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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
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Washington, D.C. 20536



FILE: [REDACTED]
EAC 02 019 50225

Office: Vermont Service Center

Date: JAN 24 2003

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

APPLICATION: Petition for Special Immigrant Battered Spouse Pursuant to Section 204(a)(1)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1154(a)(1)(A)(iii)

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a native and citizen of India who is seeking classification as a special immigrant pursuant to section 204(a)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1154(a)(1)(A)(iii), as the battered spouse of a United States citizen.

The director determined that the petitioner failed to establish that he: (1) has resided in the United States with the citizen or lawful permanent resident spouse; and (2) has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage; or is the parent of a child who has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage. The director, therefore, denied the petition.

On appeal, counsel asserts that the petitioner has reason to believe that he has met the eligibility requirements because the petitioner and his spouse stayed together for two weeks in India after their wedding, and again for two weeks when the petitioner came to America to join his wife. Counsel further asserts that the petitioner still believes that he was mentally abused and is still suffering from said abuse. He submits additional evidence.

8 C.F.R. 204.2(c)(1) states, in pertinent part, that:

(i) A spouse may file a self-petition under section 204(a)(1)(A)(iii) or 204(a)(1)(B)(ii) of the Act for his or her classification as an immigrant relative or as a preference immigrant if he or she:

(A) Is the spouse of a citizen or lawful permanent resident of the United States;

(B) Is eligible for immigrant classification under section 201(b)(2)(A)(i) or 203(a)(2)(A) of the Act based on that relationship;

(C) Is residing in the United States;

(D) Has resided in the United States with the citizen or lawful permanent resident spouse;

(E) Has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage; or is the parent of a child who has been battered by, or has been the subject

of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage;

(F) Is a person of good moral character;

(G) Is a person whose deportation (removal) would result in extreme hardship to himself, herself, or his or her child; and

(H) Entered into the marriage to the citizen or lawful permanent resident in good faith.

The record reflects that the petitioner married his United States citizen spouse on March 13, 1997, in India. The petitioner claims to have entered the United States on August 24, 2001 with a "V" nonimmigrant visa. On October 1, 1997, a self-petition was filed by the petitioner claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, his U.S. citizen spouse during their marriage.

PART I

8 C.F.R. 204.2(c)(1)(i)(D) requires the petitioner to establish that he has resided in the United States with his U.S. citizen spouse.

The director determined that upon initial review, the record did not reflect that the petitioner had resided with his spouse in the United States. He was, therefore, requested on January 31, 2002 to submit additional evidence. The director listed examples of the evidence he may submit to show joint residence. Because the evidence furnished in response to the request was insufficient to establish that the petitioner had resided with his spouse, the director denied the petition.

On appeal, counsel submits statements from two individuals stating that they had the opportunity to visit the petitioner and his wife. He also submits a statement from the petitioner stating that he and his wife stayed together for two weeks upon his arrival in the United States.

These statements, without any supporting evidence, are insufficient to establish that the petitioner and his spouse resided together. Furthermore, the petitioner's claim, on appeal, that he resided with his spouse for two weeks after he arrived in the United States is inconsistent with Form I-360, Section B, which asks, "When did you live with the person named in Section A? From (Month/Year)." The petitioner replied "n/a" (not applicable) to this section. Further, the petitioner made no notation, nor did he provide an

answer to Section B where it requests the applicant to "Give the last address at which you lived together with the person named in Section A, and show the last date that you lived together with that person at that address."

The inconsistencies in the evidence presented bring into question the credibility of the petitioner's claim that he resided in the United States with his spouse. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service. 8 C.F.R. 204.2(c)(2)(i). The petitioner has failed to submit credible evidence to establish that he resided in the United States with his U.S. citizen spouse. The petitioner has failed to overcome the director's finding pursuant to 8 C.F.R. 204.2(c)(1)(i)(H).

PART II

8 C.F.R. 204.2(c)(1)(i)(E) requires the petitioner to establish that he has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage; or is the parent of a child who has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage.

