In the United States Court of Appeals for the Seventh Circuit

Nos. 06-2745 and 06-3424

Ana Maria Sanchez,

Petitioner,

vs.

Alberto Gonzales, Attorney General of the United States,

Respondent.

On petition for review from orders of the Board of Immigration Appeals in Case No. A 77 656 255

BRIEF FOR *AMICUS CURIAE* THE NATIONAL NETWORK TO END VIOLENCE AGAINST IMMIGRANT WOMEN

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AMICUS STATEMENT

The National Network to End Violence Against Immigrant Women (the "Network") is the *amicus curiae.* Founded in 1992, the Network is a coalition of domestic-violence survivors, immigrant women, advocates, activist, lawyers, educators and other professionals working together to end domestic abuse of immigrant women. The Network is co-chaired by the Family Violence Prevention Fund, Legal Momentum Immigrant Women's Project and ASISTA Immigration Technical Assistance Project. Together, these organizations use their special expertise to provide technical assistance, training, and advocacy to their communities. The Network significantly contributed to the passage of the 1994 Violence Against Women Act and has since continued to enhance the legal remedies available to immigrant survivors. Through a collaborative approach, the Network has made great progress in assuring that non-citizen victims of domestic violence, sexual assault, and trafficking are able to flee abuse, survive domestic violence crimes, and receive assistance.

In addition, the following is information on the Network's co-chair organizations:

- The Family Violence Prevention Fund ("FVPF") is a non-profit tax exempt organization founded in 1980. The FVPF, a national organization based in San Francisco, focuses on domestic violence education, prevention and public policy reform. Throughout its history, the FVPF has developed pioneering prevention strategies in the justice, public education, and health fields. One of the FVPF's programs is its Battered Women's Rights Project. This multi-dimensional work expands victim's access to legal assistance and culturally appropriate services for all women, including battered immigrant women. The FVPF was instrumental in developing the 1994 Violence Against Women Act and has since worked to educate health care providers police, judges, employers and others regarding domestic violence. In addition, the FVPF has provided training and technical assistance to domestic violence

shelters, legal assistance workers and other service providers on issues facing battered immigrant women.

- Legal Momentum is a national organization that provides assistance to victims of domestic violence, and it has substantial knowledge and insight into issues of domestic violence, immigration law, and women's rights. Legal Momentum has long been an advocate of women's right to live free from violence. As the chair of the National Task Force to End Sexual and Domestic Violence, Legal Momentum was a leader of the original push to pass the Violence Against Women Act ("VAWA") in 1994 as well as VAWA 2000 which strengthened the law and reauthorized it through 2005. As co-chair of the National Network to End Violence Against Immigrant Women, Legal Momentum played an instrumental role in crafting the provisions of VAWA, VAWA 2000, and VAWA 2005 (Pub. L. No. 109-162, 119 Stat. 2160 (2006)).

- The ASISTA Immigration Technical Assistance Project ("ASISTA"), founded in 2004, is a collaboration of four prominent legal organizations that have provided comprehensive, cutting-edge technical assistance regarding immigration and domestic violence law for the past decade. ASISTA seeks to enhance immigrant women's security, independence and full participation in society by promoting integrated holistic approaches and educating those whose actions and attitudes affect immigrant women who experience violence. In addition to serving as a clearinghouse for immigration law technical assistance, ASISTA staff train civil and criminal judges and system personnel in best practices for working with immigrant survivors of violence, works closely with Department of Homeland Security (DHS) personnel to ensure they implement the law as Congress intended and coordinates litigation to correct misapplications of the law by the Executive Office of Immigration Review (EOIR). Together with National Network to End Violence Against Immigrant Women and DHS, ASISTA contributed a section on VAWA to EOIR's 2005 training video for all immigration judges.

The Network and its co-chair organizations have frequently appeared as *amicus curiae* in matters involving interpretation of VAWA and its amendments and reauthorizations. *See, e.g., Lopez-Umanzor v. Gonzales,* 405 F.3d 1049 (9th Cir. 2005) *Hernandez v. Ashcroft,* 345 F.3d 824 (9th Cir. 2003).

