[**INSERT COURT NAME AND JURISDICTION**]

[INSERT NAME OF PLAINTIFF]	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. [DOCKET NUMBER]
	)	
[INSERT NAME OF DEFENDANT]	)	
	)	
Defendant.	)	
	)	

MOTION FOR PROTECTIVE ORDER

Through her undersigned counsel, [Plaintiff] hereby moves for a protective order barring discovery of the substance or existence of any immigration case filed by the [Plaintiff] pursuant to the Violence Against Women Act, 8 U.S.C. § 1154, on the grounds that such discovery is prohibited by statutory confidentiality provisions, public policy, and the attorney-client privilege. [Additionally, the substance or existence of any such immigration case is irrelevant to the case at bar.] Plaintiff has attached a Memorandum in Support of the Motion for Protective Order that outlines the grounds for her motion.

Respectfully submitted,

_________/s/____________________
[NAME
TITLE
CONTACT INFORMATION]

[**INSERT COURT NAME AND JURISDICTION**]

[INSERT NAME OF PLAINTIFF]	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. [DOCKET NUMBER]
	)	
[INSERT NAME OF DEFENDANT]	)	
	)	
Defendant.	)	
	)	

MEMORANDUM IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER

Pursuant to Rule of Civil Procedure ___, [plaintiff] [name] hereby moves the Court to issue a protective order prohibiting discovery related to the existence and/or substance of any petition for immigration benefits filed pursuant to 8 U.S.C. § 1154 and prepared or submitted on behalf of [plaintiff] that may or may not exist.

[**Add facts of the case and relevant discovery request.]**

Congress has enacted federal law requiring that knowledge of the substance, or even the existence, of any Violence Against Women Act ("VAWA") immigration case be kept confidential. ("VAWA confidentiality"). *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA"), Pub. L. No. 104-208, § 384(a)(2), codified at 8 U.S.C. § 1367(a)(2) (2007). These VAWA confidentiality protections are an important component of federal immigration law protections for immigrant crime victims, including domestic violence victims. Congress created VAWA confidentiality to stop ongoing harm to victims and escalation of violence that was occurring to victims when abusers learned that the victim had filed for legal immigration status and protection from deportation. Learning that the victim was filing for

immigration status on her own, that the victim would no longer be dependent on the abuser to attain legal immigration status, and that abuser no longer had the power to have the victim deported enhanced the danger of future abuse just as separation from an abuser increases potential danger to victims.[1] When abusers lose control over victims the likelihood of retaliatory abuse rises.[2] To cut off such retaliatory actions, VAWA confidentiality also bars batterers and other crime perpetrators from interfering with a victim's VAWA, T or U visa immigration case and from triggering or securing the victim's deportation. It bars abusers and perpetrators of crime from access to information commonly used as a tool to control victims, to continue perpetrating threats of deportation and crimes against them, and effectively to secure their silence. Accordingly, this Court should issue a protective order pursuant to Rule ___ to prevent discovery related to any VAWA immigration case.

ARGUMENT

The petition for immigration benefits that [defendant] seeks in discovery is a highly confidential, federally-protected information and documentation that is filed by immigrant victims of violence against women, including domestic violence, under the federal Violence Against Women Act. In a non-abusive marriage between a U.S. citizen or permanent resident and a noncitizen, the U.S. citizen or permanent resident usually files a petition on behalf of his or her spouse to receive immigration benefits. See 8 U.S.C. § 1154(a)(1)(A)(i). In an abusive marriage, however, the power to file or withdraw such a petition – and so to control whether the

---

[1] Leslye Orloff and Olivia Garcia "Dynamics of Domestic Violence Experienced By Immigrants," in Kathleen Sullivan and Leslye Orloff "Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants" (Legal Momentum, 2004); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 807, 814, 816, 838 (1993); H.M. Hughes, Impact of Spouse Abuse on Children of Battered Women, 2 Violence Update 1, 1-11 (1992).

