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**UNITED STATES DEPARTMENT OF JUSTICE**

**EXECUTIVE OFFICE OF IMMIGRATION REVIEW**

**LOS ANGELES, CALIFORNIA**

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| --- | --- |
| IN THE MATTER OF:  XXX  Respondent | Removing Proceedings  File number: A 000 000 000 |

Immigration Judge XXX

Merits Hearing date: mm/dd/yyyy

**RESPONDENT’S Trial Brief**

**In the Matter of XXX, A 000 000 000**

**PRELIMINARY STATEMENT**

At Respondent’s last master calendar hearing on mm/dd/yyyy, the Court found that since Ms. XXX’s minor daughter, XXX (A000 000 000) was not a U.S. citizen or permanent resident, Ms. XXX is not eligible for relief for VAWA Cancellation of Removal. The Court directed the Respondent to prepare for the Merits Hearing on mm/dd/yyyy.

Furthermore, on mm/dd/yyyy, the Attorney General delivered the decision in *Matter of A-B-,[[1]](#footnote-1)* which expressly overruled *Matter of A-R-C-G* because he found the latter had failed to correctly apply the standards to determine whether the persecution was based on membership in a “particular social group.”[[2]](#footnote-2) In light of these developments, the Respondent, through undersigned counsel, submits this brief in support of her eligibility for under INA §240A(b)(2) as the parent of an abused child of a Lawful Permanent Resident.

**ISSUES PRESENTED**

1. Whether a noncitizen parent's application for special rule cancelation under VAWA based upon extreme cruelty to the applicant's child must be denied when the abused child is not a citizen or lawful permanent resident of the United States?

2. Whether "extreme cruelty" under VAWA requires evidence of "actual harm" to the child of a noncitizen parent facing deportation?

3. Whether the psychological abuse associated with a child witnessing intentional acts of domestic violence perpetrated by her father against his noncitizen girlfriend constitutes "extreme cruelty" under VAWA as a matter of law?

4. Whether the Attorney General’s ruling in the *Matter of A-B-* has foreclosed the possibility for victims of domestic violence to obtain asylum in the United States?

5. Whether the respondent and her daughter remain eligible for asylum under the “one-year rule”?

**ARGUMENTS**

As the Respondent will demonstrate, through her own testimony and testimonies of her family members, that her child, who is the daughter of a Lawful Permanent Resident, witnessed physical violence intentionally committed in her presence by her permanent resident father in her presence. Moreover, the Respondent will show, through the testimonies, that she was constantly beaten physically during the pregnancy of her daughter XXX, while the abuser frequently smoked crack cocaine in her presence within close proximity. The Respondent was forced to stay with the abuser until her daughter XXX was two years old. On one occasion, the Respondent was told by a medical professional in Progresso Yoro, Honduras that her daughter XXX’s congenital heart condition was likely caused by the violence and heavy drug use by XXX’s LPR father. Furthermore, the fact that the abuser has ignored pleas from his daughter for help with her immigration status, knowing that XXX has a life-threatening heart condition, is also indicative of his indifference and cruelty toward his daughter.

The VAWA cancellation provisions were specifically designed to, inter alia, protect from deportation, unmarried noncitizens whose children have been "battered or subjected to extreme cruelty" by a permanent resident parent. The statutory language does not require the abused child to be a U.S. citizen or a lawful permanent resident. Under VAWA, a noncitizen facing deportation may obtain special cancellation under VAWA of an order of removal ("VAWA Cancellation") by establishing that: (i) the noncitizen is the parent of **a child of an alien** who is or was a lawful permanent resident and the child has been battered or subjected to "extreme cruelty" by such permanent resident parent; (ii) the noncitizen has been continuously in the United States for a period of three years prior to the filing of their application; (iii) the noncitizen is a person of good moral character; (iv) the noncitizen is not subject to deportment under INA § 212(a)(2) or (3) or INA § 237(a)(I)(G) or (2) through (4); and (v) removal of the noncitizen would result in extreme hardship to the noncitizen or her child. INA § 240A(b)(2)(A). [Emphasis added.]

