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### Seeking Citizenship in the Shadow of Domestic Violence: The Double Bind of Proving “Good Moral Character”

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## SEEKING CITIZENSHIP IN THE SHADOW OF DOMESTIC VIOLENCE: THE DOUBLE BIND OF PROVING “GOOD MORAL CHARACTER”

NANCY E. SHURTZ\*

### INTRODUCTION

Maria is a Mexican national and resides in the United States on a Trade NAFTA (“TN”) work visa.<sup>1</sup> She falls in love with Bob, a U.S. citizen, and after a brief courtship, they marry. They immediately file a joint petition<sup>2</sup> with the U.S. Citizenship and Immigration Service (“USCIS”) for issuance to Maria of a Conditional Residence (“CR”) Card, the transitional status that acts as prelude to Permanent Resident (“Green Card”) standing.<sup>3</sup> After an interview, Maria is issued her CR card. The couple files their federal taxes jointly and also shares joint bank accounts. However, Bob controls the household finances, manifested

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1. A TN visa is a “temporary professional work visa” that is issued to those from Mexico or Canada. This is just one of the many legal ways that immigrants can come into the United States. See Immigration and Nationality Act (“INA”) § 203, 8 U.S.C. § 1153 (2012). Workers can also come into the country illegally. See Cynthia Blum, *Rethinking Tax Compliance of Unauthorized Workers After Immigration Reform*, 21 GEO. IMMIGR. L.J. 595, 595–96, 598, 601 (2007); Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 8, 10 (2006); see also Shahid Haque-Hausrath, *Immigrant Abuse Victims Often Face New Threats Due to Status*, MONT. LAW., June/July 2015, at 24, 24 (“Immigrant victims of domestic abuse may enter the country on a marriage or fiancé(e) visa, enter the country illegally, or ‘overstay’ a visa.”).

2. Andy J. Semotiuk, *Immigration and Marriage: What Happens If You Marry or Divorce a Foreign Spouse?*, FORBES (Nov. 17, 2014, 4:37 PM), <https://www.forbes.com/sites/andyjsemotiuk/2014/11/17/immigration-and-marriage-what-happens-if-you-marry-or-divorce-a-foreign-spouse/#39144af24ef9> [https://perma.cc/D4TA-BMTC]. The ability of Maria to obtain lawful permanent resident status may depend on Bob’s willingness to file an immigrant relative petition or family petition on her behalf. See *id.* (“One of the requirements the U.S. imposes on a resident who seeks to sponsor a foreign spouse is an affidavit of support.”).

3. See *Remove Conditions on Permanent Residence Based on Marriage*, U.S. CITIZENSHIP & IMMIGR. SERVICES (July 15, 2015), <https://www.uscis.gov/green-card/after-green-card-grant-ed/conditional-permanent-residence/remove-conditions-permanent-residence-based-marriage> [https://perma.cc/9D2Q-JYJD]. Permanent residence status is conditional if it is based on a marriage that was less than two years old. *Id.* The term “Green Card” and legal permanent resident will be used interchangeably in this Article.

by demands that Maria relinquish her paychecks to him as well as provide a strict accounting of her expenditures. Bob operates a cash-based business and does not report all of his taxable income. Bob's domination over Maria soon turns physical, beating her when she does not comply with his dictates.<sup>4</sup> Maria separates from Bob, and upon this action, Bob writes a retaliatory letter to the immigration authorities, seeking to withdraw their joint petition for Maria's permanent residency. This could result in Maria's deportation.<sup>5</sup>

This Article examines the challenges facing Maria and others in like positions—seeking citizenship through legitimate legal channels—yet seeing those efforts jeopardized by the specter of domestic violence and compounded by legal standards that require demonstration of “good moral character,” most specifically in the context of tax compliance. Maria is caught in several applications of the dilemma known as the “double bind.”<sup>6</sup> In the present instance, she must show proof of a good-faith marriage and a measure of “togetherness” in order to use her U.S. citizen husband as her principal anchor in the naturalization process. On the other hand, if she remains in an abusive environment, she places herself in a position of imminent danger. Prevailing professional advice in such cases would counsel Maria to flee her abuser and obtain a divorce as soon as possible.<sup>7</sup> However, pursuit of a divorce for a person in Maria's position presents new obstacles. Such proceedings are financially

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4. Domestic violence has been defined by the IRS as physical, psychological, sexual, or emotional abuse, including efforts to control, isolate, humiliate, and intimidate the requesting spouse, or to undermine the requesting spouse's ability to reason independently . . . [and could include] abuse of the requesting spouse's child or [another] family member living in the household . . . . Rev. Proc. 2013-34, § 4.03(2)(c)(iv), 2013-43 I.R.B. 397, 402 (relating to the innocent spouse rules); *see also* Temp. Treas. Reg. § 1.36B-2T (2013). Financial control can be a form of domestic abuse, manipulating and isolating the victim into believing she is dependent on him. *See* CATHERINE PARIS, INFORMATION EVERY WOMAN SHOULD HAVE: DOMESTIC VIOLENCE HANDBOOK 16 (2003). In this Article, perpetrators of domestic violence will be referred to as “he” and victims of domestic violence will be referred to as “she,” even though a minority of batterers are female. In this Article, the “she” is always the foreign spouse who is married to the male U.S. citizen. The assumption of heterosexuality is just for ease of discussion and the focus is on the patriarchal institution of marriage, even though much domestic violence occurs between friends.

5. Semotiuk, *supra* note 2.

6. Women are often faced with “double binds,” or situations where their “choices” are less than ideal. *See* MARILYN FRYE, THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 2 (1983) (explaining that double binds are “situations in which options are reduced to very few and all of them expose one to penalty, censure or deprivation” and one of the “most characteristic and ubiquitous features of the world as experienced by oppressed people”); Nancy E. Shurtz, *Gender Equity and Tax Policy: The Theory of “Taxing Men,”* 6 S. CAL. REV. LAW & WOMEN'S STUD., 485, 486 n.7 (1997) (describing generally all the various theories of feminist jurisprudence and how they relate to the field of taxation).

7. *See* Melinda Smith & Jeanne Segal, *Domestic Violence and Abuse: Recognizing the Signs of an Abusive Relationship and Getting Help*, HELPGUIDE.ORG (May 2017), <https://helpguide.org/articles/abuse/domestic-violence-and-abuse.htm> [<https://perma.cc/3DDW-42XX>].

costly, executed in hostile domestic environments, and must often surmount state laws that apply restrictive constraints on noncitizens.<sup>8</sup> A divorce action must also satisfy federal standards that the marriage was not initially entered into with fraudulent intent.<sup>9</sup>

Additional general citizenship requirements include demonstration of “good moral character.” In practice, one of the most conspicuous manifestations of this is compliance with tax laws. In Maria’s case, her filing of a joint return may be viewed favorably by immigration authorities as proof of a good-faith marriage. On the other hand, Bob’s underreporting of his income may well constitute a fraudulent tax return,<sup>10</sup> which (if discovered) could expose Maria to liability for the subsequent delinquent tax and damage her position as an upstanding citizenship candidate. The conditions (both personal and legal) that contribute to these “double bind” situations are examined more fully in the subsequent discussions.

### I. REQUIREMENTS OF CITIZENSHIP FOR FOREIGN SPOUSES

Initially the U.S. immigration laws did not recognize women’s autonomy.<sup>11</sup> Only husbands could file a petition for their foreign-born wives or accompany

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8. David S. Mitchell, Comment, *An Unhappy Union: Married Taxpayers Filing Separately and the Affordable Care Act’s Premium Tax Credit*, 69 TAX LAW. 453, 463 (2016) (“[M]any state divorce statutes include waiting periods, appeals processes, and litigation deadlines” and a “legal maze” that is “impossible to navigate, especially for low-income individuals who cannot afford an attorney or face other well-documented impediments to legal access, like low literacy, disability, or limited English proficiency.” There is also the fear that “one spouse will be left financially worse off as a result of divorce.”).

9. To avoid being deported Maria has the burden to prove that her marriage was not a fraud. She may self-petition under the Violence Against Women’s Act (“VAWA”) but has several additional obstacles or hurdles. See *infra* note 60 and accompanying text; see also Lee Ann S. Wang, “Of the Law, but Not It’s Spirit”: *Immigration Marriage Fraud as Legal Fiction and Violence Against Asian Immigrant Women*, 3 U.C. IRVINE L. REV. 1221, 1223 (2013) (“[B]attered immigrant women carry the burden of proving they are not frauds, yet women who are citizens are not asked to carry this same burden when seeking protection from domestic violence.”).

