UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 03-9553

GRACIELA PERALES,

Petitioner,

vs.

JOHN D. ASHCROFT, in his official capacity as Attorney General of the United States,

Respondent.

APPEAL FROM A DECISION OF THE BOARD OF IMMIGRATION APPEALS

BRIEF OF THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, FAMILY VIOLENCE PREVENTION FUND, AND NOW LEGAL DEFENSE AND EDUCATION FUND AS AMICI CURIAE IN SUPPORT OF PETITIONER'S REQUEST FOR REVERSAL, OR IN THE ALTERNATIVE, REMAND

Of Counsel:

Dan Kesselbrenner
Gail Pendleton
National Immigration Project of the
National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727

Attorneys for Amici Curiae:

David Neslin
ARNOLD & PORTER
370 Seventeenth Street
Suite 4500
Denver, CO 80202-1370
(303) 863-1000

Leslye Orloff
Joyce Noche
NOW Legal Defense and Education Fund
Immigrant Women Program
1522 K Street, N.W.
Washington, D.C. 20005
(202) 326-0040

Leslie M. Hill
Mona Luddy Benach
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

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The National Immigration Project of the National Lawyers Guild, the Family Violence Prevention Fund, and NOW Legal Defense and Education Fund[1] respectfully submit this brief as amici curiae in support of Graciela Perales' ("Perales") appeal of the Board of Immigration Appeals' ("BIA") decision dismissing her appeal, and affirming the Immigration Judge's ("IJ") order denying Perales' application for cancellation of removal.

Congress intended for the immigration provisions of the Violence Against Women Act ("VAWA") to remove procedural and evidentiary obstacles hindering a battered immigrant spouse's pursuit of becoming a legal permanent resident. Notwithstanding Congress' consistent efforts to alleviate these obstacles, both the BIA and the IJ committed errors of law by determining that petitioner was statutorily ineligible for cancellation of removal because (1) her testimony on marital rape was not credible and (2) the psychological abuse she suffered did not amount to extreme cruelty. These decisions arise from a lack of understanding about the dynamics of domestic violence and about the role sexual and psychological abuse play in abusive relationships. They also evidence a lack of knowledge of the history of the special immigration provisions that Congress enacted to protect immigrant victims of domestic violence, explicitly offering immigration relief to victims of battery or extreme cruelty.

This case contains issues of first impression in this court. Thus, it is critical that the court review and remand the IJ and BIA's unstudied decision. To do

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[1] Amici present this brief pursuant to Fed. R. App. P. 29. Amici are national organizations that provide assistance to immigrant victims of domestic violence like petitioner and have particular expertise with the statutory provisions at issue. Additional information on them is set forth in the accompanying motion.

otherwise would allow individual IJs and the BIA to undermine the VAWA's ameliorative purpose.

STATEMENT OF FACTS

This case involves the BIA's and IJ's interpretation of the statutory eligibility of petitioner for special three-year cancellation of removal for victims of domestic violence, the most recent version of special relief originally created by Congress in the VAWA and codified in section 240A(b)(2) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1229b(b)(2) (2000).[2] Amici hereby adopt the statement of facts presented by the petitioner.

ARGUMENT

I. VAWA'S AMELIORATIVE INTENT IS EVIDENCED IN THE LEGISLATIVE HISTORY

When Congress passed the VAWA, it was well aware of the unique problems facing battered women and children in our society.[3] Congress stated that "violence against women reflects as much a failure of our Nation's collective willingness to confront the problem as it does the failure of the Nation's law and regulations."[4] The two-fold purpose of VAWA was to protect

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[2] Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1518 (2000) (codified at 8 U.S.C. §§ 1151, 1154, 1186a, 1186a note, 1254, 2245).

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

[4] S. Rep. No. 103-138, at 37.

women from violence and to prevent further violence against women.[5] VAWA's overarching goal was to eliminate existing laws and law enforcement practices that condoned abuse or protected abusers and, instead, to commit the legal system to protecting victims of abuse while identifying and punishing the perpetrators of domestic violence.[6] To this end, VAWA sought to ameliorate the procedural problems faced by immigrant victims of domestic violence.

A. Congress Intended For VAWA To Remove Procedural Obstacles Facing Immigrant Victims of Domestic Violence

In enacting VAWA's immigration provisions in 1994, Congress noted that domestic violence is "terribly exacerbated in marriages where one spouse is not a citizen and the non-citizen's legal status depends on his or her marriage to the abuser."[7] The House Committee on the Judiciary stated in its report on the legislation, "[m]any immigrant women live trapped and isolated in violent homes afraid to turn to anyone for help. They fear continued abuse if they stay, and deportation if they attempt to leave."[8] Congress, therefore, created special

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[5] S. Rep. No. 101-545, at 38; H.R. Rep. No. 103-395, at 25.

[6] H.R. Rep. No. 103-395, at 27; S. Rep. No. 103-138, at 41.

