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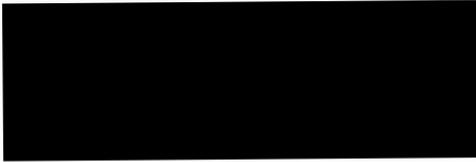
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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Services

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FILE:

██████████
EAC 05 022 52692

Office: VERMONT SERVICE CENTER

Date: JUL 03 2006

IN RE:

Petitioner: ██████████

PETITION: 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)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action.

On October 27, 2004, the petitioner filed a Form I-360 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 an alien subjected to battery or extreme cruelty by his United States citizen spouse.

The director denied the petition because the record did not establish that the petitioner was battered by or subjected to extreme cruelty by his United States citizen spouse during their marriage.

On appeal, the petitioner submits a brief and additional evidence.

For the reasons discussed below, we concur with the director's determination that the petitioner did not establish the requisite battery or extreme cruelty and find that counsel's claims on appeal do not overcome this basis for denial. However, the case will be remanded for issuance of a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

Section 204(a)(1)(A)(iii) of the Act provides that an alien who is the spouse of a United States citizen may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the United States citizen spouse in good faith and that during the marriage, the alien was battered or subjected to extreme cruelty perpetrated by the alien's spouse. In addition, the alien must show that he or she is eligible to be classified as an immediate relative under section 201(b)(2)(A)(i) of the Act, resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(A)(iii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II).

The corresponding regulation at 8 C.F.R. § 204.2(c)(1) further explicates the statutory requirements and states, in pertinent part:

(vi) Battery or extreme cruelty. For the purpose of this chapter, the 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 . . . , must have been perpetrated against the self-petitioner . . . and must have taken place during the self-petitioner's marriage to the abuser.

The evidentiary standard and guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are contained in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

Evidence for a spousal self-petition –

(i) *General.* 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.

* * *

(iv) *Abuse.* 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 abuses may only be used to establish a pattern of abuse and violence and to support a claim that qualifying abuse also occurred.

The petitioner is a 52-year old native and citizen of Ghana. The petitioner indicated that he entered the United States without inspection on or about April 5, 1994. The petitioner filed a Form I-589 asylum application April 20, 1994. The Newark Asylum Office denied the asylum application and placed the petitioner in removal proceedings on November 16, 1995. On July 24, 1999, the petitioner married [REDACTED] 14 years his junior, in Philadelphia. The petitioner's wife, a United States citizen, filed a Form I-130 on the petitioner's behalf on February 29, 2000. The district director denied the Form I-130 petition on June 18, 2002. The petitioner filed the instant petition on October 27, 2004. The petitioner's next removal hearing is scheduled for December 5, 2006.

The first issue to be addressed in this proceeding is whether the petitioner established that he was battered by, or subjected to extreme cruelty perpetrated by, his spouse.

Finding the evidence insufficient to establish that the petitioner was battered by, or subjected to extreme cruelty perpetrated by, his spouse, on August 4, 2005, the director asked the petitioner to submit evidence (RFE) to show that he had been the subject of battery or extreme cruelty committed by his wife, [REDACTED]. The petitioner responded to the RFE on October 6, 2005.

The evidence relating to abuse consists of the following:

- The petitioner's affidavits dated October 12, 2004 and December 2, 2004.

- Police report showing that the petitioner and his step-children were arrested on July 9, 2005 and charged with violating the Controlled Substance Act of 1972.¹
- Police incident report dated July 29, 2004.
- Police incident report dated August 11, 2005.

In his affidavit, the petitioner complained that his wife would not have sex with him for more than one month and that she never helped to pay bills. He stated that she abandoned her three children, ages 15, 19 and 20 with him. He added that she refused to attend immigration interviews with him. The conduct described does not rise to the level of battery or extreme mental cruelty. The petitioner further stated that he told his wife to withdraw \$2,000 from an account to post bail after his drug-related arrest but she used the money for something else. On appeal, counsel for the petitioner asserts that the petitioner's wife's failure to post bond is another example of her cruelty towards the petitioner. The record does not persuasively establish that the financial and marital problems caused by the wife were part of an overall pattern of physical violence or amounted to psychological or sexual abuse.

The petitioner stated that his wife yelled, slapped and insulted him in front of her children. Yet, the petitioner failed to submit corroborating evidence in the form of statements from the children.

