INTRODUCTION

The amicus submits this brief in support of Petitioner Kewan's appeal of the denial of his request for adjustment of status under Section 245(a) of the Immigration and Nationality Act (INA). Mr. Kewan's appeal presents this Court with the opportunity to clarify the unlawful nature of an Immigration Judge's actions in acting outside of her authority in the administration of the Violence Against Women Act (VAWA). In the instant case, the Immigration Judge (IJ) inappropriately re-adjudicated portions of the self-petition submitted by Petitioner under VAWA. The Board of Immigration Appeals (BIA) then made a clear error of law in affirming the IJ's denial of relief to Petitioner. In order to give effect to the plain language of the statute and Congressional intent in enacting VAWA, federal courts must correct the misapplication of the statute by immigration judges who are either antagonistic to victims of domestic violence or are simply unfamiliar with the unique factual, evidentiary and legal issues involved in such cases under VAWA.

INTEREST OF AMICUS

Northwest Immigrant Rights Project (NWIRP) is an organization dedicated to the defense and advancement of the rights of noncitizens in the United States. NWIRP places particular emphasis in advocating for the rights and providing

direct representation to noncitizens in removal proceedings who have been subjected to domestic violence and who are eligible for relief under VAWA. If this Court upholds the actions of the IJ and BIA in denying relief as a result of the IJ's re-adjudication an approved self-petition under VAWA, it would have the potential of undermining hundreds of clients of NWIRP who seek permanent status before the Immigration Court based upon an approved self-petitions under VAWA.

The National Immigration Project of the National Lawyer's Guild (NIPNLG) is a national organization of attorneys, law students, and paralegals committed to fair and humane administration of immigration laws and respect for the civil and constitutional rights of all persons. Many of NIPNLG's members represent battered immigrant clients who likewise may be significantly affected by the issues raised in this case.

SUMMARY OF RELEVANT FACTS

The Opening Brief in Support of Petitioner's Appeal sets forth a detailed description of the relevant facts and proceedings below. *See* Petitioner's Brief p. 2-9. The amicus hereby adopts the statement of relevant facts and proceedings below set forth in Petitioner's brief.

ARGUMENT

I. The Immigration Judge had no authority to reject the legal findings made by U.S. Citizenship and Immigrations Services in denying his application for adjustment of status under INA § 245(a).

In denying Mr. Kewan's application for adjustment of status under INA § 245(a), the Immigration Judge (IJ) impermissibly re-adjudicated conclusive findings of the United States Citizenship and Immigration Services (USCIS) on, 1) the validity, or the *bona fides*, of Mr. Kewan's marriage, and 2) whether Mr. Kewan was indeed a victim of domestic violence. Recognizing that Mr. Kewan's spouse had subjected him to emotional and physical cruelty, the Vermont Service Center (VSC) of the USCIS approved Mr. Kewan's Form I-360 Self-Petition. As part of the determination of Mr. Kewan's eligibility for approving the I-360 self-petition, the VSC necessarily determined that Mr. Kewan's marriage to his former wife was undertaken in good faith, and that Mr. Kewan had suffered domestic violence at the hands of his U.S. citizen spouse.[1]

Moreover, once in proceedings, the attorney for Immigration and Customs Enforcement (ICE) requested that the IJ continue proceedings to allow ICE to request that the VSC reconsider its original grant of the self-petition. Over objection by Petitioner, the IJ allowed proceedings to be continued so that the

[1] INA §§ 204(a)(1)(A)(iii)(I) & (B)(ii)(I) (noting, *inter alia*, that for I-360 eligibility, marriage must have been entered into for "good faith" and that noncitizen "has been battered or has been the subject of extreme cruelty").

approved I-360 could be challenged by ICE. However, upon reconsideration, the VSC re-affirmed its initial decision to grant Mr. Kewan's I-360 self-petition.

The Immigration Judge lacked jurisdiction to re-adjudicate the legal findings of the self-petition (including the VSC's determination of the validity or *bona fides* of Petitioner's marriage, and the fact that Mr. Kewan had been subjected to domestic violence) given that the adjudication of the I-360 is restricted to the jurisdiction of USCIS. Nowhere in the statute, regulations, or written policies, is there a basis for the IJ to re-adjudicate or disregard the findings of USCIS in regards to a self-petition filed under the Violence Against Women Act.

In support of this novel assertion, the IJ relied on a single case from the BIA in 1972, which is readily distinguished, and indeed, is no longer good law. The IJ cited to *Matter of Bark*, 14 I&N Dec. 237 (BIA 1972)—to erroneously assert that "[an] immigration judge may consider the bona fides of the respondent's marriage, irrespective of an approved visa petition." In *Matter of Bark*, the Board was looking at an I-130 visa petition (self-petitions under VAWA did not exist at that time). *Matter of Bark* involved a visa petition where new evidence emerged to demonstrate apparent fraud--indeed the person attempted to bribe the special inquiry officer with a payment of $1000.00. Moreover, subsequent case law has overruled a principal holding in *Matter of Bark*, namely, that the couple must be

living together at the time of the hearing.[2] Hence, that decision is not good law even in the context of I-130 visa petitions that were filed by a family member.

