

Catherine D. Cockerham
Jessica I. Rothschild
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429 3000 (phone)
(202) 429 3902 (fax)

Attorneys for Amicus Curiae ASISTA

**UNITED STATES DEPARTMENT OF HOMELAND SECURITY
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES
ADMINISTRATIVE APPEALS OFFICE
WASHINGTON, D.C.**

In the Matter of:

**Self-Petitioner under form I-360,
Violence Against Women Act**

File No: A # -----

**I-290B Receipt Number:
EAC-----**

**I-290B Notice of Appeal Receipt
Number: EAC-----**

AMICUS CURIAE BRIEF IN SUPPORT OF APPLICANT'S APPEAL

TABLE OF CONTENTS

I. INTRODUCTION AND DESCRIPTION OF AMICUS.....

II. ARGUMENT

A. VAWA Provisions Must Be Interpreted to Provide the Protection to Domestic Violence Victims that Congress Intended..... 4

1. Congress Enacted VAWA to Remove Barriers Preventing Immigrant Victims of Domestic Violence from Leaving Abusive Relationships..... 4

B. Congress Mandated a Flexible Evidentiary Standard that Recognizes the Context of Domestic Violence 7

1. A Self-Petitioner Bears the Burden to Establish Eligibility Only by a Preponderance of the Best Evidence Available 7

2. USCIS Must Apply the Congressionally Mandated “Any Credible Evidence” Standard in Making Good Faith Marriage Determinations in VAWA Cases 8

3. When Making Credibility Determinations in VAWA Cases, USCIS Must Consider the Nature and Impact of Domestic Abuse..... 12

C. USCIS’s Critical Assessment of Ms. -----’s Evidence Is Unwarranted..... 14

1. USCIS’s Preference for Evidence Controlled by the Abuser Is Inappropriate 14

a. Joint Tax Returns Controlled by the Abuser..... 14

b. Photographs Controlled by the Abuser 16

2. USCIS Must Assess Ms. -----’s Evidence in Its Totality..... 16

3. Ms. ----- Submitted Credible Evidence Demonstrating Joint Residency by a Preponderance of the Evidence, and USCIS Must Address Her Explanation for Perceived Inconsistencies 17

D. Ms. ----- Submitted Credible Evidence Demonstrating a Good-Faith Marriage by a Preponderance of the Evidence 20

III. CONCLUSION.....

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Agyman v. INS</i> , 296 F.3d 871 (9th Cir. 2002).....	8
<i>Bark v. INS</i> , 511 F.2d 1200 (9th Cir. 1975)	8, 9
<i>I.N.S. v. Cardozo-Fonseca</i> , 480 U.S. 421 (1987)	7
<i>In re Petitioner</i> , 2011 WL 7789867 (Aug. 9, 2011).....	7
<i>Matter of A-S-</i> , 21 I&N Dec. 1106 (BIA 1998)	13
<i>Matter of Boromand</i> , 17 I&N Dec. 450 (BIA 1980)	8-9
<i>Matter of Chawathe</i> , 25 I&N Dec. 369 (BIA 2010)	7
<i>Matter of E-M-</i> , 20 I&N Dec. 77 (BIA 1989)	13
<i>Matter of Laureano</i> , 19 I&N Dec. 1 (BIA 1983)	8
<i>Matter of Lugo-Guadiana</i> , 12 I&N Dec. 726 (BIA 1968)	13
<i>Matter of Soo Hoo</i> , 11 I&N Dec. 151 (BIA 1965)	7
<i>U.S. v. Sanchez-Guzman</i> , 744 F. Supp. 997 (E.D. Wash. 1990)	18
LEGISLATIVE MATERIALS	
8 C.F.R. §§ 103.2	10
8 C.F.R. § 204.2	7, 9, 12

146 Cong Rec. S10,188 (Oct. 11, 2000).....	5, 11
146 Cong. Rec. S10,192 (Oct. 11, 2000).....	6, 11
146 Cong. Rec. S10,204 (Oct. 11, 2000).....	6
151 Cong. Rec. S13,749 (Dec. 16, 2005).....	6
61 Fed Reg 13,064 (Mar. 26, 1996).....	7
61 Fed. Reg. 13,065 (Mar. 26, 1996).....	12
Immigration and Nationality Act, §§ 101(a)(15)(U), 214(p) & 245(l).....	5
Immigration and Nationality Act, § 204(a)(1)(A)(iii)(I), 8 U.S.C. § 1154(a)(a)(A)(iii)(I).....	8
Immigration and Nationality Act, §§ 204(a)(1)(J), 240(b)(2)(D), & 216(c)(4).....	9
Violence Against Women Act of 1994 Pub. L. No. 103-322, 108 Stat. 1796, 1902-55 (1994).....	4, 5, 6
Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).....	4, 5
Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2005).....	4, 6

OTHER AUTHORITIES

Adams et al, <i>Development of the Scale of Economic Abuse</i> , 14 <i>Violence Against Women</i> 563 (2008), available at http://vaw.sagepub.com/content/14/5/563.abstract	15
Adams et al, <i>Measuring the Effects of Domestic Violence on Women’s Financial Well-Being</i> , CFS Research Brief 2011-5.6 (May 2011), available at http://www.cfs.wisc.edu/presentations/Adams2011_ResearchBrief.pdf	15
Anderson et al, <i>Why Doesn’t She Just Leave?: A Descriptive Study of Victim Reported Impediments to Her Safety</i> , 18 <i>J. Family Violence</i> 151 (June 2003), available at http://www.springerlink.com/content/v433568j6918q72l/fulltext.pdf	15
Brandon Robinson, <i>The Disruption of Marital E-Harmony: Distinguishing Mail-Order Brides from Online Dating in Evaluating “Good Faith Marriage,”</i> 13 <i>Pub. Int. L. Rep.</i> 252 (2008).....	11

