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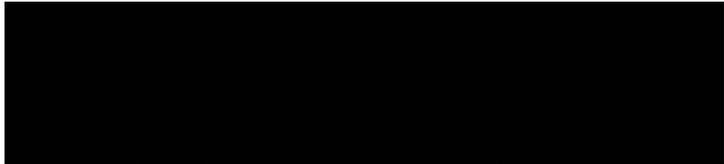
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



EAC 05 140 52919

Office: VERMONT SERVICE CENTER

Date: OCT 04 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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director (Director), Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.

The petitioner seeks 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 denied the petition on December 29, 2005, finding that the petitioner failed to establish that he was battered by or subjected to extreme cruelty by his spouse and that he entered into his marriage in good faith.

The petitioner filed a timely appeal on January 30, 2006.

Section 204(a)(1)(A)(iii) of the Act provides, in pertinent part, that an alien who is the spouse of a United States citizen, who is a person of good moral character, who is eligible to be classified as an immediate relative, and who has resided with his or her spouse, may self-petition for immigrant classification if the alien demonstrates to the [Secretary of Homeland Security] that—

(aa) the marriage or the intent to marry the citizen was entered into in good faith by the alien; and

(bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse.

The regulation at 8 C.F.R. § 204.2(c)(1)(i) states, in pertinent part, that:

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 . . . 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; [and]

* * *

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

The regulation at 8 C.F.R. § 204.2(c)(2)(iv) states:

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 abused 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 regulation at 8 C.F.R. § 204.2(c)(1)(vi) states, in pertinent part:

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 . . . 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 . . . and must have taken place during the self-petitioner's marriage to the abuser.

The record reflects that petitioner married [REDACTED] a United States citizen, on May 14, 2002 in Chattanooga, Tennessee. The petitioner's spouse filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf on October 24, 2002. The petitioner concurrently filed a Form I-485, Application to Adjust Status, on that same date. The Form I-130 petition and the Form I-485 application were denied on February 14, 2005. The petitioner filed the instant Form I-360 self-petition on April 11, 2005, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, his United States citizen spouse during their marriage.

With his initial submission, the petitioner submitted copies of his marriage certificate and birth certificate with translation, his spouse's birth certificate, a personal statement, four affidavits from friends, a letter related to the petitioner's auto insurance, photographs, and evidence related to his previously filed Forms I-130 and I-485.

On July 19, 2005, the director requested further evidence to establish the petitioner's eligibility. Specifically, the director requested further evidence to establish the petitioner's claim of abuse, that he entered into the marriage in good faith, and that he is a person of good moral character.

The petitioner responded to the director's request on September 16, 2005 by submitting a second personal statement, a "domestic violence" evaluation, three additional affidavits, and a police clearance from the city of Atlanta police department.

On December 29, 2005, after reviewing the evidence contained in the record, including the evidence submitted in response to the director's request, the director denied the petition without the issuance of a notice of intent to deny (NOID) in accordance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii),¹ finding that the petitioner had failed to establish that he was battered by or subjected to extreme cruelty by his spouse and that he entered into his marriage in good faith.

On appeal, the petitioner submits a brief, affidavits, and evidence related to the petitioner's spouse's criminal history. The petitioner does not provide any explanation or excuse for his failure to submit the aforementioned evidence when previously requested to by the director. It is noted that in instances 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 does not usually accept evidence offered for the first time on appeal. If the petitioner had wanted the submitted evidence to be considered, she should have submitted the documents in response to the director's request for evidence. *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 the notice of intent to deny as required by regulation, we have reviewed the petitioner's appellate submission in order to determine whether such evidence overcomes the director's stated grounds for denial and could be sustained without remanding to the director for further action. As will be discussed, the petitioner's appellate submission does not overcome the director's findings. Therefore, the case must be remanded for further review.

The petitioner's claim that he has been battered by, or has been the subject of extreme cruelty perpetrated by, his citizen spouse.

In discussing the petitioner's statements and those of his friends, the director found that the actions described did not support a finding that the petitioner was subjected to extreme cruelty. As it relates to the evaluation submitted by the petitioner, the director noted that the credentials of the evaluator were not submitted, that the evaluation provided no specific instances of abuse, and that it appeared that the evaluation was "prepared specifically to respond to [the director's] request for evidence" as it was obtained more than two years after the petitioner separated from his spouse. The director concluded his discussion regarding the petitioner's

¹ The regulation at 8 C.F.R. § 204.2(c)(3)(ii) 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.

claim of abuse by stating that the evidence submitted did not carry “sufficient weight upon which to base an approval.” Upon review, we find concur with the findings of the director.

