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UNITED STATES DEPARTMENT OF HOMELAND SECURITY

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES

ADMINISTRATIVE APPEALS OFFICE

WASHINGTON, D.C.

In the Matter of	)	
	)	
ESTEBAN Cabezas, Johnny Elmer	)	**A088 922 256**
	)	**EAC-08-018-51150**
Applicant,	)	
	)	
In proceedings under INA section 204.	)	

AMICUS BRIEF IN SUPPORT OF APPLICANT

I. INTRODUCTION.

Amicus curiae the National Network to End Violence Against Immigrant Women (the "Network") respectfully submits this brief to the Administrative Appeals Office ("AAO") in support of Johnny Elmer Esteban Cabezas ("applicant") to argue that he submitted credible evidence in support of his self-petition as a battered spouse or of a United States Citizen (Form I-360), which establishes by a preponderance of the evidence that he is eligible for classification as an immigrant abused spouse pursuant to section 204(a)(1)(A)(iii) of the Immigration and Nationality Act ("INA" or the "Act"). *See Matter of E-M-*, 20 I&N Dec. 77, 79 (BIA 1989) ("[P]reponderance of the evidence is not evidence that must establish beyond a doubt that the

applicant is eligible... In other words, *the director can still have doubts* but, nevertheless, the applicant can establish eligibility.")

II. STATEMENT OF INTEREST OF AMICUS.

The National Network to End Violence Against Immigrant Women (the "Network") is the *amicus curiae*. Founded in 1992, the Network is a coalition of domestic-violence survivors, immigrant women, advocates, activist, lawyers, educators and other professionals working together to end domestic abuse of immigrant women. The Network is co-chaired by the Family Violence Prevention Fund, Legal Momentum Immigrant Women's Project and ASISTA Immigration Technical Assistance Project. Together, these organizations use their special expertise to provide technical assistance, training and advocacy to their communities. The Network significantly contributed to the passage of the 1994 Violence Against Women Act and has since continued to enhance the legal remedies available to immigrant survivors. Through a collaborative approach, the Network has made great progress in assuring that non-citizen victims of domestic violence, sexual assault and trafficking are able to flee abuse, survive domestic violence crimes and receive assistance.

III. FACTS AND PROCEDURAL HISTORY.

On or about October 24, 2007, applicant filed a self-petition as a battered spouse or of a United States Citizen with USCIS for classification under section 204(a)(1)(A)(iii) of the Act. To establish that his spouse had subjected him to battery and/or extreme cruelty and to establish that he married his spouse in good faith applicant submitted two affidavits from himself, an affidavit from his brother David Esteban, and a photograph of a scar on his back he received as a

result of his spouse cutting him with a knife. At the time applicant filed his self-petition, he was detained by Immigration and Customs Enforcement. On November 6, 2007, USCIS issued a notice to applicant that it had reviewed his self-petition and determined that he had established a *prima facie* case.

On or about October 20, 2008, USCIS issued a notice to applicant that the evidence he submitted was insufficient to approve his self-petition. USCIS requested additional evidence from applicant to establish that he had resided with his spouse, that his spouse had subjected him to battery and/or extreme cruelty, and that he married his spouse in good faith. On January 21, 2009, applicant responded to USCIS by submitting two affidavits, a mental health assessment report from a licensed independent social worker concluding that applicant suffered from Post-Traumatic Stress Disorder ("PTSD"), and a statement from a medical doctor offering her opinion that the likelihood that the scar on applicant's back was caused by a very sharp instrument or weapon instrument was 50%.

On February 6, 2009, USCIS denied applicant's self-petition finding that he had not established that his spouse had subjected him to battery or extreme cruelty nor had he established that he married his spouse in good faith. Specifically, USCIS stated on both counts that "the record does not contain satisfactory evidence to demonstrate [his] qualification under [these] requirement[s]." Regarding battery and/or extreme cruelty, USCIS stated that applicant's friends did not indicate the they witnessed or that [he] told them about any incidents that would constitute batter or extreme cruelty." Regarding the statement about the scar on applicant's back, USCIS stated that because he was "seen almost three years after the alleged incident, the document holds little evidentiary value to corroborate how [he] received the scar." USCIS similarly characterized the mental health assessment. "[S]ince the document appears to be based

purely on your testimony after USCIS' request for evidence and three years after you and your spouse purportedly separated, the document does not hold sufficient weight to substantiate your claim."

On or about March 9, 2009, applicant appealed that decision by filing a Notice of Appeal or Motion on Form I-290B with USCIS. In addition to a written brief in support of his appeal, applicant also submitted a third affidavit from himself explaining he was unable to submit certain types of evidence of a good faith marriage, specifically evidence that he and his spouse commingled their finances.