I-130 Petition for Alien Relative Instructions, USCIS, http://www.uscis.gov/files/form/i-130instr.pdf	9
Marry Ann Dutton et al., <i>Characteristics of Help-Seeking Behaviors, Resources & Service Needs of Battered Immigrant Latinas</i> , 7 <i>Geo. J. on Poverty L. & Pol’y</i> 245 (2000).....	11
Memorandum from Paul W. Virtue, Office of the General Counsel, Immigration and Naturalization Service to Terrance M. O’Reilly, Director, Administrative Appeals Office (Oct. 16, 1998), 2001 WL 1047693.....	10, 12, 13
Memorandum from T. Alexander Aleinikoff, Exec. Assoc. Comm’r, Immigration and Naturalization Service (Apr. 16, 1996).....	10
Questions/Discussion Topics at Vermont Service Center Stakeholder Meeting (Aug. 20, 2009), available at http://iwp.legalmomentum.org/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/Advance%20Questions_Discussion%20Topics%20for%20VSC%20Meeting.pdf/view	7
USCIS Adjudicator’s Field Manual	8-9

Catherine D. Cockerham
Jessica I. Rothschild
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429 3000 (phone)
(202) 429 3902 (fax)

Attorneys for Amicus Curiae ASISTA

**UNITED STATES DEPARTMENT OF HOMELAND SECURITY
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES
ADMINISTRATIVE APPEALS OFFICE
WASHINGTON, D.C.**

In the Matter of:

**Self-Petitioner under form I-360,
Violence Against Women Act**

File No: A # -----

**I-290B Receipt Number:
EAC-----**

**I-290B Notice of Appeal Receipt
Number: EAC-----**

AMICUS CURIAE BRIEF IN SUPPORT OF APPLICANT’S APPEAL

ASISTA, through its counsel, respectfully submits this amicus curiae brief in support of Petitioner, Ms. -----, in the appeal of the denial of her I-360 Self-Petition.

I. INTRODUCTION AND DESCRIPTION OF AMICUS

ASISTA possesses unique and substantial experience in issues involving domestic violence against immigrants. ASISTA worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes, incorporated in the 1994 Violence Against Women Act and its progeny (“VAWA”). ASISTA

serves as liaison for the field with Department of Homeland Security (“DHS”) personnel charged with implementing these laws, most notably United States Citizenship and Immigration Services (“USCIS”), Immigration and Customs Enforcement, and DHS’s Office on Civil Rights and Civil Liberties. ASISTA also trains and provides technical support to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates, and legal services, non-profit, pro bono and private attorneys working with immigrant crime survivors.

ASISTA submits this amicus curiae brief in support of Petitioner, Ms. ----- . On November 2, 2011, Ms. ----- filed her I-360 Self-Petition with USCIS (the “Self-Petition”). In support of her Self-Petition, Ms. ----- submitted 20 exhibits, which included her personal statement (I-360 Petition, Ex. 3), marriage certificate to her husband, ----- (I-360 Petition, Ex. 8), photographs from their wedding day (I-360 Petition, Exs. 9 & 10), affidavits (I-360 Petition., Exs. 11 & 12), the lease she signed with Mr. ----- (I-360 Petition, Ex. 14), statements from the couple’s joint bank account from the years 2006, 2007, 2008 and 2009 (I-360 Petition, Ex. 16), a telephone bill (I-360 Petition, Ex. 17), and a psychological evaluation (I-360 Petition., Ex. 18).

Over two and a half years later, on June 3, 2014, USCIS issued a request for additional evidence (“RFE”) on the issues of qualifying marriage, joint residence, and good faith marriage. On August 27, 2014, Ms. ----- submitted 17 additional pieces of evidence supporting each issue, including a supplemental personal statement (RFE Ex. 2), additional photographs with captions (RFE Exs. 3, 13-15), tax returns (RFE Ex. 4), and additional letters and affidavits from witnesses to her relationship (RFE Exs. 6-12). Despite this additional evidence, USCIS denied Ms. -----’s Self-Petition finding that “the record does not include sufficient evidence to support your claim that your [sic] resided with your spouse and that you married your spouse in good faith.” USCIS

Denial Notice at 3 (Oct. 10, 2014) (hereinafter “Denial Notice”). On November 10, 2014, Ms. ----- filed form I-290B to appeal the denial. On December 8, 2014, Ms. ----- filed a brief in support of her appeal.

ASISTA believes USCIS erred: (1) by failing to acknowledge the credible corroborating evidence supplied by Ms. -----, (2) insisting on traditional primary and secondary evidence, and (3) failing to explain what details are lacking when it denied a finding of good faith marriage and joint residence for lack of sufficient evidence. Without such specification, it is impossible for applicants to know what evidence will satisfy USCIS when primary evidence is unavailable. This problem is not isolated to this case, which is why ASISTA is submitting this amicus brief. It has become a prevalent problem in VAWA self-petition adjudications, resulting in denials of status to many survivors of domestic violence who, but for their abusers’ control of the normal family-based immigration process and the primary evidence needed to support their applications, would have obtained status. This is exactly the class of victims for whom Congress enacted VAWA.

