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7 LEGAL MOMENTUM

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11
12 MARK HAWKE,

13 Petitioner,

14 v.

15 UNITED STATES DEPARTMENT OF
16 HOMELAND SECURITY, CITIZENSHIP
AND IMMIGRATION SERVICES,

17 Respondent.
18

Case No. C 07-03456 RMW

**AMICUS CURIAE BRIEF OF
LEGAL MOMENTUM**

Date: May 23, 2008
Time: 9:00 a.m.
Ctrm: 6

1 **I. INTRODUCTION**

2 Legal Momentum respectfully submits this brief as *Amicus Curiae* in opposition to
3 Petitioner’s attempts to circumvent the confidentiality requirements of Violence Against Women
4 Act (“VAWA”) statutes. Legal Momentum is a non-profit advocacy organization that has been
5 closely involved in the process of enacting VAWA legislation and VAWA Confidentiality
6 protections. Congress enacted these laws to ensure that immigration protections for immigrant
7 victims included assurances that information about the existence of a VAWA immigration case
8 and confidential immigration application materials are not disclosed to the abusive spouses of
9 applicants. In this case, Petitioner is accused of criminal battery and seeks disclosure of alleged
10 confidential immigration files which, if they exist, would be protected from disclosure under
11 VAWA confidentiality. Petitioner’s request fails because Petitioner has not established that any
12 VAWA application exists. Moreover, even assuming that a VAWA application exists as asserted
13 by Petitioner, he provides no justification for abrogating the confidentiality that Congress
14 mandated to prevent abusers from gaining access to or learning about the existence of VAWA
15 applications.

16 In particular, Petitioner argues that the alleged VAWA-related application was denied and
17 therefore, falls into an exception to the confidentiality requirements. To the contrary, nothing in
18 the evidence submitted by Petitioner even refers to a VAWA application. Moreover, the letter
19 referring to an application for permanent residency is only described as “denied.” Immigrants
20 eligible for VAWA immigration relief and VAWA confidentiality receive the protections
21 conferred by VAWA confidentiality statutes even when the applicant has also filed for other
22 forms of immigration relief the immigrant is eligible to receive. Simply because an application
23 had been rendered moot, it would not be appropriate to strip that application of any of the
24 confidentiality that it would otherwise enjoy under VAWA. Finally, Petitioner has failed to
25 address the possibility that another VAWA application, such as an application to self-petition as a
26 VAWA applicant, may exist which protects all of the requested immigration files from disclosure.

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1 **II. INTEREST OF THE AMICUS CURIAE**

2 Legal Momentum is the nation’s oldest legal advocacy organization dedicated to
3 advancing the rights of women. By helping to create a legal framework that helps immigrant
4 victims of violence against women end the destructive role of violence in their lives, Legal
5 Momentum strives to protect and expand the rights of immigrant women and their children. To
6 help immigrant women improve their lives and future prospects in their new country, Legal
7 Momentum focuses on four core interconnected areas: violence against women, immigration,
8 economic empowerment, and access to justice. Based in part on case studies and field work,
9 Legal Momentum examines and analyzes the roles of immigration, public benefits, and family
10 and criminal laws in the lives of immigrant women.

11 Victims of domestic violence, sexual assault, trafficking and other crimes are among those
12 who are the focus of Legal Momentum’s national efforts to improve access to legal immigration
13 status for immigrant women and children. Through a number of mechanisms, including advocacy
14 with Congress, the Department of Homeland Security (“DHS”), the Department of Justice, Health
15 and Human Services, the Department of Housing and Urban Development, the Department of
16 Education, and the White House, Legal Momentum advocates for regulatory, legislative, and
17 administrative improvements that benefit immigrant women. In the context of immigrant victims
18 of domestic violence, Legal Momentum identifies areas of needed law reform, works with
19 members of Congress to craft legislative solutions, collects stories documenting immigrant
20 women’s experiences illustrating the need for change, advocates for passage of favorable
21 legislation, and organizes opposition to provisions that will pose dangers to immigrant women.
22 Legal Momentum then works with federal administrative agencies to help craft policies and
23 procedures that effectively implement the laws for immigrant women and their children.

24 Starting in 1994 with the Violence Against Women Act (“VAWA”), Legal Momentum
25 has been at the forefront of legislative and administrative advocacy securing legal protections for
26 victims of violence against women. In an effort to improve upon the original VAWA provisions
27 and stop perpetrators of violence against women from using threats of deportation to harm
28 victims, Legal Momentum advocated with Congress to create the VAWA Confidentiality

1 protections of 1996. Since the enactment of these initial VAWA protections, Legal Momentum
2 has continued to be involved in advocating for subsequent improvements to VAWA
3 confidentiality protections in the Violence Against Women Act reauthorizations in 2000 and
4 2005.

