IN THE

United States Court of Appeals
for the Ninth Circuit

No. 03-72014

ROSALINA LOPEZ-UMANZOR,

Petitioner,

vs.

JOHN ASHCROFT, in his official capacity as Attorney General of the United States,

Respondent.

On Petition for Review from the determination of the Board of Immigration Appeals

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BRIEF OF *AMICI CURIAE* NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AND THE FAMILY VIOLENCE PREVENTION FUND

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AMICUS' MEMORANDUM IN
SUPPORT OF PETITIONER'S APPEAL

Amici submit this memorandum in support of Appellant Rosalina Lopez seeking reversal of the April 15, 2003 decision of the Board of Immigration Appeals ("BIA" or "the Board") denying her request for cancellation of removal filed under Section 240A(b)(2) of the INA. When it overhauled the immigration laws in 1997, Congress created this special form of cancellation of removal to replace the suspension of deportation it had designed for domestic violence survivors in the 1994 Violence Against Women Act ("VAWA").[1] As in the *Hernandez* case, this court must rectify the Executive Office of Immigration Review's (EOIR) misapplication of the special laws Congress created for immigrant survivors of domestic violence.

In this case, the Immigration Judge relied on conjecture and speculation to arrive at a negative credibility finding, rejected evidence proferred by Ms. Lopez in violation of the Congressionally mandated "any credible evidence" standard, pursued an inquiry irrelevant to the case over the objections of both parties, then relied on questionable findings derived from this *ex parte* inquiry to find a "reason to believe" that the applicant was a drug trafficker. We agree with Ms. Lopez and our fellow amici that Ms.

[1] In *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003), this court addressed several aspects of special suspension of deportation for victims of domestic violence, created by the Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902-55 (codified in scattered sections of 8 U.S.C., 18 U.S.C. and 42 U.S.C.).

Lopez' due process rights were violated as a result; we support but do not reiterate their arguments on this point.

In upholding the Immigration Judge's findings, the Board violated its own regulations on case management and neglected to mention that Ms. Lopez' case involved domestic violence and the laws Congress created to combat it. Because the Board has yet to issue a published decision on the VAWA immigration provisions and abdicated its responsibility to correct immigration judges who undermine these laws, *amici* look to this court and other federal courts to set the standards for EOIR in the VAWA arena.

INTEREST OF AMICI

This brief *amici curiae* is submitted on behalf of the Family Violence Prevention Fund and the National Immigration Project of the National Lawyers Guild. Together with Legal Momentum[2], these organizations co-chair the National Network to End Violence Against Immigrant Women and work together to expand choices for immigrant survivors of domestic violence, sexual assault and trafficking. We work closely with the Citizenship and Immigration Services (CIS) personnel charged with implementing the laws, seeking to identify and fix systemic problems before

[2] *See* separate amicus brief by Legal Momentum and the Alaska Network on Domestic Violence and Sexual Assault (Alaska Network), which places the case in the context of domestic violence research.

they erupt in litigation. We also provide assistance and training to attorneys, domestic violence advocates, civil and criminal justice system personnel and immigrant survivors, and are recognized as the leading domestic violence, immigration law, and women's rights organizations in the field. We have substantial knowledge of the problem of domestic violence and the particular dynamics of domestic violence experienced by immigrant victims, and have been involved in shaping the successive laws Congress has created to assist immigrant survivors of crimes.

Pursuant to Federal Rule of Appellate Procedure 29(b), this brief is accompanied by a Motion for Leave to File, which more fully describes the interests of *amici*.[3]

ARGUMENT

I. THE IMMIGRATION JUDGE'S "REASON TO BELIEVE" FINDING IS A 'RED HERRING' THAT THIS COURT SHOULD SWIFTLY DISMISS

As noted in the *amicus* brief by Legal Momentum and the Alaska Network, the immigration judge went to great lengths to obtain testimony he thought would undermine Ms. Lopez' credibility. He initiated the *ex parte* hearing over the objections of both parties because he wanted to hear about Ms. Lopez' relationship with Mr. Gomez Mendoza, a man who pled guilty to charges stemming from a