[2] John Bowlby, Violence in the Family as a Disorder of the Attachment and Caregiving Systems, 44 Am. J. Psychoanal. 9, 22-23 (1984).

spouse may remain in the U.S. – can become a weapon wielded by the abuser. In a VAWA immigration case, the abusive spouse is stripped of the power to file or withdraw petitions, so that the spouse who is victimized by domestic violence is given control over, and the right to file confidentially for, immigration benefits. See, e.g., 8 U.S.C. § 1154(a)(1)(A)(iii). The VAWA immigration petition – both the contents of that document and its very existence – is, by statute and by Department of Homeland Security ("DHS") policy directives, strictly confidential information. 8 U.S.C. § 1367(a)(2). The confidential treatment of the VAWA petition serves to shield a victim of domestic abuse by protecting against release of information about the fact that she is seeking VAWA immigration relief -- and the contents of any application filed for legal immigration status -- from her spouse (and his family members), so that he cannot use it as a weapon against her in legal proceedings. As explained in detail below, [defendant] has no basis to seek disclosure of the existence or substance of a VAWA immigration case here.

I. THE VAWA AND ITS LEGISLATIVE HISTORY PLAINLY SUPPORT THE NON-DISCLOSURE OF THE EXISTENCE OR SUBSTANCE OF ANY VAWA IMMIGRATION CASE.

Allowing the [defendant] to obtain information about or a copy of any VAWA immigration petition through discovery (or even to confirm the existence of any such VAWA-related immigration case) would contravene Congress's clear intent in passing the VAWA's immigration and confidentiality provisions.

The Violence Against Women Act of 1994 gave battered immigrants married to U.S. citizens or lawful permanent residents the right to self-petition for permanent resident status. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) ("VAWA 1994"). In enacting VAWA 1994, the House of Representatives Committee on the Judiciary found that "domestic battery problems are terribly exacerbated in marriages where one spouse is

not a citizen and the non-citizen's legal status depends on his or her marriage to the abuser." H.R. Rep. No. 103-395, at 26 (1993). The Committee recognized that domestic violence was fostered by "placing full and complete control of the alien spouse's ability to gain permanent legal status in the hands of the citizen or lawful permanent resident spouse," id., necessitating the self-petition provision. Congress also recognized that "a battered [immigrant] spouse may be deterred from taking action to protect himself or herself, such as filing for a civil protection order, filing criminal charges, or calling the police, because of the threat or fear of deportation." Id. VAWA's immigration provisions thus reflect Congress's intent to empower battered immigrant spouses to obtain legal immigration visas and lawful permanent resident status without the participation – or knowledge – of their abusive spouse.

In 1996, Congress enacted strict non-disclosure and confidentiality protections in VAWA in a further effort to protect immigrant women from domestic abuse. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 at § 384 (1996).[3] VAWA's confidentiality provision prohibits the U.S. government's disclosure of "any information" relating to a VAWA immigration case. See 18 U.S.C. § 1367 (a)(2). The confidentiality provision derived from similar rules included in the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986), and offered a battered immigrant spouse an additional level of security against the abusive spouse's interference in her quest for independence and relief from violence.

---

[3] In VAWA 2000 (Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000)) and VAWA 2005 (Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2005)), Congress expanded these protections to offer VAWA's nondisclosure and confidentiality protections to the full range of immigrant victims protected by VAWA, including victims of domestic violence, sexual assault, trafficking, and crimes covered by the T and U visas.

Because Congress's intent in passing VAWA's immigration and confidentiality provisions was to assist battered immigrants in gaining independence from abusive spouses – including by preventing the abusive party from finding out whether the immigrant has filed a VAWA immigration case and what information any such petition might contain – this Court should not allow the [defendant] to obtain precisely this protected information through discovery.

II. PUBLIC POLICY DICTATES THAT DISCOVERY OF THE EXISTENCE OR SUBSTANCE OF ANY VAWA SELF-PETITION BE PROHIBITED.

The existence of a VAWA immigration case would be exempt from a FOIA request to the U.S. government under FOIA Exemption 3, which incorporates express federal statutory prohibitions against disclosure, and under FOIA Exemption 6, which protects personal privacy interests. 5 U.S.C. § 552(b).[4] While the purpose of the FOIA differs from that of discovery requests,[5] and while inclusion in a FOIA exemption does not per se carry over to a discovery request, Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1344 (D.C. Cir. 1984), the policy reasons for prohibiting governmental disclosure of a VAWA immigration case under a FOIA request apply in the context of this type of discovery request as well. While the [plaintiff] does not ask this Court to apply a FOIA exemption in denying the [defendant's] discovery request, we respectfully request consideration of analogous public policy reasons supporting

---

[4] "This section does not apply to matters that are— . . . (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; [or] . . . (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . ." 5 U.S.C. § 552(b).

