NIWAP

AMERICAN UNIVERSITY
WASHINGTON
COLLEGE OF LAW

Attached Cases for the Board of Immigration Appeals in Violence Against Women Act Cases Consideration Report

National Immigrant Women's Advocacy Project (NIWAP, pronounced *new-app*)
American University, Washington College of Law
4300 Nebraska Avenue NW C100 · Washington, D.C. 20016
(o) 202.274.4457 · niwap@wcl.american.edu · wcl.american.edu/niwap

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

HENRY CRUZ, ESQUIRE
811 First Avenue, Suite 200
Seattle, WA 98104

Office of the District Counsel/SEA
1000 Second Avenue, Suite 2900
Seattle, WA 98104

Name: R[redacted]-V[redacted], A[redacted] L[redacted] **A[redacted]**

A.L. R-V.

Date of this notice: 3/18/2010

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Hess, Fred

[redacted] MAR 22 2010

File: A[redacted] - Seattle, WA Date: MAR 18 2010

In re: A[redacted] L[redacted] R[redacted]-V[redacted]

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Henry Cruz, Esquire

ON BEHALF OF DHS: James S. Yi
Senior Attorney

This case is before us on remand from the United States Court of Appeals for the Ninth Circuit. On September 8, 2009, the Court remanded the record to the Board based on the Office of Immigration Litigation's (OIL) unopposed motion to remand. Upon remand, we will vacate our October 10, 2008, decision, grant the respondent's motion, and remand the record to the Immigration Court for further proceedings.

In its brief to the Ninth Circuit, OIL requested a remand so that this Board could consider whether or not it has jurisdiction to consider the respondent's motion under *Thorsteinsson v. INS,* 724 F.2d 1365 (9th Cir. 1984), *Mendez v. INS,* 563 F.2d 956 (9th Cir. 1977), and *Estrada-Rosales v. INS,* 645 F.2d 819 (9th Cir. 1981). Therein, the Ninth Circuit found that when an alien's departure from the United States resulted from a violation of procedural due process, the departure bar set forth at 8 C.F.R.§ 1003.2(d) does not apply because the departure can not be considered legally executed. In our previous October 10, 2008, decision, we found that we lacked authority to reopen the respondent's proceedings because she had departed the United States subsequent to the completion of her administrative proceedings. *See Matter of Armendarez-Mendez,* 24 I&N Dec. 646 (BIA 2008). The respondent argues that, notwithstanding our intervening precedential findings in *Armendarez,* the fact that she received ineffective assistance of counsel in her prior proceedings requires a reopening of her proceedings because her removal was not legally executed. Subsequent to the Ninth Circuit's September 8, 2009, remand, the Court issued *Coyt v. Holder,* 593 F.3d 902 (9th Cir. 2010). Therein, the Ninth Circuit found that the departure bar set forth at 8 C.F.R.§ 1003.2(d) can not validly apply to an alien who has been forcibly removed from the United States. Accordingly, inasmuch as we based our October 10, 2008, decision on *Armendarez* and the fact that the respondent had been removed from the United States, we will vacate the decision and assume jurisdiction over the respondent's motion to reopen proceedings.

The respondent's pending motion to reopen argues that she received ineffective assistance of counsel from two of her prior attorneys. A motion to reopen in any case previously the subject of a final decision by the Board must be filed no later than 90 days after the date of that decision. *See* 8 C.F.R. § 1003.2(c)(2). The respondent's final administrative order, in which she was granted voluntary departure, was issued on December 17, 2004; accordingly, the pending motion to reopen

was filed late. *See* 8 C.F.R. § 1003.2(c)(2). Moreover, the respondent has filed two previous motions to reopen, which were denied by the Board on March 9, 2005, and on August 7, 2007. Accordingly, the motion is also barred by the regulatory limit on multiple motions to reopen. 8 C.F.R. § 1003.2(c)(2). However, the respondent seeks to equitably toll these time and number restrictions because, she argues, both [redacted], and [redacted] failed to timely pursue an asylum case on her behalf, and also failed to advise her of the availability of a nonimmigrant visa pursuant to section 101(a)(15)(U) of the Act (U visa).

As an initial matter, we find that the respondent has submitted evidence in substantial compliance with our decision in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). *See Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003) (Exhs. 4, 40, 41). Moreover, we find sufficient evidence to remand the record based on the respondent's argument regarding the ineffective assistance of her prior attorneys. The respondent has submitted, inter alia, numerous documents indicating her eligibility for a U visa. With her current motion, she has submitted evidence that she filed the requisite Form I-918 with the United States Citizenship and Immigration Services (USCIS), and she has further demonstrated that she was prima facie eligible for such relief during the period of time she was represented by both [redacted] and [redacted]. *See* 8 C.F.R. § 214.14(c) (Exh. 30, 31, 33). Specifically, the respondent argues that the domestic violence she suffered was discussed at the hearing (Tr.at 14–16; Exh. 6), and that both of her attorneys were aware of her situation (Exh. 6, 14, 16, 24). Because we find prejudice based on this form of relief, we need not address the respondent's eligibility for asylum, withholding of removal, or protection under the Convention Against Torture.

The respondent avers in her attached affidavit that she hired [redacted] to represent her before the Immigration Judge in 2003, and while she told him that she was the victim of domestic violence, he never informed her about the option of applying for a U visa (Exh. 1). Thereafter, she consulted with [redacted], who did appeal the Immigration Judge's denial, arguing summarily on the Form EOIR-26 that the respondent was ineffectively represented at the hearing due to her attorney's failure to advise her of the availability of a U visa. The respondent has submitted evidence that subsequent to [redacted]'s filing of the appeal, he was disbarred, and the respondent hired [redacted] to prepare her appellate brief (Exh. 10, 11). The respondent correctly notes that the appellate brief did not pursue the ineffective assistance of counsel claim against [redacted], and in our December 17, 2004, dismissal of her appeal, we noted that "although the respondent raised the issue of the adequacy of her counsel at the hearing ... this issue was not meaningfully pursued" (2004 Bd. Dec. at 1). The respondent argues that this failure to pursue the ineffective assistance of [redacted] resulted in a second tier of ineffective assistance of counsel by [redacted].[1]

---

[1] The respondent has provided a letter from [redacted], dated May 11, 2004, mentioning the availability of a U visa, which her current attorney found in the file sent from [redacted]'s office (Exh. 34, 39). The respondent avers, in her affidavit, that she does not recall ever receiving this letter or discussing the availability of a U visa with [redacted] (Exh. 1), and there is no evidence that the letter was actually mailed. We note that even if received by the respondent, the letter indicates that the respondent's appellate brief had already been filed (Exh. 34).

