UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
PHILADELPHIA, PENNSYLVANIA

In the Matter of	**)**	**IN REMOVAL PROCEEDINGS**
	)	
Ms. MARIA DOES,	**)**	**File No. A 1010101010**
	)	
Respondent	**)**	**MOTION TO REOPEN AND MOTION FOR STAY OF REMOVAL**

I. INTRODUCTION

Respondent, through undersigned counsel, respectfully moves this court to reopen her removal proceedings pursuant to 8 CFR § 1003.23(b)(3) and Immigration and Nationality Act (INA) § 240(c)(7)(C)(iv) as redesignated by section 101(d)(1) of the Real ID act of 2005 (division B of Public Law 109-13) and as amended by § 825(a)(1) of the Violence Against Women Act and Department of Justice Reauthorization Act of 2005 (VAWA), Pub. L. No 109-162 (enacted on January 5, 2006). Also pursuant to INA § 240(c)(7)(C)(iv), Respondent moves for an order staying her removal pending final adjudication of this motion.

II. STATEMENT OF THE LAW

A. 8 CFR §1003.23(b)(3)

A motion to reopen may be granted based on new evidence that is material, was not available and could not have been discovered or presented at the hearing.

B. INA § 240(c)(7)(C)(iv) – Time Limitation

Generally, a motion to reopen must be filed within 90 days of the entry of the date of the

entry of a final administrative order of removal.[1] However, INA § 240(c)(7)(C)(iv), as amended on January 5, 2006 by VAWA § 825(a)(1), provides an exception to the time limitation for battered spouses, children and parents if they seek to reopen proceedings to pursue relief under INA §§ 204(a)(1)((A)(iii) or (iv), 204(a)(1)(B)(ii) or (iii), or § 204A(b)(2).

Section 240(c)(7)(C)(iv) states in pertinent part:

> (iv) SPECIAL RULE FOR BATTERED SPOUSES, CHILDREN, AND PARENTS – Any limitation under this section on the deadlines for filing such motions shall not apply –
>
> (I) if the basis for the motion is to apply for relief under clause **(iii) or (iv) of section 204(a)(1)(A)**, clause (ii) or (iii) of section 204(a)(1)(B), or section 240A(b)(2) or section 244(a)(3);
>
> (II) if the motion is accompanied… by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;
>
> (III) if the motion to reopen is filed within 1 year of the entry of the final order of removal…; and
>
> (IV) if the alien is physically present in the United States at the time of filing the motion.

C. INA § 204(a)(1)(A)(iii)

Section 204(a)(1)(A)(iii) of the INA allows an alien who has been battered or subjected to extreme cruelty by his or her spouse to file a petition with the Attorney General, or what is commonly know as the VAWA self-petition.

D. INA § 240(c)(7)(C)(iv) – Stay of Removal

The filing of a motion to reopen under INA § 240(c)(7)(C)(iv) "shall stay the removal of the alien pending final disposition of the motion including exhaustion of all appeals if the motion establishes a prima facie case for the relief applied for."[2]

E. 8 CFR 245.2(a)(1)

[1] INA § 240(c)(7)(C)(i) and 8 CFR § 1003.23(b)(3).
[2] INA § 240(c)(7)(C)(iv).

Individuals who are classified as arriving aliens due to a departure and reentry under advance parole may renew an adjustment application in removal proceedings under 8 CFR part 240 if the individual had (1) previously been inspected and admitted; (2) had filed an adjustment application for adjustment prior to seeking advance parole; and was granted advance parole specifically for the purpose of returning to pursue the pending adjustment application.[3]

III. PROCEDURAL HISTORY

Respondent received her Notice to Appear on November 23, 2004. She was charged as an arriving alien subject to removal under INA § 212(a)(7)(A)(i)(I)[4] and was ordered removed to Malaysia on August 2, 2005. Respondent filed a Violence Against Women Act (VAWA) self-petition on November 16, 2005 and was issued a prima facie case determination on December 8, 2005. Based on the time exceptions outlined under INA § 240(c)(7)(C)(iv), Respondent is not time barred from filing a motion to reopen until August 2, 2006. Respondent now seeks to reopen removal proceedings and moves the Immigration Judge to set aside his decision entered on November 3, 2004 for further consideration for relief by way of a self-petition under the Violence Against Women Act (hereinafter VAWA) and so that she may later adjust status to lawful permanent resident.