[7] H.R. Rep. No. 103-395, at 26-27. Congress' first efforts to help battered immigrants were in 1990 when it created the battered spouse waiver. This waiver prevented the abusers' manipulation of the immigration laws by allowing for the battered spouse waiver to the joint petition requirement for conditional residents when immigrant victims had suffered battery or extreme cruelty. 8 U.S.C. § 1186a(c)(4)(C), INA § 216(c)(4)(C), added by the Immigration Act of 1990, section 701(a) at 26, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

[8] Committee on the Judiciary, Report on Violence Against Women Act, accompanying H.R. Rep. No. 103-395.

immigration provisions "to prevent the citizen or resident from using the petitioning process as a means to control or abuse an alien spouse."[9] Thus, Congress enacted this legislation to remove the procedural barriers that immigrant victims of domestic violence, like Perales, face.

VAWA created two forms of relief for immigrant victims of battery or extreme cruelty.[10] In 1994, VAWA created a self-petitioning process that parallels the regular family based process and allows abused non-citizens married to, or the children of, lawful permanent residents to affirmatively file their own petitions.[11] Further, for those already placed into immigration proceedings, often at the behest of their abusers, Congress created a special form of VAWA suspension of deportation, exempting the victims from the minimum seven years of residence required of other applicants for suspension of deportation and replacing it with a three year residence requirement.[12] Immigrant victims of domestic violence who had suffered extreme cruelty were subject to a lower standard to obtain suspension of deportation than other immigrants. These very provisions were designed to assist women in Perales' position.

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[9] H.R. Rep. No. 103-395, at 37.

[10] See e.g., Leslye E. Orloff & Janice V. Kaguyutan, Offering A Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses, 10 J. Gender Soc. Pol'y & Law 95 (2002) (Ex. A) (describing the history of VAWA immigrant protections).

[11] See 8 U.S.C. § 1154(a)(1)(A)(iii)-(v) & (B)(ii)-(v), INA § 204(a)(1)(A)(iii)-(v) & (B)(ii)-(v).

[12] See former 8 U.S.C. § 1254(a)(3), INA § 244(a)(3) (repealed 1996).

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"),[13] erecting new barriers to gaining lawful permanent residence for many family-based petitioners[14] and replacing suspension of deportation with the more limited cancellation of removal.[15] Simultaneously, however, Congress included exceptions to many of the new restrictive provisions for those who possessed approved VAWA petitions[16] and for those who could qualify under VAWA self-petitioning, suspension of deportation or cancellation of removal provisions.[17] Congress did not eliminate VAWA suspension of deportation or heighten the eligibility standard; instead, it transformed former INA § 244(a)(3) into the new VAWA cancellation of removal section 240A(b)(2).

As with the previous VAWA suspension of deportation provisions, applicants for cancellation of removal who have been battered or subjected to

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[13] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[14] See, e.g., 8 U.S.C. § 1182(a)(4)(C)(ii), INA §§ 212(a)(4)(C)(ii) (new enforceable affidavits of support), & § 212(a)(9)(B) and (C) (new "unlawful presence" bars to admission).

[15] New INA § 240A, replacing former INA § 244. Compare new INA § 240A(b)(1), requiring ten years of continuous physical presence and proof of "exceptional and extremely unusual" hardship to a U.S. citizen or lawful permanent resident spouse, parent or child, with former INA § 244(a)(3), requiring seven years of continuous physical presence and a showing of "extreme hardship" to an "alien or to his spouse, parent, or child."

[16] 8 U.S.C. § 1182(a)(4)(C)(i)(I) & (II), INA § 212(a)(4)(C)(i)(I) & (II) (exemption from enforceable affidavit of support requirement).

[17] 8 U.S.C. § 1182(a)(9)(B)(iii)(IV), INA § 212(a)(9)(B)(iii)(IV), referencing INA § 212(a)(6)(A)(ii) (exception to unlawful presence bars).

extreme cruelty need only show three years of continuous physical presence,[18] "good moral character,"[19] non-inadmissibility,[20] and "extreme hardship to the alien, the alien's child, or [in the case of an alien who is a child] to the alien's parent."[21] A former INS[22] General Counsel noted,[23] "Congress thus intended to apply a lower standard to battered spouses and children." [24] Congress' retention of the mandate that, "[i]n acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application," further evidences this lower standard and the broad definition of extreme cruelty.[25]

Neither the IJ nor the BIA applied this standard to Ms. Perales' case, as they were required to do under the immigration statutes. Although Perales presented credible evidence regarding her physical and emotional trauma and abuse, neither

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[18] 8 U.S.C. § 1229b(b)(2)(A)(ii) & (B), INA § 240A(b)(2)(A)(ii) & (B).

[19] 8 U.S.C. § 1229b(b)(2)(A)(iii) & (C), INA § 240A(b)(2)(A)(iii) & (C).

[20] 8 U.S.C. § 1229b(b)(2)(A)(iv), INA § 240A(b)(2)(A)(iv).

[21] 8 U.S.C. § 1229b(b)(2)(A)(v), INA § 240A(b)(2)(A)(v).

[22] Although the Homeland Security Act of 2002 eliminated the INS, Pub. L. No. 107-296 § 471, 116 Stat. 2135, 2205 (2002), for convenience, amici will refer to the organization as the INS.

