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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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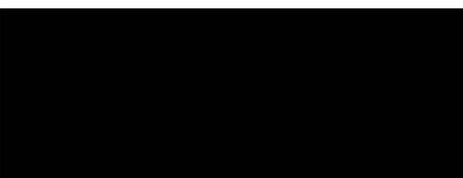


FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **NOV 22 2006**
EAC:05 169 52934

IN RE: Petitioner: [REDACTED]

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 The decision of the director will be withdrawn and the petition will be remanded for further action.

The petitioner seeks classification as a special immigrant pursuant to section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien battered or subjected to extreme cruelty by a United States citizen.

The director denied the petition because the record did not establish that the petitioner's wife battered or subjected him to extreme cruelty during their marriage and that he was a person of good moral character.

On appeal, counsel submits a brief and additional evidence.

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 or a child of 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).

Section 204(a)(1)(J) of the Act states, in pertinent part:

In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) . . . , or in making determinations under subparagraphs (C) and (D), the [Secretary of Homeland Security] shall consider 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 [Secretary of Homeland Security].

The eligibility requirements are further explicated in the regulation at 8 C.F.R. § 204.2(c)(1), which 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.

(vii) *Good moral character.* A self-petitioner will be found to lack good moral character if he or she is a person described in section 101(f) of the Act. Extenuating circumstances may be taken into account if the person has not been convicted of an offense or offenses but admits to the commission of an act or acts that could show a lack of good moral character under section 101(f) of the Act. . . . A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she . . . committed unlawful acts that adversely reflect upon his or her moral character, or was convicted or imprisoned for such acts, although the acts do not require an automatic finding of lack of good moral character. A self-petitioner's claim of good moral character will be evaluated on a case-by-case basis, taking into account the provisions of section 101(f) of the Act and the standards of the average citizen in the community.

The evidentiary standard and guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are further explicated 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.

(v) *Good moral character.* Primary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit. The affidavit should be accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. Self-petitioners who

lived outside the United States during this time should submit a police clearance, criminal background check, or similar report issued by the appropriate authority in each foreign country in which he or she resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. If police clearances, criminal background checks, or similar reports are not available for some or all locations, the self-petitioner may include an explanation and submit other evidence with his or her affidavit. The Service will consider other credible evidence of good moral character, such as affidavits from responsible persons who can knowledgeably attest to the self-petitioner's good moral character.

The record in this case shows the following pertinent facts and procedural history. The petitioner is a native and citizen of Turkey who entered the United States on July 30, 1992 as a nonimmigrant visitor (B-2). On September 1, 2000, the petitioner married Y-A-¹, a U.S. citizen, in New York. The petitioner filed this Form I-360 on May 21, 2005. On June 1, 2005, the director issued a Request for Evidence (RFE) of, *inter alia*, the requisite battery or extreme cruelty and the petitioner's good moral character. The petitioner, through counsel, requested and was granted additional time to respond. On September 28, 2005, counsel submitted additional evidence relevant to battery or extreme cruelty, but stated that the petitioner was unable to obtain police clearances because there was an outstanding order of protection issued for his wife against him. On December 8, 2005, the director denied the petition for lack of the requisite battery or extreme cruelty and good moral character. The petitioner, through counsel, timely appealed.

On appeal, counsel claims that the evidence submitted below and on appeal establishes the petitioner's eligibility. We concur with the director's determinations and find that counsel's claims and the evidence submitted on appeal do not overcome the director's grounds for denial. Nonetheless, the petition will be remanded because the director denied the case without first issuing a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

Battery or Extreme Cruelty

The petitioner submitted the following evidence relevant to his claim of battery or extreme cruelty:

- The petitioner's typewritten, undated and unsigned statement;
- The petitioner's second, typewritten and signed statement;
- An undated letter from the petitioner's friend, [REDACTED]

A copy of a Summons with Notice of the petitioner's wife's Action for Divorce from the petitioner on the grounds of abandonment and cruel and inhumane treatment.

In his statements, the petitioner explains that after the birth of their daughter, the petitioner's relationship with his wife became worse. He states that his wife took a less active role at home, argued

¹ Name withheld to protect individual's identity.

with him and “would only respond to [his] inquiries with abusive threats that [their] marriage was over.” The petitioner reports that when he was unemployed, he had to borrow money from his parents to pay bills because his wife would not give him money, but that when he found a job at a convenience store, his wife belittled him and claimed he was lazy. The petitioner states that his wife’s desire for material things caused their credit card debt to increase immensely. The petitioner explains that he gained about 50 pounds during their marriage due to the stress, his wife’s verbal abuse and her refusal to cook at home.

The petitioner states that his wife threatened that she would not attend their immigration interview and asked their attorney what she could do to take his “greencard” away from him after he received it. After their immigration interview, the petitioner states that his wife went to Turkey with their daughter and that while they were gone, their attorney told him that his wife had written a letter saying that he married her for his permanent residence. When he confronted her, the petitioner states that his wife said that if he got a “greencard” and they later got divorced, she would not be able to get a “greencard” for her next Turkish husband and that she just decided that the petitioner did not “deserve this greencard.”