ASISTA asks the Administrative Appeals Office (“AAO”) to establish clear guidelines for the Vermont Service Center (“VSC”) on how the VSC reviews credible evidence of good faith marriage and joint residence and to ensure that VSC provides specificity when requesting further evidence or denying cases on this basis. ASISTA asks AAO to consider the history of the legislation, the standard that a self-petitioner must meet to demonstrate eligibility, and the evidence that is available to victims of domestic violence, to reverse the USCIS denial, and to grant Ms. -----’s Self-Petition. Alternatively, ASISTA asks AAO to remand the Self-Petition to the VSC for reconsideration.

II. ARGUMENT

A. VAWA Provisions Must Be Interpreted to Provide the Protection to Domestic Violence Victims that Congress Intended

1. Congress Enacted VAWA to Remove Barriers Preventing Immigrant Victims of Domestic Violence from Leaving Abusive Relationships

Prior to enactment of the Violence Against Women Act of 1994 (“VAWA 1994”),¹ immigrants who suffered abuse had to endure an administrative process that did not recognize or appreciate the manifestations of domestic violence. Through VAWA 1994 and its reauthorizations in 2000 and 2005,² Congress reformed immigration law by creating special routes to status for immigrants who are victims of domestic violence.

The legislative history of VAWA 1994 reflects Congress’s concern for battered immigrants. The House of Representatives’ Committee on the Judiciary explained the purpose of enacting the new immigration provisions in VAWA 1994:

Domestic battery problems can become terribly exacerbated in marriages where one spouse is not a citizen, and the non-citizen’s legal status depends on his or her marriage to the abuser. 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.

...

Many immigrant women live trapped and isolated in violent homes, afraid to turn to anyone for help. They fear both continued abuse if they stay with their batterers and deportation if they attempt to leave.³

The Battered Immigrant Women Protection Act of 2000, which was part of the Violence Against

¹ Pub. L. No. 103-322, 108 Stat. 1796, 1902-55 (1994).

² See Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2005).

³ H.R. Rep. No. 103-395 (1993).

Women Act of 2000 (“VAWA 2000”),⁴ carried forward Congress’s goals underlying VAWA 1994. As explained in the Congressional Record of the Senate, VAWA 2000 was intended to eliminate further barriers facing immigrant victims of domestic violence:

VAWA 2000 addresses residual immigration law obstacles standing in the path of battered immigrant spouses and children seeking to free themselves from abusive relationships that either had not come to the attention of the drafters of VAWA 1994 or have arisen since as a result of [other bills that amended] immigration law.

In the vast majority of cases, granting the right to seek the visa to the citizen or lawful permanent resident spouse makes sense, since the purpose of family immigration visas is to allow U.S. citizens or lawful permanent residents to live here with their spouses and children.

But in the unusual case of the abusive relationship, an abusive citizen or lawful permanent resident can use control over his or her spouse’s visa as a means to blackmail and control the spouse. The abusive spouse would do this by withholding a promised visa petition and then threatening to turn the abused spouse in to the immigration authorities if the abused spouse sought to leave the abuser or report the abuse.⁵

VAWA 2000 advanced Congress’s express and unequivocal intent to “ensure that domestic abusers with immigrant victims are brought to justice and that the battered immigrants Congress sought to help in the original Act are able to escape the abuse.”⁶ To do this, VAWA 2000 created the U visa⁷ and removed impediments for domestic violence survivors whose marriages did not meet normal family-based requirements, allowing them to petition after a divorce, when the abuser was a bigamist and when the abuser had lost status.⁸ One consequence

⁴ Pub. L. No. 106-386, 114 Stat. 1464, 1518-37 (2000).

⁵ 146 Cong Rec. S10,188, S10,195 (Oct. 11, 2000) (Section-by-Section Summary).

⁶ *Id.*

⁷ INA §S 101(a)(15)(U), 214(p) & 245(l).

⁸ Pub. L. No. 106-386, 114 Stat. 1464 (2000).

of these changes was to alter the “daunting, difficult, and dangerous task” of providing “detailed information about the date and the place of each of the abuser’s former marriages and the date and place of each divorce.”⁹ These changes, according then-Senator Joseph Biden, the author of the original VAWA, became law as a result of “maybe the single most important provision [added] to [VAWA] . . . the battered immigrant women provision.”¹⁰

Congress continued to strengthen the VAWA immigration provisions in the Violence Against Women and Department of Justice Reauthorization Act of 2005 (“VAWA 2005”).¹¹ In floor discussions, members of Congress emphasized the continued hardships facing immigrant victims of domestic violence. Co-sponsor of all the VAWA laws, Senator Edward Kennedy stated:

Eliminating domestic violence is especially challenging in immigrant communities, since victims often face additional cultural, linguistic and immigration barriers to their safety. Abusers of immigrant spouses or children are liable to use threats of deportation to trap them in endless years of violence.¹²

With VAWA 1994 and each reauthorization, Congress ensured greater protection for immigrant victims of domestic violence, thereby furthering its goal of removing the obstacles that prevent immigrant victims of domestic violence from leaving their abusive relationships.

⁹ 146 Cong. Rec. S10,192 (Oct. 11, 2000).

¹⁰ 146 Cong. Rec. S10,204 (Oct. 11, 2000).

¹¹ Pub. L. No. 109-162, 119 Stat. 2960 (2005).

¹² 151 Cong. Rec. S13,749, S13,753 (Dec. 16, 2005) (statement of Sen. Kennedy).

