work authorization; (2) the potential adverse consequences of divorce; and (3) the INS's discretion in determining the weight and credibility of evidence.

A. Lack of Work Authorization

The Crime Act fails to provide work authorization for either undocumented self-petitioning aliens or aliens seeking suspension of deportation.¹⁴⁷ Usually, control of finances is a major missile in the abuser's arsenal.¹⁴⁸ Additionally, many abused aliens lack work skills and jobs outside the home.¹⁴⁹ As a result, survival without the financial support of the citizen spouse may prove impossible. Balancing the probability of ongoing abuse against the probability of not surviving on one's own, the abused spouse may elect to remain

144. H.R. REP. NO. 103-395, at 26 (1993).

145. 61 Fed. Reg. 13,061, 13,062 (1994).

146. See 8 U.S.C.A. § 1254(a)(3) (West Supp. 1996).

147. See 8 C.F.R. § 274a.12(a) (1997) (failing to include undocumented self-petitioning aliens or aliens seeking suspension of deportation in the listing of aliens authorized to accept employment incident to their status).

148. See Lee, *supra* note 4, at 785.

149. See *id.* at 785-86.

home. Thus, this omission may frustrate the ability to escape an abusive home.

B. Effect of Divorce

When it enacted the Crime Act, Congress intended to remove divorce either as the sole basis or a major factor in considering the self-petition. The House Report stated:

Under current law and regulation, divorce results in the automatic revocation of an immediate relative petition and a second preference petition. This section closes a loophole in the statute and ensures that in the case of abused spouses and abused children who are self-petitioning, divorce may not be the basis for revocation of the petition.¹⁵⁰

The INS rule requires the self-petitioner to be married to the abuser at the time the self-petition is filed.¹⁵¹ After the self-petition has been properly filed, termination of the marriage will have no effect on the decision made on the self-petition.¹⁵²

Generally, the INS requirement that the self-petitioner be married at the time the self-petition is filed fails to acknowledge the practical realities of an abusive and violent marriage by allowing divorce to work against the self-petitioner. Divorce is often the key in allowing the abused alien and the alien's children to receive real protection from an abusive spouse because police and the court system are more likely to enforce criminal laws such as stalking, battery, and harassment after the marriage has been legally terminated.¹⁵³

Furthermore, the INS rule may be in direct conflict with the legislative intent behind the IMMACT confidentiality provision. Congress designed the confidentiality provision to prevent the battering spouse from intercepting the communications between immigrant officials and petitioning battered aliens.¹⁵⁴ Logically, if current regulations make it tougher for the abused alien to leave home, the chances of the battering spouse intercepting the communications are greatly increased.

150. H.R. REP. NO. 103-395, at 38 (1993).

151. See 8 C.F.R. § 204.2(c)(1)(i)(a) (1997).

152. See *id.* § 204.2(c)(1)(ii).

153. See Janet Calvo, *The Violence Against Women Act: An Opportunity for the Justice Department to Confront Domestic Violence*, 72 INTERPRETER RELEASES, 485, 489 (1995).

154. See *supra* Part IV.C.

C. INS Discretion in Determining the Weight and Credibility of Evidence

The greatest impediment to the abused alien's ability to benefit from the self-petitioning provision of the Crime Act is the discretion available to the INS in determining the weight and credibility of evidence.¹⁵⁵ Although "any credible evidence relevant to the petition" will be considered, "self-petitioners are encouraged to submit primary evidence whenever possible."¹⁵⁶ Furthermore, the regulations state that "[t]he determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service."¹⁵⁷ Thus, if the INS gives great weight to official documents and almost no weight to other evidence, it could effectively negate Congress's intent that any credible evidence be accepted.¹⁵⁸

In contrast to the INS regulations, the House Report directed "the [INS] to consider any credible evidence submitted in support of hardship waivers based on battering or extreme cruelty whether or not the evidence is supported by an evaluation by a licensed mental health professional."¹⁵⁹ Nevertheless, these instructions were not incorporated into the language of the Crime Act provisions. As evidenced by the regulations, Congress's failure to include the appropriate language in the Act has provided INS with the opportunity to impose more stringent requirements upon abused aliens.¹⁶⁰

VIII. RECOMMENDATIONS

Since enacting the IMFA, Congress has corrected many of the flaws and omissions that locked aliens into abusive homes for fear of deportation. However, significant problems remain because Congress left so many loopholes in the legislation designed to correct the flaws in the IMFA.

