

10-1058

IN THE

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ATALA DE JESUS LEIVA-MENDOZA

Petitioner,

v.

ERIC H. HOLDER, JR., UNITED STATES ATTORNEY GENERAL

Respondent.

Appeal from the Board of Immigration Appeals
Appeal No. A097-653-566

**MOTION OF NATIONAL NETWORK TO END VIOLENCE AGAINST
IMMIGRANT WOMEN, LEGAL MOMENTUM, THE FAMILY
VIOLENCE PREVENTION FUND AND ASISTA IMMIGRATION
ASSISTANCE PROJECT FOR LEAVE TO FILE AMICI CURIAE BRIEF
AND APPENDIX OF AUTHORITIES IN SUPPORT OF PETITIONER AND
REVERSAL**

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ASISTA Immigration Assistance Fund

**MOTION FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF AND
APPENDIX OF AUTHORITIES IN SUPPORT OF
PETITIONER AND REVERSAL**

The National Network to End Violence Against Immigrant Women (the “Network”) Legal Momentum, The Family Violence Prevention Fund, and ASISTA Immigration Assistance Project (collectively, the “Movants”) respectfully move pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure for leave to file an *amici curiae* brief (“*Amici* Brief”) and an appendix of authorities in support of petitioner Atala De Jesus Leiva-Mendoza (the “Petitioner”). Pursuant to Rule 29(b), the Movant’s proposed *Amici* Brief is being filed via overnight delivery service.

INTRODUCTION

The instant case centers around the Board of Immigration Appeals’ (“BIA”) affirmance of the immigration judge’s order denying the Petitioner’s petition (the “Petition”) seeking cancellation of an order of removal pursuant to the Violence Against Women Act (“VAWA”), which was sought on the grounds that the Petitioner’s U.S. citizen child was subjected to “extreme cruelty” by her father. There is no dispute in the record that Petitioner’s child was forced to witness multiple acts of domestic violence perpetrated by her father upon her non-citizen mother. Nevertheless, the immigration judge wrongly denied the Petition, holding that the child’s witnessing of such acts of brutality did not constitute “extreme cruelty” because there was no evidence of “actual” injury or harm to the child.

In affirming the immigration judge's denial of the Petition, the BIA applied the same incorrect legal standard that was utilized by the immigration judge. Specifically, the tribunals below erred because VAWA does not require proof of actual harm or injury as a prerequisite to a finding of extreme cruelty.

The primary goal of VAWA is the prevention of domestic violence. Here, the BIA's decision ignores this goal and the undisputed fact that acts of domestic violence occurred in this case. Instead, the BIA wrongly chose narrowly to focus its inquiry to the immediate extent of the damage caused by the domestic violence on its victim. Moreover, as set forth in the *Amici* Brief, the Court should hold that exposing a child to intentional acts of domestic violence perpetrated by one of her parents upon the other parent constitutes extreme cruelty as a matter of law.

Because of their substantial interest in, and experience with, issues involving violence against immigrant women and children, the Movants seek entry of an order of this Court authorizing them to file the *Amici* Brief. The Movants' brief should be allowed because it will assist this Court in understanding how and why the BIA's decision misapplies VAWA's legal standards and contradicts the legislative intent and social policies underlying VAWA, and ignores widely accepted social science research regarding domestic abuse.¹

¹ As set forth *infra*, this motion also seeks authority to file an appendix of authorities, which contains all of the social science research cited in the Movants' *Amici* Brief.

INTERESTS OF THE *AMICI CURIAE* IN THIS CASE

The Network is a coalition of domestic-violence survivors, immigrant women, advocates, activists, lawyers, educators and other professionals working together to end domestic abuse. The Network is co-chaired by The Immigrant Women Program of Legal Momentum, the Family Violence Prevention Fund, and the ASISTA Immigration Assistance Project. These leading national organizations – who participated in drafting the Federal Violence Against Women Act – share a deep understanding of domestic violence, the procedures for fighting it, and the particular dynamics of domestic violence experienced by immigrant victims.