[23] Paul Virtue, "Extreme Hardship" and Documentary Requirements Involving Battered Spouses and Children, Memorandum to Terrance O'Reilly, Director, Administrative Appeals Office (Oct. 16, 1998), reprinted in 76(4) Interpreter Releases 162 (Jan. 25, 1999) ("Extreme Hardship Memo") (Ex. B).

[24] Id. at 7.

[25] 8 U.S.C. § 1229b(b)(2)(D), INA § 240A(b)(2)(D) (emphasis supplied).

the IJ nor the BIA considered it when examining her application and testimony. See Parts III & IV.

B. VAWA Authorizes Consideration Of The Evidence Submitted By Perales

In the Victims of Trafficking and Violence Protection Act of 2000,[26] Congress continued to expand access to VAWA cancellation. The immigration provisions of VAWA of 2000, which are contained within the VTVPA, aided battered immigrants by repairing residual legal obstacles or "catch-22" glitches impeding immigrants seeking to escape from abusive relationships.[27] VAWA of 2000 continues Congress' express and unequivocal intent to "build[] on VAWA of 1994's efforts to enable battered immigrant spouses and children to free themselves of abusive relationships and report abuse with out fear of immigration law consequences controlled by their abusive citizen or lawful permanent resident spouse or parent."[28]

In 1998, in the context of self-petitions, the prior INS General Counsel articulated an "any credible evidence" standard reflecting VAWA's purpose by permitting, but not requiring, petitioners to demonstrate the unavailability of

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[26] Victims of Trafficking and Violence Prevention Act of 2000 ("VTVPA"), Pub. L. No. 106-386, 114 Stat. 1464 (2000).

[27] H.R. Conf. Rep. No. 106-939, at 110 (2000); 146 Cong. Rec. H8855-02 (2000).

[28] H.R. Conf. Rep. No. 106-939, at 112.

preferred primary or secondary evidence.[29] This flexibility takes into account the experience of domestic violence:

> This principle recognizes the fact that battered spouse and child self-petitioners are not likely to have access to the range of documents available to the ordinary visa petitioner for a variety of reasons. . . . Adjudicators should be aware of these issues and should evaluate the evidence submitted in that light.[30]

Thus, the General Counsel categorically states:

> A self-petition may not be denied for failure to submit particular evidence. It may only be denied on evidentiary grounds if the evidence that was submitted is not credible or otherwise fails to establish eligibility.[31]

Here, the IJ and the BIA contradicted this directive by the General Counsel. As discussed below, Perales submitted credible evidence in the form of affidavits, both from friends and herself, and through her oral testimony, yet the court ignored this. See Parts III & IV.

The immigration courts and BIA have reflected the implementation of VAWA by acknowledging Congress' ameliorative intent, and reversing and remanding cases to IJs who evidence ignorance of domestic violence by misapplying the law or making adverse credibility determinations. See Matter of

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[29] See Extreme Hardship Memo, supra note 23, at 7 ("[T]hat section [of the regulations] allows the battered spouse or child self-petitioner to submit 'any credible evidence' and does not require that the alien demonstrate the unavailability of primary or secondary evidence."); see also, 8 C.F.R. §§ 103.2(b)(2)(iii) & 204.1(f)(1).

[30] Extreme Hardship Memo, supra note 23, at 7-8.

[31] Id. at 7.

F-G-R (June 17, 1996) (Ex. C),[32] Matter of D-G (Nov. 18, 1999) (Ex. D),[33] Matter of L-H (April 4, 2002) (Ex. E)[34]. In Perales' case, the BIA should have followed its own precedent and remanded this case to the IJ who made an erroneous adverse credibility determination as a result of his ignorance of domestic violence, in particular marital rape and emotional abuse.

II. THE SOCIAL SCIENCE ON DOMESTIC VIOLENCE SUPPORTS PERALES' TESTIMONY

As in the above cited cases in which the BIA reversed decisions of IJs whose lack of sensitivity to the experiences of domestic abuse victims and lack of understanding about the dynamics of domestic violence precipitated incorrect credibility findings, this Court should reverse the credibility determination of the IJ and BIA in the present case. The record makes clear that the IJ had no

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[32] The BIA examined the record de novo, finding "respondent was unable to fully present her case for relief from deportation because of the Immigration Judge's conduct and her feelings of fright, and that, consequently, she was denied due process." Matter of F-G-R at 4.

[33] "[I]n enacting the VAWA's immigration provisions, Congress extended its efforts to aid battered alien spouses and prevent manipulation of the immigration laws by abusers." Matter of D-G at 5. Examining the record de novo, the Board found the IJ made inappropriate comments and reversed the negative good moral character finding, but not the extreme hardship determination. Id. On Feb. 22, 2000, the BIA reopened and remanded for new evidence on extreme hardship. Matter of D-G (Feb. 22, 2000) (order).

[34] The BIA reviewed the record and found that "the Immigration Judge's adverse credibility finding in this case . . . is not supportable." Matter of L-H at 3 (citation to record omitted). It denied relief, however, because all of the abuse took place outside the United States (a requirement prior to VAWA 2000 amendments). Id. at 4.

understanding of the trauma of sexual abuse and the difficulty describing such abuse, particularly sexual abuse within a marriage.