The Network believes that its particular knowledge of the statute and of domestic violence generally will be of assistance to the Court in its resolution of this appeal. The Network has worked collaboratively with counsel for Petitioner to insure that the Network's proposed *amicus* brief will not merely repeat that which is in Petitioner's brief but will, instead, offer additional insight and perspective that the Network believes will be of assistance to the Court.

At the same time it is filing this brief, the Network is filing a motion for leave. Counsel for the respondent has indicated that he will take no position on the motion.

ARGUMENT

I. THE BOARD OF IMMIGRATION APPEALS ERRED BY FAILING TO APPLY SECTION 825(a)(1) OF THE VIOLENCE AGAINST WOMEN ACT, 8 U.S.C. § 1229a(7)(c)(iv), AND DEPARTMENT OF JUSTICE REAUTHORIZATION ACT OF 2005 TO MS. SANCHEZ' MOTION TO REOPEN.

In its decision and order, the Board of Immigration Appeals (the "BIA") held that

> The respondent's motion is barred by the time limitations for motions to reopen set forth at 8 C.F.R. § 1003.2(c)(2). *See* 8 C.F.R. § 1003.2(c)(2) (indicating that a motion to reopen must be filed no later than 90 days after the date of the final administrative decision or on or before September 30, 1996, whichever is later).

BIA Decision and Order at 1 (App. 4). The Board erred.

A. In enacting the Violence Against Women Act and subsequent amendments and reauthorizations, Congress made clear its intent to offer additional protections to immigrant women who have been victims of domestic violence.

Prior to enactment of the Violence Against Women Act of 1994 ("VAWA 1994"),[1] immigrants who suffered abuse had to endure an administrative process that did not recognize or appreciate the manifestations of domestic violence. Through VAWA 1994 and its reauthorizations in 2000 and 2005,[2] Congress reformed immigration law by providing special administrative procedures to immigrants who are victims of domestic violence.

The VAWA motion to reopen[3] is a procedure Congress created so abused immigrants could reopen removal or deportation hearings and ultimately obtain the relief that was established in VAWA 1994. When presented with a VAWA motion to reopen, it is important that immigration tribunals and reviewing courts recognize the manifestations of domestic violence and consider Congress' purpose in creating the VAWA motion to reopen.

1. VAWA History

A brief history of VAWA 1994 and its amendments and reauthorizations is important to the Court's resolution of Ms. Sanchez' case.

In an effort to diminish the widespread occurrence of domestic violence suffered by women in the United States, Congress passed VAWA 1994,[4] the first comprehensive legislation specifically designed to protect victims of domestic

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1 Pub. L. No. 103-322, 108 Stat. 1796, 1902-55 (1994).

2 *See* Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2005).

3 *See* Immigration and Nationality Act § 240(c)(7)(C)(iv)(I)-(III), 8 U.S.C. § 1229a(c)(7)(C)(iv)(I)-(III).

4 Pub. L. No. 103-322, 108 Stat. 1902-55 (1994).

violence and to prevent future domestic violence.[5] In VAWA 1994, Congress gave abused immigrant women and children specific measures of protection, such as the opportunity to self-petition for permanent residency[6] and to apply for suspension of deportation,[7] both of which could occur without the participation or knowledge of the abusive spouse.[8] Further, in VAWA 1994, Congress created the "any credible-evidence standard,"[9] which governs the evidence standard in VAWA self-petitions, VAWA suspension of deportation and abused-spouse waiver applications. *See* INA sections 204(a)(1)(J), 240A(b)(2)(D), 216(c)(4).

The legislative history of VAWA 1994 reflects Congress' concern for battered immigrants and explains why Congress amended the immigration laws in that statute. The House of Representatives' Committee on the Judiciary offered the following insight:

> Domestic battery problems can become terribly exacerbated in marriages where one spouse is not a citizen, and the non-citizens legal status depends on his or her marriage to the abuser. Current law fosters domestic violence in such situations 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.
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5 *See* Leslye Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 Am. U. J. Gender Soc. Pol'y & L. 95, 108 (2001).

