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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

B9

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FILE: [REDACTED]
EAC 06 003 52780

Office: VERMONT SERVICE CENTER

Date: FEB 02 2007

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 appeal will be dismissed.

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 petitioner did not establish that he was battered by or subjected to extreme cruelty by his citizen spouse during their marriage.

The petitioner, through counsel, submits a timely appeal.

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 further 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.

The evidentiary standard and requirements 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.

The record shows that the petitioner is a native and citizen of Mexico who indicates on the Form I-360 that he entered the United States without inspection in December 1997. On January 9, 2002, the petitioner married J-Q-¹ in Mesa, Arizona. On September 30, 2005, the petitioner filed this Form I-360.²

At the time of filing, as it relates to his claim of abuse, the petitioner submitted a statement in which he claimed that his spouse "became increasingly cold," "starting picking fights over nothing," and would accuse him of going to bars and looking at women." Although the petitioner also claimed that "going home became increasingly more difficult because of her verbal abuse," he does not provide examples of specific incidents of his spouse's "verbal abuse" to support his claim of extreme cruelty.

While counsel for the petitioner stated that the petitioner's spouse used the Form I-130 petition "as a tool with which to taunt and threaten" the petitioner, the petitioner's statement contains a single reference to an instance, after he and his spouse had separated, in which the petitioner claimed that his spouse stated she would "make trouble" with his immigration status if he tried to get the children. Although the petitioner submitted a letter purportedly written by his spouse in which she affirms that she and the petitioner were married and living together until they had personal problems, the letter is not evidence that the petitioner was "taunted or threatened." The petitioner does not indicate that the letter contains made up facts or inaccuracies that could be used to sabotage his status. Rather, she indicates that they are in the process of divorce and for that reason she wanted to "cancel" the petition. The fact that she wished to withdraw the petition she filed on the petitioner's behalf because they were in the process of divorce is not evidence that the petitioner's spouse used his immigration status against him.

The petitioner also submitted statements from his brother, sister, and friend. However, like the statement made by the petitioner, these statements do not contain sufficient detail to establish a claim of battery or extreme cruelty. First, the petitioner's brother does not indicate any instance of abuse and states only that the petitioner's

¹ Name withheld to protect individual's identity.

² Although not at issue in this proceeding, the record also contains an approved Form I-130, Petition for Alien, filed in the petitioner's behalf by his citizen spouse.

life was "shattered with the sudden abandonment of his wife." Second, despite the petitioner's sister's claim that she visited the petitioner and his spouse often, that she became "very good friends with the petitioner's spouse" and talked on the phone "almost daily," the petitioner's sister describes only two incidents, one in which the petitioner's spouse "was disrespectful and sounded aggressive" when discussing the petitioner on the telephone and a second where the petitioner's spouse cast a "fiendish glare" at the petitioner and gave an unfriendly response when the petitioner's sister requested a glass of water. The remaining letter from [REDACTED], a friend of the petitioner, indicates that the petitioner "opened up to [him] about his marriage" and told Mr. [REDACTED] that he "still does not understand why his wife left," and that "she thought he was going to bars without telling her"

Finally, the psychiatric evaluation prepared by [REDACTED], M.D., at the time of filing indicates that the petitioner is a "victim of mental and emotional injuries brought on from his wife as a result of her apparent emotional instability." Dr. [REDACTED] notes that the petitioner's basis for feeling abused stems from the fact that he was not "able to depend on . . . the physical health and location of his children" and his spouse's accusations. Significantly, while Dr. [REDACTED] states that there is no doubt that the petitioner felt his relationship was abusive, Dr. [REDACTED] indicates that he "cannot objectively ascertain whether or not the objective facts occurred." He further states:

I have yet to have a complete opportunity to evaluate [the petitioner] in a manner that will include a comprehensive psychometric testing. The nature of our interaction as a result of geographic distance required communication with a number of phone calls with both myself and a translator.