The respondent further argues that [redacted] failed to raise the issue of her U visa eligibility in the two subsequent motions to reopen he filed on her behalf. She argues, inter alia, that the first motion to reopen, denied by the Board on March 9, 2005, addressed only the issue of cancellation of removal. In the second motion to reopen, it appears that [redacted] filed for asylum, withholding of removal, and protection under the Convention Against Torture, but the option for a U visa was again overlooked, and the Board denied the respondent's second motion to reopen on August 7, 2007. The respondent was removed from the United States in July of 2007.

For its part, the DHS concedes that had the respondent pursued a U visa, "DHS would not have removed her" (DHS. Brief at 5). However, it argues that the respondent can not demonstrate prejudice because the Board has no authority to adjudicate U visas. It is true the USCIS has exclusive jurisdiction over U petitions and adjustment applications premised on U visa status. *See* 8 C.F.R. §§ 214.14(c), 245.24(k). However, the regulations further provide that even during the time when the respondent was in detention in 2007, a stay of removal could have been granted. 8 C.F.R. § 214.14(c)(1)(ii). These regulations are consistent with the memoranda submitted by the respondent demonstrating USCIS deferral of removal policy prior to the implementation of these regulations (Exhs. 27, 28); it is also consistent with the DHS' own admission that it would not have removed the respondent from the United States. Accordingly, inasmuch as we find that the respondent has demonstrated that she was prima facie eligible for a U visa at the time her hearing and appeal, we find prejudice in the respondent's prior attorneys' failure to apply for such relief on her behalf.

Lastly, the DHS argues that the respondent has not demonstrated that she pursued this motion with due diligence. The DHS points out that the respondent did not pursue this motion for ineffective assistance of counsel after the Ninth Circuit dismissed her last appeal on July 24, 2006. However, the respondent avers that she was unaware of any ineffective assistance of counsel and believed that nothing further could be done after the Ninth Circuit's decision. She further avers that, based on this belief, she did not pursue her case any further until a [redacted] contacted her subsequent to her removal and after reading an article about her in December, 2007. With [redacted]'s assistance, the respondent contacted her current attorney from Mexico, who explained that she had not received effective representation while in the United States (Exh. 1). We find, under the circumstances, no lack of due diligence on the respondent's part. *See Iturribarria v. INS,* 321 F.3d 889 (9th Cir. 2003) (individual seeking to rely upon equitable tolling of a filing deadlines must show that she has acted with due diligence).

Accordingly, we find sufficient evidence to equitably toll the motion restrictions in the respondent's case, and we will grant the respondent's motion under our sua sponte authority. *See Ekemian v. INS,* 303 F.3d 1153, 1156-60 (9th Cir. 2002)(acknowledging the Board's authority to reopen sua sponte is within its unfettered discretion.

A[redacted]

ORDER: The motion is granted, and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing decision.

FOR THE BOARD

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

C. Paige Gardner, Esquire
One Broadway , Suite A-235
Denver, CO 80203-3987

Office of the District Counsel/DEN
4730 Paris St., Albrook Center
Denver, CO 80239

Name: H[redacted] N[redacted] *

N.I.

A[redacted]

Date of this notice: 01/20/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

F. F. Krider

Frank Krider
Chief Clerk

Enclosure

Panel Members:
FILPPU, LAURI S.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A[redacted] - Denver

Date: JAN 2 0 2006

In re: N[redacted] I[redacted] a.k.a. N[redacted] H[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: C. Paige Gardner, Esquire

ON BEHALF OF DHS: Scott Johns
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] -
Inadmissible at time of entry or adjustment of status under section 212(a)(7)(A)(i)(I) of the Act[8 U.S.C. § 1182(a)(7)(A)(i)(I)] -
Immigrant - no valid immigrant visa or entry document

Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] -
Inadmissible at time of entry or adjustment of status under section 212(a)(6)(A)(i) of the Act [8 U.S.C. § 1182(a)(6)(C)(i)] -
Fraud or willful misrepresentation of a material fact

Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Cancellation of removal under section 240A(b)(2) of the Act

The Department of Homeland Security (the "DHS," formerly, the Immigration and Naturalization Service) appeals from a November 17, 2004, decision by an Immigration Judge granting the respondent's application for cancellation of removal under section 240A(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(2), which applies to aliens battered or subjected to extreme cruelty by a United States citizen spouse. The DHS raises a number of arguments in its appeal, namely (1) that the respondent, who divorced her alleged abuser 5 years before applying for cancellation of removal, is ineligible for relief under section 240A(b)(2); (2) that the respondent was not a credible witness; (3) that the respondent failed to show that she was subjected to battering or extreme cruelty as required by the statute; (4) that the respondent failed to

show the requisite level of hardship to herself or to her United States citizen son on account of her removal; and (5) that the Immigration Judge erred in accepting and adjudicating the respondent's application for relief under section 240A(b)(2) where the DHS had no more than 1 day to prepare to defend the case. On this last point, the DHS requests a remand of this matter. The appeal is dismissed.

