

Violence Against Women Act (VAWA) Board of Immigration Appeals Adjudications: A Call for Consistency and for Adjudications That Reflect VAWA's Legislative Purpose and the Courts Best Practices in the Handling of Domestic Violence Adjudications

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Introduction:

The National Immigrant Women's Advocacy Project completed a national review of Violence Against Women Act (VAWA) cancellation of removal and suspension of deportation cases that have been decided by the Board of Immigration Appeals (BIA) between 1994 and 2012. Our goal was to learn the extent to which Judges at the Board of Immigration Appeals issue rulings that reflect an understanding of the dynamics of domestic violence (battering or extreme cruelty)² experienced by immigrant victims of spouse and child abuse who are married to or the child of U.S. citizens or lawful permanent residents. The review included collecting:

- Cases in which BIA issued a written decision³
- Cases in which BIA affirmed without opinion the immigration judges ruling
- Cases that following the BIA ruling were appealed to the federal circuits courts.

The Domestic Violence Context

People who are unfamiliar with victims' reactions to domestic violence may be inclined to discredit what are actually common responses to it. They may not understand the reasons for which a domestic violence victim chooses to remain in or return to an abusive relationship, to leave her children with the abusive partner, to refuse to press criminal charges against the abuser, or to fail to tell anyone about the abuse.⁴ Strangers to the dynamics of relationships involving domestic abuse often will refuse

¹ The authors are grateful for the assistance of pro bono attorneys from Crowell and Moring without whose assistance this review would not have been possible, as well as Mojisola Ahonsi.

² See 8 C.F.R. § 204.2(c)(1)(vi) (see definition *infra* note 14); See also INA section 204(a)(1)(A)(iii)(bb); 204(a)(1)(A)(iv); 204(a)(1)(A)(vii)(V); 204(a)(1)(B)(ii)(I)(bb); 204(a)(1)(b)(iii); 216(c)(4)(C); 244(a)(3)(as in effect on March 31, 1997); 240A(b)(2). See EVANGELINE ABRIEL & SALLY KINOSHITA, THE VAWA MANUAL: IMMIGRATION RELIEF FOR ABUSED IMMIGRANTS 3-19 (5th ed. 2008) (citing Aleinkoff, Executive Associate Commissioner, Office of Programs, INS Mem/HQ 204-P, April 16, 1996, at 9-10 "There is no exhaustive list of acts that constitute "battery or extreme cruelty," and the definition of battery provided in the regulations is a flexible one that should be applied to claims of extreme cruelty as well as to claims of physical abuse").

³ We collected published opinions and unpublished rulings in individual cases involving VAWA cancellation or suspension applicants.

⁴ See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Women's Syndrome*, 21 Hofstra L. Rev. 1191, 1195 & n.16 (1993) (hereinafter Dutton, *Understanding Women's Responses to Domestic Violence*).

to credit a battered woman's belief that she is in imminent danger because she does not flee the situation.⁵

Other common misperceptions result from a lack of understanding of the cycle of domestic violence. Domestic violence results from an abusive partner's need to exercise power and control over his mate and has been described as a "pattern of interaction" comprised of physical, sexual and psychological elements.⁶ When such a pattern of violence develops within a domestic relationship, it may not be necessary for the abuser to resort to violence to control his victim. A single violent incident in the past often remains a strong enough threat to effectively control the victim and gain her continuing obedience. When the victim shows signs of resistance, the abuser merely resorts to violence to reestablish control. In this manner, a pattern of interactions changes the dynamics of the relationship. The victim comes to recognize certain non-violent cues as predictors of violence, and the "meaning of the communication extends far beyond what is being said or done in the moment."⁷

In passing the Violence Against Women Act and including immigration protections in it, Congress sought to create a mechanism through which U.S. immigration laws could offer help to immigrant victims of domestic violence, sexual assault, human trafficking, and other crimes. Spousal abuse consists of chronic violence and is characterized by persistent intimidation and repeated physical and psychological harm. Absent intervention, it is almost guaranteed that the same woman will be assaulted over and over by her mate.⁸ Studies indicate that the repeated violence escalates in severity over time and knowledge of this fact is the foremost reason women stay with their batterers.⁹

History and Purpose of the VAWA Immigration Laws

Through the Battered Spouse Waiver: Congress Defines Domestic Violence Under U.S. Immigration Laws as "Battering or Extreme Cruelty"

The first form of immigration protection developed to help remedy the problem of domestic violence perpetrated against immigrant spouses and children of U.S. citizens and lawful permanent residents was the battered spouse waiver, which was created in 1990. In 1986, Congress passed the Immigration Marriage Fraud Amendments Act (IMFA),¹⁰ which added a new section to the Immigration and Nationality Act creating a two-year conditional residency period during which immigrant spouses are required to remain married to their U.S. citizen or lawful permanent resident spouses.¹¹ This two-year residency requirement was imposed on all spousal petitions for lawful permanent residency, if the couple had been married for less than two years on the date the couple attended its lawful permanent residency interview.¹² This new section requires that both husband and wife file a joint petition to have the condition removed, and for the immigrant spouse to be granted full lawful permanent residency,

⁵ See *Domestic Violence & Immigration: Applying the Immigration Provisions of the Violence Against Women Act (A Training Manual for Attorneys and Advocates)*, Appendix C: Expert Testimony Concerning Battering, at 4 ("[I]t is extremely important that decision makers in domestic violence cases do not interpret failure to leave an abuser sooner as evidence that suggests that the abuse was not occurring. In fact, often the contrary is true").

⁶ See Letter from Nawal Ammar, et al., to Hon. Lamar Smith (R-TX) and Hon. John Conyers, Jr. (D-MI), *Revisions in HR 4970 are detrimental to provisions in VAWA* (May 31, 2012) (on file with author) (attached to this memo).

⁷ See Mary Ann Dutton, *The Dynamics of Domestic Violence: Understanding the Response from Battered Women*, 68 Fla. B.J. 24, 24 (Oct. 1994) ("[B]oth parties [come to] understand the meaning of specific actions and words within the continually changing context that includes a history of violence or abuse and the resultant physical injuries and psychological, social, and economic consequences of it.") (hereinafter Dutton, *The Dynamics of Domestic Violence*); Dutton, *Understanding Women's Responses to Domestic Violence*, *supra* note 26, at 1208-09 (describing possible patterns of violence and abuse).

⁸ See S. Rep. No. 545, 101st Cong., 2d Sess., 36 (1990)

⁹ See Ammar, *supra* note 6 at 2. See also B. E. Carlson, *Battered Women and Their Assaultants*, 22 Soc. Work 455 (1997).

¹⁰ Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended at 8 U.S.C. § 1186a.)

¹¹ Andorra Bruno and Andrea Siskin, *Immigration: Noncitizen Victims of Family Violence* CRS 2 (Congressional Research Service, May 3, 2001);

¹² INA § 216(a)(1), 8 U.S.C. § 1186a(a)(1) (1986); INA § 216(g)(1), 8 U.S.C. § 1186a(g)(1).

within ninety days before the end of the two-year period.¹³ These new IMFA requirements had unintended negative consequences for immigrant spouses and their children who were victims of family violence.¹⁴ Although IMFA contained waivers of the joint petitioning requirement, evidence of battery or extreme cruelty was not enough to obtain a waiver of the joint filing requirements.¹⁵ The House Judiciary issued a 1990 report describing the harm to immigrant domestic violence victims that resulted from the inadequacy of the IMFA waivers—

“The terms of the statute do not make it sufficiently clear that an abused spouse who has entered a marriage in good faith will be granted the waiver either on the basis of ‘extreme hardship’ or termination of the marriage for ‘good cause.’”¹⁶

The Battered Spouse Waiver was enacted as part of the Immigration Act of 1990 so that battered immigrant spouses and abused immigrant children would no longer be trapped in abusive marriages and could leave them without forfeiting access to status offered by lawful permanent residency.¹⁷ An abused immigrant spouse or child could be granted a battered spouse waiver upon submission of proof that the immigrant spouse had entered the marriage in good faith and that “during the marriage the alien spouse or child was battered by or was the subject of extreme cruelty perpetrated by” the citizen or permanent resident spouse or parent.¹⁸

Representative Louise Slaughter explained congressional intent regarding the creation of the battered spouse waiver and terms the types of abuse that were to be covered in the purpose of immigration law definition of “battering or extreme cruelty” as follows:

[T]he bill we have before us contains a small but significant provision which will literally free thousands of immigrant women from a nightmare of brutal physical abuse and mental cruelty.... Immigrant women are some of the most vulnerable to domestic violence, yet their plight is not well enough known to effect real change. Not long ago, I heard the heart wrenching story of an immigrant woman living in Rochester with her abusive American spouse. She was regularly beaten by her husband and subjected to unspeakable cruelties. She lived with two paralyzing fears--that of her husband's rage and that of being forced back to her native Haiti. The 1986 Marriage Fraud Act leaves this woman trapped in the abusive relationship for at least 2 years or face deportation to a country which is no longer her home...

Responding to this woman's circumstances and those of thousands of alien spouses nationwide, I introduced legislation to amend the Marriage Fraud Act and provide immigrant spouses in a bona fide marriage, an escape from the beatings, the insults and the fear.... The Immigration Marriage Fraud Amendments Act of 1986 [IMFA] mandates a 2-year period of conditional permanent residency for foreigners who marry American

¹³ INA § 216(c)(1), 8 U.S.C. 1186a(c)(1); INA § 216(d)(2), 8 U.S.C. 1186a(d)(2); INA § 216(d)(3), 8 U.S.C. 1186a(d)(3).

¹⁴ See generally INA § 216; Andorra Bruno and Andrea Siskin, *Immigration: Noncitizen Victims of Family Violence* (Congressional Research Service, May 3, 2001); William A. Kandel, *Immigration Provisions of the Violence Against Women Act* (May 15, 2012) available at: <http://www.fas.org/sgp/crs/misc/R42477.pdf>

¹⁵ Andorra Bruno and Andrea Siskin, *Immigration: Noncitizen Victims of Family Violence* (Congressional Research Service, May 3, 2001); at CRS 3

¹⁶ U.S. Congress. House Committee on the Judiciary. *Family Unity and Employment Opportunity Immigration Act of 1990*, report to accompany H.R. 4300, 101st Cong., 2nd Sess., H. Rept. 101-723, Part 1, p. 51. (Hereinafter cited as House Report 101-723(I)). Also see Janet M. Calvo, “Spouse-Based Immigration Laws: The Legacies of Coverture,” *San Diego Law Review*, v. 28, summer 1991, p. 606-611.