10. A married filing separately return may be advisable in order to keep finances separate, so independence can be established and joint and several liability can be avoided from the joint return. However, filing married filing separately results in worse rates and loss of tax benefits. The more favorable head of household rates may be available if a child is in the marriage and the foreign spouse is a victim of abandonment. See Mitchell, *supra* note 8, at 454. The “choice,” however, may not even be Maria’s. Her abusing husband might control how the tax return will be filed as well as any refund from the joint return. Bob might also know these rules and use them against Maria.

11. Immigration law had its roots in “coverture” whereby “the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything.” 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430 (Oxford, Clarendon Press 1765). Immigration laws were also very racist. See Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L. J. 1571, 1583 n.74 (2012). Immigration law in 1790 restricted naturalization to any “free white person.” *Id.*

them to the immigration office.<sup>12</sup> Conversely, wives could lose their U.S. citizenship if they married foreigners.<sup>13</sup> It was not until 1952, with the passage of the Immigration and Nationality Act (“INA”) that the immigration laws were made gender-neutral.<sup>14</sup> Then in 1986, Congress passed the Immigration Marriage Fraud Amendments (“IMFA”), the purpose of which was to prevent fraudulent marriages of noncitizens to U.S. citizens.<sup>15</sup> The IMFA created a presumption that *all* such marriages were fraudulent until proven to be valid and in good faith.<sup>16</sup> Under the current INA rules,<sup>17</sup> foreign spouses applying for citizenship status in the United States must: (1) be a *legal permanent resident* (Green Card holder) for at least three years, (2) be eighteen or more years old, (3) meet both a *continuous residence and physical presence requirement*, (4) “[b]e able to read, write, and speak English and have knowledge and an understanding of U.S. history and government (also known as civics),” and (5) be of *good moral character* during the required residence period and up to the time of admission.<sup>18</sup>

To be a *legal permanent resident*, the foreign spouse must not be here illegally.<sup>19</sup> Maria is here on a work visa, and she is a documented worker. Thus, she is here legally. Since Maria has been married for less than two years she is issued the aforementioned CR card.<sup>20</sup> In order to advance to permanent (Green

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12. Immigration Act of 1924, Pub. L. No. 139, Ch. 190, § 2(a), 43 Stat. 153, 153.

13. *In re Watson's Repatriation*, 42 F. Supp. 163, 164 (E.D. Ill. 1941) (“[A]ny American woman, who marries a foreigner shall take the nationality of her husband.” (quoting Expatriation Act of 1907, ch. 2534, 34 Stat. 1228) (internal quotation marks omitted)).

14. INA § 319, 8 U.S.C. § 1430(a) (2012) (originally enacted as Immigration and Nationality Act of 1952, ch. 477, § 319(a), 66 Stat. 163, 244) (“Any person whose spouse is a citizen of the United States . . . may be naturalized . . .”); *see also* INA § 204, 8 U.S.C. § 1154 (2012) (originally enacted as Immigration and Nationality Act of 1952, ch. 477, § 204, 66 Stat. 163, 179); 8 C.F.R. § 205.1(a)(1) (2012).

15. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1986). *See* Adam B. Horowitz, *Giving Battered Immigrant Fiancées a Way out of Abusive Relationships: Proposed Amendments to the Immigration and Nationality Act*, 78 BROOK. L. REV. 123, 137 (2012) (“[The] IMFA did provide the U.S. Attorney General with discretionary power to grant LPR status to an immigrant spouse, independent of her husband’s sponsorship if she demonstrated ‘extreme hardship or good faith/good cause.’ Yet, both of these provisions were still fraught with difficulty for immigrant spouses because domestic violence was generally not interpreted as adequate grounds for either waiver.”).

16. *See* Eileen P. Lynskey, *Immigration Marriage Fraud Amendments of 1986: Till Congress Do Us Part*, 41 U. MIAMI L. REV. 1087, 1100, 1104 (1987).

17. *See* INA §§ 316, 318, 334, 8 U.S.C. §§ 1427, 1429, 1445(b) (2012). The burden to prove eligibility falls on the petitioner. *Berenyi v. Dist. Dir., Immigration & Naturalization Serv.*, 385 U.S. 630, 637 (1967).

18. *Naturalization for Spouses of U.S. Citizens*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Jan. 22, 2013), <https://www.uscis.gov/us-citizenship/citizenship-through-naturalization/naturalization-spouses-us-citizens> [<https://perma.cc/VPS6-W9EZ>].

19. This is the same as having a “Green Card.”

20. INA § 216, 8 U.S.C. § 1186a (2012).

Card) status, the law requires a joint petition to be filed ninety days before the expiration of two years from which Maria first gained her legal status.<sup>21</sup> The immigrant party “can request a ‘waiver’ of the requirement to file a joint petition after the two-year period, but [will] face[] a high burden of proof to show the marriage was genuine.”<sup>22</sup>

At the two-year mark of the relationship, the marriage is reviewed by immigration to determine if the couple is still together and has a good-faith marriage.<sup>23</sup> To obtain unconditional legal permanent residence status and remove the conditions, Maria must also file Form I-751 (Petition to Remove Conditions on Residence).<sup>24</sup> Essentially, the alien spouse must prove three things: (1) that the marriage was a legal marriage in the state where the wedding took place—and that it was not dissolved by divorce or annulment,<sup>25</sup> (2) that the marriage was *not* entered into for the purpose of procuring legal permanent residence, and (3) no fee was paid (other than an attorney fee) for the marriage.<sup>26</sup> The failure of any one of these conditions will prevent the removal of the temporary conditions already in place, thus preventing permanent residence status.<sup>27</sup>

The key to all of the above is the *good-faith* marriage requirement. Maria has the burden of proving a good-faith marriage by the preponderance of the

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21. INA § 216(d)(2)(A), 8 U.S.C. § 1186a(d)(2)(A); see Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL’Y & L. 95, 102 (2002) (explaining that the law does not require the citizen spouse “to file immigration papers for her, or to follow through with the joint petition” nor “stay in the marriage for the two-year period”).

22. See Haque-Hausrath, *supra* note 1, at 24 (explaining how many abused spouses are either unaware of this rule or afraid to seek the waiver). “During this time, immigrant spouses could lose their status if they get divorced or separated, giving the abuser undue control during that time period.” *Id.*

23. Semotiuk, *supra* note 2.

24. *I-751, Petition to Remove Conditions on Residence*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Oct. 5, 2017), <https://www.uscis.gov/i-751> [<https://perma.cc/NP5A-KZXM>].

25. Marriage could take place anywhere, so long as it is valid in that jurisdiction.

26. Semotiuk, *supra* note 2. As a more recent example of this problem, see the story of the fiancé of Oregon Governor Kitzhaber, Cylvia Hayes, who received \$5,000 in return for marriage to an Ethiopian man. Noelle Crombie, *Gov. Kitzhaber’s Fiancee Cylvia Hayes Confirms Third Marriage to Ethiopian Immigrant*, *WW Reports*, OREGONLIVE (Oct. 9, 2014, 3:25 PM), [http://www.oregonlive.com/politics/index.ssf/2014/10/gov\\_kitzhabers\\_fiancee\\_cylvia.html](http://www.oregonlive.com/politics/index.ssf/2014/10/gov_kitzhabers_fiancee_cylvia.html) [<https://perma.cc/8EFH-VJHD>]; see also Semotiuk, *supra* note 2.

27. See Semotiuk, *supra* note 2. But see U.S. CITIZENSHIP & IMMIGR. SERVICES, *supra* note 3, which says you may remove your conditions if: (1) you are still married to the same U.S. citizen or permanent resident after two years; (2) you are a child and cannot be included in parents’ application; (3) you are a widow or widower who entered into your marriage in good faith; (4) you entered into a marriage in good faith, but the marriage ended through divorce or annulment; or (5) you entered into a marriage in good faith, but either you or your child were *battered or subjected to extreme hardship* by your U.S. citizen or permanent resident spouse.

evidence.<sup>28</sup> The principal question is whether Maria and Bob intended at the time of the marriage to establish a life together. The marriage needs only to be viable at the inception and not entered into “solely for immigration purposes.”<sup>29</sup> The issues to be resolved are the “bona fides of the marriage,” not its probability of lasting for any length of time.<sup>30</sup> To meet this standard, “primary evidence” is used, such as proof of joint ownership of property, birth certificates of children in common, a lease showing joint tenancy, and/or affidavits from third parties attesting to the bona fides of the marriage.<sup>31</sup> Joint tax returns are also an important indicator of togetherness.<sup>32</sup>

In addition to the requirements necessary to earn legal permanent residency, full naturalization requires both a *continuous residence and physical presence requirement*.<sup>33</sup> An applicant must be a continuous resident for five years after obtaining legal permanent resident status and continuously reside in the United States from the date of filing the application.<sup>34</sup> The residence test can be flunked in several ways, such as in the case that noncitizen spouses neglect to file the application to remove the conditional tag from their residency status. Foreign spouses will begin to accrue unlawful presence from the time the CR card expires. In these instances they are said to be “out of status.” If they leave the United States after having accumulated in excess of 180 days of unlawful

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28. Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 13,061, 13,064 (Mar. 26, 1996) (“[T]he ‘preponderance of the evidence’ criteria [is] generally applicable to visa petitions and self-petitions.”). In general, this standard is lower than “clear and convincing” and “beyond a reasonable doubt.”