The Immigration Judge found the following facts in the course of his order granting the respondent's application for relief. The respondent was, at the time of the hearing below, a 30-year-old female native and citizen of Armenia who entered the United States in June 1996 as a nonimmigrant visitor authorized to remain until September 1996 (I.J. at 1-2). At that time, she was recently married to a United States citizen, [redacted], and she gave birth to a baby boy shortly after entry (I.J. at 2-4). Although the DHS argued some 4 years ago that the respondent entered into this marriage to perpetrate immigration fraud, the Immigration Judge rejected that argument in 2001 (Tr. at 178-80, 182) and again below at the hearing on November 17, 2004 (I.J. at 2). The Immigration Judge stated that "the marriage between the respondent and her first husband [redacted] was not an immigration marriage. The parties had a child together. . . .The information . . .indicates quite clearly that these two people had a very intense relationship and were very seriously involved with one another" (I.J. at 2). Based upon the evidence of record, this factual finding is not clearly erroneous. *See United States v. National Assn. of Real Estate Boards*, 339 U.S. 485, 495 (1950) (a factual finding is not "clearly erroneous" merely because there are two permissible views of the evidence). The Immigration Judge therefore correctly refused to uphold the inadmissibility charges under section 237(a)(1)(A) of the Act, insofar as the DHS charged that the respondent's entry as a visitor and spouse of a United States citizen was related to a fraudulent marriage. Furthermore, we also find that the Immigration Judge's broader determination that the respondent credibly testified as to the physical and mental abuse she sustained during the marriage to Mr. [redacted] to be not clearly erroneous. *United States v. National Assn. of Real Estate Boards*, *supra*. In challenging the Immigration Judge's findings in this regard, the DHS argues primarily that the findings conflict with the testimony of Mr. [redacted] *See* DHS's Brief at 46-47. However, it is clear from the record that the Immigration Judge found the respondent's testimony more credible than that of Mr. [redacted] (I.J. at 3-6). Without demonstrating that this conclusion is in clear error, the DHS cannot show that the Immigration Judge erred in concluding that the parties had a bona fide (albeit ultimately unsuccessful) marriage and that the respondent's United States citizen husband, Mr. [redacted], subjected her to physical and psychological harm. We therefore dismiss the DHS's arguments that the charges under section 237(a)(1)(A) of the Act, 8 U.S.C. § 1227(a)(1)(A), should have been sustained and that the respondent's testimony regarding her abuse at the hands of Mr. [redacted] lacked credibility.

Moreover, we also agree with the Immigration Judge's conclusion that the treatment of the respondent by Mr. [redacted] constitutes "battering" or extreme cruelty" under the Act. Although "battering" and "extreme cruelty" are not defined for purposes of section 240A(b)(2) special rule cancellation, there is some regulatory authority defining appropriate standards. Specifically,

8 C.F.R. § 204.2(e)(1)(vi) defines battering for purposes of adjudicating visa petitions filed by an alien (i.e., a "self-petition") who is battered by a United States citizen parent or spouse. Section 204.2(e)(1)(vi) states that "the phrase 'was battered by or was the subject of extreme cruelty' includes, but is not limited to, being the victim of any act or threatened act of violence...which results or threatens to result in physical or mental injury [and] psychological or sexual abuse." Given that section 204 of the Act (governing self-petitions for victims of battering) and section 240A(b)(2) contain virtually identical statutory language and were enacted pursuant to the same Act of Congress, i.e., the Violence Against Women Act of 1994, we find that the above regulatory definition of "battering" is instructive for purposes of this case, as we believe it is unlikely that Congress would intend different definitions of "battering" or "extreme cruelty" to apply to these related sections of the Act. *See Matter of Puente-Salazar*, 22 I&N Dec 1006 (BIA 1999) (overruled on other grounds by *Matter of Ramos*, 23 I&N Dec. 336 (BIA 2002)) *citing United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). The court's findings that Mr. [redacted] used the couple's child "as a wedge and a tool" and its acceptance of the conclusions of the treating psychologist (based upon the statements of the respondent that alleged sexual abuse and mental cruelty) are enough to support his finding that Mr. [redacted] inflicted "extreme cruelty" on the respondent, i.e., treatment that caused mental injury by virtue of the finding that the respondent suffered a "nervous breakdown." *See* I.J. at 4-5. Given the Immigration Judge's factual finding in this regard, which is not clearly erroneous, we find no error in his related finding that the respondent qualifies as one who has been battered or subjected to extreme cruelty for purposes of section 240A(b)(2) of the Act. *See Perales-Crumpean v. Gonzalez*, 429 F.3d 977, 982 (10th Cir. 2005) (agency determination on extreme cruelty is a matter of discretion).

Similarly, we also find no error in the determination that the respondent's removal would result in extreme hardship to her and her United States citizen son. Both the respondent and her son have at this point lived in the United States for almost 10 years. At the time of the hearing below, both the respondent and her son had found a stable home through her marriage to a second United States citizen, [redacted].[1] *See* I.J. at 3, 5-6. In assessing extreme hardship, we are guided by the elements set forth in 8 C.F.R. § 1240.58 with regard to self-petitions under section 204 of the Act, 8 U.S.C. § 1154. Among the factors to be considered are the respondent's length of residence in this country, the existence of family members who are legal residents or citizens of the United States, the ability of the respondent to obtain employment in her native country, the ability of her son to speak the native language in Armenia, the psychological impact of removal, and, for cases involving battering or extreme cruelty, *inter alia*, the nature and extent of past abuse and psychological harm and the social, medical, mental health, and other needs of the alien and her children. 8 C.F.R. § 1240.58. Given all of these factors, we affirm the Immigration Judge's determination that the

[1] Although the DHS informs us in its brief that Mr. [redacted] died in March 2005, after the end of proceedings below, we still consider the impact of the respondent's home with him in our assessment of whether the Immigration Judge properly found that the requisite showing of extreme hardship had been made. *See* DHS Brief at 42.

respondent's removal would result in extreme hardship to her and to her United States citizen son, based upon the total disruption to her son's home and way of life that could be expected to result from the respondent's removal (I.J. at 3-6).