[5] "The FOIA furthers the public's general right to know and ensures government accountability. Discovery discourages unfair surprise and delay at trial." Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1344 (D.C. Cir. 1984).

nondisclosure as elucidated in FOIA case law, as a body of case law specific to the discoverability of VAWA immigration cases has not yet been developed.

A. Policy Reasons for Protecting Information Subject to a Statutory Prohibition Against Disclosure

The policy reasons for FOIA's exemption covering information prohibited from disclosure by statute apply in the context of discovery of VAWA immigration cases as well. As the U.S. Court of Appeals for the D.C. Circuit stated in Friedman:

> [S]tatutory publication shelters may have some application to discovery. These protected interests reflect a congressional judgment that certain delineated categories of documents may contain sensitive data which warrants a more considered and cautious treatment. In the context of discovery of government documents in the course of civil litigation, the courts must accord the proper weight to the policies underlying these statutory protections, and to compare them with the factors supporting discovery in a particular lawsuit.

Id. Balancing the policy behind the statutory protection against the factors supporting discovery is particularly important when the health and safety of a litigant are involved.

In establishing confidentiality of VAWA immigration cases (and other confidentiality provisions), Congress sought to "ensure that abusers and criminals cannot use the immigration system against their victims," – and in so doing, specifically targeted attempts by abusers to use the Department of Homeland Security ("DHS") "to obtain information about their victims, including the existence of a VAWA immigration case, interfering with or undermining their victims' immigration cases, and encouraging immigration enforcement officers to pursue removal actions against their victims." H.R. Rep. No. 109-233, at 120 (2005), reprinted in 2006 U.S.C.C.A.N. 1636. This clear Congressional intent would plainly be circumvented by an

abusive spouse's discovery in litigation of the existence and substance of a VAWA immigration case.

As the legislative history of VAWA's confidentiality provision makes clear, the mere existence of a VAWA immigration case warrants "considered and cautious treatment." The Court should accord great weight to the intent of this statutory protection – to prevent interference with the [plaintiff's] immigration case, to stop abusers and perpetrators of crime from successfully encouraging pursuit of victims by DHS and initiation of a removal action against [plaintiff], and to prevent other harm to the [plaintiff]. The Congressional purpose of protecting victims is furthered by granting [plaintiff's] motion for a protective order.

B. Additional Policy Reasons Exist for Protecting Personal Privacy Information

Exemptions 6 and 7(c) to the Freedom of Information Act ("FOIA") protect information that, if disclosed by the government, would create an unwarranted invasion of personal privacy. Exemption 6 covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," while Exemption 7(c) covers "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (c) could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b).

The policies underlying FOIA Exemptions 6 and 7(c) demonstrate why [plaintiff's] privacy interest in the existence or substance of any VAWA immigration case should be shielded from discovery as well. The purpose of Exemption 6 was to "require a balancing of the individual's right of privacy against the preservation of the basic purpose of the [FOIA] . . . The device adopted to achieve that balance was the limited exemption, where privacy was threatened, for 'clearly unwarranted' invasions of privacy." Dep't of the Air Force v. Rose, 425 U.S. 352,

372 (1976) *quoted in* Dep't of State v. Ray, 592 U.S. 164, 175 (1991). Similarly, though employing a less stringent standard than Exemption 6, the policy behind Exemption 7(c) was also to balance "privacy interests against any asserted public interest in disclosure." Deglace v. Drug Enforcement Admin., No. 05-2276, 2007 WL 521896, at *2 (D.D.C. Feb. 15, 2007) (citations omitted).

In addition to addressing the need to balance an individual's interest in privacy against the [defendant's] interest in disclosure, FOIA case law provides illustrative guidance as to when it is inappropriate to acknowledge even the existence of a private document, such as a VAWA immigration case. Specifically, where an individual's personal information is the target of a FOIA request:

> the agency to which the FOIA request is submitted may provide a Glomar response, that is, a refusal to confirm or deny the existence of . . . information responsive to the FOIA request, on the grounds that even acknowledging the existence of responsive records constitutes an unwarranted invasion of the targeted individual's personal privacy.