In his initial statement, the petitioner indicated that soon after their marriage, his spouse began to change, becoming “tired and nervous” and missing days from work. The petitioner claimed that his spouse began to ignore him and then would get angry and curse at the petitioner. The petitioner further claims that his spouse began spending nights out, would be gone for “several days at a time,” and would come home smelling like alcohol. The petitioner also stated that his spouse admitted to using drugs and alcohol, would pressure the petitioner to give her money and would disappear with his car, until she eventually “just stopped calling and disappeared.” The affidavits submitted by the petitioner’s friends support the petitioner’s claims that his spouse would yell at the petitioner, call him names, demand money, and used alcohol and drugs. It is important to note that none of the statements provide any claims regarding battery or physical abuse.

In the statements submitted in response to the director’s request for evidence the petitioner and his friends reiterate the claims previously made but also make additional claims. For instance, in the petitioner’s second statement, the petitioner claims that his wife “control[ed] who [he] spen[t] time with and limit[ed] the time [he] could see [his] friends” and that she “isolated [him] from almost anyone that [he] knew or liked,” including his family. The petitioner further claims that his spouse would “kick the doors and break glasses and plates,” that she “physically pushed” the petitioner “a number of times” on his arms, chest and other areas. The statements provided by the petitioner’s friends support the petitioner’s new claims that his spouse would not let him “hang out” with his friends and that she was having problems with drugs and alcohol, but provide no statements regarding physical threats or abuse.

The evaluation submitted in response to the request for evidence describes claims made by the petitioner in his initial statement but does not contain any description of physical threats, battery, or isolation as claimed in the petitioner’s second statement. The evaluation states:

[The petitioner] stated that she started to drink and used drug[s] before she said that she did not drink but after that she said she could not drink because she was in probation [sic] but she did not want to talk about it . . . [The petitioner] stated that his wife spent nights out and when he asked her she said that she stayed with a girlfriend. He also informed that when he tried to talk to her about her behavior, she yield [sic] at him using bad language and insulted him or humiliate him. [The petitioner] stated that after many times that she used to come drunk [sic] he decided not gave her more money when she react crazy yelling and insulting him. [The petitioner] added that the last time that he talked with her when she called to tell him his car that she was driving broke down and she wanted to fix it like always but he did not because he was afraid she has another accident.

On appeal, the petitioner fails to address the director's concerns regarding the fact that evaluation was prepared more than two years after the petitioner separated from his spouse and that the evaluator failed to provide her credentials.² Instead, the petitioner submits a new evaluation. The petitioner also argues that "there are not any contradictions" within the statements provided in support of the petition and that the director "dismissed all evidentiary statements on record, failing to provide any sensible motive as to why they lacked credibility." Contrary to the petitioner's argument however, the director did not make any negative finding regarding the credibility of any of the petitioner's evidence. Instead, as noted above, the director found that the evidence submitted did not carry sufficient weight to establish the petitioner's eligibility. We concur with this finding and on review, additionally find that at best, the claims made by the petitioner are exaggerated; at worst, they are inconsistent and contradictory.

First, the petitioner's claim that his wife alienated the petitioner from his friends and controlled and limited his time with his friends is not persuasive given the fact that the petitioner was *residing* with two of his friends. As the petitioner was living with his friends, the petitioner's claim that his spouse isolated him from his "usual social contacts and support" is not persuasive. Further, given the petitioner's numerous statements regarding the fact that his spouse would spend many nights out, be "gone for several days at a time," or "for a whole week," and that she would "disappear," and only "come home every now and then," it is unclear how she could exert any control or limitations on the petitioner's behavior or contact with his family and friends when she was not present. Second, the petitioner's claim that he suffered from "economic coercion" and "extortion of funds" is not supported by the evidence in the record. According to the petitioner's evaluation, the petitioner has been employed for at least four years. According to the petitioner's own statements, he had access to and control over his own money. The petitioner made clear that he refused to give his spouse money when she asked for it. The fact that his spouse damaged the petitioner's car and expected the petitioner to fix it is not sufficient evidence to establish that the petitioner's spouse exerted any economic control over the petitioner. Finally, the petitioner's statements regarding his spouse's claimed physical behavior are not corroborated by any of the affiants, despite the fact that two of the affiants actually resided with the petitioner and his spouse.³

While the petitioner does submit an additional evaluation and evidence of the petitioner's spouse's criminal history, such evidence does not overcome the director's findings. Despite being written based upon the petitioner's own statements, the evaluation submitted on appeal does not mention the petitioner's previous claim that he was physically pushed. As previously noted, as the claims regarding the petitioner's spouse's physical behavior were not substantiated by corroborative evidence, we do not find such claims carry sufficient weight to establish the petitioner's claims.