IV. STATEMENT OF THE FACTS

Respondent first entered the United States in 1996 with a student visa. While in school, Respondent met and married Mr. Joh Does, a U.S. citizen. Throughout their marriage,

[3] 8 C.F.R. §245.2(a)(1).

[4] "Immigrants… who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 211(a)…"

Respondent was emotionally, physically and sexually abused by her U.S. citizen husband. Marriage to Mr. John Does was not easy; he was possessive and verbally abusive to her. Mr. J was especially malevolent when he was drunk, which was quite frequent. He would threaten her and yell obscenities at her. For instance, Mr. John Does overheard her casually tell a female classmate she loved her as she was about to end their phone conversation, he became enraged and grabbed her by the shoulders and violently shook her.

Respondent and her husband separated in October 2001. She thought that maybe some time apart would heal their marriage and that he would miss her if they were not living together. However, with the death of his mother in November 2001, Mr. John Doea behavior only worsened. He drank even more than before and was unreceptive to any efforts made by Respondent to work on their marriage. He angrily rebuffed any mention of counseling for his alcohol problem or their marriage problem.

About a year after his mother passed away, Mr. John Does showed up at Respondent's house drunk and demanded to be let in. Once she let him in, he pushed her into the master bedroom and raped her. After he was finished, he threw up on her and then fell asleep. Respondent quietly left the room to shower. Her skin was torn, and she had bite marks all over her upper body. Feeling shameful and embarrassed, Respondent did not go to the doctor but treated her wounds herself. After that night, Respondent became more fearful of her husband. She became more subdued around him and was afraid of provoking him.

Mr. John Does often threatened to withdraw his immigration petition for Respondent if she did not do what he wanted. He did finally withdraw his petition in November 2004. Respondent had left the United States with a grant of advance parole in May 2004 to care for her sick mother in Malaysia and returned to the United States on June 14, 2004. The effect of his withdrawal was that she was put into removal proceedings as an arriving alien due to her

departure.

However, when Respondent was put into removal proceedings because of his withdrawal, he was very remorseful and wanted to reconcile with his wife. So, Mr. John Does moved back into their house, and he even agreed to go to marriage counseling. He acknowledged his wrongful behavior towards his wife and wanted to make things work for them.

Mr. Joh Does behavior improved, but as the seriousness of the proceedings dawned on him, Mr. J again turned to alcohol for comfort. He reverted to his past behavior. He even threatened to strike Respondent during her removal hearing because he said she was making too much noise while trying to retrieve papers from her purse.

In the end, Respondent was ordered removed on August 2, 2005. Mr. John Does could not deal with the possibility of having a wife in Malaysia. He drank even more and rarely came home. Respondent finally realized that her husband did not want to change or make their marriage work any longer. She filed for divorce in September 2005 and filed a VAWA a self-petition on November 16, 2005.

As a classic victim of domestic violence, Respondent did not assert a VAWA claim during her removal proceeding because she truly believed that her husband would change and that they would be able to work out their marriage. Asserting a VAWA claim would have been detrimental to the fragile nature of their relationship and would have been detrimental to her safety, as direct accusations of abuse may trigger Mr. John Does to physically retaliate against her.

V. RESPONDENT IS ELIGIBLE TO REOPEN REMOVAL PROCEEDINGS

A. Respondent is eligible to have removal proceedings reopened pursuant to INA § 240(c)(7)(C)(iv).

Section 240(c)(7)(C)(iv), as amended on January 5, 2006 by VAWA § 825(a)(1), extended the time to file motions to reopen for victims of domestic violence to one year after entry of the final removal order. Section 240(c)(7)(C)(iv) states in pertinent part:

> (iv) SPECIAL RULE FOR BATTERED SPOUSES, CHILDREN, AND PARENTS – Any limitation under this section on the deadlines for filing such motions shall not apply –
>
> (I) if the basis for the motion is to apply for relief under clause **(iii) or (iv) of section 204(a)(1)(A)**, clause (ii) or (iii) of section 204(a)(1)(B), or section 240A(b)(2) or section 244(a)(3);
>
> (II) if the motion is accompanied… by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;
>
> (III) if the motion to reopen is filed within 1 year of the entry of the final order of removal…; and
>
> (IV) if the alien is physically present in the United States at the time of filing the motion.