¹⁷ William A. Kandel, *Immigration Provisions of the Violence Against Women Act* 25(May 15, 2012) available at: <http://www.fas.org/sgp/crs/misc/R42477.pdf>

¹⁸ See generally, Cecilia Olavarria and Moira Fisher Preda, , *Additional Remedies Under Vawa: Battered Spouse Waiver*, in *Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants* (Legal Momentum, 2010) available at http://iwp.legalmomentum.org/immigration/battered-spouse-waiver/tools/3.5_Battered-Spouse-Waiver_2004-MANUAL-BB.pdf/view

citizens or permanent residents. At the end of this 2-year period, the American spouse with the foreign spouse must file a joint petition to gain full permanent residency for the foreign spouse. Due to a lack of clarity in the IMFA, a battered foreign spouse may be forced to choose between remaining in an abusive relationship or facing possible deportation to a country that is no longer his or her home...

Under the IMFA, if the resident spouse refuses to sign the joint petition, deportation proceedings can be initiated by the Immigration and Naturalization Service.... Where a foreign spouse could demonstrate that he or she entered into a marriage with a resident spouse in good faith and could establish through credible evidence that he or she was battered by the American spouse, the foreign spouse would be allowed to waive the joint petition requirement and file independently to have the conditionality of his or her permanent residence removed. This waiver would not force the foreign spouse to seek a divorce and would thus avoid the question of good cause which must be considered in the good cause/good faith waiver and it would make it clear to abused spouses that there was an escape from their situations....[T]his additional waiver would not alter the spirit of the IMFA and the conditional permanent residence system established in 1986, it would be beneficial to a large number of persons trapped in abusive relationships...

Those in this situation are often advised to remain with the abuser until the 2 years of conditional permanent residence have ended because of the lack of clarity in the law. Abused spouses should be sent a clearer signal that there is an escape from their dilemma and that the abusing spouse does not have complete control over their lives... the House intends that when the citizen or resident spouse engages in battering or cruelty against a spouse or child, neither the spouse nor child should be entrapped in the abusive relationship by the threat of losing their legal resident status. It is the Committee's intent that the Attorney General will grant the waiver when battering or cruelty to spouse or child is demonstrated. The House intends that the discretion given to the Attorney General to decide to deny waiver requests under this provision be limited to rare and exceptional circumstances such as when the alien poses a clear and significant detriment to the national interest....

I am also concerned with the situation in which the citizen or resident spouse abuses a child or alien child. It is the intent of the legislation, then, that the conditional resident spouse be able to protect the child without fearing that the citizen or resident spouse will refuse to cooperate in the joint petition, joint interview requirements for the alien spouse. In such a situation, the good faith or extreme hardship waiver will be granted to the alien spouse. The existence of a child of the marriage is evidence that the marriage was entered into in good faith. Both a child and the child's alien parent would suffer extreme hardship if the child were denied the protection and support of the alien spouse when the citizen or resident spouse abuses the child....

The group that would be targeted by the clarifications I have proposed is one of the most vulnerable in American society today. The vast majority of abused foreign spouses are women. Most are new to American society and many do not speak English as a first language. This group is in particular need of statutory language that clearly protects them

from abusive spouses taking advantage of the necessity of filing a joint petition at the end of the 2-year period.¹⁹

The House Judiciary Committee report in 1990 was explicit about congressional intent in allowing victims of “battery” or “extreme cruelty” who provided proof of a good faith marriage to a U.S. citizen or lawful permanent resident spouse to be granted the battered spouse or child waiver:

The purpose of this provision is to ensure that when the U.S. citizen or permanent resident spouse or parent engages in battering or cruelty against a spouse or child, neither the spouse nor child should be entrapped in the abusive relationship by the threat of losing their legal resident status.²⁰

Again, in 1990, the House was explicit in its intent to allow victims of “battery” or “extreme cruelty” to be granted the battered spouse or child waiver when Representative Benjamin Gilman (R-NY) supported the creation of this waiver:

In particular, the marriage fraud provisions, required our review and modification. The battered spouse or child waiver of the conditional residence requirement portion would allow the Attorney General to bestow permanent resident status if an alien can demonstrate that, while the marriage was entered into in good faith, evidence has shown that the spouse was battered by, or was the subject of extreme mental cruelty perpetrated by, his or her spouse or parent.

This provision would, in effect, create an avenue of relief for a spouse or child caught in a detrimental relationship. Under current law a damaging situation must be endured in order to maintain legal status in the United States. It would seem unconscionable that any human being should be required by our laws to remain in a situation in which they are abused in order to remain in legal status.²¹

It is important to note that the House Judiciary Committee, in creating the battered spouse waiver, chose to define domestic violence for immigration law purposes as “battery” or “extreme cruelty” and describe this behavior more generally to encompass a range of “abusive” behaviors. Evidence to support a battered spouse waiver “can include, but is not limited to, reports and affidavits from police, medical personnel, psychologists, school officials, and social service agencies.”²² The House Judiciary Committee adopted Representative Slaughter’s view, further clarifying its intent by stating that legitimate requests for battered spouse waivers should be denied only in “rare and exceptional circumstances such as when the alien poses a clear and significant detriment to the national interest.”²³

Extreme Cruelty in the Family Courts: Guidelines for Adjudicating Domestic Violence Cases

In 1994, the National Council of Juvenile and Family Court Judges created the Family Violence Model State Code that set the standard at the time for development and implementation of state laws

¹⁹ Congressional Record for the 101st Congress House of Representatives UNITY AND EMPLOYMENT OPPORTUNITY IMMIGRATION ACT OF 1990 (House of Representatives - October 02, 1990) page H8642

²⁰ House Report 101-723(I), p. 78.

²¹ Family Unity and Employment Opportunity Immigration Act of 1990, **October 2, 1990**, 136 Cong. Rec. H. 8629 (Vol. 136, No. 126, Pg. H8629).

²² *Ibid.*, p. 78-79.

²³ *Ibid.*, p. 79.

designed provide effective criminal and civil justice system responses to domestic violence.²⁴ The Model Code “treats domestic and family violence as a crime which requires early, aggressive and thorough intervention.”²⁵

“The Model Code enumerates the range of criminal conduct employed by many perpetrators of domestic or family violence. The Model Code offers this detailed list to underscore the breadth of violent crimes and fear-inducing or harmful conduct undertaken by perpetrators of domestic or family violence. ...The Model Code defines “crime involving domestic or family violence” to include one or more of the following crimes against another family or household member:

- Arson;
- Assault Offenses (Aggravated Assault, Simple Assault, and Intimidation);
- Burglary, Breaking and Entering;
- Destruction, Damage, Vandalism of Property;
- Homicide Offenses (Murder and Non-negligent Manslaughter, Negligent Manslaughter, and Justifiable Homicide);
- Kidnapping, Abduction;
- Sex Offenses, Forcible (Forcible Rape, Forcible Sodomy, Sexual Assault with an Object, and Forcible Fondling);
- Stolen Property Offenses;
- Weapon Law Violations;
- Disorderly Conduct;
- Family Offenses, Nonviolent;
- Stalking; [and]
- Trespass of Real Property...”²⁶

The Model Code also allowed the opportunity for states to add additional crimes to the list.²⁷ Over time, state protection order statutes have expanded to offer protection against a larger list of family violence offenses including stalking, harassment, and threats, and attempts to harm family members, household members and intimate partners. However, the analysis conducted to support most protection orders issued in the United States continues to focus on criminal activity.²⁸

²⁴ National Council of Juvenile and Family Court Judges, Family Violence; Model State Code (1994).

²⁵ *Id.* at iv.

²⁶ *Id.* at 3.

²⁷ *Id.*

²⁸ For an overview of the range of actions that can lead to issuance of protection orders see, American Bar Association Commission on Domestic Violence, Standards of Proof for Domestic Violence Civil Protection Orders (CPOs) By State (6/2009) available at: http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/Standards_of_Proof_by_State.authcheckdam.pdf

The family court rulings that consider extreme cruelty an important factor in determining whether to provide protection to harmed individuals have other significant considerations in common with VAWA immigration cases. All VAWA self-petitions, VAWA cancellation and VAWA suspension cases require proof of a valid marriage, and family court rulings too involve members of one family or household. Further, family court rulings focus on US citizens, and these VAWA immigration cases involve immigrant spouses and children who, but for the abuse, would have been able to obtain legal immigration status based on the marriage or the parent-child relationship, if the U.S. citizen or lawful permanent resident spouse of parent had filed for citizenship on the immigrant spouse or child's behalf.

Department of Homeland Security and Legacy Immigration and Naturalization Sees Extreme Cruelty and Part of a Pattern of Domestic Violence, Power and Control

The Violence Against Women Act Extends Immigration Law Protections to Immigrant Spouses and Children of U.S. Citizens and Lawful Permanent Residents

In 1994, Congress amended the nation's immigration laws and specifically enacted VAWA to address the unique barriers immigrant women and children face in domestic violence situations. Congress recognized that the existing immigration laws actually fostered the abuse of immigrant women by placing their ability to gain permanent lawful status completely in the control of the abusers.²⁹ VAWA 1994 offered two forms of protection to immigrant victims of spouse and child abuse – the VAWA self-petition and VAWA suspension of deportation. Domestic violence under immigration law was defined as battering or extreme cruelty. This definition applies in a range of immigration cases including VAWA self-petitioning, VAWA suspension of deportation, and the battered spouse waiver.³⁰ VAWA offers immigration relief to immigrant spouses and children who “ha[ve] been battered or³¹ ha[ve] been subjected to extreme cruelty perpetrated by” the alien's U.S. citizen or lawful permanent resident spouse, former spouse (within two years), intended spouse, parent or step-parent. The statute and the regulations treat battering and extreme cruelty as two separate factual determinations that are independent of each other.

Immigration Regulations Define “Battering or Extreme” Cruelty

VAWA immigration regulations define “battering or extreme cruelty,” as:

*[b]eing the victim of any act or a threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts [or threatened acts] that, in and of themselves, may not initially appear violent may be part of an overall pattern of violence.*³²

This single definition covers a range of abusive actions including:

- physical violence,

²⁹ See H.R. Rep. No. 395, 103d Cong., 1st Sess. 26-27 (1993).

³⁰ INA § 204(a)(1)(A)(iii)(bb); 204(a)(1)(A)(iv); 204(a)(1)(A)(vii)(V); 204(a)(1)(B)(ii)(I)(bb); 204(a)(1)(b)(iii); 216(c)(4)(C); 244(a)(3)(as in effect on March 31, 1997); 240A(b)(2).

³¹ *Id.* (Emphasis added).

³² 8 C.F.R. § 204.2(c)(1)(vi).