For self-petitions under VAWA, as explained below, the IJ does not have authority to re-adjudicate the findings made by USCIS. Rather, for self-petitions under VAWA, if evidence emerges as to potential fraud or other oversight, a system is in place, and was invoked in the instant case, to resubmit the person's application back to the VSC to determine if indeed the self-petition merits approval in light of the new evidence or allegations.

The IJ's unwarranted investigation into the *bona fides* of Mr. Kewan's marriage, and to whether he had indeed suffered from domestic violence, contravenes the language and purpose of VAWA. Immigration Judges are not part of USCIS or the Department of Homeland Security (DHS), but rather, belong to the Executive Office for Immigration Review (EOIR), which is a delegate of the Attorney General, in the Department of Justice (DOJ).[3] The VAWA contemplates no role for an IJ to adjudicate the requirements for VAWA self-petitions. The implementing regulations for VAWA similarly demonstrate that immigration

[2] *Matter of Boromand*, 17 I&N Dec. 450 (BIA 1980).

[3] 8 C.F.R. § 1.1 (l) (2005) (noting that "[t] The term immigration judge means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 240 of the Act. An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service.").

judges do not adjudicate self-petitions under VAWA.[4] In particular, these regulations clearly state that the "Service" (USCIS) adjudicates VAWA self-petitions.[5] The regulations provide detailed guidelines for the submission of evidence in support of a VAWA petition, repeatedly referencing the role of the "Service" in the adjudication of such petitions.[6]

Nowhere in the regulations is the IJ granted authority or jurisdiction to adjudicate self-petitions, nor do the regulations provide that such self-petitions may be appealed or renewed before the immigration judge.[7] Rather, appeals for denied self-petitions under VAWA may be filed with the Administrative Appeals Unit (AAU).[8] This is in stark contrast to other applications, such as adjustment applications, asylum applications, and petitions for removal of conditions of residency, which allow for the IJ to adjudicate applications in the first instance, or

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[4] *See, e.g.*, 8 C.F.R. § 204.1(e)(1) (2005) (noting that USCIS has jurisdiction over family-based petitions, including self-petitions under VAWA). The jurisdiction over VAWA petitions now lies exclusively with the Vermont Service Center,within the USCIS. Memorandum, Office of the Executive Associate Commissioner, Immigration and Naturalization Service, Department of Justice (August 2002) [hereinafter Memorandum]. *See also* 8 C.F.R. § 204.2(c)(3) (2005) (discussing how USCIS "retains" approved VAWA self-petitions that are subsequently used for adjustment of status under INA § 245).

[5] *Id.*

[6] *See generally*, 8 C.F.R. § 204 (2005).

[7] *See, e.g.*, 8 C.F.R. § 204.2(c)(3)(iii) (2005).

[8] The Administrative Appeals Unit (AAU) provides the forum for appeals of I-360 petition denials. Ann Block and Gail Pendleton, *Applications for Immigration Status Under the Violence Against Women Act*, in 1 AILA, IMMIGRATION AND NATIONALITY LAW HANDBOOK 436 (2001-02).

allow for such applications to be renewed in front of the IJ after they have been denied by USCIS.[9]

This Court has stressed the importance of using the Act's implementing regulations to interpret the statute. In *Hernandez v. Ashcroft,* 345 F.3d 824, 843 (9th Cir. 2003), this Court rejected the government's arguments, noting that the arguments advanced by the government enjoyed no support in the implementing regulations of the Act, and that the relevant decision had to be made pursuant to the Act's implementing regulations. Thus, this Court must overturn the IJ's decision, where she unlawfully exercised jurisdiction beyond the permissible bounds of the implementing regulations.

The guidelines and memorandum issued by USCIS also clarify that the Vermont Service Center has sole responsibility for adjudicating all VAWA self-petitions.[10] The memorandum clearly states that "VSC shall have sole authority to revoke an approved VAWA-based self-petition."[11] This policy memorandum was issued to ensure consistency in the adjudication of Self-Petitions and it was issued based on the fact that "VSC adjudication officers assigned to the VAWA Unit have received specialized domestic violence training and have developed expertise in

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[9] *See, e.g.,* 8 C.F.R. § 1245.2(a)(5)(ii); 8 C.F.R. § 1208.2(b); 8 C.F.R. § 1216.4(d)(2) (2005); *Matter of Stowers*, 22 I&N Dec. 605 (BIA 1999).
[10] *See* Memorandum, *supra* note 4.
[11] *Id*. p. 1

adjudicating these petitions."[12] The Revocation Memo lays out the procedure to have VSC consider whether to revoke the approval: a VAWA unit supervisor must review the request and make a recommendation. If the recommendation is to reaffirm the approval, the VAWA Unit supervisor must write a memorandum with the reasons for the recommendation.[13] This process ensures the careful consideration of the factors presented. As noted, this detailed procedure was followed in the case of Mr. Kewan and VSC decided to reaffirm the approval of the self-petition.