Id. at *1, citing Phillippi v. Cent. Intelligence Agency, 456 F.2d 1009, 1014-15 (D.C. Cir. 1976) (involving the existence of the Hughes Glomar Explorer). This standard, as with the balancing test that applies generally in Exemption 6 and 7(c) cases, is also applicable and useful in the discovery context.

In balancing the interests at issue in the case at bar, public policy clearly weighs against disclosure. The privacy interest of the [plaintiff] is very high, as revealing the existence or substance of any VAWA immigration case would put her at risk of a variety of harms – the very harms cited by Congress in protecting the confidentiality of the petitions. The interest of the [defendant] in disclosure is low, as the existence of any such petition is irrelevant to the case at

bar, and the information contained therein (e.g., name, address, marital history) would be discoverable by other means, if not already known to the [defendant]. In this family law case the existence of any history of domestic violence would be relevant a range of determinations being made by the Court in this case, including [reference relvant determinations such as custody, property division, divorce, spousal support, and/or issuance of a civil protection order]. When [plaintiff] presents evidence through testimony, [respondent] will have adequate opportunity for cross examination and discovery in this action.

The potential for abuse is so high that the information that is found in a petition, or in the fact of the existence of a petition, cannot outweigh the privacy interest of the [plaintiff]. Further, revealing the mere existence of a VAWA immigration case would put the [plaintiff] at such great risk that she should be protected from either confirming or denying whether such a petition exists. For the foregoing reasons, public policy dictates that the [plaintiff's] motion be granted.

III. THE EXISTENCE AND SUBSTANCE OF A VAWA IMMIGRATION CASE IS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.

[*CONSIDER HOLDING THIS ARGUMENT FOR REPLY*] In the instant action, [defendant] seeks discovery of information and/or materials that are covered by the attorney-client privilege, which protects confidential communications between a client and her attorney. Specifically, the privilege applies:

> (1) where legal advice of any kind is sought (2) from a professional legal advisor in his or her capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his or her instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

United States v. Jones, 828 A.2d 169, 175 (D.C. 2003). To the extent that a party seeks legal advice and assistance from an attorney in preparing and submitting a VAWA immigration case

to DHS, any confidential communications regarding that petition – including the fact of its existence – are shielded from discovery by the attorney-client privilege. While the VAWA immigration case must be submitted to DHS, admittedly a third party, that submission does not waive the privilege: DHS must, by statutory directive, maintain the confidentiality of the case. See 8 U.S.C. § 1367(a)(2) ("in no case may . . . the Secretary of Homeland Security . . . or any other official or employee of the Department of Homeland Security . . . (including any bureau or agency of [the Department])— . . . permit use by or disclosure to anyone . . . of any information which relates to an alien who is the beneficiary of an application for relief under [VAWA].").

[Defendant] may assert that attorney-client protection for any VAWA immigration case is waived upon submission to DHS, but that argument should be rejected. First, as explained above, DHS is required to keep any VAWA-related immigration case confidential.[6] Moreover, while the doctrine of selective waiver has been rejected by most jurisdictions, it does not appear that it has been considered in a context on point with the case at bar. It may well be that "the fundamental principle that 'the public . . . has a right to every man's evidence'" underlies the attorney-client privilege, Univ. of Pennsylvania v. Equal Employment Opportunity Comm'n, 493 U.S. 182, 189 (1990) (citations omitted); however, such a doctrine should not lie where an individual's personal privacy, physical protection and personal safety are at issue, as they are here. The need for privacy protection for the safety of the victim and her family is even more critical in cases such as the one at bar where the person seeking release of privacy- and VAWA-

---

[6] VAWA cases include: VAWA self-petitions (domestic abuse, child abuse, elder abuse cases filed by the victim with DHS)(INA Section 101(a)(51); VAWA cancellation of removal (INA Section 240A(b)(2)) or suspension of deportation (INA Section 244(a)(3) as in effect before March 31, 1997) (domestic abuse, child abuse, elder abuse case filed with an immigration judge); battered spouse waivers (INA sections 101(a)(51)(C); 216(c)(4)(C) (case filed by an abused spouse to attain full permanent residency when the spouse has received a conditional lawful residency); U-visas (INA Section101(a)(15)(U) (crime victim visa cases covering domestic violence, sexual assault, child abuse, kidnapping and a range of other mostly violent crimes); and T-visas (INA Section 101(a)(15)(T))(human trafficking victims).

confidentiality-protected information is the perpetrator of abuse and/or other criminal activities against the petitioner.