IV. ARGUMENT.

In 1994, Congress enacted an evidentiary provision unique to the Immigration and Nationality Act ("INA" or "the Act") when it provided that for self-petitioning battered immigrants the "Attorney General shall consider any credible evidence relevant to the petition." Violence Against Women Act of 1994 ("VAWA 1994"), Pub. L. No. 103-322, §§ 40701(a), 108 Stat. 1796, 1954 (1994) (codified at INA section 204(a)(1)(H). "Congress adopted this language for the specific purpose of putting a stop to immigration officials' practice of employing overly-strict evidentiary rules when determining the credibility of battered women…" *Oropeza-Wong v. Gonzales*, 406 F.3d 1135, 1143 (9th Cir. 2005).

In adjudicating applicant's self-petition, U.S. Citizenship and Immigration Services ("USCIS" or the "Services") erroneously rejected credible evidence he submitted that establishes by a preponderance of the evidence that he is eligible for classification as a battered immigrant spouse. An examination of the preponderance standard suggests that USCIS required applicant to establish his eligibility by more than a preponderance. "[P]reponderance of the evidence is

not evidence that must establish beyond a doubt that the applicant is eligible... In other words, *the director can still have doubts* but, nevertheless, the applicant can establish eligibility." *E-M-*, 20 I&N Dec. at 79. "[W]hen something is to be established by a preponderance of the evidence it is sufficient that the proof only establish that it is probably true." *Id.* at 80.

In other words, applicant does not have to dispel all doubts regarding his eligibility; he only need establish that it is probably true that his spouse subjected him to battery and/or extreme cruelty and that he married his spouse in good faith. By rejecting applicant's credible evidence as "not satisfactory" to meet his burden of a preponderance of the evidence, USCIS continued to employ overly strict evidentiary rules to determine his credibility, in contravention of the clear Congressional intent of the any credible evidence standard. Whether applicant's evidence was "satisfactory" was not the ultimate determination with which Congress charged USCIS with making in adjudicating applicant's self-petition. That ultimate determination was whether applicant submitted credible evidence to establish his eligibility by a preponderance, despite any doubts harbored by USCIS.

To further the Congressional intent underlying the unique evidentiary standard of "any credible evidence" when determining whether a preponderance of the evidence establishes eligibility, the Network herein proposes a framework for the application of the any credible evidence standard in the adjudication of VAWA self-petitions, and observations on applying that standard in the context of intimate partner violence.

A. THE PREPONDERANCE OF THE EVIDENCE STANDARD IS SATISFIED BY CREDIBLE EVIDENCE THAT IS CONSISTENT INTERNALLY AND EXTERNALLY WITH AVAILABLE INFORMATION.

The "any credible evidence" standard was enacted as part of VAWA 1994 by Congress in response to concerns that the former Immigration and Naturalization Service[1] implemented the battered spouse waiver amendments of the Immigration Act of 1990 (§ 701, Pub. L. No. 101-649, 104 Stat. 4978, codified as amended at INA section 216(c)(4)) in a way that "was unworkable, insensitive and contrary to congressional intent." Orloff & Kaguyutan, "Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses," 10 Am. U.J. Gender Soc. Pol'y & L. 95, 116 (2001). In response to that implementation, Congress created the any credible evidence" standard, "in order to make it *easier* for battered [immigrants] to prove spousal abuse," (*Oropeza-Wong,* 406 F.3d 1145-46) due to its recognition that "lay understandings of domestic violence are frequently comprised of 'myths, misconceptions, and victim blaming attitudes…'" *Hernandez v. Ashcroft,* 345 F.3d 824, 836 (9th Cir. 2003), citing *See* H.R. Conf. Rep. No. 103-395, at 24 (1993), *available in* 1993 WL 484760.

Although the "any credible evidence" standard applies to many immigration benefits, no court or agency to date has articulated a definition. That absence cannot be attributed solely to the fact that "the determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General." INA section 204(a)(1)(J). A more plausible explanation for that absence is that self-petitioners lack the financial resources to appeal a self-petition denial or pursue VAWA relief from removal assisted by experienced counsel. *See,* Office of Immigration Statistics, U.S. Dep't of Homeland Security, 2008 Yearbook of Immigration Statistics at 23 Table 7 (Aug. 2009), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois_yb_2008.pdf (116 battered

[1] Foot note Homeland Security Act reorganization

spouses or children granted VAWA cancellation of removal or suspension of deportation in fiscal year 2008).