We also reject the DHS's argument that it was given inadequate time to prepare a defense to the respondent's cancellation of removal application. First, it is simply untrue to imply that the Immigration Judge improperly accepted the cancellation application after only setting a filing date for the asylum application. As the record clearly shows, at the master calendar appearance before the merits hearing, the parties all contemplated that the cancellation application would also be filed if, after review, counsel for the respondent determined that the respondent was eligible to pursue this relief. *See* Tr. at 208-209. Furthermore, the DHS was on notice that the respondent intended to pursue relief under section 240A(b)(2) of the Act as early as August 2000, less than a year after her divorce from Mr. [redacted]. Tr. at 9. Thereafter, in March 2002, the Immigration Judge advised the parties that "[t]he respondent also. . .appears eligible for the three-year cancellation." Tr. at 188. Second, even we accepted the DHS's factual premise, there was no objection made to the respondent's pursuit of this relief on the grounds of inadequate notice or preparation time. Having failed to object below to the cancellation of removal application on these grounds, the DHS cannot raise this argument now. *See Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003) (arguments not raised below are considered waived).

Finally, we turn now to the DHS's argument that the respondent is not within the class of aliens eligible to apply for cancellation of removal under section 240A(b)(2) of the Act given her divorce from her husband before this claim was filed. The DHS's primary argument is that the cancellation of removal statute is written in terms of a "spouse's" ability to apply for relief, and that, therefore, the statute excludes *former* spouses. Furthermore, the DHS argues that the fact that Congress amended section 204 (regarding self-petitions) to allow aliens whose marriages to abusive spouses are terminated to pursue adjustment of status indicates that Congress considered, but rejected, amending the cancellation statute to similarly include former spouses in the class of eligible recipients for relief. *See* DHS's Brief at 29-34. The DHS further argues that both the cancellation and adjustment provisions were intended to allow the immigrant women to "escape" or "flee" abusive relationships, and that the respondent, as someone who had been divorced from her United States citizen spouse, did not need the Act's protection to "flee" her relationship. *Id.* at 30-31 (noting that cancellation application was filed in November 2004, whereas divorce from Mr. [redacted] was obtained in December 1999).

We are unpersuaded by the DHS's arguments. As to issues involving statutory construction, we start with the plain meaning of the statute. *INS v. Cardozo-Fonseca*, 480 U.S. 421, 431 (1987). We note initially that the DHS is correct in pointing out that the self-petition provisions of the Act have been amended to specifically provide for relief where the alien has divorced an abusive spouse. *See* sections 204(a)(1)(A)(iii)(II)(CC) of the Act. In contrast, the cancellation of removal statute does not expressly address the issue of divorced spouses, providing instead that cancellation may

be afforded an alien who "*has been* battered or subjected to extreme cruelty *by a spouse*. . .who is or was a United States citizen. . . ." *See* section 240A(b)(2) of the Act (emphasis added). The cancellation statute therefore does not expressly address former spouses; instead, it contemplates relief for victims of past abuse that occurred within the context of an alien's marriage to a United States citizen. The statue is silent on the issue of whether the alien had to remain married to the abuser in order to qualify for relief. But the literal language does not suggest that the marriage must exist when relief is sought or granted. Indeed, the respondent satisfies the literal requirements because she " has been" subjected to abuse "by a spouse who is or was a United States citizen."

While the cancellation of removal provisions do speak in terms of a spouse and not a former spouse, the preceding language (i.e., "*has been* battered or subjected to extreme cruelty"), implies that aliens who are the victims of past abuse that occurred during the time they were married to a United States citizen are eligible for relief. The literal language also would allow relief if the spouse "was" a citizen, which could be the case by virtue of either denaturalization or death. In the latter event, death of the abusive spouse, the marriage would obviously no longer exist. In the adjustment of status provisions, the termination of the marriage between a United States citizen abusive spouse and an alien does not end eligibility for relief, so long as the marriage was terminated pursuant to the abuse and the self-petition is filed within 2 years of the termination of the marriage. *See* sections 204(a)(1)(A)(iii)(I) and (II) of the Act. While both forms of relief were intended to address the same problem, i.e., abuse of undocumented aliens by United States citizens, *see* H. Rep. 106-939, October 5, 2000, the DHS's proposed interpretation has the potential to produce absurd results in certain cases, such as this one. As other courts have found, "the notion that Congress would require women to remain with their batterers in order to be eligible for. . .relief. . .is flatly contrary to Congress's articulated purpose in enacting" the cancellation of removal provisions at issue here. *See Hernandez v. Ashcroft*, 345 F.3d 824, 841 (9th Cir. 2003) (discussing predecessor relief of suspension of deportation for battered spouses under former section 244(a)(3) of the Act). In sum, although there may be some reasonable basis on which to distinguish the two forms of relief and in limiting only one to former spouses, the DHS does not offer any. We should avoid interpretations of statutes that would produce absurd or incongruous results. *Chapman v. United States*, 500 U.S. 453, 463 (1991).

We also are not persuaded that the legislative history compels the conclusion that a former spouse is ineligible for relief under section 240A(b)(2) of the Act. The DHS argues that the "purpose" of the Violence Against Women Act ("VAWA") of 1994 (which spurred the suspension of deportation, cancellation of removal, and self-petition forms of relief discussed herein) was to permit "battered immigrant women *to leave* their batterers without fearing deportation." DHS Brief at 30. According to the DHS, this expressly limits the relief to those fleeing abusive relationships. But DHS does not address the major inconsistency in its argument, namely that notwithstanding this alleged "purpose," Congress amended the VAWA provisions in 2000 to allow former spouses to self-petition for a visa. *See* H. Rep. 106-939, Oct. 5, 2000. Under these provisions, an alien already has obtained a divorce and thus is not in need of assistance in fleeing the abusive relationship, but Congress nonetheless would permit the alien to apply for relief. We note that in the 2000 VAWA amendments, there is no expression of Congress's intent to limit adjustment of status to former

spouses and to exclude former spouses from cancellation of removal. Moreover, in the 2000 amendments to the VAWA provisions, Congress stated that it purpose was not only to "remove immigration laws as a barrier that kept battered immigrant women and children locked in abusive relationships," but also "to offer protection against domestic violence." *Id.* In fact, one federal appellate court has found that an intent of the original VAWA was to "protect *survivors* of domestic violence." *Hernandez v. Ashcroft, supra*, 245 F.3d at 840. We therefore decline to credit the DHS's argument that the Act's legislative history compels a finding that the respondent is ineligible for relief under section 240A(b)(2) of the Act. The DHS's appeal will be dismissed. However, we will remand this record to the Immigration Court in order to complete required background and other checks. Accordingly, the following orders will be entered.