[3] *Amici* incorporate by reference the statement of facts and procedural history in Ms. Lopez' brief.

drug arrest at which Ms. Lopez was present. (R. at 671). Imposing his own assumptions based on the relative ages of the parties, he extrapolated that Ms. Lopez was lying about her relationship to the drug dealer and therefore might lack credibility.[4] Such tortured logic violates this court's admonition against negative credibility findings based on conjecture or speculation. *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996) (conjecture is not a substitute for substantial evidence). Even if the judge was right, however, Ms. Lopez relationship to the drug dealer is not material to the VAWA cancellation inquiry. *See Singh v. Ashcroft*, 2004 U.S. App. LEXIS 3760 (9th Cir. 2004). She would still qualify for VAWA because everything she said about her fundamental eligibility for status, about "the heart of her application," was true. *See Alvarez-Santos v. INS*, 332 F.3d 1245, 1254 (9th Cir. 2003); *Palv v. INS,* 204 F.3d 935, 938 (9th Cir. 2000).

At the hearing, the Detective punctured the judge's speculative bubble by stating he had "no idea" about a relationship between Ms. Lopez and Mr. Gomez-Mendoza. (R. at 290). The judge then probed him for other

[4] "There were aspects of the respondent's testimony which the Court found implausible and unpersuasive regarding the arrest, which the detective's testimony might clarify. It was noted that Jose Armando Gomez-Espinoza (sic) was with the respondent when she was arrested. *Gomez-Espinoza (sic) is apparently a middle-aged man, closer to the age of the respondent than her daughter, yet she testified that this man was her daughter's boyfriend.* Her testimony did not have the ring of truth on this point and the Court wishes to hear from the arresting officer as to any possible relationship between Gomez-Espinoza (sic) and the respondent. *If he is actually the respondent's boyfriend, it would indicate that she lacked credibility, and would affect the merits of her claim as an allegedly abused person.*" (R. at 673) (emphasis supplied).

evidence that might undermine Ms. Lopez and her claim. (R. at 267-90). The information thus elicited was double hearsay, obtained from an informant whose own credibility was highly questionable.[5] While hearsay evidence may constitute substantial evidence in certain administrative settings, it must be reliable. *See Calhoun v. Bailar*, 626 F.2d 145, 149 (9th Cir. 1980). Nothing supports the judge's finding that this evidence was reliable. The district attorney dropped the case against Ms. Lopez,[6] the INS attorneys opposed using the detective's evidence, and a plethora of reliable affiants denied Ms. Lopez' involvement in drug trafficking and attested to her good moral character. (R. at 465-94, 1107-20).

The evidence from this hearing, and the judge's findings flowing from it, fail this court's substantial evidence test. *See Dia v. Ashcroft*, 353 F.3d, 228, 247-48 (9th Cir. 2003) (requiring that findings be supported with substantial evidence); *Alvarez Santos v. INS*, 332 F.3d 1245, 1254 (9th Cir. 2003). Moreover, whether intended to subvert VAWA or not, the judge's

[5] The informant had a criminal history dating back to 1978, including a conviction for sexual assault and two other assault convictions and, in exchange for his cooperation, he was to receive lesser sentencing consideration for an outstanding criminal charge. (R. at 293).

[6] The document from the District Attorney's office, cited by the Judge as a basis for his finding, was written by the same detective found insufficiently reliable by the INS District Counsel.

"reason to believe" finding is a true "red herring," designed to "distract one's attention from the real problem or matter at hand."[7]

The Board appears to have been so distracted that it failed to notice this was a VAWA case. *See Matter of Lopez-Umanzor*, A75 011 140 (BIA Apr. 15, 2003) (no mention of domestic violence or VAWA). This may explain why the Board violated its own regulations[8] and failed to assign the

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[7] *Webster's Dictionary of American English* (1997) (defining "red herring").