5 **III. BACKGROUND**

6 The Violence Against Women Act was created in 1994 (“1994 VAWA Act”).¹ In
7 addition to providing certain confidentiality protections for domestic violence victims, the 1994
8 VAWA Act instructed the Attorney General to study and evaluate the need for additional
9 confidentiality protections. *See id.* at § 40508. In 1996, Congress enacted confidentiality
10 requirements for the immigration records of immigrant victims of domestic violence.² Congress
11 expanded upon these protections in the 2000³ and 2005⁴ VAWA reauthorization acts (“VAWA
12 2000” and “VAWA 2005,” respectively). The VAWA provisions and confidentiality protections
13 discussed herein arise from this group of statutes.

14 Petitions for relief under VAWA are filed with DHS. One manner in which an abused
15 immigrant spouse can petition for relief under VAWA is through filing a VAWA application with
16 DHS for the applicant to be designated a “VAWA Self-Petitioner.”⁵ If the VAWA Self-Petitioner
17 application is granted, DHS can then grant a request for the applicant to receive an “Adjustment
18 of Status” to permanent resident. *See* Exh. 2, Form I-485. The Adjustment of Status application
19 can only be granted if the applicant has already been granted a VAWA Self-Petitioner

20 1. *See* Violent Crime Control and Law Enforcement Act (“1994 VAWA Act”), Pub. L. No. 103-
21 322, 108 Stat. 1796 (1994) § 40153 (Confidentiality of Communications between Sexual Assault
22 or Domestic Violence Victims and their Counselors); § 40281, (Confidentiality of Abused
Person’s Address); and § 40508, (Report on Confidentiality of Addresses for Victims of
Domestic Violence).

23 2. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRAIRA”), Pub.
L. No. 104-208, § 384; codified at 8 U.S.C. § 1367 (1996).

24 3. *See* Victims of Trafficking and Violence Protection Act of 2000 (“VAWA 2000”), Pub. L. No.
25 106-386, Div B, Title V, § 1513(d) (2000).

26 4. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005
27 (“VAWA 2005”), Pub. L. No. 109-162, Title VIII, Subtitle B, § 817 (2006).

28 5. DHS Form I-360 contains an option for an abused immigrant spouse to petition for
classification by DHS as the spouse of an abuser, or a “VAWA Self-Petitioner.” *See* Exh. 1,
Form I-360, 3. Filing of a VAWA self-petition Form I-360 triggers protections of an immigrant’s
DHS information under VAWA Confidentiality provisions. *See* 8 U.S.C.S. § 1367(a)(2).

1 application. The filing of any VAWA-related application, including a VAWA Self-Petitioner
2 application, triggers protections of an immigrant’s DHS information under VAWA
3 Confidentiality provisions. *See* 8 U.S.C.S. § 1367(a)(2) (1996).

4 One of the specific reasons that Congress enacted VAWA Confidentiality protections was
5 to prohibit the disclosure of confidential VAWA immigration application materials to an accused
6 batterer. *See* 151 Cong. Rec.* E2605, E2607 (daily ed. Dec. 18, 2005) (statement of Rep.
7 Conyers) (stating that VAWA Confidentiality provisions “are designed to ensure that abusers and
8 criminals cannot use the immigration system against their victims. Examples include abusers
9 using DHS to obtain information about their victims, including the existence of a VAWA
10 immigration petition, interfering with or undermining their victims’ immigration cases, and
11 encouraging immigration enforcement offices to pursue removal actions against their victims.”).
12 This intention is explicitly written into the VAWA statutes. *See, e.g.*, 1994 VAWA Act, § 40508
13 (directing the Attorney General to analyze means for protecting the confidential information of
14 “abused spouses to protect such persons from exposure to further abuse”); *see also* VAWA 2000,
15 Pub. L. No. 106-386, § 1502, 114 Stat. 1464, 1518 (stating, “Congress finds that the goal of the
16 immigration protections for battered immigrants included in the Violence Against Women Act of
17 1994 was to remove immigration laws as a barrier that kept battered immigrant women and
18 children locked in abusive relationships”).