- sexual violence,
- threats of violence, and
- extreme cruelty
 - psychological abuse that results or threatens to result in physical or mental injury
 - acts of coercive control (e.g. forced prostitution, forceful detention, exploitation)
 - other acts, threats, attempts, or threatened acts, that are part of an overall pattern of violence and coercive control (e.g., withholding medication, immigration related abuse, isolation, intimidation, economic abuse)
 - threats or attempts to commit crimes (e.g. threats to kill, maim, sexual assault, kidnap)

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),³³ which erected new barriers to gaining lawful permanent residence for many family-based petitioners³⁴ and eliminated suspension of deportation, replacing it with a more limited form of immigration relief, cancellation of removal.³⁵ However, with regard to battered immigrants, IIRIRA created a special form of VAWA cancellation of removal that was substantially identical to and not more restrictive than VAWA suspension of deportation.³⁶ Under the IIRIRA amendments, Congress left this suspension remedy virtually unchanged and retained the mandate that, “[i]n acting on applications under this paragraph, the Attorney General *shall* consider any credible evidence relevant to the application.”³⁷

IIRIRA’s protections for immigrant domestic violence victims were not limited to the creation of VAWA cancellation of removal and included:

- Access to public benefits by making VAWA self-petitioners, VAWA suspension and VAWA cancellation or removal applicants qualified immigrants under federal public benefits laws;
- Exceptions from affidavit of support requirements³⁸ and the need to submit any affidavit of support in VAWA self-petitioning cases;³⁹
- Exceptions for victims filing for relief under VAWA from the 3 and 10 year unlawful presence bars;⁴⁰
- Creation of VAWA confidentiality protections⁴¹ designed to ensure that immigration judges, Department of Homeland Security (DHS), Department of Justice (DOJ) and State Department officials do not:

³³ 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”).

³⁴ 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).

³⁵ See new INA § 240A, 8 U.S.C. § 1229b, replacing former INA § 244.

³⁶ See INA § 240A(b)(2) and 244(a)(3)(as in effect on March 31, 1997).

³⁷ INA § 240A(b)(2), 8 U.S.C. § 1229b(b)(2) (emphasis added).

³⁸ See INA § 212(a)(4)(C)(I)(I) & (II) (exemption from enforceable affidavit of support requirement).

³⁹ See United States Citizenship and Immigration Services information regarding affidavits of support (stating “an individual who has an approved form I-360 as a battered spouse or child” does not need to file an affidavit of support), available at: <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=720b0a5659083210VgnVCM100000082ca60aRCRD&vgnnextchannel=720b0a5659083210VgnVCM100000082ca60aRCRD>

⁴⁰ See INA § 212(a)(9)(B)(iii)(IV), referencing INA § 212(a)(6)(A)(ii) (exception to three- and ten-year unlawful presence bars).

⁴¹ See Leslye Orloff, *Ch. 3: VAWA Confidentiality: History, Purpose, DHS Implementation and Violations of VAWA Confidentiality Protections*, in *Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault* (Legal Momentum, 2011), available at: <http://iwp.legalmomentum.org/reference/additional-materials/vawa-confidentiality/training-materials/Ch3-SA-Man--Confidentiality.pdf/view>

- Disclose the existence or contents of a VAWA related immigration case to anyone, with only limited exceptions;⁴²
- Rely on perpetrator provided information to harm an immigrant victim by denying immigration relief, pursuing an immigration enforcement action or a removal or deportation action against the victim;⁴³ and
- Barring immigration enforcement actions at protected locations by requiring DHS enforcement officials to certify in immigration proceedings that if part of the enforcement action occurred at a prohibited location that the enforcement action did not rely on perpetrator provided information and authorizing the immigration judge to dismiss cancellation of removal when VAWA confidentiality violations have occurred.⁴⁴

In October 2000, bipartisan efforts led to the passing of the Battered Immigrant Women Protection Act as part of the Violence Against Women Act of 2000 (VAWA 2000).⁴⁵ Congress intended the immigration provisions of VAWA 2000 to aid battered immigrants by repairing residual immigration law obstacles or “catch-22” glitches impeding immigrants seeking to escape from abusive relationships.⁴⁶ Through VAWA 2000, Congress, by expanding categories of immigrants eligible for VAWA protection through the creation of T and U-visa; improving battered immigrant access to public benefits, restoring protections offered under the VAWA of 1994 that were affected by the passage of subsequent laws; and providing other measures of protection to battered immigrants, furthered its express and unequivocal intent to “ensure that domestic abusers with immigrant victims were brought to justice and that the battered immigrants Congress sought to help in the original Act are able to escape the abuse.”⁴⁷

Congress revisited the issues faced by immigrant victims when it passed the Violence Against Women Act of 2005 (VAWA 2005). In VAWA 2005, Congress not only reaffirmed its commitment to addressing domestic violence issues by reauthorizing VAWA, but also expanded VAWA self-petitioning in the areas of child abuse and elder abuse. VAWA 2005 enhanced protection for immigrant child abuse victims by allowing immigrant children who had suffered battering *or* extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident parent before the child turned 21, to file for VAWA self-petitioning protection so long as the self-petition was filed before the applicant child turned 25. Elder abuse victims were for the first time offered access to VAWA self-petitioning if they were “battered or subject to extreme cruelty by” their U.S. citizen son or daughter over 21 years old.

Any Credible Evidence Standard: Importance of Understanding Domestic Violence Dynamics

In 1994, Congress created the special “any credible evidence” standard and has consistently applied this standard to all forms of immigration relief created from 1994 to the present under VAWA

⁴² The provisions were originally written to apply to the U.S. Department of Justice including immigration judges, the BIA and the immigration and Naturalization Service. With the creation of the Department of Homeland Security (DHS) VAWA confidentiality protections extend to DHS, DOJ and the State Department. 8 U.S.C. 1367 (2005).

⁴³ See Orloff, *supra* note 23 at 14.

⁴⁴ See Orloff, *supra* note 23 at 10.

⁴⁵ The Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified in scattered sections of 8, 18, 20, 28, 42, and 44 U.S.C.) (Oct. 28, 2000).

⁴⁶ The Violence Against Women Act of 2000 Section-by-Section Summary, Vol. 146, No. 126 Cong. Rec., 106th Cong., 2nd Sess., at S10195 (Oct. 11, 2000).

⁴⁷ *Id.*

and the Trafficking Victim’s Protection Act. A key contributor to the effectiveness of VAWA immigration relief is that statutory guarantee that victims applying for relief under VAWA or the TVPA can submit “any credible evidence” they can garner to support their immigration case.⁴⁸ Congress mandated a flexible evidentiary standard that recognizes the context of domestic violence. VAWA immigration protections eased the evidentiary standard that had been previously required in all other immigration cases that came before immigration courts. VAWA recognized that immigrant victims of abuse often lack access to evidence that is in their abuser’s control, and that immigrant victims of abuse may lack specific forms of corroborative evidence of abuse. Congress required that the Attorney General “consider *any credible evidence* relevant to the application” of a battered immigrant seeking suspension of deportation.⁴⁹ Immigration judges and the Board must make determinations in VAWA cases that recognize and evaluate the context of the abuse suffered by the applicant. To do otherwise would subvert Congress’ goal of aiding immigrant victims of domestic abuse.

While Congress intended the Attorney General to interpret the “any credible evidence” standard, that interpretation must give the statute its intended ameliorative effect.⁵⁰ The INS General Counsel’s office has articulated an “any credible evidence” standard in the context of self-petitions that reflects VAWA’s purposes, which permit, but do not require, petitioners to demonstrate that preferred primary or secondary evidence is unavailable.⁵¹ As the Office of the General Counsel has noted, the purpose of such flexibility is to take into account the experience of domestic violence. Such flexibility should also be employed by immigration judges and the Board when making decisions regarding VAWA claims. Judges and the Board must understand and consider the nature and impact of domestic abuse in making these determinations. Otherwise, the actions and statements of domestic violence victims may be misunderstood due to insufficient information regarding the dynamics of abusive relationships.

Despite the any credible evidence standard, there continue to be VAWA cancellation and suspension cases in which the immigration judge:

- Does not allow victims to provide evidence from expert witnesses on domestic violence dynamics;
- Does not allow the victim to provide full testimony on the details of the battering or extreme cruelty in the relationship; or
- Issues a decision reflecting a lack of understanding of domestic violence dynamics and issues decisions against the victim
 - discredits the victim’s testimony about domestic violence because the victim stayed with or returned to the abuser; or
 - makes findings of facts that would support a finding of fact the victim was battered or subjected to extreme cruelty but denies the case.

Board of Immigration Appeals and Immigration Judge Effectiveness and Consistency in VAWA Cancellation of Removal and Suspension of Deportation Adjudications

⁴⁸ Leslye E. Orloff, Kathryn C. Isom, & Edmundo Saballos, *Mandatory U-Visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act’s Immigration Protections and its “Any Credible Evidence” Rules- A Call for Consistency*, 11 GEO. J. GENDER & L. 619, 620-21 (2010).

⁴⁹ 8 U.S.C. § 1254(g) (emphasis added).

⁵⁰ See H.R. Rep. No. 395, at 25.

⁵¹ See, e.g., 8 C.F.R. §§ 103.2(b)(2)(iii) and 204.1(f)(1). See also Paul W. Virtue, Office of General Counsel, “*Extreme Hardship*” and *Documentary Requirements Involving Battered Spouses and Children*, Memorandum to Terrance O’Reilly, Director, Administrative Appeals Office (Oct. 16, 1998), at 6-7, reprinted in 76(4) Interpreter Releases 162 (Jan. 25, 1999)(“[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.”).

Circuit Split: Stemming From Confusion Between “Extreme Cruelty” and “Extreme Hardship” Makes BIA the Court of Last Resort For Immigrant Domestic Violence and Child Abuse Victims

When battered immigrant spouses and children appeal to the BIA and the BIA judges handling the case understand domestic violence dynamics, this understanding comes through clearly in the BIA’s decisions. When the BIA judge(s) reviewing the appeal are not well versed in domestic violence dynamics, either the appeal is summarily dismissed, leaving the immigration judge’s ruling in place, or the BIA issues a written opinion that reflects a lack of understanding of domestic violence dynamics. The United States Court of Appeals for the 9th Circuit, in *Hernandez v. Ashcroft*,⁵² held that “extreme cruelty involves a question of fact, determined through the application of legal standards” and that “Section 244(a)(3) introduces battery and extreme cruelty as parallel methods by which an individual may establish that she has experienced domestic violence.”⁵³

When VAWA suspension of deportation or cancellation of removal cases are denied based on the court’s ruling that the evidence presented does not prove the facts as sufficient to support a finding of battering or extreme cruelty, the question of whether the court erred in this ruling is a question of law as applied to the facts of the case that should be reviewable on appeal to the Circuit Courts. However, there is a split in the Circuit Courts on the issue of whether

- “extreme cruelty,” like “battery,” is a question of law as applied to the facts of the case and is therefore reviewable on appeal by the Circuit Courts; or
- “extreme cruelty” is to be treated like “extreme hardship” and considered a discretionary factor in the immigration judge’s opinion that is reviewable only by the BIA, and not reviewable by the federal Circuit Courts.

This split in the Circuits has resulted in cases in which victims of domestic violence receive the following outcomes in their cancellation of removal or suspension of deportation cases:

- Immigration Judge: denied based upon failure to prove battering or extreme cruelty and the judge’s ruling reflects a failure to understand domestic violence dynamics.
- BIA:
 - summarily denies the victim’s appeal without a full review by a BIA judge who understands domestic violence dynamics, and no written decision is issued; or
 - reviews the case and issues a written opinion reflecting the same or additional misunderstandings of domestic violence victimization as the immigration judge.
- Appeal to the Federal Circuit Courts:
 - If the victim is in the 2nd or 9th Circuits, the Circuit Court will review the case and reach the issue of whether the immigration judges correctly applied the law to the facts of the case in making their finding on battering or extreme cruelty.⁵⁴

⁵² 345 F.3d 824 (9th Cir. 2003).