29. See *Adjudicator’s Field Manual – Redacted Public Version: 21.3 Petition for a Spouse*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-3481/0-0-0-4484.html#0-0-0-389> [<https://perma.cc/TRX3-7BGC>] (“Although the petitioner and the beneficiary may not appear to have a ‘viable’ marriage, the petition may be approved if the marriage is valid and was not entered into solely for immigration purposes.”).

30. *Id.*

31. 8 C.F.R. § 204.2(a)(1)(iii)(B) (2012); see also 8 C.F.R. § 204.2(c)(2)(vii) (“Evidence of good faith . . . may include . . . proof that one spouse has been listed as the other’s spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. Other types of readily available evidence might include the birth certificate of children born to the abuser and the spouse . . . court documents providing information about the relationship; and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered.”).

32. 8 C.F.R. § 204.2(c)(2)(vii).

33. INA § 316(a), 8 U.S.C. § 1427(a) (2012).

34. See INA § 316(a)–(b), 8 U.S.C. § 1427(a)–(b). That five-year period, however, is reduced to three years if: (1) the applicant is married to a U.S. citizen; (2) that U.S. citizen spouse has been a citizen for three years; and (3) the parties have been living in a marital union for three years. INA § 319(a), 8 U.S.C. § 1430(a) (2012). Thus, Maria would be eligible to apply for permanent legal status after three years of residence. For Armed Services members, the residency period is waived completely. INA § 328, 8 U.S.C. § 1439 (2012).

presence, the foreign spouse becomes subject to a three-year bar to re-entry.<sup>35</sup> If the period of unlawful presence exceeds one year, the offending party is subject to a ten-year bar.<sup>36</sup>

Naturalization also requires that applicants display *good moral character* during the required residence period and up to the time of admission.<sup>37</sup> The good moral character requirement initially dealt with criminal conduct,<sup>38</sup> but has morphed into expanded character grounds.<sup>39</sup> Some of these markers of “good moral character” are meant to reveal citizenship qualities that show individuals to be “valuable” and “contributing member[s] of society.”<sup>40</sup> Tax compliance is considered to be a demonstrable and measurable instance of good citizenship in practice.<sup>41</sup> Thus, consistent filing of and payment of state, local, and federal taxes is an important factor in considering whether applicants possess good moral character.<sup>42</sup>

To meet the tax compliance requirement, three tests must be met. First, applicants for citizenship must file their taxes. Second, their tax returns must be accurate and not contain fraudulent content. Third, applicants must pay their taxes. Parallel to the residence requirement above, if the foreign spouse is married to a U.S. citizen, there is a three-year tax compliance requirement, but

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35. See INA §§ 316(b), 319(a), 8 U.S.C. §§ 1427(b), 1430(a).

36. Semotiuk, *supra* note 2. The problem here is that the spouse will be denied entry into the United States at the airport. *See id.*

37. INA § 316(a), 8 U.S.C. § 1427; see 8 U.S.C. § 1101(f) (2012) (creating a list of characteristics that will deny a person a finding of “good moral character,” such as being a “habitual drunkard” or “one whose income it derived principally from illegal gambling activities”).

38. The abuser husband has often forced his spouse into illegal activity, such as working without government authorization or forcing the spouse to purchase a fake green card to obtain employment. *See* Haque-Hausrath, *supra* note 1, at 24–25.

39. Section 1101(f) is a “catch-all” provision that states that the moral character test will be flunked upon “a finding that for other reasons such person is or was not of good moral character.” Lapp, *supra* note 11, at 1590 (quoting INA, § 101(f), 66 Stat. at 172) (internal quotation marks omitted). The effect of the new requirements is “the creation of bars to citizenship not found in the statute,” which “subvert the statutory and regulatory scheme governing naturalization.” *Id.* at 1571.

40. Lapp, *supra* note 11, at 1574.

41. *Ten Reasons Undocumented [Immigrants] Should File Income Taxes*, APOSTILLE.US, <https://www.apostille.us/news/ten-reaso.shtml> [<https://perma.cc/59DK-M2EL>] (“[F]iling tax returns is one form of proving good moral character.”).

42. *See* Dominguez-Capistran v. Gonzales, 413 F.3d 808, 809 (8th Cir. 2005) (noting that Mexican native and citizen who worked in the United States “diligently paid state and federal taxes in this country”), cited in Presentation at IRS Nationwide Tax Forum, Immigration and Taxes (2014), <https://www.irs.gov/pub/irs-utl/20-Immigration%20and%20Taxation.pdf> [<https://perma.cc/GXF2-RHV7>].



if she is married to a non-U.S. citizen,<sup>43</sup> a five-year compliance requirement is in place.<sup>44</sup>

Under the general federal income tax rules, a resident (whether documented or not) must file income tax returns and pay tax on their worldwide income.<sup>45</sup> Nonresidents, on the other hand, are subject to income tax only if they derive income from sources within the United States.<sup>46</sup> A resident is a person who satisfies one of the following conditions: (1) is a legal permanent resident, (2) meets the substantial presence test, or (3) makes the “[f]irst year election.”<sup>47</sup> Similar to the federal rules, residents must also pay state and local taxes.

Good moral character is also presumed to repel the likelihood of tax evasion or fraud in the filing and reporting of taxes. For instance, if tax fraud is committed by a U.S.-citizen husband of a noncitizen spouse, his demonstration of deficient moral character could taint his spouse’s perceived character as well. If both parties sign a fraudulent tax return, they are jointly and severally liable for the financial consequences of the fraud. If innocent spouse relief is not granted for the alien spouse, failure of the good moral character test is a grave possibility.<sup>48</sup>

Lastly, the foreign spouse must pay the appropriate assignment of tax liability. Of course, many noncitizen residents may not owe taxes and in fact may be entitled to refunds.<sup>49</sup> However, if taxes are owed, the immigration judge may want to see that a given taxpayer has actually paid the taxes or “has entered into a formal agreement with the IRS to pay back taxes.”<sup>50</sup>

43. This could include marriage to an abuser outside the United States. It could also include marriage to an illegal alien, marriage to a resident alien, or marriage to another legal permanent resident. All of these situations are outside the scope of this Article. These spouses may have *more* challenges than those foreign spouses married to U.S. citizens.

44. The five-year requirement is the general period for good moral character. *See* Lapp, *supra* note 11, at 1589–90, where certain offenses, like drunkenness, adultery, polygamy, illegal gambling, if committed during the five-year period immediately preceding the application could preclude a finding of good moral character. However, crimes, such as murder, could be a permanent bar to citizenship. *See* 8 U.S.C. § 1101(a)(15)(U)(iii) (2012); 8 C.F.R. §§ 316.10(b)(1)(i) (2012) (“An applicant shall be found to lack good moral character, if the applicant has been . . . [c]onvicted of murder . . .”).

45. *See* Lipman, *supra* note 1, at 7. Residency for tax purposes is thus much different than for immigration purposes. *See* RUTH ELLEN WASEM, CONG. RESEARCH SERV., RS20916, IMMIGRATION AND NATURALIZATION FUNDAMENTALS 6 (2003); Lipman, *supra* note 1, at 7 n.26.

46. *See* John R. Strohmeyer, *Estate and Gift Taxation of Nonresidents*, PROB. & PROP., Nov./Dec. 2016, at 50, 50 (addressing transfer tax issues of nonresidents).

47. I.R.C. § 7701(b)(1)(A) (2012). Presence usually means “physically present.” § 7701(b)(7)(A). However, students and teachers are exempt. § 7701(b)(5)(A).

48. *See* discussion *infra* Part III.

49. *See* Lipman, *supra* note 1, at 47.

50. *See* Presentation at IRS Nationwide Tax Forum, *supra* note 42.