Therefore, as in the arena of work product protection, the attorney-client privilege should not automatically be waived by release of an otherwise privileged document to a non-adversary government agency. See generally Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1431 (3rd Cir. 1991) (when disclosure of work product "is made to a non-adversary, it is appropriate to ask whether the circumstances surrounding the disclosure evidenced conscious disregard of the possibility that an adversary might obtain the protected materials"). An exception should be made when release to the non-adversarial agency necessarily follows the advice given and work performed by the attorney and the communication shall remain confidential upon release. In the instant case, the privilege should not be waived because: (1) the [plaintiff] must make the disclosure to DHS in order to obtain the benefit of her attorney's advice; (2) the [plaintiff] can remain confident that the statutory confidentiality provision protects against disclosure to the [defendant] and to any other person outside of the federal agency personnel adjudicating her immigration petition; and (3) no public policy interest would be served by declaring the privilege waived.

To find that the privilege is waived upon submission of a VAWA immigration case to DHS would be to give the [plaintiff] a Hobson's choice: she can follow the advice of counsel to file a VAWA Self-Petition (or other VAWA immigration case) in an attempt to gain independence and safety from her abuser, or she can withdraw the instant legal proceedings – necessary to protect her [and/or her children's] safety and well-being – so as to protect discovery of any confidential information under the VAWA.

Because of VAWA's confidentiality provisions, the only way the [plaintiff's] adversary – *e.g.*, her abusive husband – could obtain protected, confidential VAWA immigration case information (assuming any exists) would be if this Court were to provide it to him through discovery. For this reason the Immigration and Customs Enforcement division of the Department of Homeland Security, in their online course for enforcement personnel "Violence Against Women Act (VAWA 2005)," stated the following regarding VAWA confidentiality: "In addition to DHS, it applies to family court officers, criminal court judges, and law enforcement officers." Therefore, for all the reasons set forth above, the existence and substance of any VAWA Self-Petition or other confidential VAWA immigration case should be held protected by the attorney-client privilege and not discoverable.

IV. THE EXISTENCE AND SUBSTANCE OF A VAWA SELF-PETITION ARE IRRELEVANT TO THE CASE AT BAR.

[Develop this section as appropriate under the facts of each case.]

CONCLUSION

[Defendant's] attempt to discover whether [plaintiff] has petitioned for immigration benefits under the provisions of the Violence Against Women Act is improper because of the risk to the [plaintiff] if the existence or substance of such a petition is revealed to the [defendant], the highly confidential nature of such petitions, the public policy supporting this confidentiality and because the existence and substance of any such petition are subject to the attorney-client privilege.

Further, the [defendant] should not be assisted by this Court in his attempts to circumvent federal confidentiality protections and discover federally protected, confidential information.

For the foregoing reasons, [plaintiff] respectfully requests that this Court enter a protective order prohibiting discovery related to any VAWA immigration case that may or may not exist.

Dated: [MONTH, DAY, YEAR] By: /s/

[NAME
TITLE
CONTACT INFORMATION]

[**INSERT COURT NAME AND JURISDICTION**]

[INSERT NAME OF PLAINTIFF]	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.[DOCKET NUMBER]
	)	
[INSERT NAME OF DEFENDANT]	)	
	)	
Defendant.	)	
	)	

ORDER

Having considered this matter on the [Plaintiff's] Motion for Protective Order, it is hereby:

ORDERED that the motion is granted, and that the [Defendant] is barred from requesting the substance or existence of any immigration case filed pursuant to the Violence Against Women Act, 8 U.S.C. § 1154, in the above-captioned case.

Date:________________________

____
[NAME OF JUDGE]
[TITLE OF JUDGE/ COURT]