

Introduction

Congress passed VAWA to remedy the legal system's complicity in abuse against victims of domestic violence, to strengthen protections for those victims, and to encourage their cooperation in bringing abusers to justice. It enacted new provisions in 1996 to further expand benefits and protections for VAWA applicants. INS has attempted to develop an approach to VAWA claims that reflects VAWA's purpose and goals. The Board should adopt a similarly flexible approach and, where necessary, tutor immigration judges on VAWA's provisions and evidentiary standards. In this case, only remand to a different judge or a de novo grant of VAWA cancellation will satisfy VAWA's demand that manipulation of the immigration system no longer serve as a potent weapon of abuse against noncitizen family members.

I. The Purpose of the Violence Against Women Act (VAWA) Is To Remedy and Prevent Manipulation of the Immigration Laws by U.S. Citizen and Lawful Permanent Resident Perpetrators of Domestic Violence

At the time Congress passed the Violence Against Women Act, it was well aware of the special problems facing battered women and children in our society.¹ It stated that "violence against women reflects as much a failure of our Nation's collective willingness to confront the problem as it does the failure of the Nation's law and regulations."² The two-fold purpose of VAWA was to protect women from violence and to prevent further violence.³ VAWA's overarching goal was to eliminate existing laws and law enforcement practices that condoned abuse or protected abusers and, instead, to commit the legal

¹ See, e.g., H.R. Rep. No. 395, 103d Cong., 1st Sess. (1993); S. Rep. No. 138, 103d Cong., 1st Sess. 41 (1993); S. Rep. No. 545, 101st Cong., 2d Sess. 36 (1990); Staff of Senate Comm. on the Judiciary, 102d Cong., 2d Sess., *Violence Against Women: A Week in the Life of America* (Comm. Print 1992).

² S. Rep. No. 138, 103d Cong., 1st Sess. 37 (1993).

³ S. Rep. No. 545, 101st Cong., 2d Sess. 38 (1990); H.R. Rep. No. 395, 103d Cong., 1st Sess. 25 (1993).

system to protecting victims of abuse while identifying and punishing the perpetrators of domestic violence.⁴

In enacting VAWA's immigration provisions, Congress extended its efforts to prevent manipulation of the immigration laws by abusers, initiated with the battered spouse waiver to the joint petition requirement for conditional residents.⁵ It noted that domestic violence is "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."⁶ The House Committee on the Judiciary stated in its report on the legislation, "[m]any immigrant women live trapped and isolated in violent homes afraid to turn to anyone for help. They fear continued abuse if they stay, and deportation if they attempt to leave."⁷ Congress created the self-petitioning provisions "to prevent the citizen or resident from using the petitioning process as a means to control or abuse an alien spouse."⁸

A. Congress Mandated a Flexible Evidentiary Standard that Recognizes the Context of Domestic Violence

One manifestation of VAWA's remedial intent is the flexible "any credible evidence" standard embedded in both self-petitioning⁹ and VAWA suspension¹⁰ and cancellation.¹¹ The standard for self-petitioning under section 204 is the same as that for applicants for VAWA suspension or cancellation:

In acting on [applications under the VAWA provision], the Attorney General shall consider any credible evidence relevant to [the application].

⁴ H.R. Rep. No. 395, 103d Cong., 1st Sess. 27 (1993); S. Rep. No. 138, 103d Cong., 1st Sess. 41 (1993).

⁵ INA § 216(c)(4)(C), added by the Immigration Act of 1990, section 701(a), Pub. L. No. 101-649 (1990).

⁶ H.R. Rep. No. 395, 103d Cong., 1st Sess. 26-27 (1993).

⁷ Committee on the Judiciary, Report on Violence Against Women Act, accompanying H.R. Rep. No. 395, 103d Cong. 1st Sess. (1993).

⁸ H.R. Rep. No. 395, 103d Cong., 1st Sess. 37 (1993).

⁹ INA § 204(a)(1)(H).

¹⁰ INA § 244(g) (as in effect before the IIRIRA Title III-A effective date).

¹¹ INA 240A(b)(2).

The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General¹²

While Congress intended that the Attorney General interpret the “any credible evidence” standard, it also expected her to give the statute its intended ameliorative effect.¹³ As noted below, the INS General Counsel’s office has articulated a standard that reflects VAWA’s purposes. Among other things, that memo states

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.¹⁴

B. Congress Reiterated Its Commitment to Assisting Victims of Domestic Violence in Proceedings By Transforming VAWA Suspension of Deportation into VAWA Cancellation of Removal

In 1996 Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),¹⁵ which erected new barriers to gaining lawful permanent residence for many family-based petitioners¹⁶ and eliminated suspension of deportation, replacing it with the more limited cancellation of removal.¹⁷ At the same time, however, Congress included exceptions for many of the new restrictive provisions for those who had approved VAWA petitions¹⁸ or who could qualify under the VAWA provisions.¹⁹ Unlike other forms of suspension, Congress did not eliminate VAWA suspension or

¹² Congress also mandated that battered spouse waivers of the joint petition requirement for conditional residents be judged under the “any credible evidence” standard. INA § 316(c)(4)(C), as amended by section 40702 of VAWA.

¹³ H.R. Rep. No. 395 at 25.

¹⁴ Virtue, Office of the General Counsel, “*Extreme Hardship*” and *Documentary Requirements Involving Battered Spouses and Children*, Memorandum to Terrance O’Reilly, Director, Administrative Appeals Office 7 (Oct. 16, 1998), reprinted in 76(4) Interpreter Releases 162 (Jan. 25, 1999).

¹⁵ 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).