The erroneous determinations utterly fail to recognize the difficulty spousal abuse victims have talking about marital rape and recognizing that sexual abuse in marriage is criminal abuse and not normal. The BIA and IJ decisions are based upon the faulty expectation that victims of marital rape will disclose the incidence of and details relating to rape with the same objectivity or detachment as a victim of a robbery might recount the robbery. They are also based on the premise that the victim will necessarily understand forced sexual activity with one's spouse to be rape. For many domestic violence victims, particularly immigrant victims, these assumptions are patently untrue.

Social science research demonstrates that marital rape is a serious form of violence that is inflicted on a significant percentage of women in the United States. Despite the high incidence, there are severe emotional consequences attached to being raped by one's spouse that are distinct from victims of stranger rape, and distinct as well from the harm caused by domestic violence when there has been no sexual abuse.[35] Some short-term emotional effects of marital rape commonly include anxiety, shock, intense fear, and suicidal tendencies. Marital rape victims experience these psychological injuries in addition to severe long-term emotional effects that are as serious as those experienced by women who have been raped by strangers.[36] The effects of marital rape as compared to stranger rape on the victim

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[35] See, e.g., Raquel Kennedy Bergen, Surviving Wife Rape: How Women Define and Cope With the Violence, 1 Violence Against Women 117 (1995) (Ex. F).

[36] See, e.g., id.

are further complicated by the ongoing repetitive nature of rape and sexual assault within marriage.[37] In light of the complexity of the experience of marital rape and the long- and short-term psychological damage caused to survivors, late reporting of domestic violence is not indicative of a lack of credibility.[38]

Victims of sexual abuse often do not provide contemporaneous and detailed statements of the abuse they have suffered. Social science analysis of the issue shows that victims frequently are hesitant to discuss the abuse and do not make an initial comprehensive statement of the abuse.[39] For victims, being able to talk about sexual abuse can be a multi-step process. For some victims, their only

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[37] See, e.g., id.

[38] See Decl. of Mary Ann Dutton of Oct. 14, 2003, at ¶¶ 5 ("Dutton Decl.") (a noted expert in the field of domestic violence) (Ex. G); cf. Paramasamy v. Ashcroft, 295 F.3d 1047, 1052-53 (9th Cir. 2002) (stating that "the assumption that the timing of a victim's disclosure of sexual assault is a bellwether of truth is belied by the reality that there is often delayed reporting of sexual abuse") (citations omitted).

Although section 242 of the INA provides that "the court of appeals shall decide the petition only on the administrative record on which the order of removal is based," 8 U.S.C. § 1252(b)(4)(A), INA § 242(b)(4)(A), this court may consider Professor Dutton's declaration as background information on the complex subject of domestic violence. See Franklin Sav. Ass'n v. Director, Office of Thrift Supervision, 934 F.2d 1127, 1137-38 (10th Cir. 1991) (noting that "[a] reviewing court may go outside of the administrative record . . . where necessary for background information or . . . to explain technical terms or complex subject matter involved in the action") (citations omitted)); see also, e.g., Colorado Envtl. Coalition v. Lujan, 803 F. Supp. 364, 370-71 (D. Colo. 1992) (admitting extra-record testimony of geologic expert); Citizens for Envtl. Quality v. United States, 731 F. Supp. 970, 982-83 (D. Colo. 1989) (admitting testimony of computer modeling expert).

[39] See Dutton Decl., supra note 38, at ¶¶ 3-5.

sexual experiences may be the abusive sexual relations they have had with their spouse during their abusive marriage. Immigrant victim's understanding about when sexual relations are abusive is complicated by cultural expectations of women's roles and options, cultural taboos, lack of knowledge about what criminal behavior is in the United States and a level of acculturation.[40] Marital rape victims may be so ashamed that they cannot discuss marital rape or sexual abuse during marriage unless and until they have developed a trusting relationship with an advocate, attorney, or someone else.[41] This person can help them see that what they have experienced or are experiencing is sexual abuse.[42] Many victims do not begin to redefine their experiences of marital rape until they are out of the relationship and have begun the process of redefinition, through the encouragement of others.[43] Likewise, victims of domestic violence are unlikely to tell their story to a person of the same gender as their abuser.[44]

Thus, a majority of victims of marital rape redefine their experiences of rape gradually. 'Domestic violence' and 'marital rape' are recent terms where women have historically lacked a social definition that allowed them to see the abuse as anything more than a personal problem.[45] As is highlighted in petitioner's case,

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[40] See, e.g., id. at ¶ 8.

[41] See id. at ¶ 5.

[42] See Bergen, supra note 35, at 132-33.

[43] See id.

[44] See Dutton Decl., supra note 38, at ¶ 7.