**1. NONCITIZEN PARENTS OF CHILDREN WHO HAVE BEEN**

**SUBJECTED TO EXTREME CRUELTY BY THEIR**

**U.S. RESIDENT PARENT REMAIN ELIGIBLE FOR VAWA CANCELLATION**

**REGARDLESS OF THE IMMIGRATION STATUS OF THEIR CHILDREN**

"Congress expresses its intent with the language that it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433, n. 12 (1987). Thus, the first step in interpreting a statute is to look at the express language enacted by Congress. Where the language of a statute is unambiguous, the Court is required to enforce the statute as enacted by Congress.

A request for VAWA Cancellation may be brought by a parent of a child of a lawful permanent resident where the child "has been" battered or subjected to extreme cruelty by such permanent resident parent.” INA § 240A(b)(2)(A)(i)(II).

The express language of the statute does not preclude the parent of a child who is not a U.S. citizen or lawful permanent resident. Specifically, the statute is written in the past tense. All it requires is that the applicant is the parent of a child who "has been" battered or subjected to extreme cruelty. Thus, the statute is clear that eligibility is based upon actions that have occurred in the past (i.e., previously battered or previously subjected to extreme cruelty). There is no language in the statute which even suggests that the immigration status of the child is relevant to the parent’s eligibility for VAWA Cancellation.

In contrast, the statutory language for the general Cancellation of Removal relief for certain nonpermanent residents expressly states that the applicant must “establish exceptional and extremely unusual hardship” to the alien’s immediate family members who are either U.S. citizens or lawful permanent residents. INA § 240A(b)(1)(D). Therefore, had Congress intended to include the abused child’s immigration status as a statutory requirement, it would have expressly stated in INA §240A(b)(2)(A). The fact that Congress specific added the qualifying relative’s immigration status as a legal requirement for relief under §240A(b)(1), but left the same requirement out of §240A(b)(2), suggests that it was never the intent of Congress to add the limiting language to a “clear and unambiguous statute.”[[3]](#footnote-3)

The Ninth Circuit has found that VAWA is a “generous enactment, intended to ameliorate the impact of harsh provisions of immigration law on abused women. Thus, this interpretation also adheres to “the general rule of construction that when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion... This is particularly so in the immigration context where doubts are to be resolved in favor of the alien.”[[4]](#footnote-4) In an unpublished decision, the BIA reversed the decision of the Immigration Judge and granted VAWA Cancellation relief to the alien parent of an abused child who died before the resolution of the alien parent’s §240A(b)(2) application.[[5]](#footnote-5) In the same vein, if the death of the abused child did not affect the parent’s eligibility for VAWA Cancellation, neither should the child’s immigration status be a limiting factor in the same context.

Furthermore, the express language of §240A(b)(4), under the heading “children of battered aliens and parents of battered alien children,” clearly states that the Attorney General “shall grant parole under section 212(d)(5) to any alien who is **a parent of a child alien** granted relief under 240A(b)(2).[[6]](#footnote-6) [Emphasis added.] Thus, the plain language of 240A(b)(4) provides the Attorney General with parole authority on the basis of humanitarian and public benefit grounds to allow the parent of an abused alien child to remain legally in the U.S. until the time that her status can be adjusted to that of a lawful permanent resident.[[7]](#footnote-7) §240A(b)(4) goes on to say that “applications for adjustment of status filed by aliens covered under this paragraph shall be treated as if the applicants were VAWA self-petitioners.”[[8]](#footnote-8)

**2. VAWA CANCELLATION DOES NOT REQUIRE ACTUAL, PHYSICAL**

**ABUSE HAVING OCCURRED IN THE UNITED STATES**

The Ninth Circuit court has ruled that the parent of an abused child of an LPR, even if not married to the abuser, may make a claim under §240A(b)(2) based on the abuse to the child by the LPR parent **that had occurred in the past**.[[9]](#footnote-9) [Emphasis added.] The Ninth Circuit emphasized Congress’ use of the past tense in §240A(b)(2) and rejected the government’s argument that future events can result in the denial of an application for VAWA Cancellation.