6 § 40701, 108 Stat. at 1955.

7 § 40703, 108 Stat. at 1955.

8 *See* Orloff, *supra* note 5, at 113 (discussing Congress' intentions to protect the confidentiality of the abused immigrant's status through VAWA 1994 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009)

9 § 40702, 108 Stat. at 1955.

> Many immigrant women live trapped and isolated in violent homes, afraid to turn to anyone for help. They fear both continued abuse if they stay with their batterers and deportation if they attempt to leave.[10]

It is apparent that, through VAWA 1994, Congress intended to limit the control an abuser had over the immigrant victim's status and to encourage battered immigrants to flee from their violent domestic circumstances without fearing deportation.

VAWA 1994 made commendable strides towards reconstructing immigration laws to protect abused immigrants, but it fell short of fully accomplishing Congress' purpose. The Battered Immigrant Women Protection Act of 2000, which was part of the Violence Against Women Act of 2000 ("VAWA 2000"),[11] carried forward Congress' goals underlying VAWA 1994. The Congressional Record of the Senate contains the following statement explaining the relationship between VAWA 2000 and VAWA 1994:

> VAWA 2000 addresses residual immigration law obstacles standing in the path of battered immigrant spouses and children seeking to free themselves from abusive relationships that either had not come to the attention of the drafters of VAWA 1994 or have arisen since as a result of [other bills that amended] immigration law.[12]

Even the titles of the provisions within the Battered Immigration Protection Act echo Congress' motives behind VAWA 2000 by carrying a common theme of restoration and improved access to VAWA 1994 safeguards.[13] Thus, through

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10 H.R. Rep. No. 103-395 (1993).

11 Pub. L. No. 106-386, 114 Stat. 1464, 1518-37 (2000).

12 146 Cong Rec. S10188, S10195 (Oct. 5, 2000) (Section-by-Section Summary).

13 *See, e.g.,* § 1503, 114 Stat. at 1518-19 ("Improved access to immigration protections of the Violence Against Women Act of 1994 for battered immigrant women"); § 1504, 114 Stat. at 1522-25 ("Improved access to cancellation of removal and suspension of deportation under the Violence Against Women Act of

VAWA 2000, Congress further amended immigration laws to assist battered immigrants with obtaining independence from abusive relationships.

VAWA 2000 contained several provisions that continue to help abused immigrants, but the applicable provision in this case concerns the motion to reopen removal and deportation proceedings. In that statute, Congress created the "special rule for battered spouses," known as the "VAWA motion to reopen."[14] The VAWA motion to reopen substituted the otherwise applicable 90-day filing deadline for a deadline of one year from the time a removal order was entered, with the possibility of extending the deadline beyond one year if the abused immigrant could show "extraordinary circumstances or extreme hardship to the alien's child."[15] Eligibility for the extended deadline was contingent upon the abused immigrant being eligible for VAWA relief at the time of the filing.[16]

The purpose of extending the filing deadline for the VAWA motion to reopen was to expand the opportunity an abused immigrant had to reopen an order of removal. Congress recognized that certain circumstances often prevent an immigrant from effectively defending an order of removal[17] and that not allowing

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1994"); § 1505, 114 Stat. at 1525-27 ("Offering equal access to immigration protections of the Violence Against Women Act of 1994 for all qualified battered immigrant self-petitioners"); § 1506, 114 Stat. at 1527-29 ("Restoring immigration protections under the Violence Against Women Act of 1994").

[14] § 1506(c), 114 Stat. at 1528 (codified as amended at 8 U.S.C. § 1229a(c)(7)(C)(iv)).

[15] *See* Immigration and Nationality Act § 240(c)(7)(C)(iv)(I)-(III), 8 U.S.C. § 1229a(c)(7)(C)(iv)(I)-(III).