¹⁶ See, e.g., new INA §§ 212(a)(4)(C)(ii) (new enforceable affidavits of support) and 212(a)(9)(B) and (C) (new “unlawful presence” bars to admission).

¹⁷ New INA § 240A, replacing former INA § 244.

¹⁸ INA § 212(a)(4)(C)(i)(I) & (II) (exemption from enforceable affidavit of support requirement).

heighten the eligibility standard;²⁰ instead, it transformed former INA § 244(a)(3) into the new cancellation section 240A(b)(2).

As before, applicants for cancellation of removal who have been battered or subjected to extreme cruelty²¹ need only show three years of continuous physical presence²² and “extreme hardship to the alien, the alien’s child, or (in the case of an alien who is a child) to the alien’s parent.”²³ As noted by the General Counsel,²⁴ the fact that Congress “left intact” the extreme hardship standard is significant.²⁵ “Congress thus intended to apply a lower standard to battered spouses and children.”²⁶ Congress also retained the mandate that, “[i]n acting on applications under this paragraph, the Attorney General *shall* consider any credible evidence relevant to the application.”²⁷

II. In IIRIRA Congress Expanded Protections and Benefits for Noncitizen Victims of Domestic Violence

In addition to extending VAWA suspension and excepting VAWA applicants from many of the new bars to admissibility, Congress included new protections and benefits for battered noncitizens in IIRIRA. To further prevent abusers from manipulating the immigration system and sabotaging legitimate VAWA claims, Congress enacted section 384.

¹⁹ INA § 212(a)(9)(B)(iii)(IV), referencing INA § 212(a)(6)(A)(ii) (exception to three- and ten-year unlawful presence bars).

²⁰ Compare new INA § 240A(b)(1), requiring ten years of continuous physical presence and proof of “exceptional and extremely unusual” hardship to a U.S. citizen or lawful permanent resident spouse, parent or child, with former INA § 244(a)(1), requiring seven years of continuous physical presence and a showing of “extreme hardship” to the “alien or to his spouse, parent, or child.”

²¹ INA 240A(b)(2)(A).

²² INA § 240A(b)(2)(B).

²³ INA § 240A(b)(2)(E).

²⁴ Virtue, “*Extreme Hardship*” and *Documentary Requirements Involving Battered Spouses and Children*, Memorandum to Terrance O’Reilly, Director, Administrative Appeals Office (Oct. 16, 1998), reprinted in 76(4) Interpreter Releases 162 (Jan. 25, 1999).

²⁵ *Id.* at 6-7.

²⁶ *Id.* at 7.

²⁷ INA § 240A(b)(2) (emphasis supplied).

Among other things, section 384 prohibits “the Attorney General, or any other official or employee of the Department of Justice (including any bureau or agency of such Department)” from making “an adverse determination of admissibility or deportability. . .using information furnished solely by” a spouse or parent who has battered the alien or subjected the alien to extreme cruelty.²⁸ It also prohibits the “use or disclosure by anyone. . .of any information which relates to an alien who is the beneficiary of an application for relief” under the VAWA provisions.²⁹

Anyone who willfully uses, publishes or permits information to be disclosed in violation of this section shall be subject to appropriate disciplinary action and subject to a civil money penalty of not more than \$5,000 for each such violation.³⁰

A 1997 INS Office of Programs memorandum to all INS employees³¹ informs the field of section 384’s two prohibitions and states: “[v]iolation of either of these prohibitions can result in disciplinary action or in civil penalties of up to \$5,000 for each violation.”³² Further,

In the interests of full compliance in what could be difficult fact situations, the following guidance is to be followed:

If an INS employee receives information adverse to an alien from the alien’s U.S. citizen or lawful permanent resident spouse or parent, or from relatives of that spouse or parent, the INS employee must obtain independent corroborative information from an unrelated person before taking any action based on that information.

These provisions, and the Congressional and public scrutiny which accompany them, warrant particular care whenever an INS

²⁸ IIRIRA § 384(a)(1)(A) (full text attached).

²⁹ IIRIRA § 384(a)(2).

³⁰ IIRIRA § 384(c).

³¹ Presumably this includes Trial Attorneys.

³² Virtue, Office of Programs, *Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA § 384* (May 5, 1997), reprinted in 74 Interpreter Releases 795 (May 12, 1997).

officer or employee suspects that an alien with whom they are dealing might have been subject to domestic violence.³³

Thus, INS officers must tread extremely carefully when they *suspect* a noncitizen may be a victim of domestic violence. Before acting on information from a spouse of a suspected victim, they must obtain independent corroborative evidence from a third party unrelated to either the informant or the possible victim.

INS is subject to Congressional and public scrutiny precisely because its officers use information provided by abusers to place victims of domestic violence in proceedings. This allows the immigration system to be used as a weapon against victims of domestic violence. When it occurs, immigration judges should grant, and trial attorneys should support, motions to suppress. Minimally, INS should be required to prove that it followed the steps outlined in the Office of Programs memorandum.

In IIRIRA Congress also extended benefits for battered immigrants by adding all VAWA applicants to the list of “qualified aliens” eligible for most public benefits.³⁴ As a result of this change, VAWA applicants who make a “prima facie” showing of eligibility may receive public benefits.³⁵ Recognizing that access to public benefits and to work authorization are essential to escaping economic control by abusers, INS established a special system for considering prima facie self-petition eligibility³⁶ and encouraged INS district offices to issue Notices to Appear to victims of domestic

³³ *Id.* at 3.

³⁴ IIRIRA § 501, amending section 431 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. § 1641.