Additionally, Congress intended VAWA to be broadly construed for the purpose of providing humanitarian relief to battered women and children.[[10]](#footnote-10) In *Hernandez v. Ashcroft*, the Ninth Circuit addressed the issue of extreme cruelty in the context of domestic violence. The *Hernandez* court reviewed incidents of physical violence in Mexico, and found that non-physical actions in the U.S., coupled with egregious episodes of physical violence in Mexico, was sufficient to meet the definition of “extreme cruelty.”[[11]](#footnote-11) Furthermore, the Ninth Circuit found that it was not necessary to prove that the victim had lived with the abuser in the United States.[[12]](#footnote-12) The Ninth Circuit found that the notion of requiring the victim to establish physical cohabitation with the abuser in the United States is “flatly contrary to Congress’s articulated purpose in enacting section 244(a)(3),” because the VAWA statute was enacted to permit abused victims to leave their batterers without the fear of deportation.[[13]](#footnote-13)

In an unpublished decision, the Board of Immigration Appeals (“BIA”) held that observing the physical abuse of the female respondent had “subjected her daughter to extreme cruelty.”[[14]](#footnote-14) The BIA found that the child’s nightmares, flashbacks, and fear related to the physical abuse of her mother were sufficient to establish extreme cruelty for VAWA Suspension of Deportation under §244(a)(3) of the Act.[[15]](#footnote-15)

In the instant case, as the respondent will establish, that her daughter XXX has been subjected to extreme cruelty by her LPR father based on the domestic violence and extensive drug use he exposed her too while she lived with him. Under the express language of the statute and the decision in *Lopez-Birrueta*, XXX remains eligible for VAWA Cancellation because she is a noncitizen parent of a child who had been previously subjected to extreme cruelty by her resident father. Indeed, a decision to the contrary would mean that pure happenstance as to the legal status of the abused child could affect a respondent's application for VAWA Cancellation. The spirit of the VAWA statute-providing humanitarian relief for battered women and children would be wholly subverted if VAWA Cancellation is automatically denied to those who need such humanitarian aid the most-the noncitizen parents of abused undocumented children. Indeed, in the most extreme circumstance, the denial of a child’s immigration status by the abusive LPR or U.S. citizen parent could become a weapon for the vengeful abuser to ensure the removal of the noncitizen parent from the U.S. Such draconian result could not have been the intent of Congress behind the enactment of INA §240A(b)(2).

**3. THE MATTER OF A-B- OVERRULED MATTER OF A-R-C-G- BUT ASYLUM**

**FUNDAMENTALS REMAINS STRONG AND INTACT**

On June 11, 2018, Atty. Gen. Sessions issued a precedential decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018). This decision overrules a prior BIA decision, *Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014), which held that in some circumstances, domestic violence survivors could receive asylum protection. While the language used by the Atty. Gen. in *A-B-* attacks asylum claims involving harm by non-state actors, and gives the impression that these claims are foreclosed, nearly all of the damaging language is dicta. The Refugee Convention, the Immigration and Nationality Act, and established case law at the Courts of Appeals and the BIA continued to support a claim of asylum based on domestic violence.

The Attorney Gen. found that the Board in *Matter of A-R-C-G-* failed to follow the necessary analysis established by the BIA’s two earlier decisions, *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) and *Matter of W-G-R-*, 26 I&N Dec. 20 (BIA 2014). In *M-E-V-G-*, the BIA clarified that social visibility does not mean literal visibility, but instead refers to whether the Particular Social Group (“PSG”) is recognized within society as a distinct entity.[[16]](#footnote-16) The BIA thus renamed the “social visibility” requirement “social distinction.” *Matter of A-B-* eliminated *A-R-C-G-* as a precedential decision, but it does not create any new asylum standards, nor does it say that the group identified in *A-R-C-G-* can never be viable. The Attorney General (“AG”) asserts in *A-B-* that he is overruling *A-R-C-G-* because of the manner in which the BIA reached its decision. The AG otherwise merely restates the Board’s case law regarding the PSG definition and other asylum elements.