⁵³ *Id.* at 834.

⁵⁴ See *Sepulveda v. Gonzales*, 407 F.3d 59, 63-64 (2d Cir. 2005) (holding that the BIA had made a nondiscretionary legal determination that time spent in jail barred cancellation of removal for lack of “good moral character”); and *Hernandez v. Ashcroft*, 345 F.3d 824, 828 (9th Cir. 2003) (“[W]e hold that we have jurisdiction to consider the BIA’s determination that Hernandez was not subjected to extreme cruelty in the United States.”).

- If the victim is in the 3rd, 5th, 6th, 7th, or 10th, the Circuit Court will not review the decision of either the immigration judge or the BIA because the “extreme cruelty” is considered a discretionary factor that can only be decided by the immigration judge and the BIA and the BIA’s rulings are unreviewable.⁵⁵

There are many examples of domestic violence victims who have been denied access to VAWA cancellation of removal and suspension of deportation under these circumstances, including a 10th Circuit marital rape case.⁵⁶

When Congress created VAWA cancellation of removal and VAWA suspension of deportation, its goal was to provide immigrant victims of spousal and child abuse an avenue for relief in immigration courts. These immigration court proceedings were required to use relaxed evidentiary rules in which victims could present any credible evidence they could muster to prove their eligibility for relief. Immigration judges were charged with determining both the credibility of evidence presented and what weight should be given to that evidence.⁵⁷ In immigration cases, as with all other court proceedings involving family violence, judges who lack training and expertise on domestic violence dynamics fail to understand how the evidence they receive in court is consistent with social science research and the experience of judicial experts on domestic abuse. Such courts act upon assumptions about family relationships and violence that do not hold true in households in which one spouse is subjected to coercive control, physical and/or sexual abuse by the other, and based on these misperceptions, deny immigration relief to victims.

Several of the elements of proof a victim must present to win a VAWA cancellation of removal and suspension of deportation case require an understanding of domestic violence dynamics by the immigration judge. In addition to proof of battering or extreme cruelty, judges who understand domestic violence dynamics experienced by immigrant victims are better able to make the following determinations:

- extreme hardship, considering traditional extreme hardship factors and special VAWA factors that apply specifically in cases of domestic violence;⁵⁸
- continuous physical presence, including whether any of the victim’s absences from the counter were connected to the battering or extreme cruelty;⁵⁹
- good moral character, whether the battered immigrant applicant should have been granted a waiver because an act or conviction was connected to the battering or extreme cruelty;
- proof of the parent/child or spousal relationship and the immigration status of the spouse or parent, when the victim is submitting evidence that is not typically submitted by other immigrants before the court because the traditional forms of evidence to prove the

⁵⁵ See *Johnson v. Attorney Gen. of the United States*, 602 F.3d 508, 510-11 (3d Cir. 2010) (holding that there is a lack of jurisdiction because majority of circuits that have addressed this question held that “extreme cruelty” is discretionary and not subject to judicial review); *Wilmore v. Gonzales*, 455 F.3d 524, 528 (5th Cir. 2006) (holding that extreme cruelty determination is discretionary); *Ramdane v. Mukasey*, 296 Fed.Appx. 440, 442 (6th Cir. 2008) (“We have found that extreme hardship is a discretionary decision not subject to review”) (citing [Valenzuela Alcantar v. I.N.S.](#), 309 F.3d 946, 949 (6th Cir.2002)) “We have been given no reason to believe that extreme cruelty is treated differently than extreme hardship.”); *Stepanovic v. Filip*, 554 F.3d 673, 675 (7th Cir. 2009) (holding that 8 U.S.C. § 1252(a)(2) prevents exercise of jurisdiction over the BIA’s determination that Stepanovic was not subjected to “extreme cruelty”); *Perales-Cumpean v. Gonzales*, 429 F.3d 977, 982 (10th Cir. 2005) (holding that extreme cruelty determination is discretionary).

⁵⁶ *Perales-Cumpean v. Gonzalez*, 429 F.3d 977 (10th Cir. 2005).

⁵⁷ IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 958-59, (11th Ed., 2008)

⁵⁸ 8 C.F.R. § 1240.20(c) [VAWA cancellation] and 1240.58(c) [VAWA suspension].

⁵⁹ INA § 240A(b)(2)(B).

relationship or the perpetrator's immigration status are in the control of the perpetrator and the victim cannot safely obtain them.

Inconsistencies in Adjudications of VAWA Cancellation of Removal and Suspension of Deportation Cases

I. Decisions That Reflect BIA Understanding Domestic Violence Dynamics and VAWA Cancellation of Removal and Suspension of Deportation

A key congressional goal of VAWA's immigration provision was to remove obstacles inadvertently interposed by immigration laws that hinder or prevent battered immigrants from fleeing domestic violence safely and prosecuting their abusers.⁶⁰ The BIA and immigration judges have been granting immigrant victims VAWA cancellation of removal and VAWA suspension of deportation immigration relief. The following decisions provide examples of immigrant domestic violence victims who benefited from being granted VAWA cancellation or VAWA suspension and reflect understanding of the challenging dynamics in domestic violence cases.

- ***In Re N.A.J.***, file AXX-XXX-XXX⁶¹, Seattle, WA. (2001) **Attachment A**. In this case, the immigration judge and BIA found that appellant had been subject to extreme cruelty and extreme hardship and was granted VAWA cancellation of removal. Both the BIA and the immigration judge ruled against the INS argument that a child was not subject to battering or extreme cruelty when the father did not intend to harm the child. Facts included:
 - Regular beatings
 - Threatened to kill the victim in their child's presence
 - Father told daughter that he would kill her mother and kidnap the daughter
 - Appellant's daughter was at a tender age when she observed the beatings to which her U.S. citizen father subjected her mother;
 - Abusive husband threatened to kill her mother and kidnap the daughter;
 - Child experienced nightmares, flashbacks and fear that her father will kill her mother
 - Daughter suffered post-traumatic stress disorder.
 - Extreme cruelty can be established without proving intent on the part of the father.

Extreme hardship established by

- Recovery from abuse by the victim and her daughter would be jeopardized if deported
- Threats to track the victim down in Mexico if she left the U.S.
- Victim maintained a protection order in the U.S. against the perpetrator

⁶⁰ Congressional Record Vol. 146, October 11, 2000, No. 126, p.S10192.

⁶¹ Citation is available with author and is omitted from this memorandum for the purposes of maintaining VAWA confidentiality standards.

- ***In Re A.L. R-V.***, File AXX-XXX-XXX⁶², Seattle, WA. (2010), **Attachment B.** BIA overruled the immigration judge’s denial of cancellation of removal.
 - Victim suffered abuse perpetrated by her husband
 - Victim was eligible to file for a U-visa but her attorney never informed her about the U-visa relief and she was ordered removed. BIA found ineffective assistance of counsel in her removal proceedings.
- ***In Re N.I.***, File A#XX-XXX-XXX⁶³, Denver, Colorado. (2006). **Attachment C.** The BIA sustained the immigration judges finding that the respondent had been subject to battery or extreme cruelty.
 - Victim’s U.S Citizen husband used the couple’s child as a “wedge and tool.”
 - Husband’s treatment caused wife to have a nervous breakdown from sexual abuse and mental cruelty
 - Victim suffered physical and mental abuse during her marriage
 - BIA and the Immigration Judge found that the following DHS arguments at trial and before the BIA to be unfounded:
 - DHS’s argument that the victim’s marriage to the her US citizen husband was a fraudulent, “immigration marriage” could not be sustained when the couple had a child together, a very intense relationship, and were very seriously involved with one another;
 - Contrary to DHS assertions to the contrary, BIA ruled that both current and former spouses (even when divorce was 5 years ago in this case) are eligible for VAWA cancellation.
- ***In Re P-S-L-*** File A#XX-XXX-XXX⁶⁴ Denver, CO (2008) **Attachment D.** BIA overturned immigration judge finding clear error when on the following facts the immigration judge failed to find battering or extreme cruelty.
 - Husband repeatedly pushed immigrant wife
 - Husband hit immigrant wife in the face
 - Threatened to take their child away from her.
 - Slapped wife
 - Wife had bruises
 - BIA overruled immigration judge stating
 - Fact that immigrant wife attempted to enter the U.S. unlawfully is insufficient basis for the immigration judge to make an adverse credibility determination

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

- To the extent that the Immigration Judge expressed disbelief that the respondent would not have commenced divorce proceedings against her husband if she was abused by him, we find this to be impermissible speculation and conjecture.
- **De Jesus Paiva v. Aljets**, 2003 WL 22888865 (D. Minn. 2003): BIA sustained immigration judge finding of battering or extreme cruelty.
 - Abuse began soon after marriage and included on at least two occasions citizen spouse pushed immigrant spouse⁶⁵
 - On at least one occasion, the citizen spouse grabbed petitioner's son by the arm.
 - Verbal abuse, manipulation, and attempts at isolation by the citizen spouse toward the petitioner and her children
 - Citizen spouse eventually abandoned his family.
 - BIA also found that
 - Petitioners have not waived their ability to assert their VAWA claims by entering and remaining in the country beyond the 90 days provided by the Visa Waiver Program because "the VWP's waiver of rights cannot be read to require waiver of all of Petitioners' rights to judicial relief. A ruling to the contrary would allow for the waiver of rights to which the Petitioners had not yet become entitled when they entered the country and would place a restriction on those filing for VAWA claims that cannot be found in the statute." [2003 WL 22888865, at *4]
 - Deportation does not terminate processing of a VAWA self-petition which can be adjudicated and approved after the victim has been deported.
- **REDACTED** File A#XX-XXX-XXX, El Paso. (2008). **Attachment E**. BIA overturned immigration judge ruling finding battering or extreme cruelty based on:
 - Verbal abuse including citizen wife and family continuously berated and insulted him throughout the course of the marriage including
 - Berating his African ethnicity;
 - Threatening to turn him in because of his immigration status
 - Threatening to report him for marrying for immigration papers;
 - Making spouse work unlawfully
 - Wife slapped immigrant husband so hard that her nails left a scar on respondent's face;
 - Wife broke off a table leg with a nail in it and threw it at respondent, causing bleeding and a scar on his leg;
 - After respondent and his wife were separated, his wife and her family repeatedly thwarted respondent's attempts to see his two children:

⁶⁵ Wren v. Wren, 2001 Neb. App. Lexis 279 (BIA 2001)(Perpetrator pushed the victim);

- During a visit, respondent's wife encouraged one of her brothers to assault respondent, and, while respondent was holding his 2-year old son, respondent's wife's brother pushed respondent into a door with such force that the door broke from the impact (respondent filed a police report that was submitted into evidence);
- During a visit, respondent's wife shoved respondent into a door in view of the couple's children (this incident led to domestic violence charges against respondent's wife, charges which respondent later withdrew).
- BIA held that the immigration judge could not base a negative credibility determination in a VAWA cancellation of removal case discrediting immigrant victims evidence on extreme cruelty based on findings that the immigrant victim
 - Was working unlawfully in the United States,
 - Possessed an unrestricted social security card, and
 Lacks proof that the immigrant victim filed tax returns for 2001 and 2005.