[8] 8 C.F.R.§1003.1(e) reads, in pertinent part: (e) Case management system.
. . . .
(5) Other decisions on the merits by single Board member. If the Board member to whom an appeal is assigned determines, upon consideration of the merits, that the decision is not appropriate for affirmance without opinion, the Board member shall issue a brief order affirming, modifying, or remanding the decision under review, unless the Board member designates the case for decision by a three-member panel under paragraph (e)(6) of this section under the standards of the case management plan. A single Board member may reverse the decision under review if such reversal is plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation. A motion to reconsider or to reopen a decision that was rendered by a single Board member may be adjudicated by that Board member unless the case is reassigned to a three-member panel as provided under the standards of the case management plan.

(6) Panel decisions. Cases may only be assigned for review by a three-member panel if the case presents one of these circumstances:

(i) The need to settle inconsistencies among the rulings of different immigration judges;

(ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;

(iii) The need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents;

(iv) The need to resolve a case or controversy of major national import;

(v) The need to review a clearly erroneous factual determination by an immigration judge; or

(vi) The need to reverse the decision of an immigration judge or the Service, other than a reversal under § 1003.1(e)(5).

(emphasis supplied)

decision to a three-member panel, or it may reveal a fundamental flaw in the Board's case management system. The Board has yet to issue a single precedent decision in the VAWA area,[9] immigration judges are applying the law idiosyncratically in the absence of such precedent,[10] and VAWA cases are of major national import because they are an essential part of Congress' repeated attempts to address domestic violence in the United States. All of these factors militate for three-member review of VAWA decisions.

The judge's other credibility findings and the Board's failure to correct them, however, indicate that the problem may be more fundamental: profound ignorance about domestic violence and, at least in this case, antipathy towards its victims.

II. THE IMMIGRATION JUDGE'S NEGATIVE CREDIBILITY FINDINGS ARE BASED ON CONJECTURE, SPECULATION AND PURE HYPOTHESIS

Amici Legal Momentum and Alaska Network address the judge's credibility conclusions from the perspective of domestic violence experts.

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[9] Prior to the new regulations it had issued several unpublished decisions, *see, e.g., Matter of N-A-J-* (Nov. 29, 2001), *Matter of D-G-* (Nov. 18, 1999; remanded to IJ, Feb. 22, 2000), *Matter of F-G-R-* (June 17, 1996); *see also* single-member grant affirmance in *Matter of O-G-* (July 14, 2003). All unpublished BIA VAWA decisions available from the National Immigration Project's website, Immigrant Survivors section: www.nationalimmigrationproject.org.

[10] In addition to this case, *amici* are currently challenging other EOIR VAWA denials in the Second, Ninth and Tenth Circuits; these appeals represent but the tip of the iceburg, since many VAWA applicants cannot afford to appeal denials beyond the immigration judge level.

We challenge them based on this court's standards for evaluating credibility findings. Given this court's experience reviewing EOIR credibility analyses and its understanding of domestic violence evident in *Hernandez*, 345 F.3d at 836-38, a few quotes from the record may suffice to reveal the problem.

For instance, although *amici* generally applaud judges who try to put themselves "in the shoes" of applicants for status, this means attempting to see the world from the applicant's perspective, not imposing an idiosyncratic version of reality based on personal experience or supposition.

> The court finds it implausible that she would have [returned to her apartment] if there truly had been a chance that a drunken abusive man with a knife was waiting there….She could have gone to her girlfriend's house….It seems more likely that in such a circumstance she would have pleaded with her girlfriend for refuge, and not given up unless turned away….A park bench would seemingly have been preferable to risking her life by returning to her apartment.

(R. at 95).

> There were aspects of her story which seemed implausible, such as the amazing ability of her tormentors to locate her, though she traveled to the far corners of this country to escape….If her story was true, it seems more likely that she would have left specific instructions with her landlord and neighbors *not* to tell Calzadillas where she went.

(R. at 95).

> [C]onsidering all the domestic violence counseling she had received by that time, she undoubtedly knew the importance of notifying the police about such abuse, and considering that Calzadillas did not accompany her to the emergency room, it

> seems incongruous that she did not wish to seek protection from the police at that time.