In the Ninth Circuit, the precedential decision on the issue of PSG is *Perdomo v. Holder,* in which the court ruled that the BIA had erred in finding that an asylum applicant failed to establish membership in a “particular social group” under the Immigration and Nationality Act when she defined the social group as “all Guatemalan women.” In *Perdomo*, the Ninth Circuit rejected a narrow interpretation of “particular social group” and called for an expansive definition that would accommodate a group defined exclusively by gender.[[17]](#footnote-17) Perdomo presented the case of Lesley Perdomo, a Guatemalan woman who faced deportation after living continuously in the United States since 1991.[[18]](#footnote-18) In response to a removal order, Perdomo requested asylum based on her fear of persecution as a member of the “particular social group” of “all women in Guatemala,” relying on the high incidence of murder of women in Guatemala.[[19]](#footnote-19) Perdomo presented various reports describing these “femicides,” including documentation of their brutality, their prevalence, and the Guatemalan government’s lack of responsiveness.[[20]](#footnote-20) The immigration judge denied her application, and the BIA affirmed on the grounds that she had failed to prove that she was a member of a “particular social group” under the Immigration and Nationality Act.[[21]](#footnote-21)

On appeal, the Ninth Circuit rejected the BIA’s reasoning and remanded the case for a determination of whether the group “all women in Guatemala” constitutes a “particular social group.”[[22]](#footnote-22) In remanding the case, the Ninth Circuit advocated for an expansive definition of “particular social group,” which would include groups characterized by gender alone.[[23]](#footnote-23)

The Ninth Circuit provided three reasons for its support for an expansive definition of gender as a PSG. First, the Ninth Circuit found that the BIA’s holding in *Perdomo* was in opposition to the Board’s own precedent in the 1985 decision in *Matter of Acosta*, the Ninth Circuit implied that the BIA’s definition of “particular social group” in *Acosta* should be read expansively.[[24]](#footnote-24) Second, the court pointed to its own decisions as presenting a trend towards explicitly recognizing groups unified solely by gender as “particular social groups.”[[25]](#footnote-25) Third, the court expressly rejected the notion that a group may not constitute a “particular social group” merely because all of its group members may qualify for asylum.[[26]](#footnote-26) Citing its previous decision, *Singh v. INS*, the Ninth Circuit held that the fear of inundating immigration courts with asylum claims should not be an issue of central concern in deciding whether a group qualifies as a “particular social group.”[[27]](#footnote-27)

Applying the Ninth Circuit’s holding in *Perdomo*, Ms. XXX remains eligible for asylum relief as a member of a PSG. The following is a list of possible PSGs that the Respondent may be able to demonstrate under the reasoning of *Perdomo*:

(1) Honduran women who are treated as property and held against their will by the abuser;

(2) Honduran women and girls from a lower social, economic class;

(3) All Honduran women.

In *Henriquez-Rivas v. Holder,* 707 F.3d 1081 (9th Cir. 2013), the Ninth Circuit held that the “social visibility” requirement for establishing membership in a particular social group does not require “on-sight” or ocular visibility.[[28]](#footnote-28) Furthermore, the *Henriquez* court found that the perception of the persecutor may matter the most in establishing the nexus between the persecution and the protected ground.[[29]](#footnote-29) In the present case, the Respondent will demonstrate through the testimony of witnesses that she was held captive by the persecutor for several years, during which her freedom was restricted while being subjected to physical and sexual violence on a regular basis. Respondent believes she was persecuted precisely because of her persecutors, namely the father of her daughter and his siblings, considered her as their personal property. The Ninth Circuit court found that the perception on the part of the persecutors that recognized the existence of the social group is relevant to the PSG analysis.[[30]](#footnote-30)

**4. THE RESPONDENT’S SEVERE POST-TRAUMATIC DISTRESS IN THE INITIAL YEARS OF HER ARRIVAL IS AN EXTRAORDINARY CIRCUMSTANCE THAT EXCUSES HER FROM THE ONE-YEAR FILING DEADLINE**

The Respondent intends to show that her mental condition in the years after she escaped her captivity in Honduras constitute as “extraordinary circumstances” under 8 CFR § 1208.4(a)(5)(iv), which enumerates “serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past” as a possible extraordinary circumstance that excuses her from the one-year filing deadline. The Respondent will provide a mental evaluation report from the Program for Torture Victims, a nonprofit organization providing free mental and physical evaluation to torture victims, to establish that her mental condition meets the satisfaction of the Attorney General, as required by the statute.[[31]](#footnote-31) The “to the satisfaction of the Attorney General” standard has been interpreted as "credible evidence sufficiently persuasive to satisfy the Attorney General in the exercise of his reasonable judgment, considering the proof fairly and impartially.”[[32]](#footnote-32)