The VSC has sole responsibility for determining whether a marriage has been entered into in good faith, and whether an individual has been subjected to domestic violence. In the instant case, the IJ impermissibly interfered with the USCIS's determinations that Kewan had a good-faith marriage, and was a victim of domestic violence, which established his eligibility for I-360 relief. Because the VSC possesses "sole authority to revoke an approved VAWA-based self-petition,"[14] the IJ's action was *ultra vires.* [15]

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[12] *Id*. p. 1
[13] *Id*. p. 2
[14] *Id*.
[15] In other contexts, immigration judges are also forbidden from overturning USCIS determinations of the bona fides of a marriage. In *Matter of Gre*goire, the BIA concluded that the IJ could not challenge USCIS's determination on the bona fides of a marriage in an INA § 245(e) application. A76 967 987 (BIA Sept. 30, 2003). The Board concluded that "only the Service is authorized to determine

Once again, it should be noted that the Immigration Court or local USCIS office that is adjudicating an application for adjustment of status based upon an approved self-petition under VAWA is not left without recourse if they believe there has been an oversight in the approval of the self-petition by the VSC. The adjudicating officer can send the file back to the VSC to request that it be reconsidered in light of the new evidence or allegations. Indeed, in this case, the government's attorney sent the file back to VSC to have it reconsidered. After reconsideration in light of the new information and allegations provided by the ICE attorney, the VSC once again affirmed that Mr. Kewan was entitled to an approved I-360 self petition under VAWA.

The interference of an IJ with the adjudication of successful I-360 petitions further undermines Congressional intent to provide broad immigration relief for battered immigrants. Congress passed the Violence Against Women Act (VAWA) in 1994 to recognize domestic violence as a clear crisis demanding national attention, to provide protection for victims of domestic abuse, and to promote the criminal prosecution of perpetrators of such abuse.[16] As this Court has recognized, Congress amended the nation's immigration laws as part of

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under Section 245(e) of the Act whether a marriage was entered into in good faith."

[16] *Hernandez*, 345 F.3d at 835 (describing "Congress's desire to remedy the past insensitivity of the INS and other governmental entities to the dangers and dynamics of domestic violence").

VAWA to address the distinctive and uniquely harsh predicament endured by immigrants trapped in abusive intimate relationships.[17] Congress recognized that immigration laws actually fostered the abuse of many immigrants by placing their ability to gain permanent lawful status in the complete control of their abusers – their U.S. citizen or lawful permanent resident spouses. [18] Congress has preserved immigration relief for battered immigrants through several cycles of immigration law reform, indicating Congress' steadfast commitment to securing such relief for battered immigrants and suggesting that restrictions on such immigration relief undermine Congressional intent.[19]

In order to advance Congressional intent, USCIS has implemented several procedural mechanisms for ensuring that VAWA is correctly and consistently applied. As mentioned previously, one of the mechanisms is to ensure that a specially trained group of immigration officers adjudicate all of the self-petitions filed under VAWA. Thus, the VSC adjudicates all VAWA-based petitions. Because VSC adjudications officers receive specialized training in the dynamics of domestic violence and thus possess expertise in adjudicating VAWA petitions,[20]

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[17] *Hernandez*, 345 F.3d at 827 ("With the passage of VAWA, Congress provided a mechanism for women who have been battered or subjected to extreme cruelty to achieve lawful immigration status independent of an abusive spouse.").
[18] *See* H.R. Rep. No. 395, 103d Cong., 1st Sess. 26-27 (1993).
[19] *See infra* for a discussion of Congress' sustained commitment to offering relief to battered immigrants.
[20] *See supra* note 10.

the adjudication of all VAWA petitions through the VSC ensures quality and consistency. For the IJ to re-adjudicate the VSC's finding on this matter undermines the Congressional scheme in which the VSC is placed as the sole adjudicator for determinations under VAWA.