ASISTA Immigration Assistance Project (“ASISTA”), founded in 2004, provides comprehensive, cutting-edge technical assistance regarding immigration and domestic violence. 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 the best practices for working with immigrant survivors of violence. ASISTA 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 the Network and DHS, ASISTA contributed a section on VAWA to EOIR’s 2005 training video for all immigration judges.

Legal Momentum is the nation’s oldest legal defense and education fund dedicated to advancing the rights of all women and girls. For 39 years, Legal Momentum has made historic contributions through public policy advocacy and litigation to secure personal and economic security for women. Its Immigrant Women Program (“IWP”) is a national expert on the rights and services available under immigration, family, public benefits, and language access laws for immigrant victims of domestic violence, sexual assault, human trafficking and other violence. IWP shares this expertise through training, comprehensive publications, and technical assistance for lawyers, advocates, justice, and health care professionals nationwide. As co-chair of the Network, Legal Momentum led the efforts to craft and assist in implementation of the immigration protections in the Violence Against Women Acts of 1994, 2000 and 2005, the Trafficking Victims Protection Acts of 2000 and 2008 and other federal laws including public benefits access for immigrant victims and access to federally supported services necessary to protect life and safety.

The Family Violence Prevention Fund (“FVPF”) is a non-profit tax exempt organization founded in 1980. The FVPF is a national organization based in San

Francisco. It focuses on domestic violence education, prevention and public policy reform. Throughout its history, the FVPF has pioneered prevention strategies for justice, public education, and health care. The FVPF's Battered Women's Rights Project expands access to legal assistance and culturally appropriate services for all women, including battered immigrant women. The FVPF was instrumental in developing the 1994 VAWA 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.

The Movants have appeared often as *amici curiae* in matters involving interpretation of VAWA and its amendments. *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 Movants have unparalleled experience in a myriad of issues involving violence against immigrant women and children and a longstanding interest in the BIA's interpretation and application of VAWA.

The Movants are interested in the Petitioner's case because it has grave concerns about the decisions below because they improperly create a non-statutory requirement that a non-citizen seeking VAWA cancellation of an order of removal on the grounds of "extreme cruelty" directed at the non-citizen's lawful

resident child, must establish that the child suffered *actual* harm or injury as a result of the alleged abusive conduct. This incorrect legal standard improperly shifts the focus of VAWA and its progeny away from preventing abusive behavior to simply addressing the after effects of such abuse, and only then, limiting relief to those cases where there is evidence of actual harm or injury. The decisions below subvert the purpose of VAWA by completely ignoring the well-established premise that the effects of psychological abuse often do not manifest until a substantial period of time has elapsed. The tribunals below also ignore the generational harm to our society and children that Congress sought to address because children who witness abuse are more likely to become abusers themselves.

Additionally, the regulations under the VAWA recognize that certain types of behavior mandate a finding of “extreme cruelty.” The Movants believe that the psychological abuse associated with a child witnessing intentional acts of domestic abuse perpetrated by one parent upon the other parent, regardless as to proof of actual harm or injury, mandates a determination of “extremely cruelty” as a matter of law.

The Movants also seek authority to file an appendix containing the social research authorities cited in their *Amici* Brief. Many of these authorities may not be readily available on LEXIS or WestLaw, and Movants believe that providing such authorities in a single bound appendix would conserve judicial resources and be

convenient to both the Court and the parties to this appeal.

LEGAL STANDARD

This Court has broad discretion to grant leave to file an *amicus* brief. *Amicus* briefs can assist the Court with insights on “legal issues that have potential ramifications beyond the parties directly involved.” *NGV Gaming LTD. v. Upstream Point Molate, LLC*, 355 F.Supp.2d 1061, 1067 (N.D. Cal. 2005). This is especially so when the *amicus* has “unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

DESCRIPTION OF THE AMICI BRIEF

The decision below by the BIA has vitiated the statutory protection for non-citizens whose children have been subject to “extreme cruelty” by a parent who is a lawful resident of the United States. By assisting the court with its unique and substantial expertise on VAWA and the “extreme cruelty” provision, an *amici* brief by the Movants would be highly relevant to deciding Petitioner’s appeal.