[16] The reason for filing the motion to reopen has to be based on either applying for relief via a VAWA self-petition or VAWA cancellation of removal. *See* INA § 240(c)(7)(C)(iv)(I), 8 U.S.C. § 1229a(c)(7)(C)(iv)(I).

[17] *See* 146 Cong. Rec. S10188, S10192 (Oct. 5, 2000) (joint managers' statement) (abused spouses are exposed to "an atmosphere of deception, violence, and fear that make it difficult for a victim of domestic violence to learn of or take steps to defend against or reopen an order of removal in the first instance.").

the immigrant to reopen the removal proceedings after an order of removal was entered would "thwart justice or be contrary to the humanitarian purpose of [VAWA 2000]."[18] One of the purposes of VAWA 2000 was to improve the immigration laws so abused immigrants were better protected, and Congress supplied a means to the end by creating the VAWA motion to reopen.

Congress has continued to strengthen VAWA motions to reopen, the most recent example being last year's Violence Against Women and Department of Justice Reauthorization Act of 2005 ("VAWA 2005") which President Bush signed into law on January 5, 2006.[19] In VAWA 2005, Congress expanded VAWA motions to reopen in several significant ways. First, Congress clarified that VAWA motions to reopen are not subject to the numerical limits applicable to regular motions to reopen. *See* INA § 240(c)(7)(A), 8 U.S.C. § 1229a(c)(7)(A). Second, Congress provided for a stay of removal upon the filing of a VAWA motion to reopen pending final disposition of the motion, including exhaustion of all appeals, if the motion establishes that the immigrant is a "qualified alien."[20] INA § 240(c)(7)(iv), 8 U.S.C. § 1229a(c)(7)(iv). These important expansions underscore Congress's continuing intent to provide access to immigration relief for victims eligible for VAWA.

The legislative history for VAWA 2005 further illuminates Congress' concern for immigrant victims of domestic violence. In the floor discussions, members of Congress continued to emphasize how VAWA relief must remain accessible, and they continued to acknowledge the hardships abused immigrants face in general and particularly when they are threatened with deportation and

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18 *Id.*

19 Pub. L. No. 109-162, 119 Stat. 2960 (2005).

20 "Qualified alien" as defined in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. 1641(c)(1)(B).

removal. For example, Representative John Conyers (D-MI) offered the following observations:

> Protecting victims of domestic violence from deportation and assuring that they can have their day in court before an immigration judge to file for VAWA related immigration relief is a central focus of all VAWA immigration protection I have been involved in developing since 1994. ***This section contains amendments that clarify the VAWA 2000 motions to reopen for abused aliens, enabling otherwise eligible VAWA applicants to pursue VAWA relief from removal, deportation or exclusion.*** This section provides that the limitation of one motion to reopen a removal proceeding shall not prevent the filing of one special VAWA motion to reopen. In addition, a VAWA petitioner can file a motion to reopen removal proceedings after the normal 90-day cutoff period, measured from the time of the final administrative order of removal. The filing of a special VAWA motion to reopen shall stay the removal of the alien pending final disposition of the motion, including exhaustion of all appeals, if the motion establishes a prima facie case for the relief. One VAWA 2005 post-enactment motion to reopen may be filed by a VAWA applicant. Aliens who filed and were denied special VAWA motions under VAWA 2000 may file one new motion under this Act. (emphasis added).[21]

Senator Edward Kennedy (D-MA) offered the following remarks:

> Eliminating domestic violence is especially challenging in immigrant communities, since victims often face additional cultural, linguistic and immigration barriers to their safety. Abusers of immigrant spouses or children are liable to use threats of deportation to trap them in endless years of violence.
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> ***
>
> The improvements in immigration protections in the bill are designed to help prevent the deportation of immigrant victims who qualify for

[21] 151 Cong. Rec. E2607 (Dec. 18, 2005) (Extension of Remarks).