The qualifying abuse must have been sufficiently aggravated to have reached the level of "battery or extreme cruelty." 8 C.F.R. 204.2(c)(1)(vi) provides:

[T]he phrase, "was battered by or was the subject of extreme cruelty" includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence. The qualifying abuse must have been committed by the citizen or lawful permanent resident spouse, must have been perpetrated against the self-petitioner or the self-petitioner's child, and must have taken place during the self-petitioner's marriage to the abuser.

8 C.F.R. 204.2(c)(2) provides, in part:

(i) Self-petitioners are encouraged to submit primary evidence whenever possible. The Service will consider, however, any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service.

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(iv) Evidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel. Persons who have obtained an order of protection against the abuser or have taken other legal steps to end the abuse are strongly encouraged to submit copies of the relating legal documents. Evidence that the abuse victim sought safe-haven in a battered women's shelter or similar refuge may be relevant, as may a combination of documents such as a photograph of the visibly injured self-petitioner supported by affidavits. Other forms of credible relevant evidence will also be considered. Documentary proof of non-qualifying abuse may only be used to establish a pattern of abuse and violence and to support a claim that qualifying abuse also occurred.

The director determined that upon initial review, the record did not reflect that the petitioner was the subject of battery or extreme mental cruelty. The petitioner was, therefore, requested on January 31, 2002 to submit additional evidence. The director listed examples of the evidence he may submit to establish extreme cruelty. He noted that the petitioner, in response, submitted a statement that his spouse told him she no longer wished to stay with him. The director maintained that abandonment by a spouse does not constitute extreme mental cruelty.

The petitioner, in an affidavit dated February 21, 2002, states, "[a]fter my arrival my wife told me that she no longer wishes to stay with me because she is seeing an american guy. She also does not care anymore about our marriage or about our family traditions." No mention was made in this statement, nor did the petitioner furnish any other evidence, that he was the subject of extreme cruelty. The petitioner now claims on appeal that his spouse began asking him for money to pay the rent and that she has a very bad temper. His appeal states "she was harassing me, screaming at me and mentally torturing me. After few days more she went out and never came back." This issue was not previously addressed by the petitioner and is inconsistent with his previous statement. As maintained by the director, abandonment by a spouse does not constitute extreme mental cruelty.

The affidavits from Mukesh Patel and Ramesh Patel, furnished on appeal, indicate that the petitioner told the affiants that his wife was constantly harassing and screaming at him. The alleged abuse described is based solely upon information offered by the petitioner, and failed to establish that it was based on anything other than statements made by the petitioner. Nor did the affiants establish that they were eye-witnesses to the abuse and could provide sufficient details regarding any incidents of abuse or extreme cruelty. Further, while Ramesh Patel indicates that one day he visited the petitioner and his wife, and witnessed the petitioner's wife screaming and yelling loudly, this description reflects what would be considered a troubled marital relationship but does not constitute qualifying abuse. Furthermore, the affiant's claim that he visited the couple is inconsistent with the statement of the petitioner that after his arrival in the United States, his wife told him that she no longer wished to stay with him, and that his wife "went out and never came back."

The evidence provided in the present case does not suggest that the marital difficulties claimed by the petitioner were beyond those encountered in many marriages. The record indicates that the citizen spouse abandoned the marital relationship to live with her boyfriend. "Abandonment" is not included in, nor does it meet, the definition of qualifying abuse.

As provided in 8 C.F.R. 204.2(c)(1)(vi), the qualifying abuse must have been sufficiently aggravated to have reached the level of "battery or extreme cruelty." The record contains insufficient evidence to establish that the claimed abuse perpetrated toward the petitioner by his spouse was "extreme." The petitioner has failed to establish that he was battered by or was the subject of "extreme cruelty" as contemplated by Congress, and to overcome the director's finding pursuant to 8 C.F.R. 204.2(c)(1)(i)(E).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.