ORDER: DHS's appeal is dismissed.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h). *See* Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743, 4752-54 (Jan. 31, 2005).

FOR THE BOARD

[redacted]

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Saltrese-Miller, Sandra
2635 17th St., Suite #2000
Denver, CO 80211

Office of the District Counsel/DEN
4730 Paris St., Albrook Center
Denver, CO 80239

Name: S[redacted]-L[redacted] P[redacted] **A[redacted]**

Date of this notice: 5/13/2008

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
COLE, PATRICIA A.
HESS, FRED
PAULEY, ROGER

[redacted]

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A[redacted] - Denver, CO Date: MAY 13 2008

In re: P[redacted] S[redacted]-L[redacted] a.k.a. S[redacted] P[redacted] M[redacted] C[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sandra Saltrese-Miller, Esquire

ON BEHALF OF DHS: Leila Cronfel
Assistant Chief Counsel

CHARGE

Notice: Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] - Fraud or willful misrepresentation of a material fact

APPLICATION: Cancellation of removal; asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Nicaragua, appeals from the Immigration Judge's June 19, 2006, decision. In that decision, the Immigration Judge denied the respondent's applications for cancellation of removal under section 240A(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(2), asylum under section 208 of the Act, 8 U.S.C. § 1158, and withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), as well as protection under the Convention Against Torture. The appeal will be sustained, in part, and the record will be remanded to the Immigration Judge for further proceedings consistent with this decision. The respondent's request for oral argument is denied. *See* 8 C.F.R. § 1003.1(e)(7).

On appeal, the respondent argues that the Immigration Judge erred in finding that she failed to demonstrate that she was "battered or subjected to extreme cruelty" by her lawful permanent resident husband as required for cancellation of removal under section 240A(b)(2)(A)(i)(II) of the Act. Additionally, the respondent argues that the Immigration Judge erred in finding that she failed to establish past persecution and a well-founded fear and clear probability of persecution in Nicaragua by her step-father.[1] Finally, the respondent argues that the Immigration Judge erred in

[1]We note that the Immigration Judge also found that the respondent failed to establish her eligibility for relief based on a claim related to the Sandinistas in Nicaragua and the respondent has not

finding that she failed to meet her burden of establishing eligibility for protection under the Convention Against Torture.

Turning first to the issue of cancellation of removal, we do not agree with the Immigration Judge's finding that the respondent failed to demonstrate that she was "battered or subjected to extreme cruelty" by her husband for purposes of cancellation of removal under section 240A(b)(2)(A)(i)(II) of the Act (I.J. at 5-7). Specifically, we find clear error in the Immigration Judge's finding that the respondent's testimony about her alleged abuse by her husband was not credible. *See* 8 C.F.R. § 1003.1(d)(3)(i). In this regard, the sole basis for the Immigration Judge's adverse credibility finding was the fact that the respondent attempted to enter the United States by fraud (I.J. at 5-6; Tr. at 62-65). We find this to be an insufficient basis to support the Immigration Judge's adverse credibility finding.[2] *See Uanreroro v. Gonzales*, 443 F.3d 1197, 1211 (10th Cir. 2006) (finding that an alien's lies ~~upon entry into the United States~~ do not necessarily forfeit an alien's right to present a credible claim). Thus, contrary to the Immigration Judge, we find that the respondent credibly testified that her husband repeatedly pushed her and hit her in the face and that he threatened to take their child away from her (I.J. at 3; Tr. at 50-57). Moreover, the respondent's friend testified that she witnessed the respondent's husband slap and push the respondent and that she saw bruises on the respondent (I.J. at 5; Tr. at 83-84). Although the respondent failed to submit medical or police reports that were contemporaneous with the alleged abuse, we find that the evidence presented by the respondent, including her credible testimony, is sufficient to meet her burden of establishing that she is a battered spouse for purposes of special rule cancellation of removal. *See* section 240A(b)(2)(D) (providing that, in determining whether an alien is eligible for cancellation of removal under section 240A(b)(2) of the Act, any credible evidence relevant to the application must be considered). Because the Immigration Judge failed to analyze whether the respondent was otherwise eligible for cancellation of removal under section 240A(b)(2) of the Act and did not provide sufficient findings of fact for us to determine whether she is eligible for such relief, the record will be remanded for further proceedings, as appropriate, and for the entry of a new decision. Upon remand, both parties should be afforded the opportunity to present evidence regarding the respondent's eligibility for relief. Since we find it necessary to remand proceedings to the Immigration Judge for the abovementioned reasons, we need not address the respondent's other applications for relief at this time.

Accordingly, the following orders will be entered:

---

challenged this finding on appeal.

[2]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 (I.J. at 7). *See Uaneroro v. Gonzales*, *supra*, at 1205 (holding that speculation, conjecture, or unsupported personal opinion does not support an adverse credibility finding) (*quoting Chaib v. Ashcroft*, 397 F.3d 1273, 1278 (10th Cir. 2005).

A [redacted]

ORDER: The respondent's appeal is sustained, in part.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD

[redacted]

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Holguin Iliana
2400A E. Yandell
El Paso, TX 79903

One Stop Postal/DHS DICOU/ELP
1535 Hawkins Blvd., Suite 122
El Paso, TX 79925

Name: [redacted] [redacted]

Date of this notice: 3/13/2008

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
HOLMES, DAVID B.
Kendall-Clark, Molly
MILLER, NEIL P.

File: [redacted] - El Paso, TX Date: MAR 13 2008

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Iliana Holguin, Esquire

ON BEHALF OF DHS: William M. Hunt
Assistant Chief Counsel

APPLICATION: Cancellation of removal

The respondent appeals the Immigration Judge's decision dated September 19, 2006. The respondent argues that the Immigration Judge improperly found he was not eligible for special rule cancellation of removal under section 240A(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(2). The appeal will be sustained.