[45] See Bergen, supra note 35, at 130.

victims of marital rape face the additional barrier of societal or cultural beliefs about a spouse's, particularly a wife's, duty to participate in sexual activity with their spouse, even if they do not want to participate.[46] Furthermore, research suggests that immigrant Latinas, like Perales, are less likely than other women to report abuse[47] or to immediately define their experiences of violence as abuse and terminate their relationship.[48]

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[46] See Dutton Decl., supra note 38, at ¶ 8; Kathleen C. Basile, Rape by Acquiescence: The Ways in Which Women "Give in" to Unwanted Sex With Their Husbands, 5 Violence Against Women 1036, 1037-38, 1046-47, 1051-55 (1999) (Ex. H). See, e.g., K.J. Wilson, When Violence Begins at Home 12 (1997) (Ex. I) ("For too long women have been taught that sexually submitting to the husband is the wife's duty. Historically, women have had little to say as to when where, how, and with whom they engaged in sex."); see also Anita Raj & Jay Silverman, Violence Against Immigrant Women, 8 Violence Against Women 367, 367-71, 376-77 (2002) (Ex. J).

[47] See Patricia Tjaden & Nancy Thoennes, Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey, Nat'l Inst. of Justice Ctrs. for Disease Control & Prevention: Research in Brief, at 6, 12 (Nov. 1998) (Ex. K), http://ncjrs.org/pdfiles/172837.pdf ("The survey found that Hispanic women were less likely to report rape victimization than were non-Hispanic women."); see also Giselle Hass et al., Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications, Domestic Violence: Global Responses, at 96, 105, 109 (A.B. Acad. Publishers 2000) (Ex. L); cf., Edna Erez, Immigration, Culture Conflict and Domestic Violence/Woman Battering, 12(1) Crime Prevention and Community Safety: An International Journal 27, at 30 (2000) (Ex. M) ("Immigrant battered women exhibit strong reluctance to reveal the abuse to social service agencies, religious leaders or outside family members, as it will bring shame upon themselves, their husbands and their children.") (citations omitted).

[48] See Dutton Decl., supra note 38, at ¶ 9; Mary Ann Dutton et al., Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant

III. THE BIA AND IJ FAILED TO FOLLOW CONGRESSIONAL INTENT AND TO EXAMINE THE SOCIAL SCIENCE WHEN THEY FOUND PERALES' TESTIMONY ON MARITAL RAPE INCREDIBLE

Before the IJ, Perales provided consistent and credible testimony of the physical abuse she suffered at the hands of her citizen husband. Under direct examination, early in her testimony, Perales admitted that her husband forced her to have sex with him, AR 86:4-20, and, in order to prevent this forced sexual activity, she would lock herself in the bathroom. AR 87:19-22. On redirect, Perales again testified that her husband forced her to have sex and that she considered this forced activity to be rape.[49]

Latinas: Legal and Policy Implications, 7 Geo. J. Poverty L. & Pol'y 245, 249-50 (2000) (Ex. N).

[49] Under redirect, Perales gave the following testimony described by the IJ as "more colorful":

> Q. Is it difficult for you to talk about your husband?
>
> A. Yes.
>
> * * *
>
> Q. Did he ever touch you in a violent way?
>
> A. Yes.
>
> Q. When?
>
> A. He was drunk, he would force me, you know.
>
> Q. Tell me.
>
> A. He wanted to have sex.

Notwithstanding this testimony, and ignoring the nature of her experiences and the difficulty a victim has discussing abuse, the IJ found that Perales' testimony related to marital rape was not "a credible explanation" because she had failed to disclose rape in prior affidavits or earlier in her testimony. AR 58. The IJ's oral opinion emphasized that neither of her initial affidavits, one and two pages respectively, disclosed anything about Perales' sexual relations with her husband. AR 55. As noted by the IJ, her initial affidavits discussed only "verbal abuse." Id. However, the absence of details of sexual assault in these affidavits, prepared for a limited purpose, is an improper basis for finding Perales' testimony not credible. The first affidavit was intended only to demonstrate that Perales

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> Q. Would he hit you or pick you up to make you have sex with him?
>
> A. He would throw himself forward.
>
> Q. And what would happen?
>
> A. We would start fighting, I would tell him to leave me -- leave me alone and he would not agree with me.
>
> Q. Did you ever tell him to stop?
>
> A. Yes.
>
> Q. Did he?
>
> A. Nope.
>
> * * *
>
> Q. Did you consider this forced to have sex with him rape?
>
> A. I believe so.

AR 104:2-105:6.

would suffer "extreme hardship" if deported, and that she was a person of "good moral character." See AR 135-36. The second affidavit includes eight paragraphs on a single page describing the verbal and psychological abuse that Perales suffered. AR 144-45. It is unclear from this affidavit if Perales understood that forced sexual activity with her husband could constitute rape.

Additionally, the IJ expressed concern over the escalating nature of Perales' testimony, and found the progressive disclosure of marital rape incredible. AR 57-58. Similarly, the BIA, hearing the case a second time on a joint motion to reopen, agreed that she did not explain her "escalating testimony" and noted that she "provide[d] no detailed explanation, or affidavit, for her testimony about repeated incidents of marital rape when she had not previously indicated in the documentary evidence that she had been raped or for the increased elaboration regarding these incidents as the hearing progress[ed]." ASR 7.

Perales' progressive and strained disclosure of the intimate details of marital rape by her husband, however, is entirely consistent with documented responses to domestic violence and is not a proper basis for finding her testimony not credible. See Part II. While Perales did not disclose forced sexual activity in the one and two page affidavits, there is no evidence to suggest, as the IJ did, that Perales understood the need to disclose such sensitive and painful information in these affidavits.[50]

[50] In his oral opinion, the IJ stated that Perales "obviously … knew the importance of discussing anything in the marriage that involved physical violence." AR 58.