³⁵ *Id.*

³⁶ Virtue, Office of Programs, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* 2, 4-6 (May 6, 1997), reprinted in 74 Interpreter Releases 971 (June 16, 1997).

violence so they could request VAWA cancellation.³⁷ If they show prima facie eligibility for this form of relief from removal, they may obtain public benefits.³⁸

III. INS Interpretations of VAWA Should Inform the Executive Office for Immigration Review's Adjudication of VAWA Applications in Proceedings

INS has demonstrated a commitment to ensuring victims of domestic violence obtain the relief intended by Congress. It has centralized self-petition adjudication in Vermont,³⁹ assigned self-petitions to a special group of INS officers, and periodically trains these adjudicators on domestic violence issues.⁴⁰ Personnel from the INS policy office and the supervisor of the Vermont VAWA adjudicators travel to local district offices to train them on domestic violence and its impact on noncitizens seeking immigration status.⁴¹

To comply with Congressional intent, INS grants deferred action to approved VAWA self-petitioners not immediately eligible to adjust, which then forms the basis for work authorization applications.⁴² This allows spouses and children of lawful permanent residents, who must wait for their "priority dates" to become "current" to gain economic independence from their abusers. Without the ability to work and support their children, they would be forced to remain in abusive relationships until they obtained lawful permanent residence.

³⁷ *Id.* at 6.

³⁸ *Id.*

³⁹ See Virtue, Office of Programs, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues 2* (May 6, 1977), reprinted in 74 Interpreter Releases 971 (June 16, 1997).

⁴⁰ The author has twice participated in trainings and meetings with Vermont VAWA personnel.

⁴¹ Regular telephonic and fax communications between the author and Karen FitzGerald, INS Central Office, and Walter Laramie, Supervisor of VAWA adjudicators, Vermont Service Center.

⁴² Virtue memo, supra note 38, at 3. See also, Aleinikoff, Office of Programs, *Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents 4-5*, HQ 204-P (Apr. 16, 1996) (creating pre-IIRIRA special grants of voluntary departure and work authorization for approved self-petitioners) (attached).

The Vermont Service Center has approved hundreds of self-petitions by battered immigrants, employing an analysis of evidentiary requirements tailored to the context of domestic violence. Immigration judges have adjusted the status of VAWA applicants with approved self-petitions who were immediately eligible for immigrant visas. If the BIA allows immigration judges to take a different path, especially one based on ignorance of the dynamics of domestic violence or antagonism towards Congressional intent, two strands of VAWA law will emerge. Whether a particular victim of domestic violence gains immigration status, enabling her to flee abuse, may depend on where she files her claim.

Congress could not have intended such an irrational distinction, such an incongruous result. Many battered spouses and children are in proceedings as the direct result of their abuser's manipulation of the immigration system. Applying an inflexible approach to these VAWA applicants deeply offends VAWA's goal of removing the legal system's complicity in abuse. Instead, it rewards batterers who manipulate the immigration system to harm their victims. It keeps victims locked in relationships that are dangerous, even deadly.

A. The INS Regulations and Memoranda Provide Helpful Guidance

Although the INS interim VAWA regulations⁴³ and implementing memoranda⁴⁴ do not govern EOIR determinations, they show how INS applies the flexible standard and

⁴³ 61 Fed. Reg. 13061-13079 (March 26, 1996).

⁴⁴ Virtue, Office of General Counsel, "*Extreme Hardship*" and *Documentary Requirements Involving Battered Spouses and Children* (Oct. 16, 1998); Virtue, Office of Programs, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* (May 6, 1977), reprinted in 74 Interpreter Releases 971 (June 16, 1997); Virtue, Office of Programs, *Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA § 384* (May 5, 1997), reprinted in 74 Interpreter Releases 795 (May 12, 1997); Aleinikoff, Office of Programs, *Implementation of Crime Bill Self-petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents* (April 16, 1996) (attached).

remedial goal mandated by Congress. The preamble to the INS VAWA regulations explains the problem VAWA intends to ameliorate:

Some abusive citizens or lawful permanent residents, however, misuse their control over the petitioning process. Instead of helping close family members to legally immigrate, they use this discretionary power to perpetuate domestic abuse of their spouses and minor children who have been living with them in the United States. Abusers generally refuse to file relative petitions for their closest family members because they find it easier to control relatives who do not have lawful immigration status. These family members are less likely to report the abuse or leave the abusive environment because they fear deportation or believe that only citizens and authorized immigrants can obtain legal and social services. An abuser may also coerce family members' compliance in other areas by threatening deportation or by promising to file a relative petition in the future⁴⁵

1. Interpreting the Any Credible Evidence Standard

The regulations governing self-petitions state: "The self-petitioner may, but is not required to, demonstrate that preferred primary or secondary evidence is unavailable."⁴⁶ As the INS Office of the General Counsel has noted,⁴⁷ 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. 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

⁴⁵ Preamble to INS VAWA self-petitioning regulations, 61 Fed. Reg. at 13062.

⁴⁶ *See, e.g.*, 8 C.F.R. §§ 103.2(b)(2)(iii) and 204.1(f)(1). *See also*, Virtue General Counsel memo (Oct. 1998), *supra* note 44, at 7 ("[T]hat section [of the regulations] allows the battered spouse or child self-petitioner to submit 'any credible evidence' and does not require that the alien demonstrate the unavailability of primary or secondary evidence.")