An *Amici* Brief by the Movants can provide context for the VAWA and its legislative history. As a non-party expert in the broader issues involving battered immigrant women and the VAWA, the Movants can assist the Court’s understanding both of the underlying problem of domestic violence and the laws

recently designed to address it. In particular, the Movants can provide the Court its expertise on the VAWA provision cancelling removal for immigrant women whose U.S. citizen children have been “subjected to extreme cruelty” by a citizen or permanent resident spouse.

The Movants’ *Amici* Brief explains how “extreme cruelty” under VAWA does not require evidence of actual injury or harm to the child in order to qualify for cancellation of removal. VAWA does not require that acts of extreme cruelty occur any specific number of times, or even more than once. The *Amici* Brief also shows that Congress intended to define “extreme cruelty” as encompassing physical, psychological, and emotional abuse.

The Movants’ *Amici* Brief also outlines the social science research regarding the cycle of violence that is often present when children witness domestic abuse by one parent against the other, and how physical evidence of harm to the children as a result of the psychological abuse incurred as a result of witnessing such heinous activity may not manifest until years after witnessing such acts of brutality. Congress never intended such victims to be forgotten just because by happenstance such physical evidence has not yet occurred. Familiarizing the Court with studies regarding these issues will aid the Court’s understanding of how the abuser’s behavior fits into an “overall pattern of violence,” which qualifies as “extreme cruelty” under the immigration statute and its regulations.

The Movants' analysis, insight, and unique deep understanding of these critical issues will aid the Court, without causing any undue hardship on or inequity to the Petitioner or Respondent.

Finally, the Movants' appendix of authorities contains copies of all of the social science research cited in their *Amici* Brief. Since such material may not be readily obtained from LEXIS or WestLaw, the Movants believe that providing an appendix containing such authority will conserve judicial resources and be convenient to the Court and the parties.

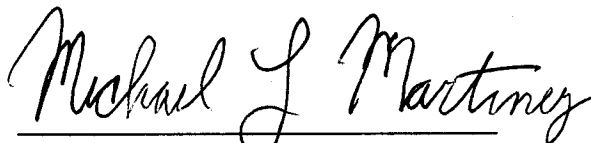
CONCLUSION

For the foregoing reasons, the Movants' motion for leave to file an *amici*

curiae brief and appendix of authorities cited therein on behalf of the Movants should be granted.

Dated: August 13, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE AND FILING

I, Bruce J. Zabarauskas, declare under penalty of perjury that I am an attorney in the office of Crowell & Moring LLP, that on August 13, 2010, the prefixed Motion of National Network To End Violence Against Immigrant Women, Legal Momentum, the Family Violence Prevention Fund and ASISTA Immigration Assistance Project For Leave To File Amici Curiae Brief And Appendix Of Authorities In Support Of Petitioner And Reversal was electronically filed with the Clerk of the Court of the Eighth Circuit Court of Appeals (the "Motion") and two copies of the Motion, and a Certificate of Service and Filing were dispatched to Federal Express for overnight delivery to the persons named below at each of the addresses stated below:

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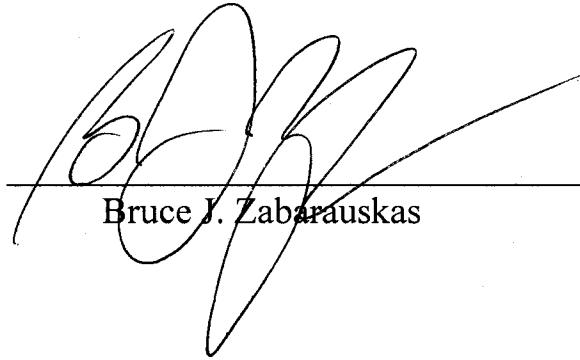
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Dated: August 13, 2010



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