Importantly, Perales' account supports documented research that marital rape is characteristic of the most violent marriages.[51] Moreover, her testimony was not inconsistent; rather, as the IJ described it, her admissions about marital rape "escalated" over the course of two affidavits and a hearing before the IJ. Social science studies have shown that abused women often minimize the extent and severity of the violence wrought against them.[52] Her testimony cannot be discounted simply because she did not make early and full disclosure of abuse that Perales likely considered to be a requirement of marriage, and not an act of violence. As the proceedings progressed, it was clear that Perales was not comfortable discussing the intimate and personally painful details of her marriage.

Early in her testimony, Perales was even reluctant to state the derogatory names her husband called her:

> MR. LAWRENCE TO MS. PERALES
> Q. What kind of names did he call you?
> A. (No audible response.)
> JUDGE TO MS. PERALES
> Q. I'm sorry, I can't hear you.
> A. (Indiscernible.)
> MR. LAWRENCE TO MS. PERALES
> Q. Say it louder.
> A. Prostitute. The word with a B, bitch and all of that.

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[51] Cf. Joan Zorza, Wife Rape: Ignored by Providers, More Devastating to Victims, Kingston, NJ: Sexual Assault Report, Sep./Oct. 1997, at 8, 13 (Ex. O).

[52] See, e.g., Angela Brown, When Battered Women Kill 126 (1987) (Ex. P) (noting battered women's tendency to under-report the severity of abuse); Judith Herman, Trauma and Recovery 82-83 (1992) (Ex. Q) (women commonly minimize domestic violence); Liz Kelly, How Women Define Their Experience of Violence, in Feminist Perspectives on Wife Abuse 124-28 (1988) (Ex. R) (women dislike labeling abuse as abuse).

AR 84. Certainly, if Perales was reluctant to discuss the vulgar names her husband called her, she would be even more hesitant to discuss forced sexual activity especially considering the documented reluctance of immigrant Latinas to disclose incidents of domestic violence.[53]

Finding that Perales failed to show that she had suffered extreme cruelty, the BIA stated that "[c]ounsel's generalized assertion on appeal that marital rape is consistent with the pattern of verbal and emotional abuse and that her failure to recognize or mention marital rape is consistent with recorded societal response is insufficient to explain this portion of respondent's testimony." ASR 7 (emphasis added). The BIA's implied requirement that expert evidence would be required for the IJ or BIA to consider Perales' testimony from the proper social science perspective is simply contrary to, and not permitted under, the statute.

In 1990, Congress created a battered spouse waiver that was designed to help battered immigrants who had been subjected to battery or extreme cruelty by their citizen or lawful permanent resident spouses to receive full lawful permanent residency instead of two year conditional residency without the knowledge or cooperation of their abusive spouses.[54] Prior to the enactment of the VAWA of 1994, in order to prove extreme cruelty INS regulations required applications for the battered spouse waiver to include an affidavit from a licensed mental health

[53] See supra Part II.

[54] See Orloff & Kaguyutan, supra note 10, at 105-106.

professional.[55] In VAWA of 1994, Congress overruled explicitly by statute, this regulatory requirement for proof of extreme cruelty directing "the Attorney General to consider any credible evidence submitted in support of hardship waivers based on battering or extreme cruelty whether or not the evidence is supported by an evaluation by a licensed mental health professional" by amending the requirements for showing extreme cruelty. H.R. Rep. No. 103-395, at 38; see 8 U.S.C. § 1186a(c)(4) (1994), INA § 216(c)(4).

Congress created the VAWA credible evidence standard, applicable to all VAWA cases including cancellation and the battered spouse waiver, specifically to prevent INS and immigration judges from imposing particular evidentiary requirements that would have practically cut-off immigrant victims from much needed relief.[56] The veiled plea for evidence, possibly including expert testimony, related to the reaction of domestic violence victims in the BIA decision, see ASR 7, is simply contrary to legislative intent.

IV. CREDIBLE AND CORROBORATED EVIDENCE SUPPORTS FINDING THAT THE PETITIONER SUFFERED EXTREME CRUELTY

During her Removal Proceedings, Perales presented her own testimony and her neighbor's testimony regarding the psychological abuse she suffered. Perales

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[55] See 8 C.F.R. § 216.5(e)(3)(iv)(1993). Specifically, the INS regulations stated that "[t]he Service is not in a position to evaluate testimony regarding a claim of extreme mental cruelty provided by unlicensed or untrained individuals. Therefore, all waiver applications based upon claims of extreme mental cruelty must be supported by the evaluation of a professional recognized by the Service as an expert in the field." Id.; see Orloff & Kaguyutan, supra note 10, at 107.