Despite the absence of a clearly articulated definition, USCIS has issued formal guidance to its adjudicators. In a policy memorandum issued in April 1996, former INS acknowledged that it was "statutorily required to consider any relevant credible evidence submitted in connection with the self-petition." Office of Programs, INS, U.S. Dep't of Justice, Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents at 5 (Apr. 16, 1996) ("INS Crime Bill memorandum) *reprinted in* 73 *Interpreter Releases* 21 (May 24, 1996). Former INS further stated that "[a] self-petition cannot be denied merely because a self-petitioner has not submitted a specific type of document" and went on to recommend that "adjudicators should give due consideration to the difficulties some self-petitioners may experience in acquiring documentation, particularly documentation that cannot be obtained without the abuser's knowledge or consent." INS Crime Bill memorandum at 7. The General Counsel of former INS further clarified that a self-petition "may only be denied on evidentiary grounds if the evidence that was submitted was not credible or otherwise fails to establish eligibility." Office of the General Counsel, INS, U.S. Dep't of Justice, "Extreme Hardship" and Documentary Requirements Involving Battered Spouses and Children at 7 (Oct. 16, 1998), *reprinted in* 76 Interpreter Releases 162 at 7 (Jan. 25. 1999) ("INS General Counsel memorandum").

The memorandum provides the closet approximation of a definition for credible evidence by stating that information is not credible when it is inconsistent with other elements of the case, or where the evidence does not conform to the external facts verified through databases available to former INS. *Id.* Having articulated what evidence is not credible, it must follow that credible

evidence is that which is consistent with the other elements of the case and conforms with external facts verified through databases available to USCIS.

Defining "credible evidence" in this manner, as internally consistent and conforming with external facts, would be in accord with credibility principles of immigration law. In general, an adverse credibility determination based upon inconsistencies or omissions turns on whether the discrepancies and omissions identified are actually present, whether the discrepancies and omissions provide specific and cogent reasons to conclude that an applicant provided incredible evidence, and whether a convincing explanation for the discrepancies and omissions has not been supplied by the applicant. *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998).; *see also E-M-*, 20 I&N Dec. 81 ("Most important is whether the statement of the affiant is consistent with the other evidence in the record"). If those principles were applied here, applicant's self-petition could not be denied unless some inconsistency or omission identified in the record provides a specific reason to reject a particular piece of evidence, absent a convincing explanation. This proposition is strongly supported by the well-acknowledged difficulties that battered immigrants often face in obtaining evidence that would support an immigrant visa petition under normal circumstances. INS Crime Bill memorandum at 7 ("[A]djudicators should give due consideration to the difficulties some self-petitioners may experience in acquiring documentation, particularly documentation that cannot be obtained without the abuser's knowledge or consent.")

Here, USCIS misapplied the "any credible evidence" standard" to deny applicant's self-petition based on its findings that his evidence was "not satisfactory" to demonstrate that he had been battered by or had been the subject of extreme cruelty perpetrated by his citizen spouse or that he entered into his marriage in good faith. By describing his evidence as "not satisfactory," it is unclear whether USCIS determined that his evidence was not credible factually, or whether

it determined that his evidence was deemed credible factually, but not did not credibly establish that his spouse subjected him to battery and/or extreme cruelty and that he married her in good faith.

B. APPLICANT SUBMITTED CREDIBLE EVIDENCE THAT HIS SPOUSE SUBJECTED HIM TO BATTERY AND EXTREME CRUELTY.

1. Applicant Submitted Credible Evidence of Battery and Extreme Cruelty.

In support of his self-petition, applicant submitted several affidavits from himself, from relatives and acquaintances, a photograph of a scar on his back, and medical and mental health evaluations establishing that his spouse subjected him to battery and extreme cruelty. In his first affidavit, applicant described how his spouse pushed, threw things at him and ultimately stabbed him in the back with a knife. First Declaration of Johnny Esteban ("First Decl.") ¶¶ 5-6. In his second affidavit, applicant also described how his spouse slapped him in the face when she confronted him about his daughter in Peru. Second Decl. of Johnny Esteban ("Sec. Decl.") ¶ 11. In his third affidavit, applicant provided additional consistent details regarding the incidents when his spouse pushed and slapped him and when she literally stabbed him in the back. Third Decl. of Johnny Esteban ("Third Dec.") ¶¶ 10-11. Dr. Inma Prieto examined the scar on applicant's back on January 16, 2009, and stated that it "could have been caused by a very sharp weapon or instrument. This wound can be assessed to be secondary to such a weapon with over 50% medical certainty." Letter from Inma Prieto, MD ("Prieto Letter").