II. Decisions Which Reflect a Misunderstanding of the Special Issues Involved In VAWA Cases

Over the years, BIA and immigration judges have reached decisions that reflect a lack of understating of the often complex issues involved in immigrant domestic violence victims seeking VAWA based relief. Because of this, the Congressional intent of protecting this vulnerable group of immigrants and ensuring that they are not deprived of their other rights and privilege is not being achieved. Often it is the Federal Circuit Courts that intervene and grant relief to victims, directing the BIA and immigration judge to review certain issues that may have not being properly reviewed.

The following cases provide examples of instances in which the immigration judge and/or the Board of Immigration Appeals failed to find "battery or extreme cruelty." In most of the illustrations provided below, the case record included findings by the immigration judge that the evidence in the record was credible. The immigration judges found that the following facts occurred, but denied the immigrant victim's application for VAWA cancellation of removal or VAWA suspension of deportation for failure to prove "battering or extreme cruelty".

The types of physical, sexual and psychological abuse suffered by victims in the VAWA cancellation of removal and suspension of deportation cases described below, are incidences of battering or extreme cruelty that are very similar to and not significantly different from the incidents of battering or extreme cruelty that were found by the BIA to sustain a finding of battering or extreme cruelty in a VAWA immigration case. However, the cases described below provide illustrations of the types of cases in which the immigration judge denies a VAWA cancellation or suspension relief to a victim that legitimately qualifies for the relief. These cases illustrate how immigrant victims of spouse and child abuse are harmed when untrained judges adjudicate domestic violence issues. Often what occurs in these cases is the judge will not allow victim put on expert testimony to educate the court about abuse and domestic violence dynamics experienced by immigrant victims and some courts make decisions based on erroneous information and assumptions. The cases below are cases in which the BIA often agree with the immigration judges ruling and the case was taken to the Federal Circuit court on appeal. However, due to the split in the Circuits, some Circuits have decided that no matter how egregious the facts are the only level of review available is the BIA and there is no federal court review.

The following list of cases is not exhaustive, but is illustrative of the kinds of incidents of spousal and child abuse that the BIA has, in recent years, agreed did not constitute “battery”, “extreme cruelty,” or did not fall within the spectrum of abuse that VAWA sought to cover on a continuum of abuse ranging from “battery” to “extreme cruelty”. Any credible evidence that a victim suffered at least one incident that falls within the definitions of battery or extreme cruelty under immigration law is sufficient. Immigration law is modeled after civil protection law in that no quantity of abuse is required. Note that the list of violent incidents that follows overlaps significantly with and is very similar to the types of abuse that was considered by immigration judges and the BIA to amount to battering or extreme cruelty in the cases with favorable outcome reported above.

- **Lopez-Biruetta**, A079748289 (Dec. 17, 2009), No 10-70128, BIA No A079-748-289, reversed by **United States Court of Appeals for the 9th Circuit** finding battery and no requirement to prove lasting harm to qualify for status, *Lopez-Birrueta v. Holder*, 633 F.3d 1211 (9th Cir. 2011): Immigration judge and BIA found the following facts did not constitute battering or extreme cruelty. The 9th Circuit Court of Appeals overruled the BIA concluding that the following facts did constitute battering to the children and therefore the children’s mother was eligible to be awarded VAWA cancellation of removal. Since the 9th circuit found these activates to be battery, the immigrant mother was eligible for VAWA cancellation and the court did not need to reach or address the issue of whether this behavior also constituted extreme cruelty. The children’s lawful permanent resident father:
 - Struck his young children when they were 3-7 years old on the legs 2-3 times a week with a tree branch 24” long and 1 ½ inch in diameter, for no reason at all,
 - The father sometimes did this in front of the father’s drunken friends.
 - Following these incidents the children were left with red welts on the child’s legs that required home medical treatment, ointments, and ice, causing the children to be scared of their father and to run and hide when he came home.
 - Drove with the children in the car while drunk.

- **Perales-Cumpean v. Gonzales**, 429 F.3d 977 (10th Cir. 2005) **United States Court of Appeals for the 10th Circuit**. The immigration judge denied VAWA cancelation of removal to Perales-Cumpean finding she had not proven extreme cruelty and BIA approved the decision. The immigration judges’ findings rested solely on emotional abuse, ignoring and not crediting significant evidence of marital rape. The 10th Circuit takes the position that determinations by the immigration judge regarding extreme cruelty are discretionary and unreviewable in the federal courts. As a result the BIA’s summary approval of the immigration judge’s ruling in this case left a marital rape victim without any meaningful appeal of her case. The record in this case contains significant evidence of a pattern of marital rape, the trauma rape survivors experience and the types of evidence presented in marital rape cases.
 - Following a two-year courtship, Perales Cumpean married her citizen husband. Immediately following the marriage verbal and sexual abuse began.
 - Verbal abuse included consisting of insults, calling her vulgar names including prostitute and bitch, and use of derogatory, demeaning language, was jealous if she spoke with another man, and accused her of infidelity.
 - She was and remains very fearful of her husband.
 - The marriage was also plagued with continual forced sexual activity that she experienced as rape.

- He would throw himself toward her, she would tell him to leave her alone and he would not stop even when she begged him to do so.
 - The forced sexual activity became so severe and offensive to Perales Cumpean that she would lock herself in the bathroom as her only way to avoid the continued rapes.
 - As a result of the physical and sexual abuse Perales Cumpean developed low self-esteem, and depression, sought therapy and began to take medication for depression.
 - The immigration judge and the BIA used the difficulties the victim had disclosing that rapes against her and failed to see any of the activity related to the case as battery; focusing instead on whether the psychological abuse in the relationship constituted extreme cruelty and decided it did not. They failed to consider the emotional abuse in the context of a relationship that was also sexually abusive and never addressed battery at all.
- **In Leiva-Mendoza, A097653566, United States Court Of Appeals For The Eighth Circuit** No: 10-1058 Remand to BIA (November 19, 2010): Immigration Judge and the BIA found that a child witnessing abuse perpetrated against the child’s mother including witnessing the following events did not constitute extreme cruelty to the child:
 - Twisting and threatening to break child’s mother’s arm.
 - Pulling the child’s mother out of a car and smashing her face against the car window.
 - Hitting the mother’s head and throwing the child’s mother against a wall causing a headache and blurred vision requiring hospital treatment.
 - Snatching the child from the mother’s arms, roughly handling the child, forcing the child into a car, and threatening that the father and the child would disappear.
 - When the mother was pregnant with the child, the U.S. citizen father threw her out of the house and onto the ground.
- **In Re Rosario, A074815199 (Aug. 18, 2009), United States Court of Appeals for the Second Circuit, Rosario v. Holder, 627 F.3d 58 (2nd Cir. 2010):** The immigration judge and BIA found no battering or extreme cruelty despite credible testimony that Rosario’s husband:
 - On 4-5 occasions physically shook and pushed the petitioner during disputes in which the petitioner’s husband demanded money from her.
 - These incidents resulted in physical pain in which her body and arms hurt.
 - Her husband also used offensive language during these incidents and these incidents caused her to suffer a lot of psychological harm.
 - On one occasion, a credible witness testified to seeing the husband grab the petitioner by the shoulders and push her down onto the bed.
 - Court denied relief because the victim “was never physically harmed to the point where she required hospitalization or medication” and “she never called the police.”
 - The Second Circuit declined review stating that federal courts cannot review discretionary rulings.
- **Lopez-Umanzor v. Gonzales-** United States Court of Appeals for the 9th Circuit Nos: 03-72014. BIA Case Number A75-011-140 (May 6, 2005). The 9th Circuit granted the petition for review and remand for a new hearing because the immigration judge refused to allow Petitioner to present relevant expert testimony that bore on Petitioner’s credibility, relying instead on his own stereotypical assumptions about domestic violence.

- On the first night the immigrant victim applicant in this case met the man who later became her husband, he drugged and raped her. The rape resulted in a pregnancy.
 - As a result of the pregnancy, a relationship developed and Lopez Umanzor married the father of her child, a lawful permanent resident.
 - She continued to be abused her during and after the pregnancy and throughout the duration of the marriage.
 - She fled to California and then Alaska, but he followed her, stalked her and continued the abuse which included stabbing her and threatening to report her to immigration.
 - On appeal, the Circuit Court overruled and determined that immigration judge and the BIA's assessments of credibility were skewed by prejudgment, personal speculation, bias, conjuncture and refusal to allow the appellant to present expert testimony.
- **A. M. Sanchez v. Keisler, United States Court of Appeals for the 7th Circuit** No: 06-2745, 06-3424, Board of Immigration Appeals. No. A77 656 255.
 - Following a short dating relationship and the unwillingness to agree to marriage, the immigrant victim went on a date at which she was served two drinks that were drugged. She lost consciousness, awoke in bed having been raped. The rape caused the victim's pregnancy. This discovery was followed by a swift marriage.
 - The victim's citizen husband immediately began to denigrate her Mexican heritage.
 - He denied her access to medical care for the pregnancy.
 - After their child was born, the husband called INS to report his wife in order to have her detained and placed in removal proceedings.
 - Sanchez's oldest daughter was sexually assaulted by a 21-year-old male during a visitation at her father's house. The perpetrator was convicted.
 - The husband hit his daughter with a shoe.
 - The 7th Circuit also noted that the BIA gave no weight at all to the substantial abuse that Sanchez and her two U.S.-citizen daughters have suffered, nor did it display any concern about the possibility that the daughters would have to be turned over to the alleged abusive parent if Sanchez's removal was not cancelled.
 - The 7th Circuit court returned the case to the BIA for further proceedings after finding that Sanchez received ineffective assistance of counsel in failing to raise and put on evidence of Sanchez' eligibility for VAWA cancellation of removal.
- **Laura Luis Hernandez v Ashcroft, United States Court of Appeals 9th Circuit** No. 02-70988, BIA No. A72-644-485. The immigration judge denied the victim in this cases VAWA suspension of deportation because no "battery" occurred in the United States. BIA agreed. The 9th circuit court of appeals overruled, stating that the correct standard to use in deciding whether there has been extreme cruelty in a case if the standard set out in the INS regulations which recognize that actions that "may not initially appear violent but that are a part of an overall pattern of violence" makes it clear that extreme cruelty must be evaluated in the context of domestic violence. In this context, Hernandez's husband's actions subjected her to extreme cruelty.
 - Victim experienced life-threatening abuse in Mexico perpetrated by her lawful permanent resident husband.
 - Husband broke into the bedroom where his wife was sleeping, shattered a window above her head.
 - Lifted her by the hair and threw her forcefully against the wall.