(R. at 95).

His incredulity derives from ignorance about domestic violence and those who commit it.

> [I]t is not very persuasive that he is going to go back to a country, because he is so obsessed by her that he is going to follow her back to her country where- a foreign country where he doesn't even have a right to be and probably can't get a job, just so, you know, he can be close to her. It does sound a little bit far out.

(R. at 137-38).

> [A]ny misrepresentation intended to conceal a relationship with Gomez-Mendoza would be likely to undercut her claim, since it would be inconsistent with her portrayal of herself as a helpless person with no one locally to protect her from her alleged tormentors.

(R. at 79).

He seems intent on finding other, contorted, explanations for the injuries she sustained at the hands of her abusers:

> She was injured, but it could also mean she was out drunk, you know, and – you know, smashing beer bottles. That's hardly abuse, other than self abuse, maybe.

(R. at 151).

> I mean, there are many ways, reasons that miscarriages happen all the time. And probably less than 1/100 or one percent are caused by, you know, the man in the household kicking them in the stomach.

(R. at 155).

> [A]ssuming there were other indicia of PTSD not fully expressed in [Dr. Elizabeth McNeill's] letter, there is no assurance that they did not result from other activities in her life. For example, she could have been beaten by some other partner she lived with other than her husband. For example, Victor Vargas, who is not a citizen or permanent resident and was never married to her. Or, Luis Gomez-Mendoza, another possible live-in boyfriend.

(R. at 96).

Amici urge this court to once again correct Judge Warren's penchant for supplanting fact with "pure hypothesis" to justify negative credibility findings, S*ee Sasetharan Arulampalam v. Ashcroft,* 353 F.3d 679 (9th Cir. 2003); s*ee also Salaam v. INS,* 229 F.3d 1234, 1238 (9th Cir. 2000); *Lopez-Reyes v. INS,* 79 F.3d 908, 912 (9th Cir. 1996).

Judge Warren evinced antipathy and antagonism towards Ms. Lopez that would generalize to all victims of domestic violence who seek help.

> [T]he more she tells these stories, the more benefit she accrues from all of these agencies that are quite eager to help her in any way they can. And the more they hear, the more they file (sic) on the services. So there's always the possibility of someone embellishing in order to gain this kind of support.

(R. at 51).

> The Court must take into account that there may be other motives for making such a claim. For example, the many well meaning people who have come to her aid would not necessarily have done so had she not told them what they wanted to hear: that she was a victim of domestic violence. The value of this is something she would likely have learned early on when she first entered a shelter.

(R. at 96).

Congress might have been thinking of Judge Warren when it noted, in VAWA's legislative history, the following problem:

> Some judges and court personnel approach domestic violence cases, whether consciously or unconsciously, with assumptions based not on personal experience or the facts of a particular case but on stereotypes and biases. Judges and court personnel may also lack information about the psychological, economic, and social realities of domestic violence victims. Gender bias contributes to the judicial system's failure to afford the protection of the law to victims of domestic violence.

S. Rep. 138, 103d Cong., 1st Sess. 41, at 46 (1993) (footnotes omitted).

Unfortunately, creating special routes to immigration status did not automatically cure the systemic problem noted by Congress. Since the Board will not rid EOIR of the biases and ignorance that undermine Congress' intent, this court must do so.

III. THE IMMIGRATION JUDGE REJECTED EVIDENCE IN VIOLATION OF THE CONGRESSIONALLY MANDATED "ANY CREDIBLE EVIDENCE" STANDARD FOR VAWA CASES

Congress mandates a liberal, "any credible evidence" standard for evaluating evidence supporting applications under VAWA and its progeny. *See, e.g.*, INA § 240A(b)(2)(D), 8 USC § 1229(b)(2)("[i]n acting on applications under this paragraph, the Attorney General *shall* consider any credible evidence relevant to the application," (emphasis supplied)). While

Congress intended the Attorney General to interpret the "any credible evidence" standard, that interpretation must give the statute its intended ameliorative effect. *See* H.R. Rep. No. 395, 103rd Cong., 1st Sess., at 25 (1993).