The petitioner states that his wife was combative and disrespectful towards his family. He describes one incident where his mother and sister tried to stop an argument between him and his wife called his sister a derogatory name, used foul language with his mother and threw a shoe towards her. The petitioner states that he then threw a slipper at his wife, his wife called the police and the police came to the house and spoke with them. The petitioner states that three days later, his wife obtained an order of protection against him by claiming that he physically harassed her, which the petitioner states was “a total lie.” However, the petitioner did not submit a copy of the protection order and evidence of its withdrawal, modification or expiration.

██████████ the petitioner’s friend, states that he witnessed the petitioner’s wife arguing with the petitioner on several occasions, that he saw that the petitioner’s wife was disrespectful towards the petitioner and his family, and that the petitioner told him that his wife was trying to take away his “greencard.” ██████████ does not provide any probative details about any physical or verbal abuse that he witnessed the petitioner’s wife inflict upon the petitioner.

On appeal, counsel submits a psychiatric evaluation of the petitioner by ██████████ ██████████ indicates that her evaluation is based on one meeting with the petitioner of an unspecified length. ██████████ describes the petitioner’s relationship with his wife, as related to her by the petitioner, and ██████████ diagnoses the petitioner with Adjustment Disorder with mixed anxiety and depressed mood, Partner relational problem. ██████████ evaluation contains no substantive analysis of the petitioner’s mental health condition, which would indicate that his condition is consistent with having survived domestic violence.

The present record does not establish that the behavior of the petitioner’s wife rose to the level of battery or extreme cruelty, as that term is defined in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). The

evidence does not demonstrate that the petitioner's wife physically assaulted him, threatened him with violence or that her nonviolent actions were otherwise part of an overall pattern of violence. The petitioner claims that his wife's claims of his abuse were false, but the petitioner does not submit evidence to support his claim, such as documentation of the resolution of his wife's protection order or evidence that he contested her divorce petition on the grounds of his cruel and inhumane treatment. Although he is not required to do so, the petitioner does not explain why such evidence does not exist or is unobtainable. *See* 8 C.F.R. §§ 204.1(f)(1), 204.2(c)(2)(i). The evidence also does not establish that the petitioner's wife's disrespectful treatment of him and his family, her excessive spending, her withdrawal of support for his adjustment of status case or her action for divorce constituted psychological abuse of the petitioner. The petitioner has not established that his wife battered or subjected him or his child to extreme cruelty, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Good Moral Character

The petitioner did not establish that he is a person of good moral character. In response to the RFE, counsel stated that the petitioner was unable to obtain police clearances due to the outstanding order of protection against him obtained by his wife. On appeal, the petitioner submits a letter dated January 24, 2006 from the New York State Division of Criminal Justice Services (DCJS) stating that a search of the DCJS's files based on the petitioner's fingerprints and personal data found no criminal or non-criminal case history information.

In cases where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not generally accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). In this instance, however, because the petitioner was not provided with a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii), we have reviewed the DCJS letter in order to determine whether the evidence overcomes the director's ground for denial and the appeal could be sustained without remanding the petition to the director for further action.

The DCJS letter alone fails to establish the petitioner's good moral character. The petitioner states that the police came to his home on March 19, 2005 and that his wife obtained an order of protection against him three days after this incident. Although the petitioner claims that his wife's assertion of his physical harassment was false, he states that he threw a slipper at her. In his second, signed statement, the petitioner reports, "The District Court Harassment charge has been turned to ACOD[.]" but he provides no further explanation. In addition, the record shows that the petitioner's wife filed an action for divorce based, in part, on the petitioner's cruel and inhumane treatment. The petitioner submitted no police report for the March 19, 2005 incident or documentary evidence regarding the outcome of the protection order case and any further proceedings in the divorce case. The petitioner's own, cursory discussion of these events is insufficient to establish that he did not engage in culpable conduct towards his wife, even if such conduct did not result in the petitioner's arrest or conviction. Culpable conduct need not result in a conviction in order to indicate a lack of good moral character. *See* 8 C.F.R.

§ 204.2(c)(1)(vii). The present record thus fails to establish the petitioner's good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

The petitioner has not demonstrated his eligibility for immigrant classification under section 204(a)(1)(A)(iii) of the Act. Nonetheless, the case will be remanded because the director denied the petition without first issuing a NOID. The regulation at 8 C.F.R. § 204.2(c)(3)(ii) directs that CIS must provide a self-petitioner with a NOID and an opportunity to present additional information and arguments before a final adverse decision is made. Accordingly, the case will be remanded for issuance of a NOID, which will give the petitioner a final opportunity to overcome the deficiencies of his case.

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.