In his affidavits, applicant described how his spouse subjected him to extreme cruelty. He described how his spouse verbally abused him. First Decl. ¶ 5 ("She became verbally abusive and seemed really crazy at times."), Sec. Decl. ¶ 11 ("Portchia would start saying that I was to blame for everything…"). Applicant also described how his spouse threatened repeatedly

to report him to immigration. First Decl. ¶ 5("Portchia was constantly threatening to call immigration if I did not give her what she waned, which was usually money."), Third Decl. ¶ 9 ("[S]he would lash out at me, and threaten me by saying that was going to call Immigration on me…"), ¶ 10 ("She then attacked me, cutting my back with a knife, and she threatened me by telling me that she would call Immigration if I ever told anyone about it.")

Applicant stated that his spouse berated him for not earning enough income. First Decl. ¶ 5 ("When I got home, she would complain that I was not making enough money."), Sec. Decl. ¶ 11 ("Portchia would start saying that I was to blame for everything: not enough money, not for her and the kids.", "I also had to send money to my daughter in Peru, and this made Portchia mad."), Third Decl. ¶ 7 ("I did share my earnings with her, and this later became a point of contention, as she demanded more money than I was making.") Applicant also described how his spouse limited his ability to utilize consumer-banking services.

> She never suggested that we open a joint bank account, but I remember on several occasions that I suggested that we open a joint bank account (as I had no bank account) and Portchia always had an excuse for why we couldn't – either she was busy, or that it was too much work, sometimes she would even get upset at my suggestions that open an account.

Third Decl. ¶ 8

Applicant also described how his spouse socially isolated him by relying on his good nature to force him into caring for her children. Third Decl. ¶ 9 ("I was practically having to care for Portchia's children when I got back from work: cooking their evening meal, making sure that they did their schoolwork and got to bed on time.") ¶ 10 ("I was stuck at home, confused and caring for the kids.") Anthony Terrones, applicant's friend, corroborated applicant's isolation at home. Anthony Terrones Decl. ¶ 9 ("Portchia became less friendly, at times she wouldn't say hello to me, or even be at home when I came to visit Johnny.").

Applicant described how his spouse's actions caused him to become depressed. Second Decl. ¶ 3 ("After I was abused by my wife, I became very depressed. I couldn't eat, everything tasted strange, I had a hard time at work because I couldn't concentrate."), ¶ 11 ("I don't ever recall being depressed only after we got married did I start to feel bad.) Applicant described how he turned to alcohol to self-medicate after becoming depressed.

> I began to drink alcohol because I was depressed and feeling lonely. Before the incident with Portchia, I would drink occasionally, but rarely in excess. … I found myself drinking lots of beer and more frequently. I didn't used to drink during the week but I was very depressed and I think I was drinking between six and twelve beers a day.

Second Decl. ¶ 5. As a result of applicant's alcohol use, he was arrested for drunk driving on two occasions. Second Decl. ¶¶ 6-7.

> The second drunk driving happened on Christmas night. I was with friends in West Chester, Ohio and even though we were together I was depressed. I remember drinking beer and then going home. Along the way I felt very sad, I started to cry because I felt so lonely. Maybe because I was crying I didn't see a curve and I drove off the road. The police came when I was stuck. I also told the officer I had been drinking. I think I was still crying because I was depressed.

Second Decl. ¶ 7.

After applicant became depressed, he was unable to communicate his feelings to others or to seek help, except for one friend whom he confided in briefly. Second Decl. ¶ 3 ("I wanted to tell my brother about being stabbed by Portchia but I couldn't. I don't know exactly why, I was afraid, I was depressed."), ¶ 4 ("I couldn't tell my friends what had happened either because I didn't want their pity. I had no one I could talk to about this.") In fact, applicant stated that his inability to seek help was motivated in part by fear of retaliation by his spouse. Second Decl. ¶ 6 ("Next, she picked up a knife and cut me, stabbing me in the back. I immediately left the home because I was afraid of what else she was going to do to me. I did not call the police nor go to the hospital because I was scared.), Third Decl. ¶ 11 ("[S]he threatened me by telling me that she

would call Immigration if I ever told anyone about it. I was afraid that she would do that, as her mental state had gotten worse and worse.")

The mental health assessment submitted by applicant corroborated his accounts of depression. That assessment was based on applicant's own statements to the social worker but also his physical presentation. Diagnostic Assessment Form by Carson Wasserman, MSW, LISW ("LISW Assessment") at 2 ¶ C.10 ("Mr. Esteban presents as tearful with a depressed mood regarding his situation…"). Mr. Wasserman concluded:

> "Mr. Esteban presents with multiple symptoms of Posttraumatic Stress Disorder, including recurrent and intrusive distressing recollection of both events, recurring nightmares of the events, intense psychological distress at exposure to cues that represent the event (such as hearing sirens, or seeing a woman who looks like his former wife) and physiological reactivity to such cues (such as rapid heartbeat and trouble breathing.

LISW Assessment at 12 ¶ X.