- Took a kitchen chair and broke it across her back while continuing to hit and kick her and utter verbal abuse. She has permanent physical scars from this assault.
- In another incident, he broke into her bedroom when she was sleeping and he smashed a pedestal fan onto her head, breaking it on her forehead.
- She fled to the U.S. to escape the abuse.
- Within two weeks, her husband stalked her, tracked her down, forced her phone number out of a neighbor, and began calling every day. When she finally talked to him, he convinced her that the abuse would end and convinced her to return with him to Mexico, where the abuse continued and once again escalated.
- He beat the victim savagely, broke all the windows in the house, destroyed all the furniture, and took a knife, lunged at the victim attempted to stab her in the back, but because the victim tried to block the attack he stabbed her in the hand slicing through to the bone. She could not seek medical treatment because her husband kept her locked in the house for two days.
- The victim escaped again to the United States and filed a VAWA self-petition and for VAWA suspension of deportation.
- The 9th Circuit overturned the decision, disagreeing with the BIA and the immigration judge, both of whom had denied the victim's case because the battering did not occur in the United States.
- The interactions between the victim and her husband that took place in the U.S. fit the pattern that perpetrators of domestic violence use to exert power and control over their victims and, therefore, constitute extreme cruelty in the United States.

Critical components of the justice system encountering domestic violence, child and elder abuse victims include police officers, prosecutors, state criminal and family courts, and federal agencies. Prior to the passing of the Violence Against Women Act, many justice system officials, including judges, believed they understood domestic violence from their own experiences with their families and/or in their work. However, as justice system personnel gained expertise in efforts to protect victims and prosecute perpetrators they learned that views and beliefs they previously held were neither accurate, nor fully informed. Since the passage of VAWA, each component has, over time, gained the specialized training they needed to avoid being manipulated by abusers and to better understand how to approach victim and community safety. The approach each agency takes to this important issue has a direct impact on victim and community safety and the justice system's ability to hold perpetrators of domestic violence accountable.

For over 3 decades, agencies throughout the justice system have gained expertise and training on domestic violence dynamics and developed best practices that have been funded, evaluated, and shared with other state and federal agencies, particularly since passage of the Violence Against Women Act in 1994. These best practices help government agencies learn how to carry out their statutory obligations to offer access to justice and assistance to victims while protecting the system against those who may try to fraudulently benefit from protections designed for victims, including perpetrators. State criminal and family courts, police and prosecutors, and federal agencies (DOJ –Human Trafficking, DHS, HHS, HUD) have all been successful in developing approaches that strike an appropriate balance between these goals that do not result in victims with valid cases being denied protections Congress developed to help them. The next section of this report will discuss the effective approach DHS developed and implemented for adjudication of crime victims cases including VAWA self-petitions, and T and U visa cases within the context of national best practices for adjudication of domestic violence cases and makes

recommendations about an approach BIA could take that would significantly improve the quality, consistency and efficiency of case processing and adjudication of VAWA cancellation of removal and suspension of deportation cases.

Recommendations

Congressional and Federal Government Priority and Best Practices: Trained Adjudicators Are a Core Component of Access to Justice For Domestic Violence and Child Abuse Victims

It is standard practice within the judicial system that specialized training is necessary and important when working with domestic violence and sexual assault victims for adjudicators to “develop expertise in domestic violence issues, including a well-developed understanding of the dynamics of domestic violence, knowledge of legal remedies for victims, and familiarity with services available....”⁶⁶ The Congressional intent of the Violence Against Women Act is to offer protection to victims and hold offenders accountable.⁶⁷ These goals cannot be accomplished when untrained judges and other adjudicators deny VAWA protections to survivors. Congress, state courts, and federal agencies have, since VAWA’s inception, placed an increasing priority on specialized training for state court judges, immigration judges, and DHS adjudicators responsible for issuing decisions in domestic violence and sexual assault cases on the dynamics of domestic violence and sexual assault, including the particular dynamics experienced by immigrant victims.⁶⁸

Successful Specialized VAWA Unit: Vermont Service Center’s Domestic Violence Expertise

The Department of Homeland Security followed the lead of law enforcement and prosecutors’ offices across the country by creating the Vermont Service Center, which is comprised of well-trained individuals in a highly specialized VAWA unit. Following passage of the Violence Against Women of Act of 2005 John Conyers stated in legislative history:

I want to emphasize the importance of the fact that the law assures that adjudication of all forms of immigration relief related to domestic violence, sexual assault, trafficking or victims of violent crime continue to be adjudicated by the specially trained VAWA unit.⁶⁹

⁶⁶ SUSAN KEILITZ, SPECIALIZATION OF DOMESTIC VIOLENCE CASE MANAGEMENT IN THE COURTS: A NATIONAL SURVEY 7 (2000).

⁶⁷ See Legislative History of the Violence Against Women Act of 1994: VIOLENCE AGAINST WOMEN ACT OF 1993 (House of Representatives - November 20, 1993) Congressional Record pages H10359 (Statement of Representative Moakley) and (Statement of Representative Morella) (“H.R. 1133 will: Require all States to enforce orders of protection regardless of State of origin and to encourage mandatory arrest policies; Provide grants for more effective law enforcement and prosecution strategies and for rape prevention programs and antiviolence curriculums for school-aged children; Grant permission for battered immigrant women, the spouses of U.S. citizens or legal residents, to self-petition for legal status for themselves and their children; and Provide training for judges and other court personnel about rape, sexual assault, and domestic violence.”);

⁶⁸ Id.; See CONGRESSIONAL RECORD, VOL.146, NO.126 TRAFFICKING VICTIMS PROTECTION ACT OF 2000--CONFERENCE REPORT --S10,195- (Senate - October 11, 2000). (“Sec. 1512. Access to Services and Legal Representation for Battered Immigrants. Clarifies that Stop grants, Grants to Encourage Arrest, Rural VAWA grants, Civil Legal Assistance grants, and Campus grants can be used to provide assistance to battered immigrants. Allows local battered women's advocacy organizations, law enforcement or other eligible Stop grants applicants to apply for Stop funding to train INS officers and immigration judges as well as other law enforcement officers on the special needs of battered immigrants.”) and S10,224 (Statement of Senator Levin “VAWA has been tremendously successful in the training of judges, court personnel, prosecutors, police and victims' advocates.”); See also Legislative History of the Violence Against Women Act of 2005 DEPARTMENT OF JUSTICE APPROPRIATIONS AUTHORIZATION ACT, FISCAL YEARS 2006 THROUGH 2009 -- (Extensions of Remarks - December 18, 2005) [Page: E2607] SPEECH OF HON. JOHN CONYERS, JR. OF MICHIGAN IN THE HOUSE OF REPRESENTATIVES SATURDAY, DECEMBER 17, 2005 (“Congress encourages the DHS's specially trained VAWA unit and CIS VAWA policy personnel: (1) to develop a training program that can be used to train DHS staff, trial attorneys, immigration judges, and other DOJ and DOS staff who regularly encounter alien victims of crimes, and (2) to craft and implement policies and protocols on appropriate handling by DHS, DOJ and DOS officers of cases under VAWA 1994, the Acts subsequently reauthorizing VAWA, and IIRIRA.”)

⁶⁹ Legislative History of the Violence Against Women Act of 2005 DEPARTMENT OF JUSTICE APPROPRIATIONS AUTHORIZATION ACT, FISCAL YEARS 2006 THROUGH 2009 -- (Extensions of Remarks - December 18, 2005) [Page: E2607] SPEECH OF HON. JOHN CONYERS, JR. OF MICHIGAN IN THE HOUSE OF REPRESENTATIVES SATURDAY, DECEMBER 17, 2005.

The bipartisan House legislative history of VAWA 2005 authored jointly by Representative James Sensenbrenner, and Representative John Conyers,⁷⁰ Ranking Member of the Chair of the House Judiciary Committee discussed the importance of the VAWA Unit by stating as follows:

In 1997, the Immigration and Naturalization Service consolidated adjudication of VAWA self-petitions and VAWA-related cases in one specially trained unit that adjudicates all VAWA immigration cases nationally. The unit was created “to ensure sensitive and expeditious processing of the petitions filed by this class of at-risk applicants . . .”, to “[engender] uniformity in the adjudication of all applications of this type” and to “[enhance] the Service’s ability to be more responsive to inquiries from applicants, their representatives, and benefit granting agencies.” See 62 Fed. Reg. 16607– 16608 (1997). T visa and U visa adjudications were also consolidated in the specially trained VAWA unit. See, USCIS Interoffice Memorandum HQINV 50/1, August 30, 2001, from Michael D. Cronin to Michael A. Pearson, 7 Fed. Reg. 4784 (Jan. 31, 2002).⁷¹

Consistent with these procedures, the Committee recommends that the same specially trained unit that adjudicates VAWA self-petitions, T and U visa applications, process the full range of adjudications, adjustments, and employment authorizations related to VAWA cases (including derivative beneficiaries) filed with DHS: VAWA petitions T and U visas, VAWA Cuban, VAWA NACARA (§§ 202 or 203), and VAWA HRIFA petitions, 214(c)(15)(work authorization under section 933 of this Act), battered spouse waiver adjudications under 216(c)(4)(C) and (D), applications for parole of VAWA petitioners and their children, and applications for children of victims who have received VAWA cancellation....⁷²

In 1996, Congress created special protections for victims of domestic violence against disclosure of information to their abusers and the use of information provided by abusers in removal proceedings. In 2000, and in this Act, Congress extended these protections to cover victims of trafficking, certain crimes and others who qualify for VAWA immigration relief. These provisions are designed to ensure that abusers and criminals cannot use the immigration system against their victims. Examples include abusers using DHS to obtain information about their victims, including the existence of a VAWA immigration petition, interfering with or undermining their victims’ immigration cases, and encouraging immigration enforcement officers to pursue removal actions against their victims.⁷³

This Committee wants to ensure that immigration enforcement agents and government officials covered by this section do not initiate contact with abusers, call abusers as witnesses or relying on information furnished by or derived from abusers to apprehend, detain and attempt to remove victims of domestic violence, sexual assault and trafficking, as prohibited by section 384 of IIRIRA. In determining whether a person furnishing information is a prohibited source, primary evidence should include, but not be limited to, court records, government databases, affidavits from law enforcement officials, and previous decisions by DHS or Department of Justice

⁷⁰ See generally, Rep. John Conyers, Jr., *The 2005 Reauthorization of the Violence Against Women Act: Why Congress Acted to Expand Protections to Immigrant Victims* 461 (Sage Publications, 2007).

⁷¹The VAWA Unit is the location where self-petitions, T and U visa cases and other cases of immigrant victims are adjudicated. Committee on the Judiciary, House of Representatives, Department of Justice Appropriations Authorization Act, Fiscal Years 2006 to 2009 to Accompany HR 3402. 109th Congress, 1st Session, Report 109- 233, September 22, 2005 p. 116

⁷² Id.