Respectfully submitted,

Daniel T. Huang

Attorney at Law

**In the Matter of XXX, A** 000 000 000

**CERTIFICATE OF SERVICE**

I, Daniel T. Huang, hereby certify that on September 14, 2018, I served a true and correct copy of the respondent’s Trial Brief via certified U.S. mail service to:

Date: September 14, 2018

ICE Office of the Chief Counsel

606 S. Olive Street, 8th Flr.

Los Angeles, CA 90014

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Daniel T. Huang

1. *Matter of A-B-,* 27 I&N Dec. 316 (A.G. 2018). [↑](#footnote-ref-1)
2. INA §§101(a)(42)(A), 208(b)(1)(a), (b)(i). [↑](#footnote-ref-2)
3. *Hernandez v. Ashcroft*, 345 F.3d 824, 841 (9th Cir. 2003). [↑](#footnote-ref-3)
4. *Hernandez*, at 840, citing *United States v. Sanchez–Guzman*, 744 F. Supp. 997, 1002 (E.D.Wash.1990) and *Matter of Vizcaino*, 19 I. & N. Dec. 644, 648 (BIA 1988). [↑](#footnote-ref-4)
5. See Exhibit 2, unpublished BIA decision granting VAWA Cancellation after death of abused child. [↑](#footnote-ref-5)
6. INA §240A(b)(4)(A)(ii). [↑](#footnote-ref-6)
7. INA §240A(b)(4)(B). [↑](#footnote-ref-7)
8. Id. [↑](#footnote-ref-8)
9. *Lopez-Birrueta v. Holder*, 2011 U.S. App. 2820 (9th Cir. Jan. 13, 2011) [↑](#footnote-ref-9)
10. *Hernandez, supra, at* 840. [↑](#footnote-ref-10)
11. Id. [↑](#footnote-ref-11)
12. *Hernandez* at 841. [↑](#footnote-ref-12)
13. *Hernandez*, id., citing H.R. REP. NO. 103–395, at 25 (stating that the goal of the bill is to “permit[ ] battered immigrant women to leave their batterers without fearing deportation”). [↑](#footnote-ref-13)
14. Exhibit 1, unpublished BIA decision from Nov. 29, 2001 at page 2. [↑](#footnote-ref-14)
15. Id. [↑](#footnote-ref-15)
16. 26 I&N Dec. at 240-241. [↑](#footnote-ref-16)
17. *Perdomo v. Holder,* 611 F.3d 662, 663, 666-69 (9th Cir. 2010). [↑](#footnote-ref-17)
18. *Id*. at 664. [↑](#footnote-ref-18)
19. *Perdomo*, 611 F.3d. at 664. [↑](#footnote-ref-19)
20. *Id.* [↑](#footnote-ref-20)
21. *Perdomo*, ever 611 F.3d. at 665. [↑](#footnote-ref-21)
22. Id., at 669. [↑](#footnote-ref-22)
23. Id., at 665-69. [↑](#footnote-ref-23)
24. Id. at 669 (citing *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985)). [↑](#footnote-ref-24)
25. See *Perdomo*, 611 F.3d at 666-67. [↑](#footnote-ref-25)
26. Id. at 669. [↑](#footnote-ref-26)
27. *Id.*  [↑](#footnote-ref-27)
28. *Henriquez-Rivas v. Holder*, at 1083. [↑](#footnote-ref-28)
29. *Id.* at 1089. [↑](#footnote-ref-29)
30. *Henriquez*, at 1089, citing *Sanchez-Trujillo v. INS*, 801 F.2d. at 1571 (9th Cir. 1986). [↑](#footnote-ref-30)
31. INA §208(a)(2)(D). [↑](#footnote-ref-31)
32. *See Matter of Bufalino*, 12 I&N Dec. 277, 282 (BIA 1967). [↑](#footnote-ref-32)