The (former) INS General Counsel's office has articulated an "any credible evidence" standard in the context of VAWA self-petitions that reflects VAWA's purposes, permitting but not requiring that petitioners demonstrate that preferred primary or secondary evidence is unavailable.[11] *See, e.g.*, 8 C.F.R. §§ 103.2(b)(2)(iii) & 204.1(f)(1); s*ee also* Paul W. Virtue, Office of General Counsel, *"Extreme Hardship" and Documentary Requirements Involving Battered Spouses and Children*, Memorandum to Terrance O'Reilly, Director, Administrative Appeals Office (Oct. 16, 1998), at 7, *reprinted in* 76(4) Interpreter Releases 162 (Jan. 25, 1999) (hereinafter "Virtue Memo"). The purpose of such flexibility is to take into account the experience of domestic violence:

> This principle recognizes the fact that battered spouse and child self-petitioners are not likely to have access to the range of documents available to the ordinary visa petitioner for a variety of reasons.

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[11] *Amici* note that, in *Hernandez*, this court considered DHS' administrative approach to VAWA cases in evaluating eligibility requirements for VAWA suspension and suggest that, in the absence of regulations or case law governing EOIR's interpretation of the phrase, the court similarly consider DHS implementation of the special evidentiary standard in the administrative context. *See Hernandez v. Ashcroft,* 345 F.3d 824, 838-39 (9th Cir. 2003).

> Many self-petitioners have been forced to flee from their abusive spouse and do not have access to critical documents for that reason. Some abusive spouses may destroy documents in an attempt to prevent the self-petitioner from successfully filing. Other self-petitioners may be self-petitioning without the abusive spouse's knowledge or consent and are unable to obtain documents for that reason. Adjudicators should be aware of these issues and should evaluate the evidence submitted in that light.

Virtue Memo at 7-8.

Thus, the General Counsel categorically stated:

> A self-petition may not be denied for failure to submit particular evidence. It may only be denied on evidentiary grounds if the evidence that was submitted is not credible or otherwise fails to establish eligibility.

Virtue Memo at 7.

The General Counsel applied indicia of credibility familiar to this court. Evidence may be "credible or incredible on either an internal or an external basis." It is internally consistent if it does not conflict with other evidence presented by the applicant; it is externally credible when objectively corroborated. "Adjudicators should carefully review evidence in both these regards before making a credibility determination." In addition, given the difficulties in collecting evidence confronting victims of domestic violence, adjudicators should give VAWA applicants "ample opportunity to

add to the evidence submitted in support of the petition if necessary." Virtue Memo at 7-8.

Judge Warren's refusal to allow Ms. Lopez's witnesses to testify contradicts this mandate. Affidavits and testimony from counsellors and domestic violence experts are credible evidence, and standard forms of corroboration in both the administrative and EOIR context. System documents, such as police reports, protection orders and medical reports, while helpful, are considered "primary" evidence, and therefore not required under the any credible evidence standard. The applicant's testimony alone could satisfy the standard, but that was not all that Ms. Lopez proferred.

A*mici* encourage this court to fulfill Congress' goal in enacting the VAWA provisions by examining the evidence in the record under the flexible evidentiary standard and remand to the Board with findings (or instructing it on how to make findings) that she has met the any credible evidence standard on all elements of eligibility for relief under VAWA cancellation of removal.

IV. CONGRESS CREATED VAWA CANCELLATION OF REMOVAL FOR VICTIMS OF DOMESTIC VIOLENCE SUCH AS MS. LOPEZ[12]

[12] In reviewing VAWA suspension of deportation for the *Hernandez* case, this court considered the legislative history of the 1994 Violence Against Women Act. *Amici* will not repeat the history provided in our brief in that case, therefore, but focus here on Congress' later efforts to expand and improve relief for immigrant survivors of violence. *See, generally*, *Hernandez*, 345 F.3d 824.