immigration relief under the Violence Against Women Act (VAWA).[22]

Representative Janice Schakowsky (D-IL) reiterated Congress' concern and intent:

> All women and families should be free from fears of violence, but immigrant women face particular problems in confronting this crisis.
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> ***
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> While VAWA 1994 and 2000 made significant progress in reducing violence against immigrant women, there are still many women and children whose lives are in danger today. Many VAWA-eligible victims of domestic violence, sexual assault, child abuse or trafficking are still being deported.
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> ***
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> Congress must remain vigilant in the fight to preserve basic due process rights — the right for immigrants to have a hearing before being deported and the right for battered immigrants to seek protection under VAWA.[23]

Simply stated, VAWA 2005 offers additional protections to abused immigrants, and it manifests continued congressional concern that motions to reopen be readily available to protect the rights of immigrants who have suffered domestic violence.

2. The statute of limitations applicable to VAWA petitions to reopen

Section 1003.2(c)(2) of Title 8 of the Code of Federal Regulations provides that an immigrant must file a petition to reopen within 90 days of the final administrative decision. 8 C.F.R. § 1003.2(c)(2). However, in VAWA 2000,

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[22] 151 Cong. Rec. S13749, S13753 (Dec. 16, 2005) (statement of Sen. Kennedy).

[23] 151 Cong. Rec. E2615 (Dec. 19, 2005) (Extension of Remarks).

Congress statutorily created a longer limitations period for immigrants who have been victims of domestic violence:

> **(iv) Special rule for battered spouses and children**
>
> The deadline specified in subsection (b)(5)(C) of this section for filing a motion to reopen does not apply –
>
> (I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title, or section 1229b(b)(2) of this title;
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> (II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen; and
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> (III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child.
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> (IV) if the alien is physically present in the United States at the time of filing the motion.

8 U.S.C. § 1229a(c)(7)(C)(iv). Thus, an immigrant who meets the other requirements of Section 1229a(c)(7)(C)(iv) is allowed a minimum of one year to file a motion to reopen, with the option of filing beyond one year if the immigrant demonstrates extraordinary circumstances or extreme hardship to her child.[24]

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[24] To the extent Section 1003.2 of Title 8 of the Code of Federal Regulations is inconsistent with this unambiguous statutory language, the statute governs. *See Stinson v. United States,* 508 U.S. 36, 44 (1993).

B. The BIA erred by failing to apply the proper limitations to Ms. Sanchez' case.

As she notes in her opening brief to this Court, Ms. Sanchez meets the requirements of Section 1229a(c)(7)(C)(iv). *See* Petitioner's Brief at 21. Accordingly, the BIA erred in applying a 90-day limitations period to her case rather than the one-year period required by VAWA 2005. Ms. Sanchez filed within the one-year deadline and demonstrated eligibility for the special relief Congress has created for her. Ms. Sanchez is exactly the kind of abused immigrant Congress contemplated when it liberalized motions to reopen to pursue relief under the Violence Against Women Act and its progeny.

II. THE BOARD OF IMMIGRATION APPEALS ERRED IN ITS DETERMINATION THAT MS. SANCHEZ' FORMER COUNSEL DID NOT OFFER INEFFECTIVE ASSISTANCE WHEN HE WITHDREW HER APPLICATION FOR VAWA CANCELLATION OF REMOVAL.

While this Court has held that ineffective assistance of counsel generally does not rise to a due-process violation in immigration cases, it has indicated that ineffective assistance may implicate due process in "egregious circumstances." *Stroe v. INS,* 256 F.3d 498, 501 (7th Cir. 2001). A petitioner claiming ineffective assistance of counsel must demonstrate actual prejudice. *See Mojsilovic v. INS,* 156 F.3d 743, 749 (7th Cir. 1998).

In this case, the performance of Ms. Sanchez' former counsel was egregiously ineffective, and his counsel actually prejudiced Ms. Sanchez.