Clearly, applicant submitted credible evidence that his spouse subjected him to battery and extreme cruelty. His evidence is internally consistent with all elements of his case and it appears that the evidence did not conflict with any external facts verifiable through databases available to USCIS. Notably, USCIS did not identify any inconsistencies in the record and applicant provided a convincing explanation for the omission of reports from police or medical personnel and provided a report from a licensed social worker. Applicant explained that he did not seek help from the police or a hospital when his spouse stabbed him because he was feared further abuse by his spouse. Second Decl. ¶ 6 ("Next, she picked up a knife and cut me, stabbing me in the back. I immediately left the home because I was afraid of what else she was going to do to me. I did not call the police nor go to the hospital because I was scared.)

The dismissal of the LISW assessment by USCIS is most troubling because it appears to have engaged in pure speculation to dismiss it, contrary to regulations issued by former INS

emphasizing such assessments. USCIS dismissed the assessment on two bases. First, USCIS stated incorrectly that the assessment was based purely on the applicant's own statements. In fact as noted above, the assessment was based on the applicant's own statements as well as his physical presentation. LISW at 2 ¶ C.10 ("Mr. Esteban presents as tearful with a depressed mood regarding his situation…")

Second, USCIS dismissed the assessment because it was performed after USCIS requested such evidence and three years after applicant and his spouse separated. The rejection of the assessment because applicant submitted it only after it was requested is contrary to USCIS own understanding of domestic violence and the applicant's statement. When USCIS requested additional evidence of battery and/or extreme cruelty, it emphasized that applicant consider whether he was "socially isolated." As explained above, applicant in deed was socially isolated and unable to seek assistance or help for several reasons. Therefore, it is quite logical that applicant would not have obtained a mental health assessment until after he separated from his spouse because his spouse socially isolated him during their marriage. The rejection of the assessment for this reason is simply unsupportable.

The dismissal of the assessment was also contrary to an emphasis on such assessments in regulations promulgated by former INS for the battered spouse waiver for conditional residents. In those regulations, former INS acknowledged that most adjudicators "have not received training in this area and are not qualified to make reliable evaluations of an abused applicant's mental or emotional state. Therefore, it is necessary for the Service to rely upon the judgment of professionals trained in the area of evaluating an individual's emotional and mental condition." Conditional Basis of Lawful Permanent Residence for Certain Alien Spouses and Sons and Daughters; Battered and Abused Conditional Residents, 56 Fed. Reg. 22635, 36 (May. 16, 1991)

(interim rule). Perhaps as part of its deferral to "the judgment of professionals trained in the area of evaluating an individual's emotional and mental condition," former INS placed no limitations on how soon such judgments must be rendered after the events affecting an individuals' emotional and mental condition. Here, USCIS appears to have substituted its own judgment rather than that of the licensed clinical social worker who evaluated the applicant. Whether USCIS substituted its own judgment or engaged in speculation, it improperly rejected the assessment although it was credible evidence that is internally consistent with the evidence of record and not contradicted by any external facts.

2. Applicant's Evidence of Battery and Extreme Cruelty Comports with Established Characteristics of Domestic Violence.

If it is assumed that applicant's evidence is credible, it is consistent with established characteristics of domestic violence in intimate relationships, or intimate partner violence ("IPV"). Advocates have defined IPV "as a pattern of coercive control in which the batterer asserts his power over the victim through the use of threats, as well as actual violence." Mary Ann Dutton and Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, *Sex Roles*, Vol. 52 at 743 (June 2005) (internal citation omitted). In this framework, violence is simply a tool that the perpetrator uses to gain greater power in the relationship. *Id.* "Other tools might include isolation, intimidation, threats, withholding of necessary resources such as money or transportation, and abuse of the children, other relatives, or even pets." *Id.*

Eight areas of coercion have been identified by Dutton and Goodman in which abusers make demands. *Id.* at 747. These areas include:

personal activities/appearance (e.g., demand to wear certain clothing or

> hairstyles), support/social life/family (e.g., refusal to allow target to seek help of counselor or talk with family members), household (e.g., demanding only specific foods be purchased), work/economic/resources (e.g., not allowing non-English speaking partner to learn English), health (e.g., not allowing target to obtain needed medications), intimate relationship (e.g., demanding target not use birth control), legal (e.g., demanding that the target engage in illegal activities), immigration (e.g., threats to report target to immigration officials), and children (threats to report target to child protective services).