Under tax procedural rules, the taxpayers can go back three years and re-file and amend their return to accurate dimensions.<sup>51</sup> However, the filing of an amended income tax return may not reverse the initial impression caused by the previous filing of an inaccurate income tax return.<sup>52</sup> This is best illustrated by *Sumbundu v. Holder* where the petitioners' claim that their deportation proceedings should be cancelled was denied.<sup>53</sup> In *Sumbundu*, the husband and wife came from Gambia and were in the United States illegally.<sup>54</sup> The couple was found to have misreported their income from their business for nearly a decade, not only to governmental tax agencies, but also to the New York Housing Authority, under whose auspices the couple received subsidized living quarters.<sup>55</sup> Although the couple had filed amended returns to correct tax deficiencies for the previous three years (allowed by law), and despite having presented an argument against deportation based on disclosure that the wife had been subjected to genital mutilation and feared the same fate for their daughter,<sup>56</sup> the Court ruled against the petitioners, citing the “grossly inadequate and probably fraudulent” nature of their tax returns that constituted an “ongoing misrepresentation in multiple years.”<sup>57</sup> Their malfeasance constituted an emphatic failing of the “good moral character” requirement, resulting in their eventual deportation.<sup>58</sup> Such a case illustrates the long reach that tax compliance rules may extend and exercise influence.

## II. HOW DOMESTIC VIOLENCE COMPLICATES CITIZENSHIP FOR THE FOREIGN SPOUSE

Domestic violence is widespread,<sup>59</sup> cutting across cultures and socio-economic lines of every stripe. It includes verbal and psychological abuse as

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51. *Ten Facts from the IRS About Amending Your Tax Return*, INTERNAL REVENUE SERV. (Aug. 17, 2017), <https://www.irs.gov/newsroom/ten-facts-on-filing-an-amended-tax-return> [<https://perma.cc/KC82-B7KF>].

52. *See Sumbundu v. Holder*, 602 F.3d 47, 50, 56 (2d Cir. 2010) (dealing with a cancellation of removal or deportation proceedings where petitioners sought to introduce amended returns).

53. *Id.* at 57.

54. *Id.* at 49.

55. *Id.* at 50.

56. *Id.* at 49.

57. *Sumbundu*, 602 F.3d at 50. Court held the immigration judge has great latitude under the “catchall” of § 1101(f) to look at “ongoing misrepresentation in multiple years’ income tax returns, irrespective of whether the misrepresentations involved a ‘substantial sum.’” *Id.* at 50.

58. *Id.* at 57.

59. The Department of Justice reported that from 1994 to 2010, women accounted for 80% of domestic violence victims. They also reported a 48% decline over that same period and a 64% decline over the last two decades. *Prevalence of Domestic Violence*, ADVOCATES FOR HUMAN RIGHTS (Aug. 2013), [http://www.stopvaw.org/prevalence\\_of\\_domestic\\_violence](http://www.stopvaw.org/prevalence_of_domestic_violence) [<https://perma.cc/7DJN-W6AU>]; *see also* Family Violence Prevention Fund, *The Facts on Health Care and Domestic Violence*, ENDABUSE.ORG, <http://police.ucsf.edu/system/files/domesticviolencehealth>

well as physical battery.<sup>60</sup> According to the National Coalition Against Domestic Violence, nearly one in four women in the United States will suffer domestic violence in her lifetime.<sup>61</sup> Due to a variety of contributing factors, immigrant spouses are more at-risk of experiencing domestic abuse than their counterparts in the general population.<sup>62</sup> Between one-third to one-half of immigrant women in the United States are estimated to have experienced domestic violence firsthand.<sup>63</sup> These numbers are even higher amongst women who are married to other immigrant partners.<sup>64</sup> One study of Latina and Filipina immigrants found that nearly half of the subjects reported an increase in domestic violence after arriving in the United States,<sup>65</sup> and better than one-in-five of the battered respondents remained in an abusive relationship for fear of being reported to immigration officials if they complained.<sup>66</sup> A study conducted by the National Institute of Justice showed that nearly two-thirds of the women surveyed said that their abusers threatened them with deportation following their arrival to the United States.<sup>67</sup> These risks are known even by policymakers in the halls of government. Witness this statement from two U.S. senators: “Women who are separated from their spouses have the highest rate of domestic abuse victimization: four times higher than that of divorced women and eight times higher than that for single women.”<sup>68</sup>

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care.pdf [https://perma.cc/ALC6-K6ZA]; *Domestic Violence Statistics*, AM. BAR ASS’N, [http://www.americanbar.org/groups/domestic\\_violence/resources/statistics.html](http://www.americanbar.org/groups/domestic_violence/resources/statistics.html) [https://perma.cc/VSK5-R2EK] (providing resources for statistics on domestic, sexual, and dating violence).

60. *See Rev. Proc.* 2013-34, § 4.03(2)(c)(iv), 2013-43 I.R.B. 397, 402.

61. *Learn More: Statistics*, NAT’L COALITION AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/statistics> [https://perma.cc/FB4R-3GEQ]; *see also* Horowitz, *supra* note 15, at 132–33 (showing that, based on a 2000 study, one in three women face such violence).

62. Horowitz, *supra* note 15, at 133; *see also* Giselle Aguilar Hass, Nawal Ammar & Leslye Orloff, *Battered Immigrant and U.S. Citizen Spouses*, LEGAL MOMENTUM (April 24, 2006), [https://www.academia.edu/4333236/Battered\\_Immigrants\\_and\\_U.S.\\_Citizen\\_Spouses](https://www.academia.edu/4333236/Battered_Immigrants_and_U.S._Citizen_Spouses) [https://perma.cc/64YJ-HWUC].

63. Horowitz, *supra* note 15, at 134.

64. *Id.* at 134. It is interesting to compare documented immigrant statistics with undocumented residents. The latter have a lower rate of “reported” abuse, probably because they have a lower reporting rate, as they are more likely to fear deportation. *See id.* at 135. According to a Department of Justice study, thirty percent of documented immigrants report abuse while only fourteen percent of undocumented immigrants do. *Id.*

65. Mary Ann Dutton, Leslye E. Orloff & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL’Y 245, 250 (2000).

66. *See id.* at 271.

67. Hass et al., *supra* note 62.

68. Press Release, U.S. Sen. Michael F. Bennet, Bennet, Casey Stand up for Health Care for Domestic Violence Victims (Dec. 22, 2011), <http://www.bennet.senate.gov/?p=release&id=1659> [https://perma.cc/F8WW-4UA6]. About “73% of emergency room visits and up to 75% of calls to the police for domestic violence occur after separation.” Jacqueline Clarke, *[In]Equitable Relief:*

Beginning in 1990, U.S. immigration policy was revised to acknowledge the victims of domestic violence. The Immigration Act of 1990, for example, created a battered spouse waiver, which allowed the spouse who had already obtained a conditional resident status to gain legally permanent status without relying on her spouse's joint petition.<sup>69</sup> However, such a spouse could not become a conditional resident without her spouse's initial sponsorship.<sup>70</sup> The Violence Against Women Act ("VAWA") of 1994 addressed this problem by allowing a battered spouse to "self-petition" and waive the joint petition filing requirement.<sup>71</sup> Others could file as well, such as husbands and non-abused spouses who were parents of abused children.<sup>72</sup> Also, both undocumented immigrants and undocumented battered immigrants could petition.<sup>73</sup>

To obtain the waiver, the petitioner must satisfy all of the following: (1) be married to a U.S. citizen (or lawful permanent resident) in good faith, (2) be married to the abuser at the time the petition was filed (divorce was a bar), (3) been battered or had suffered "extreme cruelty," (4) resided with the abusive spouse (no specific time period required), (5) be a person "of good moral character," and, to avoid deportation, (6) must show that she or her dependent children would suffer extreme hardship if deported.<sup>74</sup> In addition, if the petitioner could prove all of the above and could prove a continuous physical presence in the United States for three years, then deportation proceedings could be suspended.<sup>75</sup>

Significantly, the VAWA mandated that the Immigration and Naturalization Services ("INS") must accept "any credible evidence" in the battered spouse waiver or deportation cases.<sup>76</sup> To prove battery or extreme cruelty, a police report would be the best evidence, but medical documents, court documents, or

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*How Judicial Misconceptions About Domestic Violence Prevent Victims from Attaining Innocent Spouse Relief Under I.R.C. § 6015(f)*, 22 AM. U. J. GENDER, SOC. POL'Y & L. 825, 839 n.86 (2014).

69. Immigration and Nationality Act of 1990, Pub. L. No. 101-649, § 701(a)(4)(c), 104 Stat. 4878, 5085 (1990).

70. See Horowitz, *supra* note 15, at 137.

71. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40701(a), 108 Stat. 1796, 1953 (1994) (amending INA § 204(a)(1), 8 U.S.C. § 1154(a)(1)) [hereinafter VAWA] (the Violence Against Women Act consists of Sections 40001–40703 of the Violent Crime Control and Law Enforcement Act of 1994); see INA §§ 204(a)(1)(J), 216(c)(4), 8 U.S.C. §§ 1154(a)(1)(J), 1186a(c)(4) (2012); 8 C.F.R. § 204.2(c)(1)(i)(E) (2012).

72. 8 C.F.R. § 204.2(f).