First, Respondent is a battered spouse who is eligible to file a self-petition under INA § 204(a)(1)(A)(iii). Section 204(a)(1)(A)(iii) of the INA allows an alien who has been battered or subjected to extreme cruelty by the his or her U.S. Citizen spouse to file a petition with the Attorney General, or what is commonly known as the VAWA self-petition. Second, Respondent filed her self-petition with the USCIS Vermont Service Center on November 16, 2005 and has received a prima facie case notice. Copies of the self-petition and her prima facie case notice are attached with this motion. See Exhibit E. Third, Respondent has filed this motion to reopen within one year of her final order of removal, which was entered on August 2, 2005. Finally, the Respondent is currently present in the United States and was physically present in the United States when this motion was filed. Therefore, this motion is timely filed pursuant to INA § 240(c)(7)(C)(iv).

B. A motion to reopen may be granted based on new evidence that is material, was not available and could not have been discovered or presented at the hearing. 8

CFR §1003.23(b)(3).

The Respondent seeks to present a VAWA self-petition as a form of relief. Respondent is eligible to file a VAWA self-petition pursuant to INA § 204(a)(1)(A)(iii) and is submitting a copy of her VAWA self-petition and her prima facie case notice with her motion. See Exhibit E. Evidence of her abuse is material because it is a prerequisite element that qualifies Respondent for relief as a battered spouse under INA § 204(a)(1)(A)(iii), which allows battered spouses of U.S. citizens to file self-petitions with the Attorney General. The VAWA self-petition is material because its approval would allow Respondent to adjust her status to legal permanent resident.

Furthermore, Respondent's evidence of abuse and VAWA claim was not available at the time of the hearing because the abuser was present at the hearing and the Respondent could not and should not have to present allegations of abuse in the presence of her batterer. Although a statement by Mr. J describing his mistreatment of Respondent was submitted at the hearing, evidence as to the nature and degree of Mr. J's abuse of the Respondent was not presented. Had the Respondent asserted a VAWA claim where she would have to directly accuse her husband of abuse, her safety would have been at risk.

Any procedure dealing with VAWA claims should be conducted with the utmost care to ensure the confidentiality of the process. Section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) as amended by VAWA § 817, and the May 5, 1997 Department of Justice memo interpreting that section established clear standards regarding the confidentiality of records relating to battered immigrants. See Exhibit B and D. Section 384 explicitly prohibits any Department of Homeland Security official or employee from disclosing information that relates to an alien who has filed a VAWA self-petition. Congress enacted § 384 precisely in order to secure the integrity of the immigration process and to ensure the personal

safety of victims of domestic violence in the event of threats by an abusive spouse. Requiring Respondent to assert her VAWA claim and requiring her to present evidence of her abuse in the presence of her abuser would have been contrary to Congress' intentions.

The facts show that Respondent is a classic victim of domestic violence. Domestic violence is typically a cycle of abuse that is a pattern of growing tension, abuse, remorse and reconciliation. Perpetrators of domestic violence use a myriad of coercive and intimidating tactics in their attempts to control and dominate their partners. In the Respondent's case, her husband continually insulted her, intimidated her with threats of withdrawing his immigration petition, which he eventually did, and physically assaulting her.

Like other battered women, Respondent experienced shame, embarrassment and isolation over her situation. She often blamed herself for her husband's behavior. When her husband finally acquiesced to attend marriage counseling when he had never done so before, Respondent thought that he was serious about making their marriage work, and in her mind, if she refused to reconcile this time, she would have been the cause of the failed marriage. So, of course, she did all she could to work things out with her husband. Unfortunately for the Respondent, her husband was not serious about changing his behavior. Once again, their relationship was simply progressing through the cycle of abuse, and the Respondent's husband was simply remorseful and trying to temporarily atone for his behavior. In light of this, had Respondent mentioned her husband's abusive behavior at the hearing and in his presence, Respondent's husband may have reacted violently, and her safety would have been endangered.

Respondent is presenting new evidence that is material, was not available and could not have been discovered or presented at the hearing. Therefore, she is eligible to reopen her removal proceedings pursuant to 8 CFR §1003.23(b)(3).