Dutton and Goodman, at 747. To coerce the victim using these issues, an abuser makes a demand accompanied by a threat. *Id.* at 749. "A threatened negative outcome involved in coercion is contingent on one's failure to comply with the partner's 'demand.'" Dutton and Goodman, at 747. An important factor of this model of coercion is that "individuals enter intimate relationships with different levels of vulnerability." *Id.* at 750. These vulnerabilities each "constitute a wedge which can be used to effectively coerce the person." *Id.*

A victim of IPV may respond to coercive-e acts by (1) cognitively appraising a coercive threat as signaling credible risk, (2) compliance or resistance as a behavioral response to an abuser's demands, and (3) fear arousal. *Id.* at 751. Research suggests that "threat appraisal is related to various risk factors, such as severity of prior violence, abuser characteristics (e.g., drunkenness, drug use, unemployment, relationship estrangement, and use of controlling behaviors), social support and PTSD." *Id.* (internal citations omitted). "Sometimes compliance with expectations or demands can become internalized or routine..." *Id.* Finally, "[c]ognitive appraisals of threat are commonly associated with distressful affective responses including PTSD." *Id.* (internal citation omitted).

Under this framework for understanding IPV, applicant clearly established that his spouse subjected him to extreme cruelty. Applicant's spouse coerced in him in at least three of the eight areas identified above, using demands with explicit or implicit threats to obtain his compliance. In the area of work/economic/resources, she repeatedly complained to applicant that he was not

earning enough income to satisfy her. First Decl. ¶ 5 ("When I got home, she would complain that I was not making enough money."), Sec. Decl. ¶ 11 ("Portchia would start saying that I was to blame for everything: not enough money, not for her and the kids." In the legal area, she threatened the applicant if he reported her to the police after she stabbed him in the back. Second Decl. ¶ 6 ("Next, she picked up a knife and cut me, stabbing me in the back. I immediately left the home because I was afraid of what else she was going to do to me. I did not call the police nor go to the hospital because I was scared.), Third Decl. ¶ 11 ("[S]he threatened me by telling me that she would call Immigration if I ever told anyone about it. I was afraid that she would do that, as her mental state had gotten worse and worse.") She also threatened the applicant repeatedly regarding his immigration status. First Decl. ¶ 5("Portchia was constantly threatening to call immigration if I did not give her what she waned, which was usually money.")

In addition, the applicant's reactions to his spouse's abuse fits the response model formulated by IPV advocates. The applicant understood his spouse's threats to be credible risks to his safety, taking into account her characteristics of drunkenness or unemployment. Sec. Decl. ¶ 6 ("She was drunk and irate that I had come home. She started screaming at me and said she as going to call immigration. Next, she picked up a knife and cut me, stabbing me in the back. I immediately left the home because I was afraid of what else she was going to do to me."); Third Decl. ¶ 11 ("I was afraid that she would do that, as her mental state had gotten worse and worse.") After his spouse threatened him, the applicant would comply with her demands. Sec. Decl. ¶ 11 ("I couldn't please her, even though I tried everything."); Third Decl. ¶ 14 ("I attempted to keep our marriage going during the months of abuse and strife, by paying what I could to our household expenses, being a responsible father figure for Portchia's children, and trying to help Portchia and make our marriage work.") As a result of his spouse's coercive

actions, applicant became afraid of further abuse and developed PTSD. First Decl. ¶ 1 ("After we married she became abusive, and I left her fearing that she might really hurt me badly or kill me…"); Second Decl. ¶ 3 ("After I was abused by my wife, I became very depressed. I couldn't eat, everything tasted strange, I had a hard time at work because I couldn't concentrate."); Third Decl. ¶ 11 ("I was afraid that she would do that, as her mental state had gotten worse and worse.") LISW Assessment at 12 ¶ X ("Mr. Esteban presents with multiple symptoms of Posttraumatic Stress Disorder…").

Applying the model of IPV formulated by Dutton and Goodman, applicant clearly was subjected to extreme cruelty by his spouse. Her nonviolent actions towards the applicant constituted an effort to coerce him into complying with her demands. Her coercive actions towards him fall within several of the areas identified as common to IPV, including economic resources, legal issues and immigration status. Finally, the applicant's responses to his spouse's coercive actions fit the response model of threat appraisal, compliance and fear arousal. Based upon applicant's credible evidence, he established by a preponderance of the evidence that his spouse subjected him to battery and extreme cruelty.

C. USCIS ERRONEOUSLY REJECTED APPLICANT'S CREDIBLE EVIDENCE OF HIS GOOD FAITH MARRIAGE.

1. Applicant Submitted Credible Evidence of His Good Faith Marriage.

To establish that he married his spouse in good faith, applicant submitted several affidavits from himself, several affidavits from family and friends. In his affidavits, applicant described how they became acquainted and decided to marry.

