**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals*
*Office of the Clerk*

*5107 Leesburg Pike, Suite 2000*
*Falls Church, Virginia 22041*

**Wilk, Katherine Barrett, Esq.**
**Attorney at Law**
**2800 LaSalle Plaza, 800 LaSalle Ave.**
**Minneapolis, MN 55402**

**DHS/ICE Office of Chief Counsel - BLM**
**2901 Metro Drive, Suite 100**
**Bloomington, MN 55425**

**Name: L[redacted] M[redacted] A[redacted]** **A0[redacted]**

**Date of this notice: 3/5/2012**

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.
Pauley, Roger
Wendtland, Linda S.

File: A0[redacted] - Bloomington, MN

Date: MAR - 5 2012

In re: A[redacted] L[redacted]-M[redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Katherine Barrett Wiik, Esquire

AMICUS CURIAE FOR RESPONDENT: National Network to End Violence Against Immigrant Women; Legal Momentum; The Family Violence Prevention Fund; ASISTA Immigration Assistance Project

ON BEHALF OF DHS: Amy K.R. Zaske
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Special rule cancellation of removal

This case was last before us on December 10, 2009, when we dismissed the respondent's appeal from the Immigration Judge's June 13, 2008, decision denying the respondent's application for special rule cancellation of removal under section 240A(b)(2)(A)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(2)(A)(i)(II).[1] On [redacted] 2010, the United States Court of Appeals for the Eighth Circuit (the "Eighth Circuit"), the jurisdiction in which this case arises, in a short order granted the Attorney General's motion to remand the case to us in light of the death of the respondent's daughter at age 4, evidently from a rare form of cancer in October 2008.[2] During the pendency of the remand, the respondent filed a brief, as well as a motion to remand to the Immigration Judge. The Department of Homeland Security (the "DHS") filed a brief on remand, as well as an opposition to the respondent's motion to remand. Various Amicus Curiae ("Amici") also jointly filed a brief in support of the respondent on remand.

[1] We note that on May 11, 2010, we also deemed the respondent's motion to reopen withdrawn because she had been deported from the United States.

[2] Neither the Department of Homeland Security nor the Board was aware of the child's death at the time the Board issued its decision. The death was noted by the respondent in an April 2010 motion to stay her removal.

The respondent, a citizen of Guatemala, seeks special rule cancellation of removal as an alien "who is the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent." *See* section 240A(b)(2)(A)(i)(II) of the Act. Since the respondent never married the lawful permanent resident father of her daughter, she cannot seek relief on the basis of her status as a victim of abuse by him (I.J. at 15). Instead, the respondent's claim of cruelty is predicated on acts of violence committed by the father of the respondent's daughter against the respondent, which occurred on some occasions in the presence of the daughter, mostly during her infancy, but with the last incident occurring when she was almost 3 ½ years old (Exh. 31). Specifically, the claim is based on alleged psychological harm to the daughter (which an expert testified that such damage could occur if the violence took place in the presence or within the hearing of the child) notwithstanding that there "is no direct evidence that [the father] had any intention of harming his daughter" and "no evidence in the record that [the father] ever physically harmed his daughter" (I.J. at 16). During the pendency of her proceedings, however, the respondent's daughter died. Therefore, the principal question on remand is whether the respondent remains eligible for special rule cancellation of removal despite the death of her daughter. We find that she does.

On remand, the respondent and Amici argue that the statute is written in the past tense and thus all that is required is that she be the parent of a child who "has been" battered or subjected to extreme cruelty. On remand, the DHS argues that the respondent is no longer eligible for relief because of her daughter's death. Specifically, the DHS argues that a person can qualify as the parent of a child who has been battered or subjected to extreme cruelty only if the child is living. The DHS also argues that we properly determined in our December 10, 2009, decision that the respondent failed to establish that her daughter was subjected to extreme cruelty. Finally, the DHS argues that the respondent's motion should be denied based on her removal from the United States in April 2010.[3] See 8 C.F.R. § 1003.2(d).