73. See 8 C.F.R. § 204.2(c)(1)(i).

74. 8 C.F.R. § 204.2(c)(i); see also *Petition to Classify Alien as Immediate Relative of United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children*, 61 Fed. Reg. 13061, 13065 (Mar. 26, 1996).

75. VAWA, § 40703(a), 108 Stat. 1796, 1953 (1994) (amending INA § 244(a), 8 U.S.C. § 1254(a)).

76. VAWA, § 40702, 108 Stat. 1796, 1955 (amending INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4)).

affidavits by persons with personal knowledge of the relationship of the couple could be used. The “credible relevant evidence” standard<sup>77</sup> is a more lenient evidentiary standard than that required in family-based petitions because the abuser may control (or even destroy) documents, and the abused may be forced to flee without them.

The complex issues around credibility and domestic violence are illustrated by *Lopez-Umanzor v. Gonzalas*.<sup>78</sup> Here, the Ninth Circuit reviewed the deportation decision of the immigration judge (“IJ”) (affirmed by the Board of Immigration Appeals) that held that the testimony and evidence presented by the petitioner as to domestic violence was not credible.<sup>79</sup> The Ninth Circuit held that “refusal to hear testimony from Petitioner’s [domestic violence] experts . . . violated due process,” and remanded to a new IJ to hear such testimony.<sup>80</sup> The petitioner had submitted the following evidence to corroborate her allegation that she had suffered domestic violence: “medical records from an emergency room visit and written statement from social service providers and a psychologist who had worked with Petitioner.”<sup>81</sup> The IJ questioned why the petitioner would lie to the hospital about her abuse—she claimed she “cut her hand on a broken bottle,” and the IJ found it “implausible” that she would return to the apartment of her abuser.<sup>82</sup> The IJ refused to “hear expert testimony from professionals who had worked with Petitioner[] regarding the dynamics of abusive relationships.”<sup>83</sup> Although the court does not mention this, there seems to be three issues of concern here. First, why do domestic violence victims not disclose the presence of domestic violence at the doctor’s office, the hospital, or in prior legal proceedings, such as divorces and joint custody hearings and the like? Second, why are such victims hesitant to contact law enforcement officials in the first place? Third, why do victims of domestic violence repeatedly return to their batterers—often giving excuses for the batterer’s behaviors? All of these issues have been discussed extensively in the catalog of legal literature.<sup>84</sup>

In 2000, Congress reauthorized the VAWA and passed the Battered Immigrant Women Protection Act, which amended several provisions in the 1994 law.<sup>85</sup> First, it removed the requirement that abused spouses provide

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77. 8 C.F.R. § 204.2(c)(2)(vii).

78. 405 F.3d 1049 (9th Cir. 2005).

79. *Id.* at 1051.

80. *Id.* at 1057, 1059.

81. *Id.* at 1051.

82. *Id.* at 1051, 1055.

83. *Lopez-Umanzor*, 405 F.3d at 1055.

84. See generally MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 255–63 (2d ed. 2003); MARGI LAIRD MCCUE, DOMESTIC VIOLENCE: A REFERENCE HANDBOOK (2d ed. 2008). The court does not appear to even address the issue of “battered women syndrome.”

85. Battered Immigrant Women Protection Act of 2000, Pub. L. No 106-386, tit. V, 114 Stat. 1518 (2000) (codified as amended in scattered sections of 8 U.S.C.).

extensive documentation showing “extreme hardship” to avoid deportation.<sup>86</sup> Meeting the “extreme hardship” standard was identified as the “most difficult part of the VAWA self-petition and often required the assistance of an attorney.”<sup>87</sup> Second, it changed the three-year marriage requirement and “permitted women who divorced their abusive spouse or who were widowed to file self-petitions within two years of their divorce or of the batterer’s death.”<sup>88</sup> A battered foreign spouse who was divorced<sup>89</sup> was eligible to self-petition if the legal termination of the marriage within the past two years was “connected” to battering or extreme cruelty by a U.S. citizen spouse,<sup>90</sup> although the “connected” aspect of the domestic violence test was difficult to meet.<sup>91</sup> Third, it extended immigration protections to battered immigrants who previously did not qualify under the original 1994 version of the VAWA.<sup>92</sup> Fourth, it provided improved access to public benefits.<sup>93</sup> Fifth, it held that an action in self-defense against the abuser will not disqualify her under the good moral character requirement.<sup>94</sup> Sixth, and most significantly, the Act created the U Visa, a new visa category designed to support immigrant abuse victims who aid in the criminal prosecution of their abusers.<sup>95</sup>

The U Visa legal status is particularly valuable to battered immigrants who are undocumented, to those ineligible to self-petition because they are not married to their abuser, or those who have been divorced for more than two years from their U.S. citizen spouse.<sup>96</sup> To qualify for the U Visa, battered spouses: (1) must have “suffered substantial physical or mental abuse as a result” of the battering,<sup>97</sup> (2) the battering “must either be in violation of some federal, state,

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86. See Horowitz, *supra* note 15, at 140.

87. Orloff & Kaguyutan, *supra* note 21, at 145.

88. Horowitz, *supra* note 15, at 140.

89. *Id.*

90. Battered Immigrant Women Protection Act, § 1503(b)(1)(A), 114 Stat. 1518, 1518–19 (amending INA § 204(a)(1)(A)(iii)(II)(CC)(ccc), 8 U.S.C. 1154(a)(1)(A)(iii)(II)(CC)(ccc)).

91. Deanna Kwong, Note, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II*, 17 BERKELEY WOMEN’S L. J. 137, 146 (2002).

92. Orloff & Kaguyutan, *supra* note 21, at 145–46.

93. *Id.* at 152–53.

94. Battered Immigrant Women Protection Act, § 1505(b)(1), 114 Stat. 1518, 1525 (amending INA § 237(a)(7)(A)(i)(I), 8 U.S.C. § 1227(a)(7)(A)(i)(I)). For history, see Gail Pendleton, *Immigration Relief for Women and Children Suffering Abuse*, in DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN 65 (Deeana L. Jang et al. eds., 2d ed. 1997).

95. Battered Immigrant Women Protection Act, § 1513(c), 114 Stat. 1518, 1535 (amending INA § 214, 8 U.S.C. § 1184).

96. *A U-Visa Factsheet for Advocates*, LEGAL MOMENTUM, <http://library.niwap.org/wp-content/uploads/2015/IMM-Qref-AdvocateUVisaFactsheet-10.08.pdf> [<https://perma.cc/VV9R-WFQH>].

97. Battered Immigrant Women Protection Act, § 1513(b)(3), 114 Stat. 1518, 1534 (adding subparagraph “(U)(i)(I)” to the end of INA § 101(a)(15), 8 U.S.C. § 1101(a)(15)).

or local criminal law and have occurred in the United States or its territories and possessions,”<sup>98</sup> (3) the applicant must have been “helpful,” or likely to be helpful in the investigation or prosecution of the criminal activity,<sup>99</sup> and (4) such “helpfulness” must be certified by a federal, state, or local law enforcement official or authority.<sup>100</sup> The principal impediment to widespread use of this tool is, as mentioned previously, that many foreign spouses fear deportation and are hesitant to report abuse (or any other transgression) to law enforcement officials.

The VAWA was reauthorized in the Violence Against Women and Department of Justice Reauthorization Act of 2005<sup>101</sup> and again in the Violence Against Women Reauthorization Act of 2013.<sup>102</sup> The VAWA of 2005 amended the U Visa provisions to provide greater protections for family members of U Visa applicants who may obtain lawful status derivatively.<sup>103</sup> It offered additional remedies for abused immigrants in removal hearings.<sup>104</sup> However, the self-petition remained unavailable to abused K Visa holders (i.e., those with U.S. citizen fiancés).<sup>105</sup> The 2013 Act “reauthorized and improved upon lifesaving services for all victims of domestic violence, sexual assault, intimate partner violence, and stalking—including Native [American] women, immigrants, LGBT population, college students and youth, and public housing residents.”<sup>106</sup>

All of these reauthorizations and modifications of the VAWA show the good faith efforts by Congress to understand and help foreign spouses (and other populations) who are subject to domestic violence. A 2015 report by the Congressional Research Service shows that over six billion dollars of grants have been issued by the Office of Violence Against Women, which is within the Department of Justice.<sup>107</sup> The Bureau of Justice Statistics has issued a report showing that in the period after the VAWA of 1994 passed, “the overall rate of

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98. Kwong, *supra* note 91, at 151; *see also* Battered Immigrant Women Protection Act, § 1513(b)(3), 114 Stat. 1518, 1534 (adding subparagraph “(U)(i)(IV)” to the end of INA § 101(a)(15), 8 U.S.C. § 1101(a)(15)).