> I met my wife through a friend in early 2005. We had a lot of fun together ... We had common interests, such as dancing. She has four children from an earlier marriage, the younger three were living at home with her at the time of our

> marriage. We decided to get married the following summer, and married in Covington, Ky. on September 2, 2005. During the first seven months of my marriage I lived at my wife at 2992 West McMicken Avenue, Apartment 1, Cincinnati, OH 45225. I lived with Portchia from September, 2005 through March, 2006.

Third Decl. ¶ 7. Applicant also described caring for his stepchildren when his spouse failed to do so. Third Decl. ¶ 9 ("I was practically having to care for Portchia's children when I got back from work: cooking their evening meal, making sure that they did their schoolwork and got to bed on time.") ¶ 10 ("I was stuck at home, confused and caring for the kids.") Applicant submitted other evidence to corroborate his assertions, a copy of his marriage certificate to, and copies of a IRS Form W-2 from applicant's employer and of a *capias* recall order from Hamilton County Ohio Municipal Court for applicant's spouse both listing the same address on West McMicken Avenue.

The affidavits of applicant's family and friends also corroborated his good faith marriage. Anthony Terrones visited the apartment applicant shared with his spouse and described him as caring for his stepchildren. Terrones Decl. ¶ 11 ("On a couple of occasions I saw Portchia's children when I visited: two girls and two boys I remember meeting. Johnny seemed to get along well with them.") Pedro Martinez, a mutual friend introduced applicant and his spouse and frequently saw them at social events. Pedro Martinez Decl. ¶ 10-11. Mr. Martinez stated that he and others were aware that applicant and his spouse shared an apartment. Martinez Decl. ¶ 13.

Applicant also provided a credible explanation for why he was unable to submit evidence that he and his spouse held joint insurance policies, bank accounts or property. First, applicant was an undocumented immigrant and unable to obtain a Social Security number

> I came to the United States in October of 2002 on a B1/B2 Tourist visa. This visa does not permit work authorization. Therefore the work that I was able to obtain

> was not done through the proper means of legitimately having: 1) authorization to work, and 2) a Social Security Number.
>
> I was under the impression that because I did not have a Social Security Number I could not open a bank account.

Third Decl. ¶ 3-4. Without a bank account, applicant cashed his paychecks at "various stores and service companies that catered to people without bank accounts." Third Decl. ¶ 4.

While applicant's spouse was aware of his lack of immigration status and that she could petition for him so that he could obtain status and thereby a Social Security number, she refused to do so.

> She knew about my problem of not having proper work authorization, and I remember that as she wanted me to get a better paying job, we talking about filling out the paperwork to help me get work authorization and a green card. … However, Portchia would put off filling out the papers, always having an excuse as to why she couldn't be bothered.

Third Decl. ¶ 9. Applicant's spouse treated his suggestion that they open a joint bank account in the same manner.

> She never suggested that we open a joint bank account, but I remember on several occasions that I suggested that we open a joint bank account (as I had no bank account) and Portchia always had an excuse for why we couldn't – either she was busy, or that it was too much work, sometimes she would even get upset at my suggestions that open an account.

Third Decl. ¶ 8.

Other examples of applicant's good faith marriage were nonexistent for similar reasons. Applicant's spouse rented the apartment where they lived because he "did not have proper immigration papers, I never tried to get put on the lease in the months that we lived together." Third Decl. ¶ 8. Applicant was unaware that he was required by the State of Ohio to carry automobile insurance and was unsure if his spouse had such insurance. Third Decl. ¶¶ 8. Finally, applicant obtained his sole asset, his automobile, before he married his spouse. Third

Decl. ¶ 6.

As explained above, applicant submitted credible evidence of his good faith marriage. His evidence was internally consistent and appears not have been contradicted by external facts. He explained his inability to obtain some types of evidence of good faith marriage, because of his spouse's actions, in a manner entirely consistent with the realities of IPV as acknowledged by former INS. INS Crime Bill memorandum at 7 ("[A]djudicators should give due consideration to the difficulties some self-petitioners may experience in acquiring documentation, particularly documentation that cannot be obtained without the abuser's knowledge or consent.") Essentially, applicant and his spouse did not have sufficient financial means that would produce many types of evidence of a good faith marriage or his spouse made it impossible to do so. While USCIS may have reasonable doubts of his intent in marrying, applicant need only establish by a preponderance, not beyond a reasonable doubt, that he married in good faith. *See E-M-*, 20 I&N Dec. at 80.