B. Congress Mandated a Flexible Evidentiary Standard that Recognizes the Context of Domestic Violence

1. A Self-Petitioner Bears the Burden to Establish Eligibility Only by a Preponderance of the Best Evidence Available

In both VAWA self-petitions and regular family-based petitions, the burden of proof is on the petitioner to establish eligibility for the benefit sought by a preponderance of the evidence.¹³ The preponderance of the evidence standard is lower than the “clear and convincing evidence” standard used in other immigration contexts¹⁴ and the “beyond a reasonable doubt” standard found in criminal courts. In simple terms, the preponderance standard is met even if the decision-maker is just slightly above 50% convinced by what is being argued.¹⁵

The preponderance of the evidence standard requires examination of “each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the *totality of the evidence*, to determine whether the fact to be proven is probably true.”¹⁶

¹³ 61 Fed Reg 13,064 (Mar. 26, 1996) (stating that “the preponderance of the evidence “criteria” is “generally applicable to visa petitions and self-petitions”); *In re Petitioner*, 2011 WL 7789867 (Aug. 9, 2011); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

¹⁴ As an example, the clear and convincing standard is used where a lawful permanent resident, who obtained that status through a prior marriage, has remarried an alien within five years and filed a visa petition on his/her behalf. If the lawful permanent resident’s former spouse is still alive, the lawful permanent resident must show through clear and convincing evidence that the status-conferring marriage was not entered into for the purposes of evading immigration laws. See 8 C.F.R. § 204.2(a)(1)(i)(A).

¹⁵ See *I.N.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining “more likely than not” as a greater than 50 percent probability of something occurring).

¹⁶ See e.g., *Matter of Chawathe*, 25 I. & N. Dec. 369, 376 (BIA 2010) (emphasis added); see also Questions/Discussion Topics at Vermont Service Center Stakeholder Meeting (Aug. 20, 2009), available at http://iwp.legalmomentum.org/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/Advance%20Questions_Discussion%20Topics%20for%20VSC%20Meeting.pdf/view (good faith marriage determined by examining the “total picture presented by the record”).

2. USCIS Must Apply the Congressionally Mandated “Any Credible Evidence” Standard in Making Good Faith Marriage Determinations in VAWA Cases

To qualify for relief, a self-petitioner must demonstrate, *inter alia*, a good faith marriage.¹⁷ To determine whether an applicant has met his or her burden to show good faith marriage, the principal question for USCIS adjudicators is whether the couple intended at the time of the marriage to establish a life together.¹⁸ Generally, the marriage need only be viable at inception to be valid.¹⁹ Furthermore, the Adjudicator’s Field Manual instructs adjudicators,

Remember that the issue to be resolved during the interview is the bona fides of the marriage, not its “viability” (i.e., the probability of the parties remaining married for a long time). USCIS is not in the business of determining (or even speculating about) viability. *Although the petitioner and the beneficiary may not appear to have a “viable” marriage, the petition may be approved if the marriage is valid and was not entered into solely for immigration purposes.*²⁰

¹⁷ See INA § 204(a)(1)(A)(iii)(I), 8 U.S.C. § 1154(a)(a)(A)(iii)(I).

¹⁸ *Agyman v. INS*, 296 F.3d 871, 883 (9th Cir. 2002); *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

¹⁹ See *Matter of Boromand*, 17 I&N Dec. 450 (BIA 1980). See also *Matter of McKee*, 17 I&N Dec. 332 (BIA 1980) (differentiating between nonviable and sham marriages). By contrast to a bona fide marriage, a sham marriage has been defined by the BIA as a marriage which may comply with all the formal requirements of the law but which the parties entered into with no intent, or “good faith,” to live together and which is designed solely to circumvent the immigrations laws. Sham marriages are not recognized for immigration purposes.” USCIS Adjudicator’s Field Manual 21.3(H) [hereinafter “AFM”]. See also *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983) (holding a “marriage entered into for the primary purpose of circumventing the immigration laws, commonly referred to as fraudulent or sham marriage, is not recognized for the purpose of obtaining immigration benefits.”).

²⁰ AFM at 21.3 (emphasis added).

In other words, the dissolution of a marriage does not mean it was entered into for purposes of fraud.²¹ If the marriage was valid at inception, it is valid for immigration purposes even if partners have separated and the marriage is no longer viable.²²

To meet the “bona fide”²³ marriage requirement in regular family-base cases petitioners must submit evidence regarding the “bona fides” of their marriage.²⁴ Ironically, the regulations governing evidence for VAWA petitions contain the same nonexclusive list of evidence as provided in the “bona fide” marriage exception that applies to people who marry while in immigration proceedings: “primary evidence,” such as proof of joint ownership of property, birth certificates of children in common, joint tax returns, a lease showing joint tenancy, and/or affidavits from third parties attesting to the bona fides of the marriage.²⁵ However, despite the similarity in the nonexclusive list of evidence enumerated, VAWA provides a more lenient evidentiary standard—“any credible evidence”—for what evidence may be considered.

Because abusers often control documents central to proving good faith marriage and other eligibility requirements, Congress created the special “any credible evidence” standard for all VAWA cases.²⁶ Under this standard, USCIS must “consider any credible evidence relevant to a self-petition The self-petitioner may, but is not required to, demonstrate that preferred

²¹ *E.g.*, *Bark*, 511 F.2d at 1202.

²² *Matter of Boromand*, 17 I&N Dec. 450, 454 (BIA 1980).

²³ AFM at 21.3(H).

²⁴ *See* I-130 Petition for Alien Relative Instructions, ISCIS, <http://www.uscis.gov/files/form/i-130instr.pdf>.

²⁵ Compare 8 C.F.R. § 204.2(c)(2)(vii) with 8 C.F.R. § 204.2(a)(1)(iii)(B).