⁷³ Id. at 122.

personnel. Other credible evidence must also be considered. Government officials are encouraged to consult with the specially trained VAWA unit in making determinations under the special “any credible evidence” standard.⁷⁴

The primary goal in creation of the VAWA Unit was to establish a centralized system that uniformly handled VAWA cases in an efficient manner and with the utmost care. The highly specialized unit was able to maintain consistency and efficiency through intensive training, two key components to effective adjudication of these types of applications.⁷⁵ These improvements in the processing method were especially important to battered immigrants whose safety depended on the expediency of the Unit’s determinations. The creation of the specialized unit enhanced the safety and security of victims by ensuring that a properly trained expert who understood the serious nature of domestic violence and the impact on its victims would adjudicate their VAWA cases. The Unit was also trained on “how batterers use their authority over victims’ immigration status to control victims and prevent them from seeking assistance from the criminal justice system.”⁷⁶ Maintaining confidentiality and being well versed in the resources that should be offered to victims allowed the Unit to preserve victim safety while adjudicating cases and to prevent the perpetrator from exerting further control over the victim.

Due to its training, the VAWA unit staff has developed the expertise necessary to analyze the credibility of the applications the Unit receives. This skill is important because of the high volume of applications received; efficiency is important in processing these types of cases, particularly in making *prima facie* determinations. By constantly being exposed to this limited type of application, the Unit was able to expertly and quickly distinguish between fraudulent and legitimate cases. This was accomplished through training that allowed staff to identify patterns and dynamics among both the valid approvable applications and the fraudulent ones.⁷⁷ Since the members of the specialized staff share information with each other, each case is adjudicated appropriately, consistently, and in a timely manner, and the fraudulent cases are disposed of quickly. The VAWA Unit’s current approach and structure provides the public with a one-stop, user-friendly service where the staff knows the status of each case and fully understands the process of adjudication.⁷⁸

The 2005 amendments to VAWA confidentiality required DHS and DOJ to issue guidance and train officers and employees.⁷⁹ This training requirement was added by Congress to more effectively stop VAWA confidentiality violations that were being committed most often by immigration enforcement officers, District office personnel, and DHS trial attorneys.⁸⁰ This training requirement also applies to officials at the DOJ including immigration judges and the BIA.

The Vermont Service Center embraced this mandate by training its staff in domestic violence, sexual assault, trafficking, and crime victimization, and how these issues impact immigrant victims. Their training also fosters expertise in how abusers of immigrant victims exert power and control. In addition to these subjects, the VAWA Unit was trained to understand the full range of VAWA

⁷⁴ Id. at 122

⁷⁵ Conyers, *supra* note 53 at 461.

⁷⁶ *Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 2083 Before the Subcomm. On Immigration and Claims of the H. Comm. On the Judiciary*, 106th Cong. (2000) (statement of Barbara Strack, Acting Executive Associate Commissioner for Policy and Planning, Immigration and Naturalization Service), available at: <http://judiciary.house.gov/legacy/stra0720.htm>.

⁷⁷ Office of Policy and Planning, “Strategic Plan Toward INS 2000.” U.S. Immigration and Naturalization Service, 1994, p. 17.

⁷⁸ Id. at 16.

⁷⁹ 8 U.S.C. 1367(d).

⁸⁰ Report of the Committee on the Judiciary House of Representatives to Accompany H.R. 3402. Department of Justice Appropriations Act Fiscal Years 2006 through 2009. 109th Congress, First Session, Report 901- ; September 22, 2005. Pages 118-122.

confidentiality requirements and the ways in which VAWA confidentiality laws affect adjudication and case processing. Effective training allowed the Unit to become more efficient in its case processing and more proficient and successful in making *prima facie* determinations to distinguish fraudulent cases from legitimate ones. As the legislative history of the 2005 amendments to VAWA makes clear, this level of training is necessary to both the efficiency of the Unit, but also protects victims' confidentiality and expedited processing of their sensitive cases.

Increasing immigration judges' and the BIA's understanding the dynamics of domestic violence will greatly enhance the quality of VAWA cancellation of removal and VAWA suspension of deportation case adjudications. There is much that can be learned from DHS's VAWA Unit experience. The VAWA specialized Unit is effective. The specially trained DHS VAWA Unit uses a high degree of diligence and vigilance in adjudicating these cases as compared to family based immigration applications. VAWA and U visa cases have a higher rate of Requests for Further Evidence (RFE) issued by immigration authorities as compared to other types of immigration cases.⁸¹ DHS data on VAWA unit case processing reveals that the VAWA Unit requires significantly more evidence in VAWA self-petitioning cases when battered spouses and children apply for immigration relief on their own without the abusive U.S. citizen or lawful permanent resident spouse's knowledge, assistance or consent. The DHS VAWA unit issues a 4 times greater rate of requests for further evidence in VAWA self-petitioning cases than in family based visa petition cases.⁸²

- Requests for further evidence rate
 - 74% VAWA cases
 - 18.3% family visa petition cases

The denial rate for VAWA self-petitioning cases is also higher than for family based visa petition cases generally.⁸³

- Denial rate
 - 31.4% VAWA self-petitions
 - 21% U visas
 - 11.2 % family members of citizens
 - 14.2% family members of lawful permanent residents

The Board of Immigration Appeals Should Assign All VAWA Cases to a Specially Trained Panel of Judges Staffed By BIA Attorneys Who Also Receive Specialized Training

The Board of Immigration Appeals should follow the lead of the Department of Homeland Security and assign all cases involving applicants who have been subject to battering or extreme cruelty to a specially trained Panel of Board Members, staffed by a fixed team of BIA attorneys who also receive specialized training. All VAWA cancellation of removal, VAWA suspension of deportation,

⁸¹ DHS VAWA Unit data (2007-2011); See also, See also, Immigration Committee of the National Task Force to End Sexual and Domestic Violence, *Without Evidence of a Systemic Problem, House VAWA Bill Proposes Radical Changes that Undermine VAWA Protections for Immigrant Victims Current System Saves Thousands of Lives Each Year, but Changes Will Jeopardize Victims and Empower Abusers* (2012) Available at: <http://4vawa.org/pages/vawa-fact-sheets>

⁸² DHS VAWA Unit data (2007-2011)

⁸³ Id.

VAWA adjustment of status cases, and any other cases that the BIA handles involving an immigrant crime victim seeking relief as a VAWA self-petitioner or as a T-or U-visa applicant should be assigned to this specially trained team of attorneys and Board members. There have been instances where the immigration judge and/or the BIA has issued an unfavorable decision⁸⁴ when considering similar or same types of abuse that it considered extreme cruelty in other cases and issued a favorable decision⁸⁵. This approach will promote consistency of adjudications and will help ensure that immigrant crime victims receive a careful, full and fair adjudication of their VAWA claims on appeal. The split among Federal Circuit courts on the issue of whether “battery or extreme cruelty” is a factual determination that is reviewable or a discretionary decision that is unreviewable makes the need for a specialized panel at the BIA more urgent. Without specially trained adjudicators and attorneys handling battered immigrants’ cases at the BIA, legitimate victims will continue to be denied VAWA protections because neither the immigration judge nor the BIA member reviewing the case had the specialized training necessary to make full and fair adjudications consistent with VAWA’s goals and requirements.

As the National Center for State Courts⁸⁶ and the U.S. Department of Justice’s Office on Violence Against Women⁸⁷ and State Justice Institute⁸⁸ have developed expertise and best practices for adjudications in civil and criminal domestic violence cases, it has become clear that both domestic violence victims and state courts are harmed when cases are adjudicated by judges who lack specialized training on domestic violence dynamics. The primary benefits of specialized courts are an increased efficiency in case management and improved decision making by expert judges.⁸⁹ It is critical for a judge to cultivate knowledge about factors including the social, economic, immigration status, cultural, and religious ties that the abuser uses to maintain power and coercive control over the victim.⁹⁰ For foreign born victims, immigration related abuse often persists even after a protection order has been issued against the perpetrator.⁹¹ Immigration related abuse corroborates, co-exists with, or predicts escalation of the abuse toward physical and sexual abuse.⁹² Extensive experience with adjudicating

⁸⁴ Pushed victim: *Rosario v. Holder*, A-074-915 CON (BIA 2009); Hit victim in the face: *In Re Petitioner* (name redacted by agency), 2009 WL 3065731 (INS); marital rape: *In Re Petitioner* (name redacted by agency), 2009 WL 7441501 (INS); physical abuse of child: *Ekasinta v. Gonzales*, 2005 U.S. App. Lexis 14563.

⁸⁵ Pushed victim: *Wren v. Wren*, 2001 Neb. App. Lexis 279 (BIA 2001); Hit victim in the face: *In Re Patricia Sanchez-Lopez*, File A79-150-628 CO (IJ 2008); marital rape: *In Re Petitioner* (name redacted by agency), 2009 WL 2137579 (INS).

⁸⁶ Hon. Donald E. Shelton, *The Current State of Domestic Violence Courts in the United States*, 2007 available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/famct/id/173>, See generally <http://www.ncsc.org/Topics/Children-Families-and-Elders/Domestic-Violence/Resource-Guide.aspx>; Melissa Labriola, Sarah Bradley, Chris S. O’Sullivan, Michael Rempel, Samantha Moore, National Portrait of Domestic Violence Courts, Center for Court Innovation (February 2010) Available at <https://www.ncjrs.gov/pdffiles1/nij/grants/229659.pdf>

⁸⁷ See Court Training and Improvements Grant Program, available at: <http://www.ovw.usdoj.gov/ovwgrantprograms.htm#3> and <http://www.ovw.usdoj.gov/docs/courts-program-solicitation-final-for-release.pdf>

⁸⁸ Bureau of Justice Assistance, State Justice Institute, American University, *Challenges and Solutions to Implementing Problem Solving Courts from the Traditional Court Management Perspective*, (March 2008), available at: http://www.sji.gov/PDF/Problem_Solving_Courts-BJA3-31-08.pdf

⁸⁹ Markus B. Zimmer, *Overview of Specialized Courts*, 2 INT’L J. FOR CT. ADMIN. 46, 46 (2009).