The Immigration Judge's decision did not include comprehensive findings of fact, but the record reflects the following general chronology of events: The respondent entered the United States in September 1999 on a student visa to attend aviation school in Florida. Shortly thereafter, he transferred to a school in Oklahoma and ultimately completed his studies in that state. The respondent conceded that he was removable for failing to maintain the conditions of non-immigrant status under which he was admitted to this country.

While the respondent was attending college in Oklahoma, he met his now ex-wife, a United States citizen, at her father's church. Her parents opposed their relationship and physically abused their daughter to discourage her from seeing the respondent. On March 27, 2001, the couple married. The respondent was 19 years old and his wife was 18. As her family was opposed to the marriage, they married first and informed her parents after the fact. The respondent's father, who is a also pastor, attempted to mediate on behalf of the couple with his son's father-in-law. Two United States citizen children, currently ages 4 and 5, were born of their marriage.

The respondent did not engage in employment before the couple married. He testified that after they were married, his wife refused to work, demanded that he do so, but did not submit the applications that would have allowed him to seek work authorization. He ultimately engaged in unauthorized employment to support his family, giving false information to employers to obtain employment. The respondent also testified that he applied for a Social Security card without making any false representations, but received an unrestricted card in the mail. The couple lived in various locales, including for a time with the respondent's in-laws.

The respondent related that his wife and her family continually berated and insulted him throughout the course of the marriage, and that his wife was both verbally and physically abusive to him. On one occasion, his wife slapped him so hard that her nails left a scar on his face from the force of the blow. On another occasion, she broke off a table leg with a nail in it and threw it at him causing bleeding and a scar on his leg. The respondent testified that his wife regularly used his lack of status as means to threaten him. He stated that his wife and her family insulted and berated him because of his African ethnicity, and frequently accused him of marrying her for immigration purposes even though the couple had lived in a marital union for years and had two children born of the marriage. The respondent testified that he worked to sustain the marriage because of his religious faith and his love of his children, and he presented evidence in support of his testimony in his regard. Ultimately, in March or April 2004, his wife did file a concurrent visa petition and adjustment of status application on his behalf.

In July 2004, however, the respondent returned from work one day to find that his wife had left him and taken their children with her. Shortly thereafter, the couple was legally separated. The respondent testified that his attempts to see his two young children and exercise his visitation rights were repeatedly thwarted by his wife and her family. On one occasion when the respondent was at his wife's parents' home visiting his children, his wife encouraged one of her brothers to physically assault him. The respondent, who was holding his son, was pushed into a door by his brother-in-law with such force that it broke the door. The respondent called the police and filed a police report, which was submitted into evidence, but his wife convinced him not to pursue the charges by promising him greater access to his children. On another occasion, during a visit with his children, the respondent's wife grabbed him by the arm and shoved him violently into a car. This incident occurred in view of their children and led to domestic violence charges being filed against his wife. The respondent ultimately withdrew the charges for the sake of the children at the urging of his pastor, who corroborated his testimony in this regard.

The respondent also related that at one point he became concerned that his father-in-law was physically abusing his young son and he contacted Child Protective Services to investigate. Within days of this report, and prior to the scheduled interview with the state agency, the respondent was arrested by Immigration and Customs Enforcement officers. The respondent believed that his wife or her family contacted the officers in retaliation for the report filed with Child Protective Services. The couple's marriage ended in December 2005, and the respondent received joint custody of the children.

The respondent both submitted documentary evidence and presented witnesses to corroborate his testimony. The witnesses included two friends who testified to the severe effects the respondent's wife's conduct had on him, including discussions of his depression and contemplation of suicide. The attorney who represented the respondent in his domestic relation proceedings testified regarding the belligerence of the wife and her family and related an incident when she (the attorney) was intimidated by the family's "physical posturing" and had to interact with the courthouse staff to ensure nothing happened. The respondent's pastor's stipulated testimony reflected his unsuccessful attempts to help the couple reconcile and confirmed various aspects of the respondent's narration of events, including the pastor's "spiritual advice" to the respondent not to pursue the domestic violence charges against his wife. The Department of Homeland Security did not present any witnesses or any other evidence that brought the respondent's testimony and factual claims into question.

As noted, the respondent conceded that he was removable as charged, but applied for special rule cancellation. In support of his application, the respondent claimed that he had been battered and subjected to extreme cruelty at the hands of his United States citizen wife. The Immigration Judge ultimately denied the respondent's application on a number of bases, which we will address below. We first note, however, that the Immigration Judge did not make separate, clear, and comprehensive findings regarding the credibility of the respondent and his witnesses; rather, he included limited findings in this regard during his discussion of the application of the law to the facts. There is nothing in the nature of the respondent's testimony itself or in the testimony of his corroborating witnesses that would give cause to doubt its truthfulness, and various of the significant claimed events most pertinent to his application for relief are supported by contemporaneous documentary evidence. Accordingly, as will be further discussed, we accept the truth of the respondent's factual claims.

In denying the respondent's application, the Immigration Judge suggested, without ultimately making a specific finding, that the respondent failed to establish a "good faith" marriage. The Immigration Judge noted the timing of the marriage, that it was held in secret from the respondent's in-laws, that the respondent's wife and her family had accused him of having married for immigration purposes, and that the respondent fathered two children during a one-year period even though the marriage "began to crumble within weeks after consummation." He also noted the respondent's relationship with two girlfriends after the marriage had ended. However, the respondent provided detailed, reasonable explanations for the circumstances of the marriage, provided supporting documentary evidence, and presented witness testimony and affidavits regarding the couple's relationship, including evidence from the pastor who provided him spiritual advice and counseling. Albeit a troubled marriage, there is no adequate basis to support a finding, implicit or otherwise, that it was not a "good faith" marriage within the meaning of the immigration laws, particularly considering that this couple parented two children and cohabited for years.