A. Repealing the IMFA

Spending more time, money, and energy reforming the IMFA is futile when Congress can eliminate its harmful effects with one quick blow by repealing its provisions. This approach is justified be-

155. The author is not questioning the INS's credibility and fairness. However, individuals should be able to rely upon a clear, objective, and nonarbitrary standard.

156. 8 C.F.R. § 204.2(c)(2)(i) (1997).

157. *Id.*

158. See H.R. REP. NO. 103-395, at 38 (1993).

159. *Id.* (emphasis added).

160. See 8 C.F.R. § 216.5(e)(3)(iv) (1997) ("[A]ll waiver applications based upon claims of extreme mental cruelty must be supported by the evaluation of a professional recognized by the Service as an expert in the field.").

cause the premise of the IMFA—that marriage fraud is a significant threat to the United States—has been proven inaccurate.

The IMFA is based upon statistical data that was misrepresentative and misleading. When the IMFA was enacted, INS Commissioner Alan C. Nelson, testifying before the Senate Subcommittee Hearing on Immigration and Refugee Policy, stated that marriage and fiancée frauds posed “significant threats to the integrity of lawful immigration procedures.”¹⁶¹ When asked to estimate how many persons were involved in fraudulent or invalid marriages, Nelson stated that “based on a preliminary survey . . . we believe as much as 30 percent, which is an extremely high figure, of the spouse relationships may be fraudulent.”¹⁶² The survey figure was later estimated to be thirty to forty percent.¹⁶³ The Commissioner’s dire predictions did not go unchallenged during the hearing. Jules Coven, president of the American Immigration Lawyers Association, rebutted: “[I] would be extremely surprised to learn, if it could be shown statistically, that more than one or two percent of the ‘green cards’ issued annually on the basis of marriage involved fraud.”¹⁶⁴ Just over a year later, the House Judiciary Committee adopted a report in favor of the legislation.¹⁶⁵

Coven’s suspicions were later supported by the findings of a North Carolina federal district court in *Manwani v. INS*.¹⁶⁶ In *Manwani*, the INS conceded the invalidity of the survey estimating that one-third of immigration marriages were fraudulent.¹⁶⁷ In conducting that study, the INS collected data in only three cities.¹⁶⁸ Moreover, the thirty-percent figure was only based upon the number of cases that field investigators in those cities suspected were fraudulent; they were not cases where actual fraud had been proven.¹⁶⁹ In fact, the INS had never determined the exact number of cases of known fraud before Congress enacted the IMFA.¹⁷⁰ Nevertheless, the

161. IMF Hearings, *supra* note 11, at 6 (statement of INS Commissioner Alan C. Nelson).

162. *Id.* at 35.

163. See *id.* at 69 (statement of Roger L. Conner, Executive Director, Federation for American Immigration Reform).

164. *Id.* at 78 (statement of Jules C. Coven, President, American Immigration Lawyers Association).

165. During a floor debate on the legislation, Representative Romano L. Mazzoli cited an internal INS study claiming that one-third of marriages in INS cases are fraudulent. See 132 CONG. REC. H27,015 (daily ed. Sept. 1, 1986) (statement of Rep. Romano L. Mazzoli).

166. 736 F. Supp. 1367 (W.D.N.C. 1990).