In 1996 Congress passed the Illegal Immigration Reform and Immigrant ResponsibilityAct, Illegal Immigration Reform and Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (hereinafter "IIRIRA"). It eliminated suspension of deportation, replacing it with the more limited cancellation of removal. For the VAWA category, it transformed VAWA suspension into VAWA cancellation, retaining the any credible evidence standard and the lower "extreme hardship" eligibility requirement, while requiring all other cancellation applicants to meet a new, higher, "exceptional and extremely unusual hardship" requirement. *Compare* INA § 240A(b)(1)(D), 8 USC § 1229b(1)(D) ("exceptional and extremely unusual hardship") *with* INA § 240A(b)(2)(A)(v), 8 USC § 1229b(2)(A)(v)("extreme hardship"). The INS General Counsel at the time noted the significance of leaving the extreme hardship standard intact. Virtue Memo at 6-7. Indeed, he said, "Congress thus intended to apply a lower standard to battered spouses and children." Virtue Memo at 7.

In October of 2000, bipartisan efforts led to the enactment of the Battered Immigrant Women Protection Act as part of the Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified in scattered sections of 8, 18, 20, 28, 42, and 44 U.S.C.) (Oct. 28, 2000).

Congress intended the immigration provisions of VAWA 2000 to aid battered immigrants by repairing residual immigration law obstacles or "catch-22" glitches impeding immigrants seeking to escape from abusive relationships. VAWA 2000 Section-by-Section Summary, Vol. 146, No. 126 Cong. Rec., 106th Cong., 2nd Sess., at S10195 (Oct. 11, 2000) (hereinafter "Summary"). It removed the "extreme hardship" requirement for self-petitioners, expanded categories of immigrants eligible for VAWA protection, improved battered immigrant access to public benefits, restored VAWA protections unintentionally diminished by subsequent laws, and provided new routes to status for noncitizen victims of crimes. In doing so, it continues its campaign to "ensure that domestic abusers with immigrant victims are brought to justice and that the battered immigrants Congress sought to help in the original Act are able to escape the abuse." Summary at S10195.

V. MS. LOPEZ QUALIFIES FOR VAWA CANCELLATION OF REMOVAL

Ms. Lopez has provided satisfactory evidence on all eligibility elements for VAWA cancellation:

* She has shown ample evidence that she suffered battery or extreme cruelty[13] by a spouse who "is or was" a lawful permanent resident, *see* INA § 240A(b)(2)(A)(i)(II), 8 USC § 1229b(2)(A)(i)(II);

* She has been physically present in the United States for three years, *see* INA § 240A(b)(2)(A)(ii), 8 USC § 1229b(2)(A)(ii);

* Despite Judge Warren's inaccurate finding that there is reason to believe she is a drug trafficker, she has proffered sufficient evidence of good moral character, having no criminal record and numerous affiants in her favor,[14] *see* INA § 240A(b)(2)(A)(iii), 8 USC § 1229b(2)(A)(iii);

* She is not ineligible under any other enumerated inadmissibility or deportation ground, *see* INA § 240A(b)(2)(A)(iv), 8 USC § 1229b(2)(A)(iv);[15] and

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[13] *Amici* Legal Momentum & Alaska Network, at 9-10; *see also* DHS regulations on proving battery or extreme cruelty at 8 CFR §204.2(c)(2)(iv)(evidence of abuse may include "reports and affidavits from medical personnel, school officials, clergy, social workers, and other social service agency personnel" and "evidence that the abuse victim sought safe-haven in a battered women's shelter or similar refuge may be relevant.").

[14] Ms. Lopez provided eight written affidavits that all support the fact that she is a person of good moral character, conveying her truthfulness about the abuse she suffered, her diligence at improving her English skills, and her dedication to her religious faith. *See Vera-Villegas v. INS*, 330 F.3d 1222, 1234 (9th Cir. 2003) (when a substantial number of individuals are willing to come forward on behalf of an undocumented immigrant, their evidentiary value is powerful in the aggregate, and so an IJ must not dismiss their testimony without a reasoned and persuasive explanation.)