2. <u>USCIS Misapplied the Any Credible Evidence Standard to Applicant's Evidence of Good Faith Marriage.</u>

The request for evidence issued by USCIS misapplied the "any credible evidence" standard, misunderstands the good faith marriage requirement and is a *prima facie* indication that USCIS failed to understand the dynamics of IPV. To show that applicant had married his spouse in good faith, USCIS requested evidence including but not limited to:

1. Insurance policies in which you or your spouse is named as the beneficiary
2. Bank statements, tax records and other documents that show you share accounts and other similar responsibilities
3. Evidence of your courtship, wedding ceremony, residences, special events, etc.
4. Evidence of joint ownership of property (such as a home, automobile, etc.)
5. Birth certificates of children born to you and your spouse

6. Affidavits of friends and family who can provide specific information verifying your relationship with your spouse.

At the same time, USCIS also requested additional evidence regarding extreme cruelty, stating that such evidence or testimony might relate to several issues in his marriage, with one specific suggestion that he consider whether he was "socially isolated?" To justify its finding that applicant failed to establish his good faith marriage, USCIS dismissed his evidence as lacking specificity about his relationship and noted that he "did not provide any evidence to establish that [he] had any joint assets, accounts of commingling of funds or provide an explanation regarding why such evidence is not available."

First, in the denial of his self-petition, USCIS failed to acknowledge that social isolation in the context of IPV may prevent a battered spouse from obtaining many types of good faith marriage. If one is socially isolated, it logically follows that one would not have certain types of evidence because of an abuser's actions. Former INS appears to have acknowledged that reality although it was not considered in this case. INS Crime Bill memorandum at 7 ("[A]djudicators should give due consideration to the difficulties some self-petitioners may experience in acquiring documentation, particularly documentation that cannot be obtained without the abuser's knowledge or consent.")

Second, the authority cited for the regulations implementing the battered spouse self-petitioning provisions suggests that USCIS doubted his self-petition from the beginning. In the preamble to those regulations, former INS listed evidence types that could show a good-faith marriage. *See* Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 13061, 68 (Mar. 26, 1996) (interim rule). That list of evidence, however, was lifted verbatim from a case involving allegations of admitted marriage fraud. *Id.* at 13065 ("The

Service has previously determined that a variety of evidence may be used to establish a good-faith marriage, and a self-petitioner should submit the best evidence available."), citing *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

In *Laureano*, the petitioner and beneficiary were interviewed with respect to an immigration visa petition. *Id.* at 2. The petitioner subsequently withdrew the visa petition, "stating that he married the beneficiary to do her a favor so that she would be able to obtain her residence and remain in Puerto Rico." *Id.* In response to this allegedly admitted marriage fraud, the Board of Immigration Appeals poised the central question as "whether the bride and groom intended to establish a life together at the time they were married." *Laureano*, 19 I&N Dec. at 2-3. To resolve that question in that case involving allegations of marriage fraud, the Board provided a list of evidence that could show that the marriage was not fraudulent. *Id.* at 3.

Here, USCIS suggested that applicant submit the same types of evidence that the Board suggested in response to allegations of marriage fraud although no such allegations are present here, suggesting that it failed to appreciate that applicant only need establish a positive fact, that he married in good faith, and need not establish he did not commit marriage fraud. While this is a subtle distinction, failing to distinguish between the two impermissibly increases the burden upon the applicant. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) ("*Where there is reason to doubt the validity of the marital relationship*, the petitioner must present evidence to show that the marriage was not entered into for the purpose of evading the immigration laws. Such evidence could take many forms, including, but not limited to…") (emphasis added). While applicant must establish he married in good faith, there is no evidence to doubt the validity of his marriage, suggesting that his evidentiary burden is less than otherwise suggested.

If USCIS adheres strictly to the list of evidence types in *Laureano*, it essentially takes the position that all marriages resulting in battered immigrant self-petitions are fraudulent.

This distinction requires acknowledging that establishing a good faith marriage does not equal establishing that one did not act to evade the immigration laws through a sham marriage. Although INA section 204(a)(1)(A)(i) requires applicant to prove that he married his spouse in good faith , he need not also prove that he did not marry "for the purpose of procuring [his] admission as an immigrant." *Id.* section 245(e)(3) (immigrant visa petition based upon marriage during removal proceedings may not be approved unless clear and convincing evidence establishes marriage entered into in good faith). While these statutory provisions appear to impose the same requirement, applicant is only required to prove a positive fact, that he married in good faith, and need not prove both a positive fact and disprove a negative.

With these two points in mind, that IPV often prevents a battered spouse from submitting certain types of evidence of good faith marriage and that applicant need only prove he married in good faith and not also that he did not fraudulently marry, the application by USCIS of the "any credible evidence" standard on this issue was in error.

V. CONCLUSION.

For the reasons given above, *amicus curiae* respectfully states that USCIS erred in denying applicant's self-petition because he established by a preponderance of his credible evidence that his spouse subjected him to battery and extreme cruelty and that he married her in good faith.

Respectfully submitted, Date: October 2, 2023

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