²⁶ INA §§ 204(a)(1)(J), 240(b)(2)(D), & 216(c)(4), 8 C.F.R. 204.2(c)(2)(i).

primary or secondary evidence is unavailable.”²⁷ Moreover, “[a] self-petition may not be denied for failure to submit particular evidence. It may only be denied on evidentiary grounds if the evidence that was submitted is not credible or otherwise fails to establish eligibility.”²⁸

This standard is in line with Congress’s intent to ease the evidentiary challenges that immigrant victims of domestic violence often face. For abused spouses, evidence normally available in family-based marriage petitions may not be accessible because of the dynamics of domestic violence. The former Immigration and Nationality Service repeatedly advised 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.”²⁹ Victims of domestic violence may not be able to obtain the sort of evidence generally available in family-based petitions:

[B]attered spouse... self-petitioners *are not likely to have access to the range of documents available to the ordinary visa petitioner for a variety of reasons*. Many self-petitioners have been forced to flee from their abusive spouse and do not have access to critical documents for that reason. Some abusive spouses may destroy documents in an attempt to prevent the self-petitioner from successfully filing. Other self-petitioners may be self-petitioning without the abusive spouse’s knowledge or consent and are unable to obtain documents for that reason. Adjudicators should be aware of these issues and should evaluate the evidence submitted in that light.³⁰

²⁷ 8 C.F.R. §§ 103.2(b)(2)(iii) & 204.1(f)(1).

²⁸ Memorandum from Paul W. Virtue, Office of the General Counsel, Immigration and Naturalization Service to Terrance M. O’Reilly, Director, Administrative Appeals Office (Oct. 16, 1998), 2001 WL 1047693 (hereinafter “Virtue Memo”).

²⁹ Memorandum from T. Alexander Aleinikoff, Exec. Assoc. Comm’r, Immigration and Naturalization Service (Apr. 16, 1996) at 5.

³⁰ Virtue Memo, *supra* n. 28.

Primary documentary evidence will often be difficult or impossible to produce for other reasons related to the domestic violence context. Evidence often simply does not exist, as abusers will often, as part of their power and control, exclude their spouses from normal documentation (this is true for citizen victims as well):

Abusive relationships are about power, and physical abuse often accompanies other forms of abuse, such as economic, social or emotional abuse and isolation. The abused spouse therefore will often not be named on property leases, bank accounts or tax forms because the abusive spouse prevents her from having knowledge of or control over any financial decisions. Similarly, there may be few available friends with personal knowledge of the relationship, because the abused spouse was socially isolated. The evidence listed in the regulations, therefore, is often inaccessible or nonexistent in even the most bona fide of abusive marriages.³¹

Additionally, abusers often use the legal system against their victims, refusing to provide information necessary for victims seeking status or other help.³² There may also be impediments posed by cultural and language differences.³³

Therefore, a self-petition should not be denied on evidentiary grounds solely because the petitioner has not submitted a specific document requested by the adjudicator. Rather, a self-

³¹ Brandon Robinson, *The Disruption of Marital E-Harmony: Distinguishing Mail-Order Brides from Online Dating in Evaluating "Good Faith Marriage,"* 13 Pub. Int. L. Rep. 252, 258-259 (2008) (hereinafter "Disruption").

³² See, e.g., Marry Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources & Service Needs of Battered Immigrant Latinas,* 7 Geo. J. on Poverty L. & Pol'y 245, 292 (2000) (discussing threats of deportation, refusal to file immigration papers, and calling the INS); see also 146 Cong. Rec. S10,188, S10,192 (Oct. 11, 2000) (discussing abusers who blackmail their victims with threats related to immigration status).

³³ Indeed, "defining a 'bona fide marriage' based on joint residence and commingled finances can be seen as ethnocentric and overbroad, imposing 'American' norms onto the validity of a marriage and failing to recognize that many happily married U.S. citizens have separate bank accounts, separate property and no children." Disruption, *supra* n. 31, at 259.

petition “may only be denied on evidentiary grounds if the evidence that was submitted is not credible or otherwise fails to establish eligibility.”³⁴

To this end, for a VAWA petitioner, evidence of a good-faith marriage

may include, but is not limited to, proof that one spouse has been listed as the other’s spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. Other types of readily available evidence might include the birth certificates of children born to the abuser and the spouse; police, medical, or court documents providing information about the relationship; and affidavits of persons with personal knowledge of the relationship. ***All credible relevant evidence will be considered.***³⁵

In other words, this enumeration is not an exhaustive list, and the regulations acknowledge that a successful petition may not contain any of the listed items.³⁶

3. When Making Credibility Determinations in VAWA Cases, USCIS Must Consider the Nature and Impact of Domestic Abuse

The General Counsel for the former Immigration and Nationality Service previously analyzed indicia of credibility in the Virtue Memo, explaining that evidence may be “credible or incredible on either an internal or an external basis.”³⁷ Evidence is internally consistent if it does not conflict with other evidence presented by the applicant. Evidence is externally credible when objectively corroborated. “Adjudicators should carefully review evidence in both these regards before making a credibility determination.”³⁸ In general, an adverse credibility determination

³⁴ Virtue Memo, *supra* n. 28.

³⁵ 8 C.F.R. § 204.2(c)(2)(vii) (2012) (emphasis added).

³⁶ *See also* 61 Fed. Reg. 13,065 (Mar. 26, 1996) (“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.***”) (emphasis added).

³⁷ Virtue Memo, *supra* n. 28.