I have been given enough information through the sources I had available to me to come to the conclusions that I am making with the understanding by counsel and [the petitioner] that follow-up comprehensive documentation will be included shortly.

Thus, the information presented here, although not a comprehensive as will ultimately be the case, is sufficient to the general impression that I will delineate.

After reviewing the evidence submitted, the director issued a Request for Evidence (RFE) on December 6, 2005 indicating that the evidence submitted was insufficient to support a finding of abuse. The petitioner, through counsel, responded to the RFE on February 3, 2006 and requested an additional 60 days in which to respond to the RFE.

On March 29, 2006, the director issued a Notice of Intent to Deny (NOID), again indicating that the record contained insufficient evidence to establish the requisite battery or extreme cruelty and affording the petitioner 60 days in which to respond. The petitioner timely responded by providing a second personal statement and additional statements from his brother and sister. The petitioner also submitted a copy of a withdrawal receipt from his joint account with his spouse and a copy of the table of contents for all of the titles and criminal code of the Arizona Revised Statute. Additionally, the petitioner resubmitted the "Initial Psychological Evaluation" prepared by Dr. [REDACTED]. However, the petitioner's response to the NOID failed to contain the more comprehensive "follow-up" evaluation as previously indicated would be forthcoming in Dr. [REDACTED] initial evaluation.

In his second statement, the petitioner reiterates his previous claim regarding his spouse's accusations of

infidelity. In this statement however, the petitioner now also claims that he was “constantly” degraded and called names, that after his second child was born, his spouse “kept threatening [him] with [his] immigration status,” that he “began to have anxiety attacks” which affected his work, and that he “began isolating [himself] from [his] friends, family and co-workers” To bolster his claim of being threatened by his spouse, the petitioner also indicates that “until this day I have not been able to see my boys [because] I would have to face the consequences . . . [and] have no idea what [my wife] would do.”

The second statement from the petitioner’s sister is similar to her initial statement except for the new claim that although she began to sense that something was wrong with the petitioner in February 2004, it was only after the petitioner’s spouse left the petitioner that she realized “the deep psychological trauma he endured” during his marriage. She states:

I had no idea that she constantly yelled at him and made wild accusations towards him. I also never knew that she had threatened to have him deported, never to see his sons again.

The second statement provided by the petitioner’s brother is virtually identical to his previous statement and contains no further details regarding a claim of abuse. However, the one significant change in this second statement is the claim that the petitioner “has not seen his sons since his wife took them” This detail is important given the claim in his first statement where he indicated that the petitioner knows where his children are, that he “has been going to visit them,” and that “he suffers when he sees them and after he no longer can be with them.”

Additional claims that were made in response to the RFE are also not supported by the evidence in the record. Specifically, while counsel claims that the petitioner’s spouse kidnapped their children, the record contains no evidence to support this claim. Further, the petitioner’s claim that his spouse “stole approximately \$7,000” and counsel’s allegation that the petitioner was left “penniless” is unsubstantiated. First, contrary to the petitioner’s claim, the record reflects that the petitioner’s spouse withdrew only \$5,500, not \$7,000. Moreover, the record does not contain evidence of how much money remained in the account after the withdrawal or that the petitioner’s spouse’s withdrawal of the money from their *joint* account was unlawful. We also note that while the petitioner claims to have been plagued with anxiety attacks, this claim is not supported by the initial evaluation from Dr. [REDACTED] or any of the testimonial evidence from his sister, brother, or friend.

On August 7, 2006, after reviewing the evidence contained in the record, including the evidence submitted in response to the RFE and NOID, the director denied the petition, noting in part, the petitioner’s failure to submit the “follow-up comprehensive documentation” from Dr. [REDACTED] and inconsistencies in the record.