⁴⁷ Since this memo articulates the General Counsel's approach to certain VAWA issues, *amici* suggest that Trial Attorneys should abide by its interpretation.

for that reason. Adjudicators should be aware of these issues and should evaluate the evidence submitted in that light.⁴⁸

Thus, the General Counsel categorically states:

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.⁴⁹

The General Counsel also analyzes indicia of credibility. It may be “credible or incredible on either an internal or an external basis.”⁵⁰ Evidence is internally consistent if it does not conflict with other evidence presented by the applicant. Evidence is externally credible when objectively corroborated. “Adjudicators should carefully review evidence in both these regards before making a credibility determination.”⁵¹ 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.”⁵²

This approach sensibly and faithfully interprets the any credible evidence standard. Unfortunately, in the case before the Board, the Immigration Judge violated every one of its precepts. He mentioned the “any credible evidence” standard only once, in the iteration of VAWA’s provisions,⁵³ and otherwise completely ignored its implications, relying instead on a “clear and convincing” evidentiary standard.⁵⁴ Nowhere does the judge acknowledge the evidentiary obstacles facing battered spouses, nor does he explain how his dismissal of the applicant’s evidence abides by the statute’s

⁴⁸ Virtue General Counsel Memo, *supra* note 44, at 7-8.

⁴⁹ *Id.* at 7.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 8.

⁵³ Immigration Judge decision at 3.

⁵⁴ *Id.* at 25.

requirement that he entertain “any credible evidence.” By itself, this failure to employ a standard explicitly mandated by Congress is a fatal flaw.

2. Proving VAWA Extreme Hardship

On proving extreme hardship, the VAWA regulations state:

Evidence of extreme hardship may include affidavits, birth certificates of children, medical reports, protection orders and other court documents, police reports, and other relevant credible evidence.⁵⁵

To ensure that the “extreme hardship” requirement for VAWA self-petitions does not defeat Congressional intent, INS has developed extreme hardship factors that reflect the experience of battered noncitizens.⁵⁶ The preamble to the regulations, the INS implementing memoranda and the notices sent by the Vermont Service Center to self-petitioners requesting more information articulate extreme hardship factors tailored to the context of domestic violence. Without the ability to prove VAWA extreme hardship based on factors tailored to the context of domestic violence, many battered spouses and children would be trapped in abusive homes, unable to qualify under VAWA.

Since the language of the VAWA cancellation provision parallels that of the self-petitioning law,⁵⁷ *amici* encourage the Board to adopt the same approach to VAWA extreme hardship. The factors considered by INS are:⁵⁸

1. The nature and extent of the physical or psychological consequences of abuse;

⁵⁵ 8 C.F.R. §§ 204.2(c)(2)(vi) and (e)(2)(vi).

⁵⁶ VAWA regulations, 61 Fed. Reg. 13061-13079 (March 26, 2996); Virtue General Counsel Memo, *supra* note 44, at 4-7; Aleinikoff Memo, *supra* note 44, at 8-9.

⁵⁷ The primary variance between VAWA cancellation and VAWA self-petitioning is that VAWA cancellation applicants must show three-years’ continuous presence, INA § 240A(b)(2)(B), while VAWA self-petitioners must show residency with the abuser, *see., e.g.*, INA § 204(a)(1)(A)(iii).

⁵⁸ This list combines minor variations in wording from three sources: Aleinikoff memo, *supra* note 44, at 8-9; Preamble to the VAWA regulations, 61 Fed. Reg. at 13067; and standard language in Notices of Action seeking further evidence issued by the Vermont Service Center, which adjudicates all self-petitions. See also Virtue General Counsel memo, *supra* note 44, at 4-7.

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 applicant's needs and/or needs of the applicant's child(ren) for social, medical, mental health, or other supportive services which might not be available or reasonably accessible in the home country;
4. The existence of laws, social practices, or customs in the home country that would penalize or ostracize the applicant or the applicant's child(ren) for having been the victim of abuse, or for having taken steps to leave an abusive spouse or father, or for actions taken to stop the abuse;
5. 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 child(ren) from future abuse;
6. The likelihood that the abuser's family, friends, or others acting on behalf of the abuser in the home country would physically or psychologically harm the applicant or the applicant's child(ren).

Traditional extreme hardship factors often are irrelevant to the experience of victims of domestic violence. For instance, family and long-term ties to the United States will often be lacking because perpetrators of domestic violence typically isolate or severely limit their victims from any contact with the outside world. They often insist that their victims sever any ties with family members and friends in the United States;⁵⁹ prevent them from obtaining jobs,⁶⁰ going to school,⁶¹ learning English,⁶² or receiving a

⁵⁹ See, e.g., Ewing, *Battered Women Who Kill: Psychological Self-Defense as Legal Justification* 10 (1987)(citing studies showing almost 50% of women studied were forbidden by their batterers from having personal friends or having such friends in the house); *Gazzillo v. Gazzillo*, 379 A.2d 288 (N.J.Ch. 1979)(husband's refusal to allow wife to invite relatives to visit constituted extreme cruelty).

⁶⁰ See New York Victim Service Agency Report on the Costs of Domestic Violence (1987).

⁶¹ Family Violence Prevention Fund, *Domestic Violence in Civil Court Cases* 23 (1992).

⁶² Orloff, Jang & Klein, *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 Fam.L.Quart. 313, 316-17 (1995).

driver's license; and closely monitor and control money spent on food and other essentials.⁶³

A battered noncitizen's only ties outside the abuser may be to the shelter or health care worker who helps her. Moreover, family ties, either in the United States or in the home country, do not necessarily protect battered women. Instead of supporting her for leaving an abusive spouse, her family may ostracize her for challenging social or religious mores concerning marriage and male dominance and for "bringing shame and embarrassment" to the family by speaking out against abuse.

Need for and use of services for victims of domestic violence available here that are unavailable in the home country often is more relevant to VAWA applicants than the traditional emphasis on ties to the community, "health conditions" or "medical treatment" in the home country. Even "psychological impact" of deportation does not adequately capture the significance of this factor. The effect of deportation should be only part of the inquiry. The juxtaposition of needed resources⁶⁴ available here against their lack in the home country is the centerpiece of this VAWA factor.