19 In the present case, Petitioner requests that the Court review the denial by DHS for the
20 production of documents related to the confidential immigration files of Lucia Herrera Hawke
21 (“Lucia”). *See* Petitioner’s First Amended Petition, 5:4-11. Petitioner is currently being
22 prosecuted on a felony charge of battery of Lucia pursuant to the California Penal Code. *See id.*
23 at 4:25-28. The reason that Petitioner seeks these confidential immigration files is that he
24 believes that the files may contain information which might assist him in his criminal defense.
25 *See id.* at 2-4.

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1 **IV. ARGUMENT**

2 A. PETITIONER HAS NOT ESTABLISHED THE EXISTENCE OF A VAWA
3 APPLICATION

4 Petitioner’s request is based upon the contention that there is “overwhelming evidence” to
5 support the existence of a VAWA application. *See* Petitioner’s Reply, 3:20. Petitioner states that
6 “Lucia applied for an adjustment of status under the provisions of VAWA. Her application was
7 denied because she had already been granted the status of lawful permanent resident via her joint
8 application with Petitioner during their marriage.” *See id.* at 3:11-13. Petitioner’s argument
9 primarily relies upon a letter from DHS addressed to Lucia.⁶

10 The DHS letter, as noted by the Government in its Response, does not make any reference
11 whatsoever to a VAWA application. *See* Government’s Response, 4:12-13. Moreover, the
12 testimony of Lucia relied upon by Petitioner does not prove the existence of a VAWA
13 application. First, in the transcript cited by Petitioner, the state court judge presiding over the
14 hearing correctly refuses to entertain discussion of any alleged VAWA application. *See*
15 Petitioner’s First Amended Petition, Exh. 3, 71:19-21 (“THE COURT: . . . If it’s the Violence
16 Against Women [Act], we’re not going there.”). Second, Lucia never testified that she filed a
17 VAWA application, and no statement that Petitioner cites supports his assertion that Lucia
18 confirmed that she filed a VAWA application. Third, the time frame that she referenced for the
19 filing of the alleged VAWA application in March or April of 2006 in her quoted testimony does
20 not correspond to the application date of June 13, 2006 alleged by Petitioner to be a VAWA-
21 related application.

22 Petitioner’s demand that the Government confirm the existence of such an application
23 would itself undermine the confidentiality protections of VAWA. Thus, as the Government
24 notes, it can “neither confirm nor deny” the existence of the application. *See* Government’s
25 Response, 3 n.2:26-28. To provide Petitioner with any information concerning such an
26 application, if it exists, would undermine the very purpose of the VAWA Confidentiality
27 provisions. The Government must not be compelled to respond in any manner which may reveal

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6. Petitioner does not explain why he is in possession of a confidential correspondence from DHS
addressed to Lucia.

1 the existence or substance of an alleged VAWA application.

2 B. EVEN ASSUMING THE EXISTENCE OF A VAWA APPLICATION, THE
3 CONFIDENTIALITY PROVISIONS OF VAWA WOULD STILL PREVENT
4 DISCLOSURE.

5 1. The Alleged VAWA-Related Application Was Not Denied on Its Merits,
6 but Mooted.

7 Even if we assume that Lucia’s alleged Adjustment of Status application was based upon
8 VAWA, it was mooted, not denied on its merits. VAWA immigration protections were designed
9 by Congress to allow victims to move forward simultaneously with any immigration case filed by
10 their abusive spouse on the victims’ behalf and to file, confidentially, a VAWA self-petition. In
11 this way Congress severed the ability of an abusive spouse to control whether an immigrant
12 victim attained legal immigration status. If the abuser withdrew or sought revocation of the
13 immigration case he filed, the victim would receive lawful permanent residency through her
14 VAWA case.

15 Petitioner attempts to argue that Lucia filed an Adjustment of Status application and that
16 the letter from DHS is a denial of this application. Petitioner argues that the VAWA
17 confidentiality for Lucia terminated because, by statute, VAWA confidentiality “ends when the
18 application for relief is denied and all opportunities for appeal of the denial have been exhausted.”
19 8 U.S.C.S. § 1367(a)(2) (1996). However, according to the DHS letter, Lucia was not denied, but
20 granted, permanent residency. *See* DHS Letter (“On September 21, 2006 you were granted
21 lawful permanent residency based on the application filed on August 10, 2006.”). When DHS
22 granted lawful permanent residency to Lucia, the grounds upon which she was granted that relief
23 does not control whether any VAWA confidentiality protection she is entitled to receive
24 continues. The award of lawful permanent residency to a victim through another immigration
25 case results in DHS not having to finally adjudicate any VAWA case that may have been filed.
26 As a result, according to the letter, Lucia has been granted status as a permanent resident in this
27 country, and her alleged VAWA-related Adjustment of Status application would still be afforded
28 VAWA confidentiality-based protection.