99. Battered Immigrant Women Protection Act, § 1513(c), 114 Stat. 1518, 1535 (adding subparagraph “(o)(1)” to the end of INA § 214, 8 U.S.C. § 1184).

100. *Id.*

101. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006).

102. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

103. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, § 801(b)(2), 119 Stat. 2960, 3054 (amending clause “(ii)” of INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U)).

104. *See id.* §§ 804(c), 813, 119 Stat. 2960, 3055, 3057–58.

105. *See* Horowitz, *supra* note 15, at 141.

106. *Violence Against Women Act*, NAT’L NETWORK TO END DOMESTIC VIOLENCE, <https://nnedv.org/content/violence-against-women-act/> [<https://perma.cc/368P-AVTF>].

107. LISA N. SACCO, CONG. RESEARCH SERV., R42499, THE VIOLENCE AGAINST WOMEN ACT: OVERVIEW, LEGISLATION, AND FEDERAL FUNDING 4 (2015).

intimate partner violence in the United States declined by 64%.”<sup>108</sup> However, as the aforementioned Ninth Circuit case illustrates, much more sensitivity training for judges, continuing support of law enforcement educational programs, and related domestic violence initiatives are necessary.

Given some of the more recent statutory protections being offered to battered immigrant spouses, prospects for Maria’s attainment of her Green Card (and perhaps eventual U.S. citizenship) may have brightened. Maria appears to be eligible to self-petition and seek a waiver of the joint application requirement for permanent resident eligibility. To this end, her task is to satisfy the checklist of evidentiary tests to establish her case. She seems to have established the good-faith basis of the marriage. At the outset of her marriage to Bob, she was already established in the United States on the work-related TN visa. She did not rely on her relationship with Bob as a pretext to be in the United States. Once married, she shared a residence, financial assets and accounts with Bob, and also filed tax returns jointly with him. At the time of her self-petition, she is separated from but still married to him. This brings us to two remaining (and critical) open-ended questions in this process.

The first of these involves the required presentation of “credible relevant evidence” that Maria was the victim of domestic violence—the pivot on which her subsequent actions rest. Did she show obvious signs of physical injury or impairment? Did she report the abuse to the police? Did she miss work or seek medical treatment for her injuries? Did she confide in co-workers or friends about her abuse? Are there third parties who can testify as to abnormal, dominating, or intimidating behavior directed at Maria by Bob? All of these questions can be answered with an appropriate level of thorough inquiry.

Assuming Maria can affirmatively present such “credible relevant evidence” of abuse, this leaves the burden of proof that she has displayed “good moral character” in her conduct since the time she initiated the process of petitioning for permanent residency status. The question is: Will her joint tax return with Bob taint her character if she knew of his tax avoidance activities? As the subsequent discussion reveals, this can be a riskier proposition than it may initially appear.

### III. INNOCENT SPOUSE RULES AND THE GOOD MORAL CHARACTER REQUIREMENT OF CITIZENSHIP

Married couples may file a joint return,<sup>109</sup> and such a return can indicate evidence of a good-faith marriage. However, filing such a return<sup>110</sup> imposes on

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108. Shannan M. Catalano, *Intimate Partner Violence, 1993-2010*, BUREAU JUST. STAT. (Nov. 27, 2012), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4536> [<https://perma.cc/353P-EW> MV].

109. I.R.C. § 6013(a) (2012).

110. *See supra* note 10 and accompanying text.



each spouse the responsibility for the accuracy and completeness of the return and for the payment of the tax.<sup>111</sup> Thus, the IRS can pursue either or both of the taxpayers for any deficiency (including any penalties or interest due). If the foreign spouse is not able to establish grounds of innocence and is not in compliance with tax laws, then she may fail the good moral character requirement of the immigration laws.

It is estimated that 50,000 individuals a year face income tax liability attached to their marital status.<sup>112</sup> A majority of those individuals claiming innocent spouse relief are women.<sup>113</sup> Before 1971,<sup>114</sup> the only way an innocent spouse could obtain relief from joint liability was if she signed the return under duress.<sup>115</sup> The IRS Restructuring and Reform Act of 1998 (“RRA”), however, granted three exceptions to joint liability: (1) § 6015(b) offered a complete release if the innocent spouse had no knowledge of any understatement or deficiency,<sup>116</sup> (2) § 6015(c)–(d) offered partial release if the spouses are now divorced or separated and the innocent spouse elects to have her liability limited to only items which would be allocable to her,<sup>117</sup> and (3) § 6015(f) (which is the focus of this Article).

Section 6015(f) provides that if § 6015(b) and § 6015(c) are not available, discretionary equitable relief can be granted to a spouse who can demonstrate that a tax understatement or underpayment would be unfair or “inequitable” because of the presence of certain “facts and circumstances”—factors like economic hardship and abuse.<sup>118</sup> Abused spouses can write “Potential Domestic Abuse Case” at the top of Form 8857, (Request for Innocent Spouse Relief).<sup>119</sup>

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111. INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, DIVORCED OR SEPARATED INDIVIDUALS, PUBLICATION No. 504, at 4 (2016), <https://www.irs.gov/pub/irs-pdf/p504.pdf> [<https://perma.cc/E6AN-H922>]; Presentation at IRS Nationwide Tax Forum, Advocating for Innocent Spouse Relief and Injured Spouse Relief (2015), [https://www.irs.gov/pub/irs-utl/2015\\_NTF\\_Advocating\\_Injured\\_Innocent\\_Spouse\\_Relief.pdf](https://www.irs.gov/pub/irs-utl/2015_NTF_Advocating_Injured_Innocent_Spouse_Relief.pdf) [<https://perma.cc/U967-WVQR>].

112. Clarke, *supra* note 68, at 827.

113. 144 CONG. REC. S7,668 (daily ed. July 8, 1998) (statement of Sen. D’Amato) (stating that 90% of the innocent spouse cases brought before the Restructuring and Reform Act of 1998 were by women); see Stephanie Hunter McMahon, *An Empirical Study of Innocent Spouse Relief: Do Courts Implement Congress’s Legislative Intent?*, 12 FLA. TAX REV. 629, 662 (2012) (stating that women bring approximately 85.3% of the trial cases and 88.1% of the appellate cases).

114. Revenue Act of 1971, Pub. L. No. 91-679, 84 Stat. 2063 (1971).

115. McMahon, *supra* note 113, at 636; see U.S. GEN. ACCOUNTING OFF., GAO-02-558, TAX ADMINISTRATION: IRS’S INNOCENT SPOUSE PROGRAM PERFORMANCE IMPROVED; BALANCED PERFORMANCE MEASURES NEEDED 32 (2002), <http://www.gao.gov/assets/240/234431.pdf> [<https://perma.cc/7ME6-L32L>] (holding that “abuse” is a factor weighing in favor of relief, but not “duress”); I.R.C. § 6013(e) (1998) (repealed).

116. I.R.C. § 6016(b) (2012).

117. I.R.C. § 6015(c)–(d) (2012).

118. I.R.C. § 6015(f).

119. U.S. DEP’T OF TREASURY, INTERNAL REVENUE SERV., FORM 8857: REQUEST FOR INNOCENT SPOUSE RELIEF (rev. 2014), <https://www.irs.gov/pub/irs-pdf/f8857.pdf> [<https://perma.cc/7ME6-L32L>].

Part V (24a) of that form allows the spouse the chance to check-off up to eleven boxes that could indicate physical or emotional abuse.<sup>120</sup> Included here are several factors that could help Maria, such as lack of control of financial decisions and physical abuse. The spouse can describe the abuse and attach documentation (including injury photographs, medical reports, police reports, etc.)—many of the items that the immigration office requires under the VAWA. The designation as a “Potential Domestic Abuse Case,” however, does not necessarily lead to “special consideration” when the IRS makes an innocent spouse decision.<sup>121</sup> In addition, it will not prevent the IRS from telling “a taxpayer’s spouse (or former spouse) that innocent spouse relief has been requested.”<sup>122</sup> Under law, “[t]he spouse (or former spouse) has the right to provide the IRS with information and receive limited information from the IRS about that request.”<sup>123</sup>

The Commissioner has prescribed several revenue procedures as guidelines to determine the “facts and circumstances” of importance in innocent spouse

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cc/8JGV-T7YG]. Must file within two years. See Carla Fried, *For ‘Innocent Spouses,’ a Helpful Shift in I.R.S. Policy*, N.Y. TIMES (Feb. 11, 2012), <http://www.nytimes.com/2012/02/12/business/yourtaxes/innocent-spouses-get-more-relief-from-irs.html> [https://perma.cc/RA62-9V45] (where dentist’s wife was denied relief for failure to file within two-year statute of limitations period).