II. Unlawful decisions cannot be shielded from judicial review.

A. The re-adjudication of the I-360 by the IJ, and the BIA's affirmance of the IJ's Decision, constituted errors of law.

The IJ's decision-making process also exhibited flagrant abuse of discretion in the adjudication of Mr. Kewan's 245(a) petition. This Court has clarified that it has jurisdiction to overturn an IJ's decision to deny discretionary relief that rests on impermissibly considered factors.[21] Although INA § 245(a) permits the exercise of discretion in the adjustment of a noncitizen's status to that of a lawful permanent resident,[22] the statute does not equip the adjudicator of a 245(a) petition with

[21] This Court has clarified that "an agency's interpretation of its administrative regulations is controlling unless it is plainly erroneous or inconsistent with the regulations." *Salehpour v. INS*, 761 F.2d 1442, 1445 (9th Cir. 1985). This Court recognized that interpretations that contravene the regulations constitute an abuse of discretion. *See Yepes-Prado v. U.S. I.N.S.*, 10 F.3d 1363, 1370 (9th Cir. 1993) (noting that IJ who "based his decision on unreasonable and improper factors rather than on legitimate concerns about the administration of the immigration laws" committed abuse of discretion); *Mabugat v. I.N.S.*, 937 F.2d 426 (9th Cir. 1991) (holding that immigration judge committed abuse of discretion by including unverified criminal behavior in balancing of equities for asylum case).

[22] INA § 245(a) (2004).

untrammeled discretion.[23] The IJ misconstrued INA § 245(a) in adjudicating Mr. Kewan's application for relief under this statute. In contrast to the IJ's assertion, the exercise of discretion in 245(a) adjudications in the VAWA should not depend upon factors such as entry without inspection, the applicant's visa overstay, employment without authorization or alleged intent to remain in the United States without regularization of status. The Violence Against Women Act of 2000 (VAWA 2000)[24] specifically exempts approved VAWA self-petitioners from INA 245(c)'s bars to admission on the basis of entry without inspection, unlawful presence, and employment without authorization.[25] These exemptions represent a striking and dramatic departure from the standard procedure for adjustment of status under § 245: approved VAWA self-petitioners are the *sole* category of petitioners for adjustment of status that is *completely* exempted from these bars to

[23] The statute provides for discretionary adjustment of an alien if "(1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed." INA § 245(a) (2004). Although the statute equips the adjudicator with the discretion to decide whether to adjust an alien who meets all three of these conditions, the statute does not give the adjudicator to adjudicate these conditions themselves. As previously discussed, USCIS has sole authority to adjudicate the fulfillment of these conditions.

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

[25] INA § 245(c).

admission.[26] Because many VAWA applicants often face economic jeopardy in addition to severe domestic violence and abuse, Congress has recognized that factors such as visa overstay and employment without authorization should not defeat a VAWA petition alone.[27] Congress has addressed the particularly precarious and marginalized position of VAWA applicants by providing VAWA applicants with generous standards for the regularization of immigration status under INA § 245. Per Ninth Circuit precedent, the IJ's improper balancing of equities in a case for humanitarian relief like Mr. Kewan's petition constitutes abuse of discretion.[28]

The BIA's affirmance attempts to cloak its decision as a matter of discretion. But as this Court has clarified, the BIA does not have the discretion to act in a manner contrary to the law.[29] "Because the decision made by the BIA was contrary to law, it was not discretionary and jurisdiction exists to review that

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[26] INA § 245(i) exempts limited other classes of aliens from § 245(c)'s inadmissibility bars, subject to strict preconditions such as the payment of a $1000 fee and the submission of application within particular time periods. VAWA applicants face no such preconditions before receiving exemption from § 245(c)'s inadmissibility rules.

[27] INA § 245(c). In contrast, Congress has recognized that actual negative discretionary factors should rightfully be counted against the VAWA applicant. For example, criminal convictions can be considered in the adjudication of adjustment under INA § 245(a).

[28] *Cf. Yepes-Prado v. INS*, 10 F.3d 1363, 1370. In *Yepes-Prado*, the Ninth Circuit held that an IJ committed abuse of discretion by failing "to offer a reasoned explanation of why the only adverse factor ... outweighed all of the equities in Yepes-Prado's favor." 10 F.3d at 1370.

[29] *Hernandez v. Ashcroft*, 345 F.3d 824, 832, 845-48 (9th cir. 2003).

determination."[30] This Court has also recognized that the BIA abuses its discretion in adjudicating discretionary relief when it imposes requirements for discretionary relief contrary to regulation and case law.[31] In the case at bar, the consideration of factors such as Mr. Kewan's unlawful presence and employment without authorization contravene the Act. Indeed, they counter the express language of the statute, which specifically notes that self-petitioners like Mr. Kewan, who enter without inspection, and persons who work without employment authorization, are nonetheless eligible for adjustment of status under INA § 245.[32]

Moreover, it is impossible to isolate or separate the discretionary analysis from the unlawful findings regarding the validity of the marriage and the abuse suffered by Mr. Kewan. The IJ cannot on the one hand make an unlawful determination regarding the *bona fides* of Mr. Kewan's marriage and the abuse he suffered, but then on the other hand be permitted to say, notwithstanding any tainted analysis that goes to the core of the application for relief, this person's application may be denied as a matter of discretion, in part based upon those same unlawful findings. As discussed *supra*, the USCIS has sole authority to determine the bona fides of an I-360 applicant's petition for relief. This improper