A. In enacting VAWA and its progeny, Congress intended immigration tribunals and reviewing courts to consider the special circumstances that affect immigrants who have been victims of domestic violence.

As described above, in enacting VAWA and its progeny, Congress made plain its intention that immigrants who have suffered domestic violence be treated

with particular sensitivity by immigration judges, the BIA and the courts. Thus, for example, Congress created a special motion to reopen available to victims of domestic violence, extended the limitations period for filing such motions and liberalized the evidentiary standards for victims of domestic violence seeking various sorts of relief, including cancellation of removal. *See, supra,* at 4-10.

Although VAWA plainly modified the standards applicable to motions to reopen filed by domestic-violence victims, the regulations on which the BIA relies have not been updated to reflect either the language of the VAWA statutes or the legislative intent underlying them. *See* 8 C.F.R. § 1003.2(c)(2). As a result, the BIA often does not consider or fully implement Congress' intent with respect to immigrants who have suffered from domestic violence. Even apart from those regulations, the BIA has often failed to consider the special circumstances involved in VAWA applications. This is such a case.

B. Ms. Sanchez' former counsel's withdrawal of her application for VAWA cancellation under Section 1229b(b)(2) reflects no reasonable strategic decision but instead an egregious error that deprived Ms. Sanchez of the rights Congress intended persons such as her to have.

The record in this case is replete with evidence that Ms. Sanchez suffered domestic violence at the hands of her former husband. Ms. Sanchez' opening brief describes that evidence, and the Network will not repeat it here. Ms. Sanchez' former counsel knew of this evidence, and he knew of the more liberal evidentiary standards available to applicants for cancellation of removal who have suffered domestic violence. However, for some reason, he chose to withdraw Ms. Sanchez' VAWA-cancellation-of-removal application under Section 1229b(b)(2) at the final hearing before the immigration judge.

The BIA discounted this significant error by holding that "subsequent dissatisfaction with a strategic decision by counsel is not grounds to reopen." BIA

Decision and Order at 2 (App. 5). The problem with the BIA's holding is that there is no reason to believe that Ms. Sanchez' former counsel acted in accordance with some considered strategy. The BIA itself acknowledged that "it is not clear from the record precisely why this decision was made." *Id.* Thus, without evidence, the BIA concluded that the withdrawal of the VAWA-cancellation application was part of some strategy instead of what it appears to have been: an unaccountable error that deprived Ms. Sanchez of the right to pursue a remedy Congress created expressly to assist persons in her situation. At the very least, the Court should remand the case for an evidentiary hearing to consider why Ms. Sanchez' former counsel acted as he did.

The withdrawal of Ms. Sanchez' VAWA-cancellation application was not only an egregious error, it was a prejudicial one. Ms. Sanchez had significant evidence to support her VAWA cancellation application, and there is every reason to believe she would have obtained relief had her lawyer pursued that application. As it is, Ms. Sanchez' application for cancellation under Section 1229b(b)(2) was denied, and she faces deportation.

Simply stated, viewed through the lens of the language of VAWA and its progeny, the unexplained decision of Ms. Sanchez' former counsel to forego an application for VAWA cancellation that would almost certainly have succeeded constitutes ineffective assistance of counsel. The BIA's suggestion that it was "strategic" is unsupported by evidence, and it ignores plain congressional intent that VAWA rights be afforded to victims of domestic violence.

CONCLUSION

The BIA erred both in its application of the limitations period and in its evaluation of the performance of Ms. Sanchez' former counsel. This Court should reverse the BIA's determination and remand the case for consideration of Ms. Sanchez' VAWA cancellation application so that her rights may fairly be exercised and considered.

Respectfully submitted,

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DIGITAL FILING CERTIFICATIONS

I hereby certify that, in accordance with Circuit Rule 31(e), I have electronically filed a copy of this brief and served copies of that digital copy on all counsel of record.

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CERTIFICATE OF SERVICE

I hereby certify that, on November 8, 2006, I served a copy of the attached document on the following by U.S. Mail, postage-prepaid:

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