167. See *id.* at 1373.

168. See *id.*

169. See *id.*

170. See *id.*

House subcommittee accepted the INS's incorrect estimate and used it as a basis to gain support for passage of the legislation.¹⁷¹

Furthermore, the Manwani court found that Congress relied upon the estimate despite its knowledge of the questionable nature of the figures. "[H]igh ranking officials in the INS Central Office were aware of and had discussed the limitations of the [survey] in 1984 and knew that the [survey] was not a valid or reliable survey of marriage fraud."¹⁷² David Nachtsheim, the INS official responsible for designing and overseeing the survey, acknowledged that the data would not be a reliable indication of the need for legislative changes.¹⁷³ Thus, instead of sham marriages, the only proven sham so far has been sham legislation. "The result has been a piece of legislation that was not necessary and that has had the devastating effect of endangering the lives of many immigrant women."¹⁷⁴

B. Enhanced Enforcement of Pre-IMFA Procedures

The problem with pre-IMFA provisions was not marriage fraud, but rather a lack of resources and officials to enforce already adequate procedures for granting status based upon marriage to U.S. citizens or LPRs. Before passing the IMFA, Congress was encouraged to provide for enhanced enforcement of the present marriage fraud regulations, not to pass broad, sweeping legislation.¹⁷⁵ "From our perspective, the answer really lies in enhancing our existing anti-fraud programs, which means, more training, continuing improvement in our information-sharing, and operational cooperation."¹⁷⁶ Nevertheless, Congress elected to cure these personnel and resource problems by passing a bill that created more difficulties for alien spouses and immigration officials than it solved.¹⁷⁷

Furthermore, the INS has demonstrated the ability to implement better enforcement mechanisms for the pre-IMFA provisions. Vernon D. Penner, Jr., Deputy Assistant Secretary of State for Visa Services, testified that in cases of marriage fraud involving U.S. service personnel stationed overseas, the INS has worked with mili-

171. See *id.*

172. *Id.*

173. See *id.*

174. O'Herron, *supra* note 10, at 565.

175. See IMF Hearings, *supra* note 11, at 31 (statement of Deputy Ass't Sec'y of State for Visa Services Vernon D. Penner, Jr.). "In considering such a significant departure from existing provisions of law, careful consideration should be given to whether enforcement of existing law might not render the provision unnecessary." *Id.*

176. *Id.* at 32. There is no evidence that Congress or the INS conducted any further investigation to consider Penner's suggestion before or after passage of the IMFA.

177. If pre-IMFA problems were personnel-related, Congress could not reasonably have thought that giving the shorthanded and underfunded INS more work with new duties would solve the problems.

tary authorities, chaplains, and civilian personnel officers in establishing a military clearance process that was “a strong deterrent” to marriage fraud.¹⁷⁸ No statute was necessary to correct military marriage fraud. Likewise, Congress should simply have provided officials with appropriate funding and training to inform interested parties and to enforce the pre-IMFA procedures for detecting and deterring marriage fraud.

IX. CONCLUSION

Although designed to deter marriage fraud, the IMFA has become a weapon for oppressing alien spouses and children. The underlying premise of the IMFA—that thirty percent of alien spouses marry U.S. citizens solely to gain citizenship—has been deemed incorrect and even fraudulent.¹⁷⁹ Support exists for more enforcement of pre-IMFA procedures.¹⁸⁰ While Congress has steadily attempted to remedy the adverse effects of the IMFA, these attempts have fallen short. In light of the faulty statistical data and the disastrous effects the IMFA has had on alien spouses, the only logical and ethical solution is for legislators to admit their misjudgment¹⁸¹ and repeal the IMFA.

178. IMF Hearings, *supra* note 11, at 38 (statement of Deputy Ass’t Sec’y of State for Visa Services Vernon D. Penner, Jr.).

179. See *supra* notes 167-73 and accompanying text.

180. See *supra* note 175 and accompanying text.

181. Supporters of the IMFA already have admitted that they “may have gone too far and are now infringing on the rights of those U.S. citizens and alien spouses who marry out of true love and respect for each other.” 134 CONG. REC. S1625 (daily ed. Feb. 29, 1988) (statement of Sen. Paul Simon) (calling for the repeal of section 5 of IMFA).