Congress clearly intended to protect the confidential information of VAWA petitioners

1 whose VAWA-related adjustment of status applications were not denied on their merits, but
2 mooted due to permanent residency being granted on other grounds. In such a situation, the
3 abused immigrants remain in the United States, and the need to “protect such persons from
4 exposure to further abuse” (1994 VAWA Act) and “to remove immigration laws as a barrier that
5 kept battered immigrant women and children locked in abusive relationships” (VAWA 2000) still
6 exists.

7 If Lucia has filed an Adjustment of Status application based upon an approved VAWA
8 self-petition, then the need to protect Lucia from further abuse still exists. If this Adjustment of
9 Status application exists as asserted by Petitioner, then the protection from further abuse, as
10 contemplated by the VAWA Confidentiality provisions, would be defeated if Petitioner is
11 allowed access to Lucia’s confidential immigration files. Given that Lucia’s alleged VAWA-
12 related Adjustment of Status petition was not denied on its merits, but mooted by the granting of a
13 separate application for permanent residency, such an alleged application does not fall under the
14 denial exception.

15 2. Other VAWA Applications Would Also Prevent Disclosure.

16 Petitioner’s request fails to consider the possibility that other VAWA applications may
17 exist which would also trigger VAWA Confidentiality requirements. For example, in order to
18 grant an Adjustment of Status application as asserted by Petitioner, DHS would first need to have
19 granted a VAWA Self-Petitioner Application.⁷ The documents submitted by Petitioner are
20 consistent with the possibility that Lucia has already been granted status as a VAWA Self-
21 Petitioner. As a VAWA Self-Petitioner, Lucia’s entire immigration file would be already
22 protected under VAWA Confidentiality provisions. *See* 8 U.S.C.S. § 1367(a)(2) (1996).⁸ Since

23 _____
24 7. The arguments presented in this section neither confirm nor deny the existence of any VAWA
25 application filed by Lucia. Rather, they are presented under the hypothetical scenario postulated
by Petitioner, regarding the evidence that he purports represents a VAWA-related adjustment of
status denial.

26 8. 8 U.S.C.S. § 1367(a)(2) states:

27 [I]n no case may the Attorney General, or any other official or
28 employee of the Department of Justice, the Secretary of Homeland
Security, the Secretary of State, or any other official or employee
of the Department of Homeland Security or Department of State
(including any bureau or agency of either of such Departments)

1 Petitioner has not identified any exception that could even arguably apply to a granted VAWA
2 Self-Petitioner application, to the extent one exists, the Petitioner’s motion must fail.

3 **V. CONCLUSION**

4 In enacting the provisions of VAWA, Congress sought to protect battered immigrants by
5 preventing the batterer from gaining access to the confidential immigration files of the person
6 whom he is accused of battering. In this case, Petitioner has not only failed to produce evidence
7 that confirms the existence of any VAWA application, but has also failed to provide any
8 justification for disregarding the important confidentiality safeguard that would apply to any
9 application that did exist.

20 permit use by or disclosure to anyone . . . of any information
21 which relates to an alien who is the beneficiary of an application
22 for relief under paragraph . . . (51) of section 101(a) of the
23 Immigration and Nationality Act [8 U.S.C.S. § 1101(a)].
24 8 U.S.C.S. § 1101(a)(51) states, “The term ‘VAWA self-petitioner’ means an alien, or a child of
25 the alien, who qualifies for relief under . . . clause (iii) . . . of 8 U.S.C.S. § 1154(a)(1)(A).
26 Clause (iii) of 8 U.S.C.S. § 1154(a)(1)(A) describes the requirements for a VAWA Self-
27 Petitioners application, and it states:

28 An alien who is described in subclause (II) may file a petition with
the Attorney General under this clause for classification of the
alien (and any child of the alien) if the alien demonstrates to the
Attorney General that--
(aa) the marriage or the intent to marry the United States citizen
was entered into in good faith by the alien; and
(bb) during the marriage or relationship intended by the alien to be
legally a marriage, the alien or a child of the alien has been
battered or has been the subject of extreme cruelty perpetrated by
the alien’s spouse or intended spouse.

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Dated: May 22, 2008

Respectfully submitted,

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By: _____ /s/
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