120. These include:

[1] [p]hysically harm or threaten you, your children, or other members of your family . . . [2] [s]exually abuse you, your children, or other member of your family . . . [3] [m]ake you afraid to disagree with him/her . . . [4] [c]riticize or insult you or frequently put you down . . . [5] [w]ithhold money for food, clothing, or other basic needs . . . [6] [m]ake most decisions for you, including financial decisions . . . [7] [r]estrict or control who you could see or talk to or where you could go . . . [8] [i]solate you or keep you from contacting your family members and/or friends . . . [9] [c]ause you to fear for your safety in any other way . . . [10] [s]talk you, your children, or other members of your family . . . [and] [11] [a]buse alcohol or drugs.

FORM 8857: REQUEST FOR INNOCENT SPOUSE RELIEF 6. Approximately 91% of the innocent spouse claimants who allege abuse are women, and women have won 72.4% of the cases where abuse was alleged. McMahon, *supra* note 113, at 697.

121. See I.R.S. News Release, IR-2001-23 (Feb. 20, 2001).

122. *Id.*

123. *Id.*

[T]he IRS strictly adheres to tax law provisions that protect the confidentiality of sensitive information . . . [refusing to] release information that could endanger the safety of domestic violence victims. For example, the IRS will not release to a taxpayer’s spouse (or former spouse) a new name, address, information about an employer, phone or fax number or other information not related to making a determination about the innocent spouse claimant. For potential abuse cases, the IRS also centralizes all correspondence in one location. This change means the other spouse cannot guess the [location] of the domestic abuse victim through a postmark or the location of a local IRS office. . . . IRS workers with innocent spouse cases also . . . receive special training on how to properly handle abuse cases.

*Id.*

cases. Revenue Procedure 2003-61 sets forth three safe harbor factors.<sup>124</sup> If the claimant can prove all three, she will obtain equitable relief: (1) the claimant is legally separated or divorced at the time of relief; (2) the claimant had no knowledge or reason to know that the non-requesting spouse did not pay the liability; and (3) the claimant would suffer economic hardship if required to pay the tax.<sup>125</sup> Maria is separated from Bob, but she might have reason to know that he is not paying his taxes. She may be afraid to confront him as he is controlling and abusing. As for “economic” hardship, she works and produces income on her own, so depending on her level of income and associated tax liability, and the extent to which Bob exercised control over her financial affairs, there may be a finding of economic hardship. But she certainly experiences a hardship of a different kind—the fear of omnipresent deportation.

If Maria flunks any one of the three safe harbor rules, the Commissioner can employ a balancing test and assess the following factors: (1) whether the innocent spouse received a significant benefit from the nonpayment of the tax; (2) the state of mental or physical health of the innocent spouse at the time of signing the return; (3) whether the innocent spouse made a good faith effort to comply with the tax law; and (4) whether the alleged abuse by the former spouse occurred as claimed.<sup>126</sup> Abuse is just one factor of consideration and can be outweighed by other factors.<sup>127</sup> The key here is whether, taking into account all facts and circumstances, it would be unfair to hold the innocent spouse liable for the tax.<sup>128</sup>

Jacqueline Clarke has examined sixty cases in which an innocent spouse claimed she was abused.<sup>129</sup> Clarke concludes that the two factors that are most important in influencing legal decisions are the establishment of abuse itself, and the degree to which the petitioner knew or should have known of the illegal tax.<sup>130</sup> Both factors are important. Clark states, for instance, that even if abuse is proved, “[i]f the requesting spouse fails to prove that she lacked knowledge or

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124. Rev. Proc. 2003-61, § 4.03(2)(a), 2003-32 I.R.B. 296, 298. The Treasury Department’s guidelines for § 6015(f) include certain threshold conditions plus additional levels of factors before the Commissioner will grant a request for equitable relief. *Id.* at 298–99.

125. Rev. Proc. 2003-61, § 4.03(2)(a), 2003-32 I.R.B. 296, 298.

126. Rev. Proc. 2003-61, §§ 4.03(2)(a)(iv)–(vi), (2)(b)(i)–(ii), 2003-32 I.R.B. 296, 298–99.

127. *See id.* Divorced spouses are provided safe harbor, which is not the case here. Rev. Proc. 2013-34, § 4.03(2), 2013-43 I.R.B. 397, 400. The studies have shown that in the innocent spouse cases, divorce as a factor is more important than if there is merely separation.

128. The “reason to know” test asks whether “[a] reasonable person in a similar circumstance would have known of the understated tax.” INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, DIVORCED OR SEPARATED INDIVIDUALS, PUBLICATION NO. 971, at 6 (2014). The IRS will take into account the educational background of the spouse, the participation in the activity (i.e., earning the unreported income), the significance of the erroneous item compared to other times, departures from prior years’ tax return, and whether the spouse should have questioned the item. *Id.* at 6.

129. *See Clarke, supra* note 68, at 828.

130. *Id.* at 830–31.

had no reason to know, this factor will weigh against relief.”<sup>131</sup> On the other hand, if the spouse cannot prove abuse, she still can get relief, but her odds of success are substantially diminished.<sup>132</sup> In over two-thirds (66.7%) of the cases in which abuse was alleged, the judge found that there was no abuse.<sup>133</sup> Of these, barely a quarter (27.5%) of petition spouses were granted relief.<sup>134</sup> Conversely, in 90% of the cases in which the alleged abuse was confirmed, the claimant “was ultimately granted equitable relief.”<sup>135</sup> Clarke concludes that the courts have not developed consistent interpretation of the various facts and circumstances.<sup>136</sup>

Of note are the inconsistencies in the financial control cases.<sup>137</sup> In one case, *Bishop v. Commissioner of Internal Revenue*, the claimant spouse had a high school education, but the court held there was evidence of financial control.<sup>138</sup> In a case reaching the opposite result, *Smith v. Commissioner of Internal Revenue*, the court held the petitioner spouse was educated and intelligent and could not be “oblivious about the family resources from which taxes could have been paid.”<sup>139</sup> Unlike in the immigration area where “any credible evidence” is the standard, tax courts generally require more concrete proof. Thus, in *Sotuyo v. Commissioner of Internal Revenue*, the spouse introduced a police report into evidence that detailed the incidence of domestic violence, but the court dismissed the abuse claim as irrelevant because the wife was granted joint custody and the “family court did not order supervised visitation.”<sup>140</sup> Thus, the level of abuse did not “rise to the level that would keep her from challenging the omission of income for fear of [the husband’s] retaliation.”<sup>141</sup> Similarly, in *Collier v. Commissioner of Internal Revenue*, the claimant spouse introduced testimony from a friend who witnessed episodes of verbal and mental abuse, but the court held the testimony was not “conclusory and lacking in any

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131. *Id.* at 831.

132. *See id.* at 831.

133. *Id.* at 846.

134. Clarke, *supra* note 68, at 846.

135. *Id.* at 839, 846 (45% of divorced spouses won, versus 30% for separated).

136. *See id.* at 846; *see also* McMahon, *supra* note 113, at 629. Professor McMahon examined the factors under Rev. Rul. 2003-61 and the variables utilized by the Tax Court in determining whether an abuse claim was upheld or rejected. She concluded that there “remains uncertainty as to how a particular case will be decided *ex ante*” but that “courts are doing a relatively good job of implementing Congress’s intent.” *Id.* at 635.

137. *See* Clarke, *supra* note 68, at 852–53.

138. No. 7595-06S, 2008 WL 852028, at \*1, 2 (T.C. Mar. 31, 2008); *see also* Clarke, *supra* note 68, at 853.

139. 82 T.C.M. (CCH) 963, 969 (2001); *see also* Clarke, *supra* note 68, at 853.

140. No. 25692-10S, 2012 WL 1021306, at \*5 (T.C. Mar. 27, 2012); *see also* Clarke, *supra* note 68, at 828 n.22.

141. No. 25692-10S, 2012 WL 1021306, at \*5 (T.C. Mar. 27, 2012); *see also* Clarke, *supra* note 68, at 828 n.22.

specificity.”<sup>142</sup> Even in *Acoba v. Commissioner of Internal Revenue*, the court was unmoved by issuance of restrictions placed on an abusive spouse, stating that “there is no evidence to indicate whether the restraining order was the result of historical abuse or was a prophylactic measure taken by the court as an outcome of the divorce.”<sup>143</sup>

For Maria, physical violence is helpful for her innocent spouse claim but not ultimately determinative. Financial control is a stronger argument, but it is harder to prove, and more detailed evidence would need to emerge to confirm her claim. However, if Maria knows or has reason to know that Bob is not reporting all of his business income, this would tend to damage her efforts to obtain innocent spouse relief and thus satisfy the moral character requirement.