The petitioner's spouse's arrest history appears to relate to her problems with drugs and alcohol. Neither the director nor the AAO has disputed the petitioner's claims regarding his spouse's drug and alcohol use.

² The evaluation indicated that the evaluator was an "ICADC" and a "CCS." These acronyms indicate that the evaluator is an "International Certified Alcohol and Drug Counselor" and a "Certified Clinical Supervisor." Such titles alone do not establish the evaluator's ability or expertise in evaluating claims of battery or extreme cruelty.

³ We note that even on appeal, the affiants make no mention of the petitioner's spouse's physical threats or actions toward the petitioner.

However, while we acknowledge that the petitioner's spouse has been arrested, the arrests do not appear to have any correlation to the petitioner's claims of abuse. There is no evidence that any of the petitioner's spouse's arrests were the result of battery or extreme cruelty perpetrated against the petitioner.

The remaining evidence, which consists of general statements that the petitioner was called names and that the petitioner's spouse abused drugs and alcohol do not carry sufficient weight to establish that the petitioner was battered or that he was subjected to extreme cruelty as described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). Accordingly, we concur with the finding of the director that the petitioner has failed to establish that he was battered by or subjected to extreme cruelty by his spouse.

The petitioner's claim that he entered into the marriage in good faith.

As evidence to support his claim that he entered into his marriage in good faith, the petitioner submitted photographs, statements, and a letter from his auto insurance company. In his decision, the director noted that with the exception of the auto insurance,⁴ the record does not contain evidence "verifying [the petitioner's] conduct and activities as a married couple" and stated that such evidence is "relevant to demonstrate [the petitioner's] intent at the time of marriage."

Although the record does contain photographs of the petitioner and his spouse, such photographs are evidence that the petitioner and his spouse were together at a particular place and time; they provide no evidence regarding the petitioner's intent at the time of his marriage. It is noted that despite a claimed relationship of more than one year, the petitioner only provides photographs taken at the time of their marriage. There are no other photographs which document their life together at other points in the year-long relationship.

In his decision, the director also noted the lack of documentary evidence such as "joint documentation corresponding to the purchase of [their] home," and other documentation such as "utility bills, telephone bills, bank statements, and proof of insurance" as well as the petitioner's failure to explain the lack of such documentation as part of the reason for finding that the petitioner failed to establish he entered into his marriage in good faith.

Regarding the lack of documentary evidence such as a lease and joint bills, the petitioner claims that his landlord would not put him on the lease because he did not have a work permit. While this may be an explanation for why the petitioner was not on the lease, it does not explain why the petitioner's spouse was not on the lease or why there were no joint bills, such as cell phone bills or credit cards or banks accounts other shared finances. As an explanation for the lack of tax documentation, the petitioner claims that he did not file taxes with his spouse because he did not have a work permit to work legally in the country. Again, we do not find such an explanation to be persuasive. While the petitioner may not have had authorization to work in the United States, such a fact does not excuse him from filing taxes based upon the earnings received through his employment using a taxpayer identification number. Regardless, the petitioner's spouse would have had to file taxes and as a married person her filing options were either married filing jointly or married filing separately. The lack of any joint financial

⁴ It is noted that the director ascribed a discounted weight the petitioner's auto insurance evidence as the policy covered a period of time in which the petitioner and his spouse were no longer together.

documents and shared assets and liabilities other than the auto insurance does not lead to a finding that the petitioner intended to share a life with his spouse and entered into the marriage in good faith.

While the record also contains statements from the petitioner and from his friends regarding the bona fides of the petitioner's marriage, based upon the previous discussion regarding the veracity of the petitioner's statements, his statements are not sufficiently reliable. Without any other documentary evidence, these remaining statements from the petitioner's friends do not carry sufficient weight to establish that the petitioner entered into his marriage in good faith.

In accordance with the above discussion, we concur with the determination of the director that the record is insufficient to establish that the petitioner was battered by or subjected to extreme cruelty by his spouse and that he entered into his marriage in good faith. The petitioner has not overcome this finding on appeal. Despite our support of the director's findings, however, the director's decision cannot stand because of the director's failure to issue a notice of intent to deny to the petitioner prior the issuance of the denial. Accordingly, the decision of the director must be withdrawn and the case remanded for the purpose of the issuance of a notice of intent to deny as well as a new final decision. The new decision, if adverse to the petitioner, shall be certified to this office for review.

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 which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.