The petitioner, through counsel, submitted a timely appeal on September 11, 2006. On appeal, counsel argues that the director “violated the ‘any credible evidence’ standard,” that he abused his discretion in making determinations regarding “inconsistencies and the probative value of evidence submitted,” “misapplied the law,” and violated the petitioner’s right to due process. As will be discussed, we do not find counsel’s appellate arguments to be persuasive and concur with the finding of the director.

Counsel’s first argument that the director violated the “‘any credible evidence’ standard” is not supported by the record. While we acknowledge that the director’s NOID references the regulation at 8 C.F.R. § 103.2(b)(2)(i) which requires a petitioner to prove the unavailability of primary evidence, the director’s final decision is not based upon the petitioner’s failure to submit primary evidence. Rather, after discussing all of

the evidence submitted by the petitioner, the director noted that "taken together," the evidence reveals discrepancies that diminish the weight of the petitioner's evidence and found that the evidence did not "rise to the level of extreme cruelty." The decision was based upon the insufficiency of and inconsistencies in the evidence submitted, not because of the petitioner's failure to submit any specific piece of evidence. While counsel challenges the weight the director accorded the petitioner's evidence, as noted previously, the determination of what evidence is credible and the weight to be given that evidence "shall be *within the sole discretion* of the Service."

Regarding the petitioner's failure to submit a completed evaluation from Dr. [REDACTED], counsel argues that his initial evaluation "made medical conclusions with reasonable certainty" and that the Service "should not take an adverse position with respect to Dr. [REDACTED] testimony simply because [the Petitioner] could not afford additional treatment and therapy." We do not find counsel's argument to be persuasive. In his evaluation, Dr. [REDACTED] himself states that he has "yet to have a complete opportunity to evaluate" the petitioner and that he is making the conclusions contained in the initial evaluation, "with the understanding *by counsel and [the Petitioner]* [emphasis added] that follow-up comprehensive documentation will be included shortly. Even if we were to accept Dr. [REDACTED] initial findings, the information contained in the evaluation only addresses the petitioner's claims regarding the taking of his children and his wife's accusations that he led a "double life." Dr. [REDACTED] does not provide examples of actions that rise to the level of those acts described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi) which include forceful detention, psychological or sexual abuse or exploitation, rape, molestation, incest, or forced prostitution .

Counsel also challenges "several [of the] 'alleged' inconsistencies" noted by the director. As it relates to the petitioner's initial claim that his spouse "stole" \$7,000 from their joint account and the subsequent documentary evidence which demonstrated that only \$5,500 had been stolen, counsel states:

The Service attempts to frame as reasonable Petitioner's wife's action of taking all the money saved by her husband, the sole provider for the family. Unfortunately, USCIS fails to recognize the relevance of [the petitioner's spouse's] action. She took all of her husband's money and his children and simply vanished. These actions were not reasonable even if [the petitioner's spouse] had legal access to the account.

[T]he Petitioner never stated that the only money taken from him was inside of the joint bank account. [He] presented the primary evidence that he had concerning the taking of the couple's savings. However, he does not state that all \$7,000 was in the bank account. Any conclusion reached to the contrary may have been caused by loose language in the Petitioner's declaration, but not the actual statements made by [the Petitioner]. Given that [the Petitioner] never stated that all the money stolen from him was contained in the bank account, because he in fact had money taken from him that was not in the bank account, no inconsistency existed between his declaration and the bank statement

Contrary to what is argued by counsel, the petitioner's exact words as stated in his declaration and signed under penalty of perjury on March 28, 2006, were that his spouse "took almost al of our life's saving[s] from *our bank account* [emphasis added]." The petitioner does not mention that money was taken from any place other than their savings account. Now on appeal, the petitioner claims that he also kept a "small emergency fund of cash" in his home which his spouse took as well. The petitioner does not explain why he did not

mention this additional stash of cash previously or when he submitted the receipt showing the withdrawal from his account, add the fact that additional monies were taken from him. We find this additional statement lacks credibility and casts even further doubt on the petitioner's claims.