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[30] *Id.* at 847; *see also, Medina-Morales v. Ashcroft*, 371 F.3d 520 (9th Cir. 2004).
[31] *Lal v. INS*, 255 F.3d 998, 1006-07 (9th Cir. 2001) (finding BIA's imposition of requirements for discretionary relief that had no basis in statute or regulations and contravened settled precedent to be abuse of discretion).
[32] INA § 245(c).

consideration of nondiscretionary factors *ipso facto* precluded a proper balancing of equities in Mr. Kewan's case, which also constituted abuse of discretion.[33]

B. The Immigration Judge's application of discretion in the 245(a) adjudication Undermined Congressional intent to provide broad relief under VAWA.

Moreover, in order to further Congress' clear intent to provide generous relief to battered immigrants under VAWA, 245(a)'s discretionary "balancing test" applied to VAWA cases must operate under a strong presumption in favor granting the immigrant's request for lawful permanent resident status. In affirming the IJ's decision in Mr. Kewan's case, the BIA's assertion that "the Immigration Judge found that the Petitioner had identified no substantial countervailing equities that could overcome his negative factors" represents a clear misapprehension of the law. As discussed *supra*, Congress decisively stated that factors such as unlawful presence and employment without authorization, cannot then be used to deny applications for adjustment of status under 245(c) for approved VAWA self-petitioners. To allow the IJ to nonetheless include these factors in her

[33] *Cf. Watkins v. I.N.S.*, 63 F.3d 844, 849 (9th Cir. 1995) (noting in asylum case that "[t]he BIA abuses its discretion if it 'fails to state its reasons and show proper consideration of all factors when weighing equities and denying relief.' (citing *Yepes-Prado v. INS*, 10 F.3d 1363, 1366 (9th Cir.1993)); *Lauvik v. I.N.S.*, 910 F.2d 658, 660 (9th Cir. 1990) (holding that denial of E-2 visa extension based on evidence "so slight and so thoroughly outweighed by contrary evidence" constituted abuse of discretion).

discretionary analysis, including these factors in any sort of "balancing test" in the adjudication of Mr. Kewan's application, directly contravenes the law.

Furthermore, Congress intended for VAWA to provide battered immigrants with broad immigration relief and robust protection from abuse on our shores. Congress' sustained and serious commitment to providing substantial immigration relief to battered immigrants through VAWA is most evident from Congress' preservation of VAWA's provisions through several successive cycles of immigration law reform. In 1996 Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"),[34] which erected new barriers to gaining lawful permanent residence for many family-based petitioners[35] and eliminated suspension of deportation, replacing it with the more limited cancellation of removal.[36] At the same time, however, Congress included exceptions from many of the new restrictive provisions for those who had approved VAWA petitions[37] or who could qualify under the VAWA provisions.[38]

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[34] Illegal Immigration Reform and Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (hereinafter "IIRIRA").

[35] *See, e.g.*, new INA §§ 212(a)(4)(C)(ii) (new enforceable affidavits of support) and 212(a)(9)(B) and (C) (new "unlawful presence" bars to admission).

[36] *See* new INA § 240A, 8 U.S.C. § 1229b, replacing former INA § 244.

[37] *See* INA § 212(a)(4)(C)(i)(I) & (II) (exemption from enforceable affidavit of support requirement).

[38] *See* INA § 212(a)(9)(B)(iii)(IV), referencing INA § 212(a)(6)(A)(ii) (exception to three- and ten-year unlawful presence bars). Moreover, unlike other forms of suspension, Congress did not eliminate VAWA suspension or heighten the

In October of 2000, bipartisan efforts led to the enactment of the Battered Immigrant Women Protection Act as part of the Violence Against Women Act of 2000 ("VAWA 2000").[39] Congress intended the immigration provisions of VAWA 2000 to aid battered immigrants by repairing residual immigration law obstacles or "catch-22" glitches impeding immigrants seeking to escape from abusive relationships.[40] By removing strict evidentiary requirements to show "extreme hardship," expanding categories of immigrants eligible for VAWA protection, improving battered immigrant access to public benefits, restoring protections offered under the VAWA of 1994 but affected by the passage of subsequent laws, and providing other measures of protection to battered immigrants, VAWA 2000 advanced Congress's express and unequivocal intent to "ensure that domestic abusers with immigrant victims are brought to justice and

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eligibility standard. Instead, it transformed former INA § 244(a)(3) into the new cancellation section 240A(b)(2). *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)(1), requiring seven years of continuous physical presence and a showing of "extreme hardship" to the "alien or to his spouse, parent, or child." As before, applicants for cancellation of removal who have been battered or subjected to extreme cruelty need only show three years of continuous physical presence 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." *See* INA § 240A(b)(2)(A)-(B), (E).