[56] See Orloff & Kaguyutan, supra note 10, at 116.

testified that her husband insulted her,[57] was jealous of her speaking with other men,[58] and called her a prostitute and a bitch.[59] Further, she testified that she was, and remains, fearful of her husband.[60] In order to cope with this abuse, Perales sought therapy and began to take medication for depression.[61] Perales also developed low self-esteem.[62] To corroborate and support Perales' testimony, Perales' neighbor testified that Perales' husband insulted her,[63] was jealous,[64] called her names,[65] and accused her of infidelity.[66]

In his Oral Decision, the IJ noted that Perales and her witness consistently testified that Perales' husband insulted her and called her a prostitute and a bitch. AR 54-55, 57. Further, the IJ observed that Perales testified that she believed her husband could harm her, AR 54-55, and that she submitted evidence regarding counseling and taking anti-depressants. AR 56. Despite this testimony, the IJ found that Perales had not shown that her husband had subjected her to extreme

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[57] AR 83:22-24, 84:9-11, 85:4-12, 97:7-9, & 98:12-17.

[58] AR 84:9-11 & 97:21-100:5.

[59] AR 84:19-20 & 85:4-12.

[60] AR 85:13-20, 87:19-88:15, & 92:14-20.

[61] AR 89:24-91:25, 100:17-20, & 110:5-21.

[62] AR 104:6-7.

[63] AR 115:10-12 & 117:22-118:7 & 137 ¶¶ 4-8.

[64] AR 113:25-115:2 & 137 ¶ 5.

[65] AR 114:21-115:2, 116:21-22, 117:22-118:7 & 137 ¶¶ 4-8.

[66] AR 114:21-115:2, 116:1-3, & 117:22-118:7 & 137 ¶ 5.

cruelty. AR 57. The IJ failed to address any of the psychological abuse suffered by Perales. Instead, he focused on the seeming lack of physical abuse. AR 57-58. Similarly, despite noting the consistency of Perales' testimony regarding the psychological abuse, the BIA found that "respondent has not met her burden of establishing that the insults, name calling, and use of derogatory language when referring to the respondent, … rise to the level of extreme cruelty." ASR 7 (emphasis added).

No court had interpreted the meaning of "extreme cruelty" within VAWA until the United States Court of Appeals for the Ninth Circuit did so earlier this month. Hernandez v. Ashcroft, No. 02-70988, 2003 WL 22289896, at *11-14 (9th Cir. Oct. 7, 2003) (Ex. S). In Hernandez, the court stated: "Non-physical actions rise to the level of domestic violence when 'tactics of control are intertwined with the threat of harm in order to maintain the perpetrator's dominance through fear.'" Id. at *13 (quoting Anne L. Ganley, Understanding Domestic Violence, in Improving the Health Care Response to Domestic Violence 20 (Carole Warshaw & Anne L. Ganley eds., 1996)). Additionally, "[b]y defining extreme cruelty to encompass 'abusive actions' that 'may not initially appear violent but are part of an overall pattern of violence,' [the statute] protects women against manipulative tactics aimed at ensuring the batterer's dominance and control." Id. (quoting 8 C.F.R. § 204.2(c)(1)(vi)). The IJ and BIA's narrow interpretation of "extreme cruelty" under VAWA is at odds with the Court of Appeals for the Ninth Circuit's application of this standard in Hernandez.

Although the IJ and BIA could not have relied upon Hernandez for guidance, the IJ's and BIA's finding that Perales did not suffer extreme cruelty

absent her testimony regarding marital rape is contrary to congressional intent,[67] prior BIA decisions,[68] INS self-petitioning regulations, [69] and international conventions.[70] Further, it is contrary to the definition of "extreme cruelty" as involving mechanisms of power and control.[71]

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[67] See supra Part I.

[68] Although the BIA has not published an opinion in a VAWA cancellation case, it has adopted, in unpublished decisions, a broad definition of extreme cruelty reflecting the domestic violence and family law disciplines' definition. See, e.g., Matter of N-A-J (Nov. 29, 2001) (unpublished decision) (Ex. T) (finding extreme cruelty where domestic violence counselor testified on the destructive psychological and physical effects of witnessing abuse to a parent); Matter of L-S (Sep. 10, 1996) (unpublished decision) (Ex. U) (recognizing certain measures taken by the abuser to have his spouse deported were an exercise of absolute authority over the spouse).

[69] See 8 C.F.R. §§ 204.2(c)(1)(vi) & (e)(1)(vi) ("[b]attered" or "'the subject of extreme cruelty' include, but is not limited to, being the victim of any act or 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 . . . shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence.") (emphasis added)

[70] See Declaration on the Elimination of Violence Against Women, G.A. Res. 104, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/104, at Art. 1 (1993), http://www.un.org/womenwatch/resources/documents/gad-RES-48-104.htm ("The term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty.") (emphasis added); The United Nations Fourth World Conference on Women Platform for Action, Violence Against Women, ¶ 113 (1995) available at http://www.un.org/womenwatch/daw/beijing/platform/violence.htm (same); Report of the Special Rapporteur on Violence against Women, Its Courses and Consequences ¶ 3 (Feb. 1996), http://www.unhchr.ch/Huridocda/

Just as for battery, there is no minimum quantum of extreme cruelty necessary under VAWA. Extreme cruelty encompasses social isolation, threats, economic abuse, possessiveness, or harassment suffered at the hands of the abuser,[72] including degrading the victim[73] and accusing the victim of infidelity.[74]

Huridoca.nsf/TestFrame/0a7aa1c3f8de6f9a802566d700530914?Opendocument ("It is urged that States adopt the broadest possible definitions of acts of domestic violence and relationships within which domestic violence occurs …."); id. at ¶ 11 ("All acts of gender-based physical, psychological and sexual abuse by a family member against women in the family, ranging from simple assaults to aggravated physical battery, kidnapping, threats, intimidation, coercion, stalking, humiliating verbal abuse, … sexual violence, marital rape, … and attempts to commit such acts shall be termed 'domestic violence.'").