³⁸ *Id.*

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 evidence lacking credibility, and whether a convincing explanation for the discrepancies and omissions has not been supplied by the applicant.³⁹

Critically, when making a credibility determination, an adjudicator must consider “the facts and circumstances of that case only, taking into account the limitations that pertain to battered . . . self-petitioners.”⁴⁰ Rather than dissecting and exaggerating every potential discrepancy or omission in a self-petition, adjudicators should consider a case as a whole: a credibility determination “apprehends the overall evaluation of testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence.”⁴¹ As the Virtue Memo observed, “apparent inconsistencies may disappear upon more careful examination and comparison with other evidence submitted.”⁴² In addition, given the difficulties in collecting evidence confronting victims of domestic violence, adjudicators should give VAWA applicants “ample opportunity to add to the evidence submitted in support of the petition if necessary.”⁴³

³⁹ *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998); see also *Matter of E-M-*, 20 I&N Dec. 77, 81 (BIA 1989) (“Most important is whether the statement of the affiant is consistent with the other evidence in the record”).

⁴⁰ Virtue Memo, *supra* n. 28.

⁴¹ See *Matter of Lugo-Guadiana*, 12 I&N Dec. 726, 729 (BIA 1968).

⁴² Virtue Memo, *supra* n. 28.

⁴³ *Id.*

C. USCIS’s Critical Assessment of Ms. -----’s Evidence Is Unwarranted

USCIS raises four main criticisms of Ms. -----’s application relating to: (1) the tax returns submitted by Ms. -----, (2) the number of photographs submitted by Ms. -----, (3) a supposed lack of detail contained in supplemental affidavits; and (4) information collected by USCIS from other sources that supposedly “casts doubts” on Ms. -----’s claim of joint residency. USCIS’s critiques are unsupported, disregard the standards applicable in the domestic violence context, and/or seize on potential discrepancies that disappear once all of the evidence is considered in its totality. Indeed, when considered as a whole, it is clear that Ms. ----- submitted sufficient evidence to show a good faith marriage and joint residence by a preponderance of the evidence.

1. USCIS’s Preference for Evidence Controlled by the Abuser Is Inappropriate

a. Joint Tax Returns Controlled by the Abuser

Ms. ----- submitted copies of income tax returns for the years 2006, 2008, and 2009, which list Ms. -----’s spouse. Nevertheless, USCIS rejected these tax returns as credible evidence because the taxes were filed with the status of “married, filing separately,” rather than “married, filing jointly.” Denial Notice at 2 (“Since these returns were not jointly filed with our spouse, these tax documents provide little evidence that you . . . married your spouse in good faith”). The Denial does not explain why a married couple who file their taxes separately should be deemed a couple who married in bad faith. More importantly, however, the notion that abusers would necessarily include their victims in tax returns is unreasonable, given that abusers typically and purposefully fail to include their spouses in any document that implies that the spouse is an equal. Withholding resources is a classic tactic of an abuser:

[B]y controlling resources (*e.g.*, money, employment, etc.), the batterer ensures that the victim remains dependent upon the batterer, thus

reinforcing subjugation and reducing the likelihood of escape by the victim. Isolating the victim from resources or sources of emotional support is another way of controlling the victim. By separating the victim from friends and family either physically . . . or emotionally . . . , the batterer creates an atmosphere of dependence and control.⁴⁴

Studies performed by an expert working with abusers show that abusers “restrict women’s access to assets by refusing to include their name on property such as a home, vehicle, or business; they may deny access to cash, savings, and investments; and they may control access to health insurance.”⁴⁵ “[A]busive men hide jointly earned money, prevent their partners from having access to joint bank accounts, lie about shared assets, and withhold information about their finances.”⁴⁶ Indeed, according to a recent study, 99% of domestic violence survivors reporting psychological abuse also reported economic abuse.⁴⁷ It bears repeating: abusers view spouses as property that they solely control, not as equal partners who should be given access to resources allowing them to act independently.

Ms. -----’s experience is a classic example of such tactics. As Ms. ----- explained in her supplemental declaration, her ex-husband “controlled all of the paperwork” for financial and other matters. RFE Ex. 2, Supp. Dec. at 5-6. Mr. ----- refused to add Ms. ----- to his car insurance and took out “large amounts of money” without Ms. -----’s permission towards the end of the marriage. *Id.* at 5. As for tax forms, Ms. ----- did not file her taxes with her husband

⁴⁴ Anderson et al, *Why Doesn’t She Just Leave?: A Descriptive Study of Victim Reported Impediments to Her Safety*, 18 J. Family Violence 151 (June 2003), available at <http://www.springerlink.com/content/v433568j6918q72l/fulltext.pdf>.

⁴⁵ Adams et al, *Measuring the Effects of Domestic Violence on Women’s Financial Well-Being*, CFS Research Brief 2011-5.6 (May 2011), available at http://www.cfs.wisc.edu/presentations/Adams2011_ResearchBrief.pdf.

⁴⁶ Adams et al, *Development of the Scale of Economic Abuse*, 14 Violence Against Women 563, 566 (2008), available at <http://vaw.sagepub.com/content/14/5/563.abstract> (collecting papers).

⁴⁷ *Id.*

because he controlled the tax returns, and she did not ask him why the tax returns were not filed jointly. *Id.* at 6. The Denial, however, makes no mention of Ms. -----’s credible explanation as to why the evidence emphasized by USCIS is missing. USCIS should not require victims of domestic violence to produce evidence controlled by their abuser.

b. Photographs Controlled by the Abuser

Ms. ----- submitted seventeen captioned photographs of the couple’s wedding and two visits with Mr. -----’s family. In its Denial, USCIS admits that the photographs lend credence to Ms. ----- having entered into her marriage in good faith, while simultaneously faulting Ms. ----- for not submitting additional photographs. Denial Notice at 2 (stating that the wedding photographs “provide little evidence of your intent in entering this marriage” and the “remaining photographs of the claimed visit to your spouse’s family provide some evidence of a good faith marriage, though a small number of photographs provides little insight into your intent in entering this marriage”). But Ms. ----- submitted a detailed, credible explanation why additional photographs are in the control of her abusive husband. She explained in her Supplemental Declaration that, while more photographs had been taken of the couple before and during their marriage, Mr. ----- took the photo album containing these photographs, without Ms. -----’s permission, when he moved out of the apartment. RFE Ex. 2, Supp. Decl. at 6. The Denial makes no mention of Ms. -----’s credible explanation. USCIS’s apparent insistence on abuser-controlled evidence is not only unreasonable, it is dangerous. To obtain such evidence, survivors would have to contact abusers placing themselves and their families in jeopardy.