### CONCLUSION

This Article has highlighted numerous obstacles that noncitizen spouses face when seeking U.S. citizenship under the omnipresent dark canopy of domestic violence. Both the immigration agencies and the IRS have shown progress in accommodating victims of domestic abuse. However, these policy adjustments have been decidedly *ad hoc* in nature, lacking the critical level of coordination that marks a directed and deliberate approach to an important issue. Along this front, immigration authorities should be more accepting of citizenship candidates who file separate tax returns. It can be argued that this is actually a display of transparency that should count in the applicant’s favor. Similarly, the IRS should grant more deference to noncitizen spouses seeking relief under the innocent spouse rules.<sup>144</sup> These individuals already routinely operate in environments of duress and domination. Closely related to this is that both immigration and taxation authorities should revisit their employment of the “credible relevant evidence” standard. Foreign-born spouses, by definition, operate at a certain disadvantage due to being immersed in an American society with its ingrained cultural, language, economic, and religious challenges. These factors only get amplified when funneled through the personal trauma wrought by systematic physical and emotional spousal abuse.

The big “X-Factor” looming in this area, however, is the yet-unknown impacts of President Trump’s policies on both the incidence and reporting of domestic violence and the increase of deportations of noncitizen spouses. Concerns have recently been sounded based on the Administration’s initial

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142. 83 T.C.M. (CCH) 1790, 1799 (2002); *see also* Clarke, *supra* note 68, at 847–48.

143. No. 4002-05S, 2010 WL 1993610, at \*5 (T.C. May 19, 2010); *see also* Clarke, *supra* note 68, at 828 n.21.

144. *See* Mitchell, *supra* note 8, at 473 (suggesting as “extreme” the elimination of the joint return).

budget proposals.<sup>145</sup> In seeming opposition to the spirit and intention of the original VAWA, which “provided funding to programs ‘designed to develop the nation’s capacity to reduce domestic violence, dating violence, sexual assault, and stalking by strengthening services to victims and holding offenders accountable,’”<sup>146</sup> the Trump budget would trim dedicated funds to survivors of sexual assault and domestic violence by 93% over ten years.<sup>147</sup> This proposal appears to echo the sentiments of the conservative Heritage Foundation, which in a dispatch called federal grants related to VAWA enforcement and victim support “a misuse of federal resources and a distraction from concerns that are truly the province of the federal government.”<sup>148</sup> Based on the early evidence, programs related to addressing domestic violence are clearly on President Trump’s “budgetary chopping block.”<sup>149</sup>

A second concern is that President Trump’s new policy supporting a massive deportation regime will have a chilling effect on the reporting of domestic violence by unconfirmed immigrants<sup>150</sup> and perhaps expand the number of deportations of foreign-born spouses of American nationals. Recent statements by Attorney General Jeff Sessions<sup>151</sup> directed at municipalities meant to coerce them into adopting the Trump policy of aggressive deportation of undocumented residents<sup>152</sup> seem to confirm a trend of official indifference to the personal plight of victims of domestic abuse in favor of a policy simply aimed at enforcing the law. Courts used to be the arbiters of immigration issues, but now the USCIS (a wing of the Department of Homeland Security) dominates this realm. This shift in authority has long-reaching ramifications since agencies such as USCIS operate on the policy directives of the Executive Branch. The level of fear in the immigrant community has spiked lately due to the

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145. Claire Landsbaum, *There’s New Reason to Be Worried That Trump Will Slash Funding to Violence Against Women Programs*, CUT (Jan. 19, 2017, 2:54 PM), <https://www.thecut.com/2017/01/trumps-team-could-cut-violence-against-women-programs.html> [https://perma.cc/KGP5-EF MF].

146. *Id.*

147. Lindsay Wise, *Massive Cuts to Violence Against Women Programs Just “Technical,” White House Says*, MCCLATCHY: DC BUREAU (May 25, 2017, 6:05 PM), <http://www.mcclatchydc.com/news/politics-government/white-house/article152705234.html> [https://perma.cc/9A5N-C2 2X].

148. Landsbaum, *supra* note 145.

149. *See id.*

150. *See* James Queally, *Latinos Are Reporting Fewer Sexual Assaults Amid a Climate of Fear in Immigrant Communities, LAPD Says*, L.A. TIMES (Mar. 21, 2017, 8:25 PM), <http://www.latimes.com/local/lanow/la-me-ln-immigrant-crime-reporting-drops-20170321-story.html> [https://perma.cc/CC3H-MGSQ].

151. *See* Juan González & Franco Ordoñez, *Did Jeff Sessions Foreshadow New Immigration Crackdown in a Memo Before Becoming Attorney General?*, DEMOCRACY NOW! (Feb. 20, 2017), [https://www.democracynow.org/2017/2/20/did\\_jeff\\_sessions\\_foreshadow\\_new\\_immigration](https://www.democracynow.org/2017/2/20/did_jeff_sessions_foreshadow_new_immigration) [https://perma.cc/46ZY-WXM4].

152. Queally, *supra* note 150.

Administration's stated devotion to an immigration policy model that emphasizes detention and deportation of mass numbers of undocumented residents. A related and residual concern is that the rate of reporting domestic violence events will be reduced as a result of the overarching fear of deportation by law enforcement personnel. A recent *Los Angeles Times* article reports that reporting rates of "sexual assault and domestic violence made by the city's Latino residents have plummeted this year amid concerns that immigrants in the country illegally could risk deportation by interacting with police or testifying in court."<sup>153</sup> The article indicates that the reporting of domestic violence by Latino residents has dropped ten percent.<sup>154</sup>

Within the scope of themes presented in this Article, the central concern with the new political order in Washington is that law enforcement officials, guided by the renewed federal emphasis on enforcement of immigration statutes, will work to prosecute foreign-born victims of domestic abuse on alleged immigration transgressions while turning a blind eye to the perpetrators of the abuse—who are often U.S. citizens. It is critically important that law enforcement and immigration officials view the currently avowed reverence for the "rule of law" seriously when it comes to domestic violence. With the new President talking about the need to build a border wall to keep hordes of "bad hombres"<sup>155</sup> out of our country, it may be more instructive (and better policy) to examine avenues to eradicate the rampant physical abuse visited (principally) upon women already in our midst. Far too often it is the victim of violence and systematic abuse who is vilified as a "criminal" invader of our home soil and defiler of "American values."

A residual effect of this new political development is that a large number of potential immigrants to the United States—including women—are being summarily turned away on whimsical grounds. Most recently, women from six Muslim majority countries (Iran, Libya, Somalia, Sudan, Syria, and Yemen), specifically targeted in President Trump's travel ban Executive Order, signed March 6, 2017, will be adversely affected by this Administration's policy initiatives.<sup>156</sup>

However, on March 29, 2017, CBS News reported that First Lady Melania Trump will adopt domestic violence against women as her chief personal

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153. Queally, *supra* note 150.

154. *Id.*

155. Reference is to President Trump's comment in the third presidential debate. *Donald Trump: Deport "Bad Hombres" – Video*, GUARDIAN (Oct. 20, 2016, 4:46 AM), <https://www.theguardian.com/us-news/video/2016/oct/20/donald-trump-bad-hombres-us-presidential-debate-las-vegas-video> [<https://perma.cc/PF6F-TBVL>].

156. See Brent Kendall, *Trump's Revised Travel Ban Set for an Array of Legal Challenges*, WALL ST. J. (Mar. 14, 2017, 8:57 PM), <https://www.wsj.com/articles/trumps-revised-travel-ban-set-for-an-array-of-legal-challenges-1489524985> [<https://perma.cc/V8UF-7V7M>].

initiative theme.<sup>157</sup> Interestingly, at the State Department's annual International Women of Courage award ceremonies, two of the recipients of the award went to women who would be banned from entering the United States under the President's aforementioned Executive Order, by virtue of hailing from nations featured in his immigration restrictions.<sup>158</sup> This visible, but officially unacknowledged dichotomy of values exhibited within the Trump family, is illustrative of the disjointed nature of policy approaches to immigration matters generally, and the low priority given the plight of women in vulnerable situations around the globe, specifically. Perhaps the First Lady, herself an immigrant citizen of our country, can inspire a reappraisal of our official policies toward a population that deserves a better fate than that being offered through present prevailing channels.

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157. *Melania Trump Makes Rare Public Appearance in Washington*, CBS NEWS (Mar. 29, 2017, 6:45 PM), <http://www.cbsnews.com/videos/melania-trump-makes-rare-public-appearance-in-washington/> [https://perma.cc/M453-HX53].

158. Gail Collins, Opinion, *Trump Remembers the Ladies*, N.Y. TIMES (Mar. 30, 2017), [https://www.nytimes.com/2017/03/30/opinion/trump-remembers-the-ladies.html?\\_r=0](https://www.nytimes.com/2017/03/30/opinion/trump-remembers-the-ladies.html?_r=0) [https://perma.cc/68JV-ANXH].