[71] See H.R. Rep. No. 103-395, at 37 (Congress created special immigration provisions "to prevent a citizen or resident from using the petitioning process as a means to control or abuse an alien spouse."); Declaration on the Elimination of Violence, supra note 70 ("[V]iolence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men … [and] is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men …."); Leti Volpp, Working with Battered Immigrant Women: A Handbook to Make Services Accessible, at 4-5 (Family Violence Prevention Fund 1995) (diagramming two "Power and Control wheels") (Ex. V); Erez, supra note 47 ("Feminists have long argued that woman battering, particularly among intimates, is an expression of male power, domination and control."); Hass, supra note 47, at 109-110; Orloff & Kaguyutan, supra note 10, at 106.

[72] See e.g., K.J. Wilson, supra note 46, 11-13 & 17-18 (1997) (listing examples of verbal abuse, sexual abuse, threats, intimidation, and emotional abuse); Diane R. Follingstad, et al., The Roles of Emotional Abuse in Physically Abusive Relationships, 5 J. Family Violence 107, 113 (1990) (Ex. W) (listing six types of emotional abuse, including ridicule and jealousy).

[73] See, e.g., Gazzillo v. Gazzillo, 379 A.2d 288, 292-93 (N.J. Super. Ct. Ch. Div. 1977) (criticizing the victim constantly and calling the victim names); Keenan v.

For many women, "emotional abuse [is] equally, if not more, damaging [than] physical abuse."[75]

In this case, Perales provided credible testimony of harassment, jealousy, possessiveness, and degradation, all of which amount to extreme cruelty. Thus, the IJ and BIA should have found that Perales suffered extreme cruelty.

CONCLUSION

For the reasons set forth above, this Court should remand to the BIA for proper consideration of petitioner's testimony in the context of a victim of domestic violence.

Keenan, 105 N.W.2d 54, 57 (Mich. 1960) (telling the victim that he did not care for her and she was at liberty to leave); Volpp, supra note 71, at 4-5 (listing the various behaviors, which batterers use to control their partners, including "putting her down," "calling her names," "humiliating her," and "calling her a prostitute").

[74] See, e.g., Mark v. Mark, 29 N.W.2d 683, 684 (Mich. 1947) (accusations of infidelity); Volpp, supra note 71, at 5 ("Sexual Abuse: Calling her a prostitute."); Follingstad et al., supra note 72, at 109 ("Jealousy and possessiveness appear to become abusive when the man harangues and interrogates his wife about strangers or other men with whom she comes in contact. He may repeatedly accuse her of infidelity.").

[75] Wilson, supra note 46, at 10; see also Follingstad et al., supra note 72, at 108 ("Indeed, some battered women described psychological degradation, fear and humiliation as constituting the most painful abuse they experienced.").

Dated this 16th day of October, 2003

Of Counsel:

By: _____

Dan Kesselbrenner
Gail Pendleton
National Immigration Project of the
National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727

David Neslin
ARNOLD & PORTER
370 Seventeenth Street
Suite 4500
Denver, CO 80202-1370
(303) 863-1000

Leslye Orloff
Joyce Noche
NOW Legal Defense and Education Fund
Immigrant Women Program
1522 K St., N.W.
Washington, D.C. 20005
(202) 326-0040

Leslie M. Hill
Mona Luddy Benach
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

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I hereby certify that I have this 16th day of October, 2003, caused the foregoing BRIEF OF THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, FAMILY VIOLENCE PREVENTION FUND, AND NOW LEGAL DEFENSE AND EDUCATION FUND AS AMICI CURIAE IN SUPPORT OF PETITIONER, and the exhibits thereto, to be served upon the following persons by United States Mail, First Class postage prepaid:

_____

David Neslin

Attorneys for Petitioner
Marlene G. Gonzalez, Esq.
Multi-Cultural Legal Center
309 East 100 South, Ste. 11
Salt Lake City, UT 84111

Leonor Perretta, Esq.
Immigration Aid-Salt Lake City
562 S. Main, 2nd Floor
Key Bank Building
Bountiful, UT 84010

Respondent
John Ashcroft
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

Blair T. O'Connor
U.S. Dept. of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 878
Ben Franklin Station
Washington, D.C. 20044

Michael M. Comfort
Acting District Director
BCIS Denver District Office
4730 Paris Street
Denver, CO 80239

Corina E. Almeida/Dani Lisa Page-Arck
Office of the District Counsel
Bureau of Immigration and Customs Enforcement
4730 Paris Street, Albrook Center
Denver, Colorado 80239