The Immigration Judge explicitly found that the respondent had not credibly established that he was either battered or subjected to extreme cruelty. Regarding credibility, the Immigration Judge cited the respondent's illegal employment in the United States, his possession of a restriction-free Social Security card, and lack of definitive proof of filing income taxes in 2001 and 2005, even though the respondent provided proof of filing tax returns for the years 2002, 2003, and 2004. These acts, however, do not relate to the respondent's testimony and the objective evidence of record he presented in support of his claim of extreme cruelty. The respondent's testimony about how his spouse treated him was detailed, consistent, plausible, and supported by corroborative evidence. Further, the Immigration Judge clearly erred in finding an inconsistency with the respondent's statements in a police report from October 2004 (regarding an assault by the spouse's brother while respondent was holding his son), based on his confusion with the police report from April 2005 (regarding refusal to permit visitation to his children). The record before us does not support a finding that the respondent was not credible regarding the events underlying his application for relief. That, however, does not answer the question whether these facts, even if true, satisfy the requirements for special rule cancellation. And, this is the closest question presented in this case.

"Battered" and "extreme cruelty" are not defined for purposes of § 240A(b)(2) special rule cancellation; however, there is some regulatory authority defining appropriate standards. Specifically, 8 C.F.R. § 204.2(c)(1)(vi) defines battering for purposes of adjudicating visa petitions

filed by an alien spouse (i.e., a "self-petition") who is battered by a United States citizen. Section 204.2(c)(1)(vi) states that "the phrase 'was battered by or was the subject of extreme cruelty' includes, but is not limited to, being the victim of any act or threatened act of violence . . . which results or threatens to result in physical or mental injury." Given that § 204 of the Act (governing self-petitions for victims of battering) and § 240A(b)(2) contain virtually identical statutory language—discussing victims of "battering" or "extreme cruelty" at the hands of a United States citizen—we find that the above regulatory definition of "battering" is instructive for purposes of this case, as is unlikely that Congress would intend different definitions of "battering" or "extreme cruelty" to apply to these related sections of the Act.

The Immigration Judge dismissed much of the respondent's claim regarding extreme cruelty as simply being the product of a bitter divorce and custody battle. However, accepting the truth of the respondent's claims, we are ultimately persuaded that the evidence does support a finding of extreme cruelty. His wife assaulted him resulting in physical injury on a number of occasions throughout the course of the marriage. After they separated, but while still married, she incited her brother to assault the respondent while he was holding their 2-year-old son. On another occasion, she physically assaulted him in front of their of their children and other witnesses. During the course of the marriage, the respondent's wife and her family subjected him to threats and mental cruelty that led to his depression and contemplation of suicide, facts which were corroborated by unchallenged supporting evidence. Particularly as there is no question on this record regarding the respondent's love of his children and their central importance in his life, an added dimension in this case was the respondent's wife's threats that he would be reported to Immigration authorities so he could never see his children again. Therefore, although a close question, we conclude that the respondent has established "extreme cruelty" within the meaning of that term in § 240A(b)(2) of the Act.

The Immigration Judge also ruled that the respondent had not established the requisite good moral character, principally because the respondent provided false information on I-9 Forms for employment eligibility and had a Social Security card that did not reflect that he was restricted from employment. The Immigration Judge, however, did not reference any of the significant positive evidence presented regarding the respondent's character and did not specify whether the respondent's acts were encompassed by any of the specified legal bars to finding good moral character under section 101(f) of the Act, 8 U.S.C. § 1101(f), or the catch-all provision of section 101(f). *See Beltran-Resendez v. INS*, 207 F.3d 284 (5th Cir. 2000) (holding that false attestations under penalty of perjury on I-9 Forms were not tantamount to false testimony under section 101(f)(6)). The respondent has not been convicted of any crimes related to these acts, and the facts are not sufficient to support a finding that the respondent received the Social Security card as a result of providing false information. We do not find an adequate basis set forth in the Immigration Judge's decision to support a finding that the respondent lacks good moral character.

Further, section 240A(b)(2)(C) of the Act provides that a person's act that does not otherwise bar the granting of cancellation may be waived where it was "connected" to the alien's having been "battered" or "subjected to extreme cruelty." The respondent did not engage in any unauthorized employment prior to his marriage and he only worked after his separation from his wife to meet her demands, particularly while striving to maintain contact with his children. The respondent's wife threatened him with deportation and separation from his children if he did not do as she said. Given the evidence that the respondent's wife refused to work, insulted him for not being able to support his family, yet refused over a period of years to submit the applications that would have permitted

him to file for employment authorization, we are not persuaded in the specific context of this case that the respondent's acts related to his employment were not "connected" to the "extreme cruelty."

Given the evidence of his close relationship with his children, the order of joint legal custody, and the affidavits and witness testimony corroborating the relationship with his children, the respondent has adequately shown that his removal would result in extreme hardship to himself and his two young United States citizen children. *See* section 240A(b)(2)(A)(v) ("extreme hardship" rather than 240A(b)(1) standard of "exceptional and extremely unusual hardship" applies in special rule cancellation cases.).

There being no doubt with regard to the respondent's continuous physical presence, the issue remains whether he merits a favorable exercise of discretion. There is evidence that the respondent for at least a time was working and receiving income (on which he paid taxes) by filing false I-9 forms. The respondent did this to support his family. There is no other meaningful adverse information of record. The respondent submitted significant evidence regarding his good character, and included a positive reference letter from a United States Army recruiter. Particularly considering his close and loving relationship with his United States citizen children, we conclude that the respondent merits a favorable exercise of discretion on his application for special rule cancellation under section 240A(b)(2) on the record before us. Accordingly, the following orders will be entered.

ORDER: The respondent has established eligibility for cancellation of removal under section 240A(b)(2) of the Act, and his appeal from the Immigration Judge's denial of this relief is sustained.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h). *See* Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743, 4752-54 (Jan. 31, 2005).