Similarly, a child's acclimation to U.S. society and the disruption of her or his educational opportunities are often of less concern than the immediate danger the mother's deportation poses for the child: either the child must leave with the mother or remain with an abusive father. Most children in abusive households suffer from

⁶³ Some abusers physically imprison their victims. See, e.g., *In re Marriage of Blinstein*, 569 N.E.2d 1357, 58-59 (Ill.Ct.App. 1991) (abuser locked victim in closets and in the home and tied her to furniture); *Gazillo v. Gazillo*, 379 A.2d at n.28 (abuser locked victim in house at night).

⁶⁴ Battered women are almost five times more likely than nonbattered women to require mental health treatment, see Stark & Flitcraft, "Spouse Abuse," in *Violence in America: A Public Health Approach* (Rosenbeg & Fenley, eds., 1991). Twenty-five percent of women using psychological services have histories of being victims of domestic violence, Stark & Flitcraft, "Violence Among Intimates: An Epidemiological Review," in *Handbook of Family Violence* at 304 (Haselt et al, eds., 1988). Social services

observing, if not experiencing first hand, the violence in their homes and need counseling⁶⁵ which they cannot obtain in the mother's home country. For most mothers, leaving the child in the hands of a proven abuser is unthinkable.⁶⁶

The VAWA factor that considers the need for ongoing access to the U.S. court system recognizes this dilemma. If a mother is deported, she will be unable to appear in family court to object to an abuser's attempt to gain custody of the children. If she leaves the country with the children, she may violate an existing custody order, and any required support payments by the father will become impossible to enforce.⁶⁷ The "ongoing access to the U.S. court system" factor is paramount when U.S. prosecutors need the

for victims of domestic violence have increased greatly in the United States in the past decade. See Glazer, *Violence Against Women*, 13(8) CG Researcher 171 (Feb. 1993).

⁶⁵ National Council of Juvenile and Family Court Judges, *Courts and Communities: Confronting Violence in the Family*, Conference Highlights 27 (March 1993) ("Toddlers are not too young to understand what is happening, and children who do not show adverse effects at the time of the violence may have problems later."); Saunders, *Child Custody Decisions in Families Experiencing Women Abuse*, Social Work 51 (Jan. 1994) ("In one study, three-fourths of the children of battered women exhibited clinically significant behavioral problems, compared with only 13% of those in a control group"); Topkins et al., *The Plight of Children Who Witness Woman Battering: Psychological Knowledge and Policy Implications*, 18 Law & Psych. Rev. 137 (1994) ("Research on children who witness violence consistently confirms that these children experience significant emotional trauma."). Congress also has recognized the severe impact of domestic violence on children in the household, Staff of Sen. Comm. on Judiciary, 102d Cong., 2d Sess., *Violence Against Women: A Week in the Life of America* 7-9 (1992). See also Elbow, *Children of Violent Marriages: The Forgotten Victims*, J. Contemp. Soc. Work 465 (Oct. 1982); Giles-Sims, *A Longitudinal Study of Battered Children of Battered Wives*, XXXIV Fam. Rel. 205 (1985); Jaffe et al., *Children of Battered Women* 32-33, 35, 42 (1990); Kenning et al., *Research on the Effects of Witnessing Parental Battering: Clinical Legal Policy Implications* 237 (1991); Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 Hofstra L. Rev. 1295, 1308 (1993); U.S. Attorney General's Task Force on Family Violence, *1984 Report*; U.S. Civil Rights Commission, *The Federal Response to Domestic Violence* (1982).

⁶⁶ Several studies have found a 60-75% correlation between spouse and child abuse. See Jaffe et al., *Children of Battered Women* (1990); Roy, *Children in the Crossfire* (1988); Strauss et al., *Behind Closed Doors: Violence in the American Family* (1980).

⁶⁷ Family and juvenile courts now prefer awarding custody to the non-abusive parent, with structured, safe, often supervised visitation with the children for the abusive parent. National Council of Juvenile and Family Court Judges, *Model Code on Domestic and Family Violence*, 26-28 (1994). Congress also is on record wishing to discourage the award of custody to abusers. H.R. Con. Res. 172, 101st Cong., 2d Sess., 164 Stat. 5183 (1990) ("for the purposes of determining child custody, credible evidence of physical abuse of a spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse. . ."); see also Zorza, *How Abused Women Can Use the Law to Help Protect Their Children, Ending the Cycle of Violence: Community Responses to Children of Battered Women* (1994) (discussing majority of states that mandate judges to take domestic violence into account in custody

noncitizen victim to successfully prosecute the abuser. No traditional extreme hardship factor encompasses these concerns, which implicate the goals and functions of our legal system, as well as the fate of the noncitizen VAWA applicant.

Every day abusers stalk and murder those who have fled their violence;⁶⁸ the border is an insignificant barrier to someone intent on punishing family members who have challenged his or her power and control.⁶⁹ Only the VAWA factors concerning the likelihood of the abuser travelling to the home country, the laws and social mores that would condone or ignore continued abuse,⁷⁰ and the existence of family members or others in the home country who would harm the VAWA applicant if she returns reflect the deadly consequences of deporting victims of domestic violence.

Amici urge the Board to adopt the flexible approach to VAWA extreme hardship articulated by INS. Allowing immigration judges to adopt a rigid and unsympathetic approach to victims of domestic violence will eradicate VAWA's promise.