2. USCIS Must Assess Ms. -----’s Evidence in Its Totality

The Denial criticizes the numerous affidavits submitted by Ms. ----- in response to the June 3, 2014 RFE, claiming that they “provided no detail regarding their [affiants’] interactions

with you” and concluding that the affidavits “are not sufficient to establish these [good faith marriage and joint residence] requirements.” Denial at 2.

As an initial matter, USCIS is simply wrong that the affidavits lack any detail. As Ms. ----- explains in her brief supporting her appeal, multiple affidavits provided details of their interactions with the couple, including the circumstances under which the affiants would encounter the couple during their marriage and joint residence. *See* Br. in Supp. of Self-Petitioner’s Appeal at 25-27 (listing several examples from the affidavits, which span years of the couple’s marriage and include friends, fellow church members, and neighbors). USCIS also ignores that Ms. -----’s efforts to obtain supporting affidavits from neighbors was made more difficult by the extensive delay between the filing of Ms. -----’s self-petition (in October 2011) and the RFE she received over two and a half years later.

Additionally, USCIS’s focus on each individual affidavit’s “sufficiency” is an example of USCIS picking apart each piece of evidence submitted and finding that, by itself, it does not show good faith marriage or joint residence. This approach seems designed to result in denials, since it is unlikely any one piece of evidence will prove good faith marriage or joint residency on its own. USCIS should, instead, look at all the evidence together to get the full picture of the marriage and joint residency—the totality of the circumstances. In this respect, the numerous affidavits provide corroborating evidence of the couple’s good faith marriage and joint residence.

3. Ms. ----- Submitted Credible Evidence Demonstrating Joint Residency by a Preponderance of the Evidence, and USCIS Must Address Her Explanation for Perceived Inconsistencies

Evidence submitted by Ms. ----- demonstrated that she and Mr. ----- lived together at -----, including: 1) a lease document dated ----- signed by Ms. -----, Mr. -----, and ----- (I-360 Petition, Ex. 14);
2) a telephone bill dated ----- jointly addressed to Ms. ----- and Mr. ----- (*id.*,

Ex. 17); 3) and bank statements related to a joint banking account from ----- dated ----- - -----, all jointly addressed to Mr. ----- and Ms. ----- (*id.*, Ex. 16); and 4) declarations from Ms. --- -----, -----, and various affiants indicating that Ms. ----- rented a bedroom in the apartment and that Mr. ----- resided with Ms. ----- at that same apartment during their marriage (*id.*, Ex. 3, RFE Exs. 2, 6-12). All of this evidence, considered as a whole, demonstrates that Ms. ----- and her ex-husband jointly resided during their marriage at the apartment listed on the 2005 lease signed by her, the roommate, and her spouse.

Instead of crediting this evidence, USCIS apparently conducted an independent investigation in an effort to cast doubt on Ms. -----’s joint residence claims. *See, e.g.*, RFE at 3. (“USCIS has uncovered information from other sources that casts doubt on your claims.”). An independent investigation specifically aimed at unearthing inconsistencies is itself inconsistent with the ameliorative goal of VAWA. Congress intended VAWA to be an ameliorative statute and “there is the general rule of construction that when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion with the goal of promoting congressional intent. ***This is particularly so in the immigration context where doubts are to be resolved in favor of the alien.***”⁴⁸ Amicus is particularly troubled that USCIS seems to have attempted to discover problems with an eligibility requirement, residence with the abuser, unrelated to the social problem Congress sought to address. Such an approach undermines the goals of this law, discourages survivors from accessing safety and justice, and makes the immigration system a weapon of power and control in the hands of abusers.

⁴⁸ *U.S. v. Sanchez-Guzman*, 744 F. Supp. 997, 1002 (E.D. Wash. 1990).

Moreover, the inconsistencies perceived by USCIS disappear upon consideration of the evidence as a whole, including the additional evidence submitted by Ms. ----- in response to the concerns raised by USCIS. For example, the RFE and Denial state that Ms. -----'s evidence of joint residency is called into question by -----'s own immigration filings indicating that his wife lived with him in the apartment in 2006. But Ms. ----- explained in her Supplemental Declaration that she knew that Mr. ----- had been married and that a woman sometimes stayed with Mr. ----- in his room. Ms. ----- did not ask Mr. ----- about this woman because "it would be inappropriate for me to ask a man questions like that or to pry into his personal life." RFE Ex. 2, Supp. Decl. at 7. The Denial discarded the explanation offered by Ms. ----- for the alleged discrepancy without explanation or discussion. USCIS should explain why the explanation Ms. ----- provided was insufficient.