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

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

that the battered immigrants Congress sought to help in the original Act are able to escape the abuse."[41]

Given the clear Congressional intent in providing broad immigration relief for battered immigrants, 245(a) relief should be denied in VAWA cases only in which the balancing of competing interests under 245(a) strongly disfavors the 245(a) petitioner. In the instant case, Mr. Kewan possessed an approved VAWA self-petition and did not demonstrate any "negative" factors recognized by the immigration laws as relevant to a 245(a) determination. When these facts are coupled with the presumption in favor of granting relief to battered immigrants under VAWA, the decision to deny 245(a) relief to Mr. Kewan on the basis of impermissibly considered factors constitutes a clear error of law that directly contravenes Congressional intent. This Court has overturned the Board where it fails to recognize Congress's intent in providing relief in comparable situations. [42] This court should uphold and apply this same principle of statutory interpretation in the instant case to grant INA § 245(a) adjustment to Mr. Kewan, an approved self-petitioner under VAWA.

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[41] *Id.*

[42] This Court has found abuse of discretion by an IJ who fails to recognize presumptions in favor of petitioners for other comparable forms of humanitarian immigration relief, such as asylum. In *Osorio v. I.N.S.*, the Ninth Circuit held that the immigration judge abused his discretion by not recognizing a presumption in favor of an asylum applicant that past political persecution would likely lead to future political persecution. 99 F.3d 928 (9th Cir. 1996).

III. Male Victims

Mr. Kewan's application for adjustment of relief under INA § 245 also illustrates the important, yet often ignored problem, of domestic violence perpetrated against men. Domestic violence is a pattern of assaultive and coercive acts, including the use of threats, isolation, physical and sexual violence, and economic abuse, that perpetrators use to cause physical and psychological harm to their victims aimed at assuring control over them.[43] Domestic violence has primarily been studied and understood as a problem in which the primary victims are women and children.[44] Yet contrary to common perception, domestic violence survivors are not limited by gender, ethnicity, class, or sexual orientation.[45] Although women constitute the vast majority of domestic violence victims,[46] they

[43] *See* Leti Volpp, *WORKING WITH BATTERED IMMIGRANT WOMEN* 3-4 (Family Violence Prevention Fund, 1995).
[44] *See, e.g.*, Eve S. Buzawa and Carl G. Buzawa, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 3-23 (2d ed. 1996); Richard J. Gelles, INTIMATE VIOLENCE IN FAMILIES 21-22 (3d ed. 1997); Karel Kurst-Swanger and Jacqueline L. Petcosky, VIOLENCE IN THE HOME: MULTIDISCIPLINARY PERSPECTIVES 88-104 (2003)
[45] Karel Kurst-Swanger and Jacqueline L. Petcosky, VIOLENCE IN THE HOME: MULTIDISCIPLINARY PERSPECTIVES 3 (2003)
[46] Richard J. Gelles, INTIMATE VIOLENCE IN FAMILIES 92-93 (3d ed. 1997); Karel Kurst-Swanger and Jacqueline L. Petcosky, VIOLENCE IN THE HOME: MULTIDISCIPLINARY PERSPECTIVES 108-09 (2003).

are not the sole victims.[47] and other circumstances in which men face battering by intimate partners.[48] Domestic violence committed against men has been established a severe and serious public health problem.[49] In addition to the 1.3

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[47] Karel Kurst-Swanger and Jacqueline L. Petcosky, VIOLENCE IN THE HOME: MULTIDISCIPLINARY PERSPECTIVES 104-105 (2003) (discussing same-sex intimate partner violence). Female batterers may nonetheless have different motivations for inflicting violence on their intimate violence than male batterers. Mai Y. El-Khoury, PREDICTORS OF BATTERED WOMEN'S USE OF INTIMATE PARTNER VIOLENCE (IPV): A FOCUS ON IPV EXPOSURE, POST-TRAUMATIC STRESS DISORDER (PTSD) AND THREAT APPRAISAL (TA). Unpublished Dissertation, George Washington University 15 (2005):

> Context-based research findings (which incorporate these related factors of IPV [Intimate Partner Violence]) suggest that, even if IPV is bidirectional across gender, the phenomenon of male violence against women is not equal or identical to that of female violence against men.