B. Similar Principles of Flexibility and Redress Should Apply to Potential Legal Barriers to VAWA Applicants Posed by the INA's General Provisions

Congress has progressively attempted to exempt qualified immigrant victims of domestic violence from unintended barriers posed by the general provisions of the

cases); Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations* (Nat'l Council of Juv. and Fam. Ct. Judges, 1992).

⁶⁸ Thirty percent of all female homicide victims are killed by husbands. Federal Bureau of Investigation, *Uniform Crime Reports* 11 (1986).

⁶⁹ Abusers often go to great lengths to locate their victims. Browne, *When Battered Women Kill* 114 (1987); Family Violence Prevention Fund, *Domestic Violence in Civil Court Cases* (1992). Indeed, once the abuser leaves the jurisdiction of U.S. courts, existing orders of protection become unenforceable and the threat of civil action or criminal prosecution meaningless.

⁷⁰ See, e.g., *Matter of A and Z*, A72 190 893 & A72 793 219 (EOIR, Dec. 12, 1994)(noting that in Jordan it is considered "culturally unacceptable to highlight what is considered a private family matter, i.e., wife beating"); Heise, *Violence Against Women: The Hidden Health Burden*, 255 World Bank Discussion papers iii (World Bank, Washington, D.C. 1994)(Papua New Guinea Parliamentarian stated: "Wife beating is an accepted custom. . .we are wasting our time debating the issue.").

immigration law.⁷¹ It has not been able to anticipate all problems, but it has never rescinded a provision intended to help battered immigrants. Instead, its repeated and sequential acts exhibit commitment to helping battered immigrants escape abuse.

As the INS' approach to interpreting VAWA's extreme hardship requirement demonstrates, those administering the immigration laws need not await Congressional pronouncements on every aspect of immigration law that may harm battered immigrants. Instead, they should interpret all immigration law in a way that conforms with Congressional goals regarding immigrant victims of domestic violence.

Specifically, both INS and the EOIR should ensure that specific provisions of the law do not prevent otherwise qualified victims of domestic violence from gaining the status they need to escape abusive citizen and lawful permanent resident spouses. Moreover, immigration judges and INS officers should reject a rigid interpretation of the law if it fosters or condones manipulation of the system by citizen and lawful permanent residents as a weapon of abuse against their noncitizen family members. To comply with these tenets, immigration judges should evaluate the requirements of voluntary departure and the effect of criminal conduct on good moral character in the context of the dynamics of domestic violence.

- 1. Failure to Comply with a Voluntary Departure Order because of Domestic Violence Should Not Bar Consideration of Claims under VAWA**

When confronted with a VAWA suspension or cancellation applicant who has failed to comply with a voluntary departure order, immigration judges should ask

⁷¹ The battered spouse waiver, added by the Immigration Act of 1990, marked the first such attempt. This was followed in 1994 by the immigration provisions of the Violence Against Women Act and special exemptions and protections in IIRIRA.

whether the failure is directly related to the applicant's experience of domestic violence.

To determine this, a judge should ask two more specific questions:

- * Did the abuser interfere with oral or written notice?
- * Did the applicant fail to comply with the voluntary departure order because she was fleeing the abuser or was dealing with the consequences and effects of the abuser's actions?

As in the case before the Board, abusers typically control their victims' access to information.⁷² Unfortunately, when one party does not speak English well, law enforcement officers, including the INS officer in this case, may rely on the English-speaking spouse to convey information. When the English-speaking spouse is an abuser, the officer unwittingly affords a perpetrator a new and extraordinarily powerful weapon of abuse: now he may prevent her from getting status by failing to explain the consequences of failure to voluntarily depart.

This is what happened here. Because the officer could not provide adequate oral notice in Spanish, he gave the written notice to the abuser and relied on him to explain it to respondent. This act alone should fail the proper notice requirement. In a recent unpublished decision, this Board stated

We find that the Act contemplates official notice by an officer of the United States government. We do not consider an oral communication by the respondent's attorney to meet the requirements of the Act for formal notice of the consequences of failure to depart in a timely manner.⁷³

If oral notice provided by the respondent's attorney is insufficient, must notice provided by an abusive spouse be even more inadequate?

⁷² See discussion of extreme hardship and any credible evidence, above.

⁷³ *Matter of Hadam*, A26 590 203 (Feb. 19, 1999).

Even if the INS officer complied with his obligations, which is questionable, now that it is clear that the person to whom he entrusted the communication was using that information as a weapon of abuse, the Board should find that the notice requirements were not met. To do otherwise would give abusers the power over their victims' immigration status that Congress intended to eliminate. That this was exactly the abuser's intent is demonstrated by his actions: He reported his spouse to the border patrol, the proximate cause for his victim being placed in proceedings.⁷⁴

The context of the domestic violence experienced by respondent also should inform the exceptional circumstances analysis. Rather than dismissing the respondent's contention out of hand,⁷⁵ the immigration judge should have explained why the respondent's proffered exceptional circumstances did not meet the "totality of the circumstances" test enunciated by Congress.⁷⁶ Over and over again Congress has stated that domestic violence is of paramount societal concern and that, as required by *Matter of Shaar*,⁷⁷ noncitizens victimized by U.S. citizen or lawful permanent resident spouses or parents are "excepted" from the normal rules.

Domestic violence is a crime. For an immigration judge to find its consequences less compelling than illness or death of a relative evinces "the . . . attitude that this

⁷⁴ Immigration Judge decision at 11. Note that, if as suggested by the judge, the reason INS issued the notice to appear was because it "was aware of her illegal status ever since November of 1995", then why did it require a call from the abuser to set her proceedings in motion? Contrary to the judge's conclusion that IIRIRA § 384 is not implicated, since the notice was issued as a direct consequence of information provided by an abuser, INS should bear the burden of showing that it obtained "independent, corroborative information from an unrelated person before taking any action based on that information." Virtue memo, on section 384, *supra* note 44, at 3.