Counsel also addresses the director's findings regarding the inconsistencies in the record related to the whereabouts of the petitioner's children. Counsel states:

[The director's] determination that [the petitioner's] forced separation from his children through his wife's taking of his children across state lines was not supported by any evidence was an abuse of discretion when evidence exists that she took the children across state lines without [the petitioner's] consent in clear violation of Arizona law.

Given that the record contained discrepant statements regarding the petitioner's contact with his children and lacked evidence to support a finding that that his children were "kidnapped," counsel's claim that the director abused his discretion is without merit. In his decision, in order to highlight the inconsistencies in the record, the director noted the petitioner's brother's statement that the petitioner knows where his children are and that he "has been going to visit them" and the petitioner's claim that he was not able to see his children because he feared the "consequences" from his wife. While counsel indicates on appeal that the discrepancy in the petitioner's brother's statement can be attributed to drafting his letter "in an emotional state," the petitioner's brother submits no statement on appeal explaining the reason for his inconsistent statement. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Further, counsel's argument that USCIS "is placing the burden on [the petitioner] to show court documents that he has challenged his children's removal from Arizona," is without merit. Counsel has consistently and repeatedly alleged that the petitioner's spouse is in violation of Arizona law but has not offered a single document to show that she has been charged, much less convicted of any crime involving the removal of the petitioner's children. The director's reference to the lack of evidence related to the petitioner's spouse's violations were justified given counsel's unsupported claims making it appear as if the petitioner's spouse was adjudicated as guilty of some crime. Despite counsel's reassertion of the petitioner's spouse's violation of the law on appeal, the declaration of Blair Green regarding "parental kidnapping," and an article and report on undocumented aliens and parental kidnapping, counsel has still failed to provide any proof that the petitioner's spouse has been charged and found to be guilty of any crime.

Counsel's remaining arguments are equally unpersuasive. First, counsel fails to specifically identify how the director "misapplied" the law to the facts of this case and to identify how the director violated the petitioner's right to due process. Moreover, counsel has not shown that the petitioner suffered "substantial prejudice" as a result of the director's action. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case.

As discussed above, the petitioner's claims are not sufficient to establish that he was battered by or subjected to

extreme cruelty, as that term is defined in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). First, the petitioner makes no claim that his wife ever physically assaulted him. Second, because of the petitioner's increasing claims from his first statement where he alleged only that his wife was accusatory, to his second statement where he claimed that he was "constantly" degraded and called names, the petitioner's statements lacks credibility. Similarly, the claims regarding being "taunted" by his immigration status went from a single instance in which his wife allegedly indicated she would "make trouble . . . with immigration," to being threatened for over a year. Moreover, the bank receipt does not support the claim that he was left "penniless" when his wife withdrew \$7,000, just as the psychological evaluation does not support his claim of suffering anxiety attacks. Further doubt is cast upon the petitioner's veracity given the inconsistencies regarding the petitioner's contact with his children. These discrepancies have not been sufficiently overcome on appeal.

Even if the credibility issues were resolved, the claims themselves are too general to establish that the petitioner was threatened with violence or that his spouse's nonviolent actions were psychologically abusive or part of an overall pattern of abuse. Accordingly, the petitioner has failed to establish that he was battered by or subjected to extreme cruelty, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Beyond the decision of the director, the petitioner has also failed to establish that he is a person of good moral character. The regulation at 8 C.F.R. § 204.2(c)(i) indicates that primary evidence of the petitioner's good moral character is *an affidavit from the petitioner accompanied by a police clearance* from each place the petitioner has lived for at least six months during the three-year period immediately preceding the filing of the self-petition. With the initial filing of the petition, counsel submitted the "package requesting police clearance from the FBI . . ." and indicated that she would "forward the clearances when available." However, the record does not contain any clearance and does not contain any statement from the petitioner regarding his good moral character.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.