See also Archer, J. (2000). Sex differences in aggression between heterosexual partners: A meta-analytic review. *Psychological Bulletin, 126,* 651-680; Dasgupta, S.D. (2001). Towards an understanding of women's use of non-lethal violence in intimate heterosexual relationships. *Internet source, http://www.vawnet.org/DomesticViolenc/Research/VAWnetDocs/AR_womviol.ph;* Grandin, E., & Lupri, E. (1997). Intimate violence in Canada and the United States: A cross-national comparison. *Journal of Family Violence, 12* (4), 417-443; Bograd, M. (1990). Why we need gender to understand human violence. *Journal of Interpersonal Violence, 5* (1), 132-135; Kimmel, M. (2002). Gender symmetry in domestic violence: A substantive and methodological research review. *Violence Against Women, 8*(11), 1332-1363; and Worcester, N. (2002). Women's use of force: Complexities and challenges of taking the issue seriously. *Violence Against Women, 8* (11), 1390-1415.

[48] Karel Kurst-Swanger and Jacqueline L. Petcosky, VIOLENCE IN THE HOME: MULTIDISCIPLINARY PERSPECTIVES 104-105 (2003) (discussing same-sex intimate partner violence).

[49] *Id. See also* Richard J. Gelles, *Family Violence*, in Ann. Rev. Sociol. 1985 11:347-367 (page 357) (discussing male victims of family violence); Clifton P. Flynn, *Relationship Violence by Women: Issues and Implications*, Family Relations, Vol. 39, No. 2, Apr. 1990, 194-198; Lisa D. Brush, *Violent Acts and Injurious Outcomes in Married Couples: Methodological Issues in the National*

million women victims of domestic violence every year in the United States, approximately 835,000 men are physically assaulted by an intimate partner annually in the United States.[50]

Although domestic violence perpetrated against men is a well-documented phenomenon, male victims of domestic violence experience obstacles to reporting and prosecuting domestic violence. The pervasive yet inaccurate social construction of domestic violence as a "woman's problem" often inhibits recognition that men can also experience domestic violence.[51] Because of societal expectations for men to be "leaders" and "providers" for their families, male victims of domestic violence often believe that reporting domestic violence is a humiliating and embarrassing demonstration of failure.[52] Male victims

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Survey of Families and Households, Gender and Society Vol. 4 No. 1 (March 1990) 56-67; Jan E. Stets and Maureen A. Pirog-Good, Violence in Dating Relationships, Social Psychology Quarterly, 1987, Vol. 50 No. 3, 237-246.

[50] Executive Summary to National Institute of Justice, Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey iv (2000), *available at* http://www.ncjrs.org/pdffiles1/nij/183781.pdf.

[51] Philip W. Cook, Abused Men: THE HIDDEN SIDE OF DOMESTIC VIOLENCE 2-35 (1997).

[52] Philip W. Cook, Abused Men: THE HIDDEN SIDE OF DOMESTIC VIOLENCE 52-53 (1997):

> For men, there is an added dimension of shame not faced by female victims. While the word *shame* was not used by any of the men I interviewed, the word that did come up time and time again was *wimp*. "I didn't tell anyone because I was afraid of being called a wimp." They feared what might be said about them. Being physically abused by a woman, even though they were not supposed to hit back, was emasculating. Clearly, the victims

consequently underreport the abuse they suffer.[53] Because social conventions about gender often inaccurately equate male victimhood with emasculation and weakness, male victims may experience scorn for not having prevented the abuse that they suffered.[54] The combination of these deeply entrenched biases also often prejudices law enforcement and the judiciary against male victims of domestic violence.[55] Although the number of arrests of women perpetrators of intimate partner violence is increasing,[56] male victims of domestic violence face numerous

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believed that their friends, relatives, and coworkers would believe that they were not real men if they told about their abuse.

[53] Clifton P. Flynn, *Relationship Violence by Women: Issues and Implications*, Family Relations, Vol. 39, No. 2, Apr. 1990, 194-198; Eve S. Buzawa and Carl G. Buzawa, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 57 (2d ed. 1996) ("It has already been well documented that male victims are less likely to report a domestic assault.

[54] Eve S. Buzawa and Carl G. Buzawa, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 57-58 (2d ed. 1996) ("Officers may incorrectly assume that a male victim should be capable of preventing violence by his partner or that he initiated the exchange. When he does not, he no longer conforms to accepted standards and perhaps renders his account of events suspect.").

[55] Eve S. Buzawa and Carl G. Buzawa, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 57 (2d ed. 1996)

> it was reported that male victims believed that even when severely injured, their desires for arrest of a female abuser were not respected by police. For example, one male reported requiring hospitalization for treatment of a stab wound that just missed puncturing his lungs. Despite his request to have the offending woman removed (not even arrested), the officers simply called an ambulance and refused formal sanctions against the woman, including her removal. Indeed, all the men who were interviewed consistently reported having the incident trivialized and belittled by officers.