⁹⁰ Natasha Bakht for Justice Paul Bentley of the Ontario Court of Justice on behalf of the National Judicial Institute, *Problem Solving Courts as Agents of Change*, 13 (2004), available at: <http://www.iadtc.law.ecu.edu.au/pdfs/Problem%20Solving%20Courts%20Paper%20final%20ppr.pdf>. See also, Nawal H. Ammar, Leslye E. Orloff, Mary Ann Dutton, and Giselle A. Hass, *Battered Immigrant Women in the United States and Protection Orders: An Exploratory Research*, *Criminal Justice Review* 2012 37: 337 (originally published online 1 August 2012), available at: <http://iwj.legalmomentum.org/reference/additional-materials/family-law-for-immigrants/protective-orders/research-reports-and-data/AmmaretalCPO.pdf/view>; Nawal Ammar, Helene Berman, Jacquelyn Campbell, Anindita Dasgupta, Mary Ann Dutton, Giselle Hass, Stephanie J. Nawyn, Leslye E. Orloff, Anita Raj, Rachael Rodriguez, Evan Stark, Jay G. Silverman, Cris M. Sullivan, David B. Thronson, Veronica Tobar Thronson, Hannah Brenner, J. Ruben Parra-Cardona, Julia L. Perilla, *Researcher’s Perspective on Immigration Protections for Immigrant Victims of Domestic Violence and Sexual Assault*, (December 6, 2012), available at: <http://iwj.legalmomentum.org/reference/additional-materials/research-reports-and-data/research-US-VAIW/20120531%20VAWA%20IV%20House%20Researcher%20Data%20Sign%20on%20FINAL.pdf/view>

⁹¹ Mary Ann Dutton, Leslye Orloff and Giselle Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 2 GEO. J. GENDER & L 245 (2000), available at: <http://iwj.legalmomentum.org/reference/additional-materials/research-reports-and-data/research-US-VAIW/Characteristics%20of%20Help-Seeking%20Immigrant%20Battered%20WomenOVW%2010.23.01.pdf/view> (Hereinafter Dutton Helpseeking)

⁹² Giselle Aguilar Hass, Mary Ann Dutton and Leslye E. Orloff, *Lifetime Prevalence of Violence Against Latina Immigrant: Legal and Policy Implications*, *Domestic Violence: Global Response* (2000) at 93-113, available at: http://iwj.legalmomentum.org/reference/additional-materials/research-reports-and-data/research-US-VAIW/RSCH_Lifetime_Prevalence_DV_Latinas.pdf/view

domestic violence results in efficient and well-informed decision-making⁹³ and furthers procedural fairness and trust that decisions will be made in a consistent manner that is objective, neutral, and fair.

Part of this development should also include specialized training, which Congress has consistently supported in the context of VAWA.⁹⁴ Additionally, the lack of mandatory specialized training in domestic violence of judges that preside over such cases leads to inefficiency in court management. Understanding of issues such as the domestic violence dynamics experienced by abused spouses and children, immigration related abuse,⁹⁵ problems and patterns in criminal investigations and prosecutions of perpetrators,⁹⁶ support services for victims, problems immigrant victims have in accessing services,⁹⁷ and sentencing procedures are crucial to proper and efficient adjudication of domestic violence cases⁹⁸.

Without specialized training and expertise, courts issue inconsistent rulings on similar facts leading the judicial system to invest significantly more resources in cases that are overturned on appeal and/or that require multiple hearings. When adjudicators lack training on domestic violence dynamics, access to justice for battered immigrants who are abused by their U.S. citizen or lawful permanent resident spouses or parents is delayed or denied. When an application for VAWA cancellation of removal or suspension of deportation relief is denied, victims of spouse and child abuse must choose between returning to live with her perpetrator or leaving the country and losing all contact with their children. Either option leaves victims with legitimate cases susceptible to ongoing abuse, coercive control, and retaliation by the abuser. This result is contrary to Congressional intent in VAWA, and is particularly troubling since, in most circuits, such a decision by the Board is unreviewable.

A specialized panel would be more adept at looking for particular patterns that are indicative of abuse and of the dynamics of the relationship between the perpetrator and the victim. They are also more qualified to swiftly recognize fraudulent cases and claims. This highly specialized knowledge is gained through limited subject matter the judges on the panel are exposed to.⁹⁹ Limiting subject matter also allows judges to “remain current on new...issues and laws.”¹⁰⁰ Since judges on a specialized panel would be exposed to domestic violence cases exclusively, they would only need to remain current on related issues and changes in the applicable law. This focused approach would not only contribute to the expertise of the judges, but also allow for more efficient adjudication since they would be current on developments in the law.

Another compelling argument for a specialized panel is uniformity in applying relevant law. After developing expertise on the subject matter, judges on specialized panels are more likely to apply

⁹³ Keilitz, *supra* note 41 at 24 (citing Delphi study of practitioners, judges, court managers and domestic violence experts).

⁹⁴ H.R. Rep. No. 109-233, at 118 (2005).

⁹⁵ Giselle Aguilar Hass, Mary Ann Dutton and Leslye E. Orloff, Lifetime Prevalence of Violence Against Latina Immigrant: Legal and Policy Implications, *Domestic Violence: Global Responses*, pp. 93-113 2000 A B Academic Publishers Printed in Great Britain available at http://iwp.legalmomentum.org/reference/additional-materials/research-reports-and-data/research-US-VAIW/RSCH_Lifetime_Prevalence_DV_Latinas.pdf/view

⁹⁶ HON. STEPHEN B. HERRELL & MEREDITH HOFFORD, FAMILY VIOLENCE: IMPROVING COURT PRACTICE, RECOMMENDATIONS FROM THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES 16 (1990)

⁹⁷ Anna Pohl, Hema Sarangapani, Amanda Baran, and Cecilia Olavaria, Barriers to Accessing Services: The Importance of Advocates Accompanying Battered Immigrants Applying For Public Benefits (2004) available at http://iwp.legalmomentum.org/public-benefits/benefits-for-qualified-immigrants/PB_BB-Accompanying_Immigrants_Applying_for_Benefits-MANUAL-BB.pdf/view

⁹⁸ See Herrell, *supra* note 96 at 42.

⁹⁹ See ROHAZAR WATI ZUALLCOBLEY, ET AL., STUDY ON SPECIALIZED INTELLECTUAL PROPERTY COURTS 4 (2012) (citing findings that specialized intellectual property courts yield “accurate, consistent case outcomes” because of the expertise that is developed through judicial specialization and limiting subject matter jurisdiction in those types of courts).

¹⁰⁰ *Id.* at 6.

the law in a more uniform and consistent manner than their courts of general jurisdiction counterparts.¹⁰¹ Uniformity and consistency facilitate a more streamlined judicial process and also “yields more consistent case law,”¹⁰² which could lead to less litigation over time. Increased uniformity in domestic violence cases decisions and in the application of the law will also allow the court to be more efficient in its case management. Case precedent and a consistent application of the law will allow the specialized panel to approach domestic violence cases in a more methodical and efficient manner.

The Board’s specially trained panel will work to ensure that immigration judges are able to fully implement the array of protections Congress created for this special class, including the opportunity to have their cases heard in proceedings. As with the other immigration laws created by Congress for domestic violence survivors, the Panel and the Board should review VAWA based relief in the context of domestic violence and the generous standards Congress has created within these provisions. These “special” cases should not be reviewed in the more narrow evidentiary and regulatory process created for all other cases.

Specialized training will include understanding the dynamics of domestic violence experienced by immigrant victims to enable adjudicators to correctly identify abuse dynamics, patterns, coercive control, and nuances that are present in legitimate cases of abuse and not present in fraudulent cases. Research and data regarding urban homicide rates indicate that foreign-born women are at a higher risk for homicide from an intimate partner.¹⁰³ This phenomenon occurs because there is often a clash of culture, language barriers, the issue of fear and deportation, especially in cases where such immigrants are undocumented. Domestic violence abuse rates rise to almost three times the national average when a foreign born woman is married to U.S. citizen man.¹⁰⁴ Without any specialized training to fully understand the implication of such abuse for immigrants, the judges may not recognize the more subtle signs of trauma and other patterns of abuse, including immigration related abuse.¹⁰⁵ Threats of deportation, to turn the victim in for immigration enforcement and/or to withdraw papers the perpetrator filed for the victim constitute immigration related abuse.¹⁰⁶ Such abuse is ten times higher in physically and sexually abusive relationships than in emotionally abusive relationships.¹⁰⁷ When immigration related abuse exists in a relationship where physical or sexual abuse has not yet occurred, immigration related abuse could be an indication that the lethality of abuse is increasing.¹⁰⁸

It is important to remember that VAWA cancellation of removal and suspension of deportation applicants, with their children, are each immigrants married to or the children of a U.S. citizen or lawful permanent resident. The citizen or lawful permanent resident spouse or parent, were they not an abuser, would have filed on behalf of the immigrant for lawful permanent residency, based on proof of the

¹⁰¹ Zimmer, *supra* note 42 at 47.

¹⁰² Zimmer, *supra* note 42 at 47.

¹⁰³ Victoria Frye, Sandro Galea, Melissa Tracy, Angela Bucciarelli, Sara Putnam, and Susan Wilt, *The Role of Neighborhood Environment and Risk Femicide of Intimate Partner in a Large Urban Area*, American Journal of Public Health, August 2008, Vol. 98, No 8, pp1473-1479.

¹⁰⁴ Add cite

¹⁰⁵ Giselle Aguilar Hass, Mary Ann Dutton and Leslye E. Orloff, Lifetime Prevalence of Violence Against Latina Immigrant: Legal and Policy Implications, Domestic Violence: Global Responses, pp. 93-113 2000 A B Academic Publishers Printed in Great Britain available at http://iwp.legalmomentum.org/reference/additional-materials/research-reports-and-data/research-US-VAIW/RSCH_Lifetime_Prevelence_DV_Latinas.pdf/view

¹⁰⁶ Id.

¹⁰⁷ Mary Ann Dutton, Leslye Orloff and Giselle Hass, Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications, 2 GEO. J. GENDER & L 245 (2000), available at: <http://iwp.legalmomentum.org/reference/additional-materials/research-reports-and-data/research-US-VAIW/Characteristics%20of%20Help-Seeking%20Immigrant%20Battered%20WomenOVW%2010.23.01.pdf/view>

¹⁰⁸ Giselle Hass, Nawal Ammar and Leslye Orloff “Battered Immigrants and U.S Citizen Spouses” (Legal Momentum, April 24, 2006) available at http://iwp.legalmomentum.org/reference/additional-materials/iwp-training-powerpoints/september-9-12-2012-san-diego-ca/research/BB_RSRCH_ImmVictims_Battered_Imm.pdf/view

immigrant's good faith marriage to a U.S. citizen or lawful permanent resident. Were it not for the abuse, the immigrant would have received lawful permanent residency as a result of the filing by their citizen or lawful permanent resident spouse or parent.

As was the case when Congress determined the need for the DHS VAWA Unit, there is now a need for a specially trained panel within the BIA to curb the instances described above and to ensure access to relief for those who are eligible under VAWA.¹⁰⁹ The specialized panel would allow the BIA to be more effective by making it easier for them to detect fraud due to specialized training that equips them with the knowledge they need to easily identify patterns in fraudulent claims that come before them. With the proposed training in place, immigration judges and the BIA will acquire the knowledge necessary to properly discern credibility issues, effectively work with victims of abuse, and note that it requires them to understand the victim's fear for herself, for her children, her sense of guilt and shame, which are further complicated by ongoing threats of deportation from her abuser, which then prevents her from seeking help and cooperating with law enforcement.¹¹⁰

¹⁰⁹ See House Judiciary Committee Report, *supra* note 73, at 116.

¹¹⁰ Ann Shalleck, *Theory and Experience in Constructing the Relationship between Lawyer and Client: Representing Women who have been abused*, 64 TENN. L. REV. 1019, 1046-47 (1997).