VI. RESPONDENT IS ELIGIBLE TO HAVE HER REMOVAL STAYED UNTIL FINAL ADJUDICATION OF THIS MOTION.

Under INA § 240(c)(7)(C)(iv), the Respondent is eligible to have her removal stayed while this motion to reopen is being adjudicated. The filing of a motion to reopen under INA § 240(c)(7)(C)(iv) "shall stay the removal of the alien pending final disposition of the motion including exhaustion of all appeals if the motion establishes a prima facie case for the relief applied for." INA § 240(c)(7)(C)(iv). The Respondent has filed this motion pursuant to INA § 240(c)(7)(C)(iv), and she has established a prima facie case for her VAWA self-petition. Please see Exhibit E for a copy of Respondent's prima facie case notice issued by USCIS Vermont Service Center. Therefore, Respondent is eligible to have her removal stayed pending final adjudication of this motion.

VII. RESPONDENT WILL BE ELIGIBLE TO ADJUST STATUS ONCE HER VAWA SELF-PETITION HAS BEEN APPROVED.

Although an arriving alien is precluded from adjusting status while in removal proceedings,[5] the regulation provides an exception for arriving aliens who departed the United States with advance parole. Individuals who are classified as arriving aliens due to a departure and reentry under advance parole may renew an adjustment application in removal proceedings under 8 CFR part 240 if the individual had (1) previously been inspected and admitted; (2) had filed an adjustment application for adjustment prior to seeking advance parole; and was granted advance parole specifically for the purpose of returning to pursue the pending adjustment application.[6] Based on the facts, Respondent meets the requirements of the regulation. She had been inspected and admitted prior to filing an adjustment application. Prior to her departure from the United States, she was granted advance parole specifically for the purpose of returning

[5] 8 C.F.R. §245.1(c)(8)
[6] 8 C.F.R. §245.2(a)(1).

to pursue the application. So, once the Respondent's self-petition has been approved, she will be eligible to adjust whether she is removal proceedings or not.

CONCLUSION

Because Respondent has met the all requirements to file a motion to reopen under 8 CFR § 1003.23(b)(3) and INA § 240(c)(7)(C)(iv), we respectfully request that the Immigration Judge reopen removal proceedings, stay Respondent's removal and terminate removal proceedings, or administratively close proceedings so that the Service may adjudicate Respondent's self-petition and so that she may later adjust status to lawful permanent resident with the Service. In the alternative, we request that the Immigration Judge reopen removal proceedings, stay Respondent's removal and allow Respondent to apply for VAWA cancellation of removal.

Please find attached the following supporting documentation:

Exhibit A: Form EOIR-28;
Exhibit B: Copy of VAWA 2005, Pub. L. No 109-162 § 825(a)(1); INA § 240(c)(7)(C)(iv)(updated through July 19, 2005); copy of VAWA 2005 , Pub. L. No 109-162 § 817; and copy of IIRIRA § 384; and
Exhibit C: 8 CFR § 1003.23(b)(3) and 8 CFR § 245.2(a)(1); and
Exhibit D: INS memorandum dated May 6, 1997; and
Exhibit E: Prima Facie Case Notice, Receipt Notice for I-360 and Form I-360 Self-Petition, with supporting documentation.

Respectfully Submitted,

_____

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
IMMIGRATION COURT
PHILADELPHIA, PENNSYLVANIA

In the Matter of: MARIA DOES File No.: A# 1010101010

[PROPOSED] ORDER OF THE IMMIGRATION JUDGE

Upon consideration of Respondent's Emergency Motion to Reopen, it is HEREBY ORDERED that the motion be [ ] GRANTED [ ] DENIED because:

[ ] DHS does not oppose the motion.
[ ] The respondent does not oppose the motion.
[ ] A response to the motion has not been filed with the court.
[ ] Good cause has been established for the motion.
[ ] The court agrees with the reasons stated in the opposition to the motion.
[ ] The motion is untimely per _____.
[ ] Other:_____.

Deadlines:

[ ] The application(s) for relief must be filed by _____.
[ ] The respondent must comply with DHS biometrics instructions by _____.

_____ _____
Robert Ro Date
Immigration Judge

Certificate of Service

This document was served by: [ ] Mail [ ] Personal Service
To: [ ] Noncitizen [ ] Noncitizen c/o Custodial Officer [ ] Noncitizen's Attorney [ ] DHS
Date:_____ By: Court Staff_____

CERTIFICATE OF SERVICE

I hereby certify that I have sent a true and correct copy of the foregoing motion to the Department of Homeland Security Trial Litigation Unit, 114 North 8th Street; Philadelphia, PA 19107 on this 18th day of December 2005 via certified mail, return receipt requested.

_____
Edward T Moises