[56] El-Khoury *supra* 43, page 9. *See also* Goldberg, C. (Nov. 2nd, 1999). Spouse abuse crackdown surprisingly nets many women. *The New York Times*, p. A16; Martin, M. (1997). Double your trouble: Dual arrests in family violence. *Journal*

challenges in the recognition and prosecution of their abuse: "Resistance to the concept of a male victim of domestic violence is high and, in some instances, virulent."[57]

Immigrant victims face additional forms of abuse regardless of their gender solely because of their immigration status.[58] In the case of noncitizens, immigration laws become a very powerful tool of abuse. Congress recognized the particular issues that immigrant survivors of domestic violence face when enacting VAWA:

> Domestic battery problems can become terribly exacerbated in marriages where one spouse is not a citizen, and the non-citizens legal status depends on his or her marriage to the abuser. Current law fosters domestic violence in such situations by placing full and complete control of the alien spouse's ability to gain permanent legal status in the hands of the citizen or lawful permanent resident spouse. Under the Immigration and Nationality Act, a U.S. citizen or lawful permanent resident can, but is not required to, file a relative visa petition requesting that his or her spouse be granted legal status based on a valid marriage. Also, the citizen or lawful permanent resident can revoke such a petition at any time prior to the issuance of permanent or conditional residency to the spouse. Consequently, a battered spouse may be deterred from taking action to protect himself or herself, such as filing for a

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of Family Violence, 12, 139-157; and Miller, S. (2001). The paradox of women arrested for domestic violence: Criminal justice professionals and service providers respond. *Violence Against Women, 7* (12), 1339-1376.

[57] Philip W. Cook, Abused Men: THE HIDDEN SIDE OF DOMESTIC VIOLENCE 109 (1997).

[58] *See generally,* American Bar Association, Commission on Domestic Violence, Continuing Legal Education Teleconference, Civil Legal Assistance for Battered Immigrants. May 23, 2001.

> civil protection order, filing criminal charges, or calling the police, because of the threat or fear of deportation.[59]

Following the intent of Congress, courts should not make distinctions on the basis of gender in adjudicating VAWA relief and must ensure that battered immigrant men receive the necessary remedial action offered by VAWA. First, VAWA offers immigration relief to all battered immigrants regardless of gender.[60] Moreover, courts must provide relief under VAWA to battered immigrant men to effectuate the statute's purpose. VAWA was enacted "to respond both to the underlying attitude that [domestic] violence is somehow less serious than other crime and to the resulting failure of our criminal justice system to address such violence."[61] Congress intended the VAWA to correct "not only the violent effects of the problem, but the subtle prejudices that lurk behind it."[62] These objectives are particularly salient in the context of abused men, who are often misunderstood and marginalized by biased social expectations and an unresponsive legal system.

In the case at bar, Mr. Kewan's receipt of an approved I-360 self-petition under VAWA demonstrates the Government's conclusive determination that Mr. Kewan was a victim of domestic violence at the hands of his spouse. Indeed, after USCIS initially approved Mr. Kewan's self-petition, the government attorney for

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[59] Violence Against Women Act H.R. REP. 103-395, H.R. Rep. No. 395, 103RD Cong., 1ST Sess. 1993, 1993 WL 484760 (Leg.Hist.) p. 31
[60] *See generally*, INA § 204.
[61] S. Rep. No. 138, at 60.
[62] *Id.* at 63.

ICE requested that USCIS reconsider its decision. Upon reconsideration, USCIS reconfirmed its initial decision, that Mr. Kewan had a *bona fide* marriage to a U.S. citizen, and that he was a victim of domestic violence. Nonetheless, the IJ refused to accept the findings of USCIS, and instead, acted in a manner *ultra vires* to the governing statute and regulations in re-adjudicating these factors. The Board further exacerbated this egregious error by affirming the decision of the IJ. Given that no bars to Mr. Kewan's admissibility exist, this Court should grant this petition, recognizing the unlawful actions of the IJ and BIA, and in so doing, give effect to Congressional intent and the plain language of the statute enacted by VAWA.

Congress recognized that immigration laws have often provided another mechanism for perpetrators of domestic violence to terrorize their victims.[63] Congress enacted VAWA so that battered immigrants will not need to depend on their abusers to secure lawful status in the United States.[64] Mr. Kewan's situation vividly illustrates Congress' concern that abusers will be able to exert control over their battered spouses through exploitation of the immigration laws. As USCIS determined on both occasions, Mr. Kewan has suffered domestic violence at his wife's hands; and, as is often the case, his immigration status hinged on the whims of his abusive partner. VAWA must be given its full effect, as intended by

[63] *See supra* note 16.
[64] *Id*.

Congress, by granting status to abused immigrants like Mr. Kewan, who clearly qualify under the provisions of the statute.

CONCLUSION

For the reasons stated herein and upon the authorities cited above, Amicus respectfully asserts that this Court should grant the petition for review, clarifying that the actions of the Immigration Judge and Board of Immigration Appeals were contrary to the plain language of the statute and governing regulations implementing the Violence Against Women Act.

Respectfully submitted,

Date: August 8, 2005

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