USCIS also raised questions about the couple's joint residency by pointing to a 2002 lease for the apartment that listed ----- and to other individuals as tenants, stating that "[n]o other leases were filed with the apartment manager and the apartment complex had no record that you or your spouse had resided in the apartment." Denial at 3. This focus places form over substance. The facts that the lease was not updated over numerous years and that the 2005 sub-lease between Mr. -----, and Ms. ----- and Mr. -----, was never filed with the management company do not contradict the evidence submitted by Ms. ----- showing joint residency. The 2002 lease pre-dates Ms. -----'s residency in the apartment by a year and pre-dates Ms. -----'s joint residence with Mr. ----- by several years. Additionally, Ms. ----- explained that it is a common practice in the ----- apartment complex for tenants to obtain roommates without involving or notifying the property manager. RFE Ex. 2, Supp. Decl. at 3. Ms. ----- also explained in her Supplemental Declaration that Mr. -----

attempted to add his name to the lease, but that either he or the couple's roommate, -----
-, were told by the apartment complex that they could not do so because there were already too
many people on the lease. *Id.* Ms. ----- was not involved in this process, and as she explained
in her Declaration, her husband controlled the paperwork during their marriage. USCIS again
ignores this detailed, credible evidence without discussion. *See Denial at 3.*

Amicus respectfully suggests that USCIS adjudicators must consider additional evidence
provided by applicants when addressing perceived inconsistencies and, where they determine
that the additional evidence and explanation is inadequate, articulate why the information fails to
satisfy the applicant's burden of proof. When doing so, rather than looking for inconsistencies,
USCIS should attempt to reconcile any external information with a self-petitioner's evidence.
USCIS should not purposefully try to find reasons to deny cases for the victims of domestic
violence Congress sought to help.

D. Ms. ----- Submitted Credible Evidence Demonstrating a Good-Faith Marriage by a Preponderance of the Evidence

Ms. ----- provided sufficient evidence to meet her evidentiary burden demonstrating
good-faith marriage by a preponderance of the evidence. As described in detail by Ms. ----- in
her brief in support of her appeal, Ms. ----- submitted five pieces of primary evidence and
thirteen pieces of secondary evidence supporting her good faith marriage to her abusive husband.
Br. in Supp. of Self-Petitioner's Appeal at 16-22. She submitted each of the kinds of evidence
available to her: marriage certificate (I-360 Petition Ex. 8), two personal statements (I-360
Petition Ex. 3, REF Ex. 2), bank account information (I-360 Petition Ex. 16), tax returns (RFE
Ex. 4), a telephone bill (I-360 Petition Ex. 17), photographs (I-360 Petition Exs. 9 & 10, RFE
Exs. 3, 13-15), a lease (I-360 Petition Ex. 14), and affidavits from other friends and neighbors
(RFE Exs. 6-12). These items are each credible pieces of evidence and, when considered as

whole, demonstrate that self-petitioner has established that she entered into her marriage in good faith.

As noted above, USCIS has not specified any valid basis for the denial. Moreover, USCIS failed to analyze in the Denial numerous pieces of evidence submitted by Ms. ----- – namely, a telephone bill addressed to “----- and -----” at their joint apartment, joint bank account records addressed to both Ms. ----- and Mr. ----- at the marital address, and a psychologist’s report. *See* I-360 Petition, Exs. 16, 17 & 18. The joint bank account and the bill addressed to the couple, *see* I-360 Petition, Exs. 16 & 17, demonstrate that the couple commingled their funds, dealt with household expenses as a unit, and shared a marital residence. USCIS fails to mention the report from Ms. -----’s psychologist, which provides an expert opinion that she had good-faith intentions in entering into marriage. *See* I-360 Petition, Ex. 18 at 9. The lack of discussion in the Denial of this evidence suggests that these submissions were not considered. Assuming they are credible (and, if not, USCIS must say why), USCIS must explain why such evidence is insufficient.

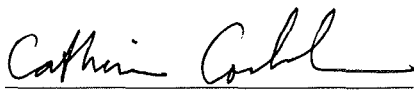
In addition to minimizing, dismissing, and ignoring Ms. -----’s credible evidence, the USCIS also failed to: (1) explain why the detail Ms. ----- provided was insufficient; or (2) articulate what specific missing details would have satisfied them. We suggest that this is a basis, on its own, for the AAO to reverse or remand the denial. Without an explanation for why the evidence is insufficient and what specific evidence is missing, applicants cannot know what will satisfy the agency. The AAO need not reverse on this basis, however. Amicus respectfully suggests that the AAO find that Ms. ----- provided sufficient credible evidence that she entered into a good faith marriage and established joint residency.

III. CONCLUSION

The USCIS's denial fails to conform with the dictates of the law and undermines Congress's determination to protect victims of abuse who, but for the abuser's control of the normal family-immigration process, should have received legal status. Most troubling is that this kind of denial—based on lack of evidence in the abuser's possession or control—provides abusers with an easy tool for controlling their victims: keep your victim out of household and financial records and USCIS will deny her status.

For Ms. -----, we ask the AAO to reverse VSC's finding that she did not meet her burden and grant her VAWA self-petition, or, alternatively, remand to the VSC for reconsideration. For all VAWA self-petitioners we ask the AAO to: (1) require VSC to provide more specificity about why evidence is not sufficiently detailed when it cites lack of detail; (2) refrain from insisting on evidence often controlled by abusers; (3) address all evidence presented and explain why it is irrelevant or insufficient, if it deems it inadequate; and (4) remind USCIS that Congress created a special evidentiary standard for these cases because of the reality of domestic violence. VSC's failure to recognize and adhere to this standard is undermining the law Congress created for victims of this pernicious crime.

RESPECTFULLY SUBMITTED this 2nd day of February, 2015.

By 

Catherine **D.** Cockerham
Jessica I. Rothschild
Steptoe & Johnson **LLP**
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429 3000 (phone)
(202) 429 3902 (fax)

Attorneys for Amicus Curiae
AS/STA