In his affidavit, the petitioner stated that on September 29, 2004, his wife grabbed a knife to stab him, so he ran outside and called the police. He further stated that he told the police what happened and that they wrote up a report. The police incident report is dated July 29, 2004, and not September 29, 2004. The report does not mention a knife. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The August 11, 2005 police report states that the petitioner complained that his wife used a hammer to break open a second floor bedroom door. There is no indication that the petitioner's wife was arrested or charged for the incident.

The record is also devoid of any documentation in the form of reports from court officials, medical personnel, school officials, clergy, social workers, and other social agency personnel. The petitioner did not claim to have sought assistance in a shelter or seek an order for protection. There is no requirement that an applicant produce such documentary evidence, but the petitioner failed to explain why he did not take legal steps to end his wife's alleged abuse. The record does not indicate that the petitioner ever sought medical or mental health treatment for the effects of his wife's treatment or that he sought assistance from religious figures or social service agencies. The petitioner has not established that he was battered or subjected to extreme cruelty by his United States citizen spouse.

¹ Counsel for the petitioner submitted evidence that the charges against the petitioner were *nolle prosequied*.

Based on the current record, the petitioner is thus ineligible for classification under section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii).

However, the case will be remanded because the director failed to issue a NOID pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii), which states, in pertinent part:

Notice of intent to deny. If the preliminary decision on a properly filed self-petition is adverse to the self-petitioner, the self-petitioner will be provided with written notice of this fact and offered an opportunity to present additional information or arguments before a final decision is rendered.

Consequently, the case must be remanded for issuance of a NOID, which will give the petitioner a final opportunity to overcome the deficiencies of his case.

On remand, the director should also consider whether the petitioner is subject to section 204(g) of the Act, which states:

Notwithstanding subsection (a), except as provided in section 245(e)(3), a petition may not be approved to grant an alien immediate relative status by reason of a marriage which was entered into during the period [in which administrative or judicial proceedings are pending], until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.

Section 245(e) of the Act states:

- (1) Except as provided in paragraph (3), an alien who is seeking to receive an immigrant visa on the basis of a marriage which was entered into during the period described in paragraph (2) may not have the alien's status adjusted under subsection (a).
- (2) The period described in this paragraph is the period during which administrative or judicial proceedings are pending² regarding the alien's right to be admitted or remain in the United States.
- (3) Paragraph(1) and section 204(g) shall not apply with respect to a marriage if the alien establishes by clear and convincing evidence to the satisfaction of the [Secretary of Homeland Security] that the marriage was entered into in good faith and in accordance

² See *Blackwell v. Thornburgh*, 745 F.Supp. 1529, 1533-37 (C.D. Cal. 1989); *Minatsis v. Brown*, 713 F.Supp. 1056 (S.D. Ohio 1989); *Matter of Enriquez*, 19 I&N Dec. 554 (BIA 1988); and Legal Opinion, General Counsel, CO 204.21-P (Oct. 17, 1990), reprinted in 68 *Interpreter Releases* 89 (Jan. 18, 1991) in which CIS determined that a case is also deemed pending even if it is administratively closed.

with the laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition under section 204(a) . . . with respect to the alien spouse or alien son or daughter. In accordance with the regulations, there shall be only one level of administrative appellate review for each alien under the previous sentence.

The regulation at 8 C.F.R. § 245.1(c)(9)(v) states, in pertinent part:

Evidence to establish eligibility for the bona fide marriage exemption. Section 204(g) of the Act provides that certain visa petitions based upon marriages entered into during deportation, exclusion or related judicial proceedings may be approved only if the petitioner provides clear and convincing evidence that the marriage is bona fide

The petitioner wed [REDACTED] on July 24, 1999, long after he was placed in removal proceedings on November 16, 1995. There is no evidence in the record that the petitioner has resided outside the United States for a two-year period beginning after the date of the marriage. Therefore, the petitioner must establish his eligibility for the bona fide marriage exemption.

On remand, the director should also consider whether the petitioner established that he is a person of good moral character. According to the Investigation Report dated January 24, 2005, the petitioner has a prior narcotics related arrest.³ The petitioner failed to submit a copy of the arrest report, copies of court documents showing the final disposition of the charge(s), and relevant excerpts of law for that jurisdiction showing the maximum possible penalty for each charge.

As always, the burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision that, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.

³ Prior to the January 5, 2005 drug-related arrest.