⁷⁵ The following statement embodies the Judge's complete evaluation of exceptional circumstances: "As in *Shaar*, the Respondent in the instant case has not demonstrated exceptional circumstances for her failure to voluntarily depart the United States." Decision at 17.

⁷⁶ H.R. Conf. Rep. No 955, 101st Cong., 2d Sess. 132 (1990), reprinted in 1990 U.S.C.C.A.N. 6784, 6898 ([T]he conferees expect that in determining whether an alien's failure to appear was justifiable the Attorney General will look at the totality of the circumstances to determine whether the alien could not reasonably have been expected to appear.")

violence is somehow less serious than other crimes. . .”⁷⁸ Congress strives to eliminate this attitude on the part of law enforcement personnel;⁷⁹ the Board should condemn and reform it when it colors immigration judge deliberations involving victims of domestic violence. Where, as here, domestic violence disfigures the normal voluntary departure presumptions, judges should allow reopening for consideration of the merits of a VAWA claim.

2. Criminal Convictions Arising Out of the Experience of Domestic Violence Should Not Undermine a Finding of Good Moral Character

Both VAWA self-petitioning⁸⁰ and VAWA cancellation⁸¹ require that the applicant demonstrate good moral character. The INS regulations on good moral character for self-petitioning note that, although convictions listed under INA § 101(f) preclude a finding of good moral character, extenuating circumstances may exist for those who were convicted for “unlawful acts that adversely reflect upon his or her moral character. . .although the acts do not require an automatic finding of lack of good moral character.”⁸²

The “extenuating circumstances” exception appears to be a corollary to the Board’s finding that admission to prostitution does not render a person inadmissible if “she was involuntarily reduced to such a state of mind that she was actually prevented from exercising free will through the use of wrongful, oppressive threats, or unlawful

⁷⁷ Matter of Shaar, Int. Dec. #3290 (BIA 1996)

⁷⁸ S. Rep. No. 103-138 at 38 (1993).

⁷⁹ *Id.*

⁸⁰ INA " 204(a)(1)(A)(iii) and (B)(ii) and (iii). A child of less than 14 years of age is presumed to be of good moral character and need not submit affidavits, police clearances or other evidence.

⁸¹ INA 240A(b)(2)(C).

⁸² 8 C.F.R. § 204.2(c)(1)(vii).

means.”⁸³ The regulations specifically state that “[a] person who was subjected to abuse in the form of forced prostitution or who can establish that he or she was forced to engage in other behavior that could render the person excludable under section 212(a) of the Act would not be precluded from being found to be a person of good moral character, provided the person has not been convicted for the commission of the offense or offenses in a court of law.”⁸⁴

Although extenuating circumstances may not overcome conviction for an offense that precludes a finding of good moral character, they should overcome convictions for lesser offenses, such as the offenses in this case. Minimally, a VAWA applicant with a lesser conviction should be allowed to demonstrate that she was forced or driven to engage in the behavior because of abuse.

Many victims of domestic violence, especially those who lack a command of the English language or of the U.S. legal system, are charged and convicted for crimes because their abusers are adept at manipulating the criminal justice system and law enforcement personnel. It is not uncommon for victims of abuse to be convicted for attempting to defend themselves against their abusers.⁸⁵ Criminal courts may take into account a defendant’s experience of abuse when evaluating responsibility and punishment for a crime.⁸⁶ Finally, some abused women resort to drug or alcohol use to lessen their physical and psychological pain, and may be caught up in the criminal justice

⁸³ Aleinikoff memo, *supra* note 44, at 11, *citing* Matter of M, 7 I&N Dec. 251 (BIA 1956).

⁸⁴ 8 C.F.R. § 204.2(c)(1)(vii).

⁸⁵ *See, e.g.*, Bowker, *Beating Wife-Beating* (1983); Richie, *Compelled to Crime: The Gender Entrapment of Battered Black Women* (1996); Thyfault, *Self Defence: Battered Woman Syndrome on Trial*, 20 Cal. Western L. Rev. 490 (1984).

⁸⁶ *See, e.g.*, *McMaugh v. State*, 612 A.2d 725 (R.I. 1992)(murder); *U.S. v. Gaviria*, 804 F. Supp. 476 (E.D.N.Y. 1992)(possession of cocaine); *State v. Lambert*, 173 W. Va. 60 (1984)(welfare fraud); *Hale v. State*, 453 S.W. 2d 424 (Tenn. App. 1969)(driving car for spouse committing crime).

system as a result.⁸⁷ In all of these situations, a VAWA applicant should be able to overcome the presumption of lack of good moral character by demonstrating the acts for which she was convicted flowed from her experience of domestic violence.

Amici also note that the Immigration Judge appears to assume that receiving Food Stamps for an eligible child is evidence of bad moral character. On the contrary, unless there is evidence of fraud, using such legal means to provide for her child helps prove her good moral character.⁸⁸ “Willful failure to support” her child, absent exceptional circumstances, would undermine her ability to show good moral character.⁸⁹

IV. The Immigration Judge’s Antagonism for Mandated Protections for Victims of Domestic Violence, His Flagrant Violations of the VAWA Flexible Evidentiary Standard and His Overt Bias against Victims of Domestic Violence Violate the Purpose and Goals of VAWA

The opinion below demonstrates that some immigration judges are unfamiliar with the dynamics of domestic violence. It is unfortunate that immigration judges are not trained in domestic violence, as are the VAWA self-petition adjudicators. Absent such training, it is incumbent on the Board to tutor judges in the proper approach to victims of domestic violence and their claims to relief from removal.⁹⁰

This immigration judge’s decision is replete with statements and conclusions that directly contradict the purpose of VAWA and other Congressional efforts to protect noncitizen victims of domestic violence. He repeatedly laments Congressionally mandated protections under IIRIRA § 384 against contamination of the court proceedings

⁸⁷ See Richie, *supra* note 85.