[15] Note that, if DHS thought she was ineligible because of drug trafficking, they would have charged with ineligibility under this section.

*   She has proffered sufficient evidence in the record to find that she would suffer extreme hardship if removed, see INA §240A(b)(2)(A)(v), 8 USC § 1229b(2)(A)(v).

The one area of VAWA on which EOIR has issued regulations is the meaning of extreme hardship for VAWA suspension and cancellation. 8 C.F.R. § 1240.20(c), referencing section 1240.58. 8 C.F.R. § 1240.58(c) provides, in pertinent part:

> For cases under [the VAWA provisions], the following factors *should* be considered *in addition to, or in lieu of,* the factors listed in paragraph (b) of this section.
>
> (1) The nature and extent of the physical or psychological consequences of abuse;
>
> (2) The impact of loss of access to the United States courts and criminal justice system (including, but not limited to, the ability to obtain and enforce orders of protection, criminal investigations and prosecutions, and family law proceedings or court orders regarding child support, maintenance, child custody, and visitation);
>
> (3) The likelihood that the batterer's family, friends, or others acting on behalf of the batterer in the home country would physically or psychologically harm the applicant or the applicant's child(ren);
>
> (4) The applicant's needs and/or needs of the applicant's child(ren) for social, medical, mental health or other supportive services for victims of domestic violence that are unavailable or not reasonably accessible in the home country;
>
> (5) The existence of laws and social practices in the home country that punish the applicant or the applicant's child(ren) because they have

> been victims of domestic violence or have taken steps to leave an abusive household; and
>
> (6) The abuser's ability to travel to the home country and the ability and willingness of authorities in the home country to protect the applicant and/or the applicant's children from future abuse.

(emphasis supplied).

If Ms. Lopez were returned to Honduras, she would be exposed to further abuse, possibly fatal. Both Mr. Vargas and Mr. Calzadillas followed Ms. Lopez to Alaska, underscoring Rosalina's reasonable fear that they will follow her back to Honduras where she will be without support or protection. When living in Honduras, Ms. Lopez called the police for protection after a particularly severe beating, but they refused to help her. While that incident occurred in 1979, the US State Department recognized in 1998 that these conditions have not changed significantly, that violence against women remains a widespread problem, that it estimates that 80% of women in Honduras are victims of domestic violence, and that there are few resources for victims of domestic violence, and almost no shelters for battered women. U.S. Dept. of State, *Honduras Report on Human Rights Practices*, 108, 117 (1998).

The VAWA special extreme hardship factors recognize that survivors of domestic violence must be able to obtain counseling and education about the abuse they have suffered. There are few such support services for Ms.

Lopez in Honduras, whereas she has found these services in Alaska. Through such resources, Rosalina has been able to better protect herself and her children, and develop the skills necessary to support her children, who witnessed the abuse. Both Ms. Lopez and her children continue to need these support services to overcome their trauma. *Affidavit of Dr. McNeill*, R. at 465-66 (recommending ongoing treatment for PTSD, expansion of support systems to overcome social isolation, and assertion training so she can avoid abusive relationships in the future); *Affidavit of Elizabeth Farber*, R. at 468-69; *Affidavit of Susan Afenir*, R. at 481; *Affidavit of Lori Whinery*, R. at 1105-06 (stating that Ms. Lopez's children display behavior consistent with families where domestic violence occurs and that support services are therefore crucial*); Affidavit of Polly Smith*, R. at 1107 (reiterating the extreme hardship the family would suffer if sent to Honduras, where they would not receive necessary support services, and specifically mentioning that Ms. Lopez's daughter Joanna needs special care in school, including consistency and security).

Sending Ms. Lopez and her children back to Honduras would cause them extreme hardship and undermine Congress' goal of helping survivors of domestic violence. Amici ask this court to ensure this does not happen.

July 2, 2004

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 4,950 words.

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Gail Pendleton