FOR THE BOARD

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Zanipatin, Jeannette
909 Eighth Avenue, Suite 100
Seattle, WA 98104-0000

Office of the District Counsel/SE
1000 Second Avenue, Suite 2900
Seattle, WA 98104

Name: A[redacted]-J[redacted] N[redacted]

N-A-J

[redacted]

Date of this notice: 11/29/2001

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Very Truly Yours,

Lori Scialabba

Lori Scialabba
Acting Chairman

Enclosure

Panel Members:
HOLMES, DAVID B.
HURWITZ, GERALD S.
VILLAGELIU, GUS

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: [redacted] - Seattle

Date: NOV 29 2001

In re: N[redacted] A[redacted] J[redacted]

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Anne E. Benson, Esquire

ON BEHALF OF SERVICE: Robert Peck
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] - Entered without inspection

APPLICATION: Suspension of deportation

ORDER:

PER CURIAM. We dismiss the Immigration and Naturalization Service's[1] appeal of the Immigration Judge's decision of November 7, 1996, which granted the respondent's application for suspension of deportation under section 244(a)(3) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1254(a)(3).[2] We adopt and affirm the decision of the Immigration Judge (I.J. at 1-11). *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994).

The Service has made two principal assignments of error on appeal. First, the Service argues that the respondent's United States citizen child was not "subject to extreme cruelty" by her lawful permanent resident father because he did not intend to harm the child. *See* Service Brief at 6-9. However, the father regularly beat the respondent and threatened her life in their daughter's presence (Tr. at 98-99, 104, 108, 115, 128). He told his daughter [redacted] that he was going to kill her

[1] Hereinafter "Service."

[2] The Service has objected to the appellate submission of the declaration of Dr. Mary Ann Dutton. *Cf.* Amici's Memorandum in Support of Respondent's Reply Brief at Tab 6. Parties should be mindful that the Board does not ordinarily entertain new evidence on appeal. *See, e.g., Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The Board is an appellate body whose function is to review, not to create, a record. *See Matter of Fedorenko*, 19 I & N Dec. 57 (BIA 1984). Accordingly, we sustain the Service's objection to the admission of the declaration of Dr. Dutton, and have not considered it or other new evidence in reaching our decision in this case. *Id.*

[redacted]

mother and threatened to kidnap his daughter (Tr. at 73, 99, 109, 111). The respondent obtained court ordered protection for herself and daughters[3] against [redacted] father in April 1995 and had the protection order renewed on October 30, 1996 (Exh. 2 at 135).

Despite [redacted] tender age at the time she observed the beatings, we agree with the Immigration Judge that the repeated physical abuse of the respondent subjected her daughter to extreme cruelty. *See* sections 244(a)(3) and (g) of the Act. The respondent presented the testimony of both a case worker and a licensed counselor which indicated that [redacted] behaved as if she had witnessed extensive violence against her mother by her father, and that she experiences recurring nightmares, flashbacks, and fear that her father will return to kill her mother (Tr. at 34-36, 42, 75-77; Exh. 2 at 49-50). The licensed counselor, who holds a masters degree in social work, believes that [redacted] is suffering from post-traumatic stress disorder ("PTSD") (Tr. at 25, 36-44; Exh. 2 at 143). The Service argues that the Immigration Judge erred by permitting the mental health counselor to testify concerning PTSD. *See* Service Brief at 9. Here, where the counselor was directly responsible for the mental health and well being of the child, and has been trained to treat children who have experienced domestic violence, we do not find that the Immigration Judge erred by permitting her testimony (Tr. at 23-31, 34-61; Exh. 2 at 143-44). The Service has not demonstrated that a diagnosis of post-traumatic stress disorder is outside of the witness's expertise. *Cf.* section 244(g) of the Act. Even if it is, we find that the testimony presented demonstrates that the child's nightmares, flashbacks and fear are related to her father's physical abuse of her mother. *See id.* The plain language of section 244(a)(3) of the Act does not require that the alien establish intent in order to prove extreme cruelty. In this case, we agree that by repeatedly beating the respondent in the presence of her child, the father subjected his daughter to a form of extreme cruelty. *See id.*

Second, the Service argues that the respondent has failed to establish that her deportation would result in extreme hardship to either herself or her United States citizen child. *See* Service Brief at 10-12.[4] We agree with the Immigration Judge's decision that, based on the totality of the circumstances, the respondent has established the requisite extreme hardship (I.J. at 10). *See Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (recognizing that while one factor by itself may be insufficient to constitute "extreme hardship," that factor, when considered cumulatively with other relevant factors, may constitute hardship that is sufficiently unusual to be "extreme"). The respondent has resided in the United States for 13½ years. The recovery of the respondent and her daughter from the abusive relationship would be jeopardized by her deportation (Ex. 2 at 84; Tr. at 33-48, 67-74, 79-80, 115). In the United States, the respondent has been able to maintain a protection order against [redacted]'s father (Tr. at 113; Exh. 2 at 135-36). However, he has threatened to pursue them if they return to Mexico, and the respondent fears that she would not be able to prevent him from resuming his physical abuse of her in that country (Tr. at 112, 114-15, 117). The State Department has reported that domestic violence in Mexico is widespread, and women do not

[3] The respondent has an older daughter from a previous relationship who was born in Mexico.

[4] The Immigration Judge found that the respondent satisfied the continuous physical presence and good moral character requirements for suspension of deportation under section 244(a)(3) of the Act (I.J. at 2-3, 9). These findings have not been challenged on appeal.

[redacted]

have the same opportunities for protection that exist in the United States (Exh. 2 at 55). The respondent's United States citizen daughter is 9½ years old, and the record does not reflect that she has ever been outside this country. At the time of the last hearing, the respondent's other daughter spoke fluent English and the respondent was taking classes to learn English. While the respondent does not have substantial economic ties to the United States, she works to support herself and her daughters. In light of the evidence of record, we agree with the Immigration Judge that based on the totality of the circumstances, the respondent has established the requisite extreme hardship and merits a grant of suspension of deportation in the exercise of discretion. *See Prapavat v. INS*, 662 F.2d 561, 563 (9th Cir. 1981) (finding abuse of discretion where BIA failed to consider cumulative effect of all relevant factors such as existence of United States citizen children and minimal economic opportunities for suitable employment in an underdeveloped country).

FOR THE BOARD