⁸⁸ Discussions between VAWA adjudicating staff at Vermont Service Center and the author during training sessions, St. Albans, Vermont, July 16, 1997 and December 3, 1997 (use of public benefits does not affect good moral character absent evidence of fraud).

⁸⁹ 8 C.F.R. § 204.2(c)(1)(vii).

⁹⁰ *Amici* have previously submitted several briefs in VAWA suspension cases, including an extensive brief on VAWA extreme hardship and proving extreme cruelty in the pending suspension appeal, Matter of Aguilar-Jimenez, A72-714-045, which the Board may wish to consult.

by the abuser,⁹¹ belittles the respondent and her evidence,⁹² and exhibits extreme ignorance of the dynamics of domestic violence and the Congressional intent of VAWA.⁹³ As noted above, the Judge consistently violates the “any credible evidence” standard.⁹⁴ Indeed, his statements taken together demonstrate the systemic hostility towards victims of domestic violence that Congress sought to eradicate by passing the Violence Against Women Act.⁹⁵

It is not possible for a victim of domestic violence to obtain a fair hearing in this environment, and the Board should not countenance such outrageous behavior on the part

⁹¹ *See, e.g.*, decision at 7; at 14 (“he cannot even be told the time, place, or existence of the proceeding. Violations of these rules result in fines; such fines result in a chilling effect upon all participants except the Respondent. .”); at 21 (“the Court is of the opinion that this ‘special rule’ and related provisions under the law and regulations impede the development of evidence concerning the good moral character of V2”)

⁹² Referring to the applicant as “V2”, for instance, is repugnant and reminiscent of the attitude towards victims of domestic violence that Congress wishes to squelch. *See also* decision at 9 (discounting expert testimony because the expert did not interview the abuser and intimating that no expert testimony that failed to interview the abuser would suffice, violating general requirements for experts and specific, wide-spread and widely accepted practice in domestic violence cases); at 10 (discarding articles by experts on domestic violence for frivolous reasons); at 15 (finding testimony of victim “incredible” with regard to lack of actual notice of consequences of failure to comply with voluntary departure and suggesting she be subjected to perjury proceedings)

⁹³ *See, e.g.*, decision at 7-8 (assumption that it is just a “disturbed relationship”); at 9-10 (ignorance about standard procedure for expert testimony on victims of domestic violence); at 12 (presumption that victim should have attempted to obtain documents from abuser, despite known danger); at 13 (describing as “pure fantasy” counsel and victim’s fear of reprisals by convicted abuser); at 22 (applying a “narrow interpretation” of extreme hardship, completely ignoring extreme hardship factors arising out of the context of domestic violence); at 25 (VAWA “does not provide for indiscriminate cancellation of removal and adjustment of status”); at 26 (equating abuser’s behavior with victim’s, misinterpreting “extreme cruelty” requirement, stating that both parties “are addicted to violence”).

⁹⁴ *See, e.g.*, decision at 9 (requiring “first-hand knowledge” for corroborating witness); at 9-10 (belittling expert testimony); at 10 (discarding articles by experts on domestic violence); at 11 (rejecting expert testimony because she “assumed an adversarial role in favor:” of the victim).

⁹⁵ *E.g.*, antagonism toward expert who fails to interview abuser and points out that the vast majority of abuser are men, a fact well-documented by law enforcement agencies, decision at 9-10, and alleging this expert has “an institutional ax to grind,” presumably the ax that Congress grinds in its efforts to punish perpetrators of domestic violence, decision at 11, and disregarding her testimony because she advocates for victims of domestic violence, *id*; suggestion that victim be subject to perjury proceedings for alleging she did not receive adequate notice of the consequences of failing to comply with voluntary departure notice, decision at 15; statement that section 384 “and related provisions” impede evidentiary development), at 21; and completely ignoring the intent of VAWA when exercising discretion against applicant, at 25; equating abuser’s and victim’s behaviors, stating they are both “addicted to violence” and that the evidence “reveals a deteriorating marriage and mutual antagonizing by both parties”), at 26.

of an immigration judge charged with ensuring victims of domestic violence receive the protection contemplated by VAWA.

Conclusion

The lives of battered women and children depend on the EOIR employing a thoughtful analysis of the meaning and purpose of VAWA and crafting an approach to its implementation that furthers Congressional intent. Contrary to the Judge's conclusion,⁹⁶ it is his analysis and decision that mock our laws. *Amici* urge the Board to take this opportunity to loudly affirm the EOIR's commitment to VAWA's purpose by repudiating the judge's antagonism and ignorance and by remanding for a fairly conducted hearing.⁹⁷

Amici further urge the Board to explicitly mandate that immigration judges consider the context of domestic violence when confronted with potential barriers to the remedial intent of Congress, apply the VAWA extreme hardship factors used by Vermont in adjudicating self-petitions, and articulate how and why the evidence proffered meets or fails to meet the "any credible evidence" standard. This would foster uniform application of VAWA to all eligible battered immigrants, regardless of how their abuser's actions have affected the posture of their applications. Most important of all, it would eradicate any vestige of the abuser's influence over the immigration process.

Respectfully submitted,

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⁹⁶ Immigration Judge decision at 25.

⁹⁷ Alternatively, *amici* urge the Board to review the record de novo and to grant VAWA cancellation.