As mentioned above, section 240A(b)(2)(A)(i)(II) of the Act provides for relief for an alien "who is the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent." We find that the answer to whether this form of relief terminates upon the death of the victim child depends not on grammar (i.e., whether the statute is written in the past tense; indeed, necessarily any harm will have occurred in the past, before relief is sought) but on the statutory purpose. In *Matter of Federiso*, 24 I&N Dec. 661 (BIA 2008), we held that an alien must establish a qualifying relationship to a living relative to be eligible for a waiver of removal under section 237(a)(1)(H)(i) of the Act,

---

[3] We adhere to our holding with regard to the departure bar in *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008), but we find that the Eighth Circuit's remand compels us to address the merits insofar as the respondent's appeal is concerned. *See Ortega-Marroquin v. Holder*, 640 F.3d 814 (8th Cir. 2011) (finding it unnecessary to resolve the issue of the departure bar). We note that the court's remand occurred not in the context of the respondent's motion to reopen, but in the course of the court's adjudication of the respondent's petition for review of our initial order entered on direct appeal of the order of the Immigration Judge.

8 U.S.C. § 1227(a)(1)(H)(i).[4] However, in that case, the legislative history showed that the waiver was intended to foster family unity. *See id.* Here, by contrast, the relevant provisions of the statute, which were added to the Act as part of the Violence Against Women Act of 1994 ("VAWA"), appear to have been intended to protect certain aliens from domestic violence if committed by, e.g., a United States citizen or lawful permanent resident against an alien parent of a child of the abuser. *See* section 240A(b)(2)(A)(i)(II) of the Act. In this very different context, we do not believe that Congress would have intended an alien's eligibility for relief to terminate with the death of the child. Indeed, as Amici argue, under such an interpretation an offending parent could kill an abused child and thereby deny VAWA relief to the alien parent in removal proceedings. We therefore find that the respondent continues to be eligible for relief despite the death of her daughter.

In her motion to remand, the respondent argues that the Board erred in determining that she failed to establish that her daughter was subjected to extreme cruelty. We find that remand of proceedings is warranted. In the Immigration Judge's June 13, 2008, decision, he incorrectly indicated that the respondent was required to establish actual harm.[5] In fact, as argued by the respondent and Amici in the proceedings following the remand by the Eighth Circuit, actual injury is not a prerequisite to a finding of "extreme cruelty." *See* 8 C.F.R. § 204.2(c)(1)(vi) (defining "extreme cruelty" as including acts or threatened acts of violence and providing that psychological abuse constitutes an act of violence in the context of VAWA self-petitions for visas). Furthermore, there is no requirement that the abuser intend to inflict harm on the victim. Thus, as here, it is possible that "extreme cruelty" can be demonstrated by showing that the abuser knew (or perhaps was aware of facts supporting a finding that the abuser should have known) that a child was present when the abuse occurred. On remand, Amici have submitted numerous documents discussing the potentially harmful impact to children of witnessing abuse. Moreover, as aforementioned, the respondent submitted evidence following the underlying hearing about an incident of abuse that occurred in the presence of her daughter when she was almost 3 ½ years old (Exh. 31). We find that remand of proceedings to the Immigration Judge is warranted for the Immigration Judge to reassess whether the respondent established that her daughter suffered sufficient psychological abuse to constitute "extreme cruelty," and to consider any related evidence submitted by the parties, including Amici.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing decision.

FOR THE BOARD

[4] We note that the Ninth Circuit reversed *Matter of Federiso*. *See Federiso v. Holder*, 605 F.3d 695 (9th Cir. 2010). Notwithstanding, we continue to apply our precedent elsewhere, *see Matter of U. Singh*, 25 I&N Dec. 670 (BIA 2012), although we find *Matter of Federiso* distinguishable here.

[5] We note that in determining that the respondent failed to establish extreme cruelty, the Immigration Judge made irrelevant observations about the fact that the respondent returned to the abuser's home after the incidents of abuse (I.J. at 16).