



U.S. Citizenship
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Date: **JAN 08 2007**

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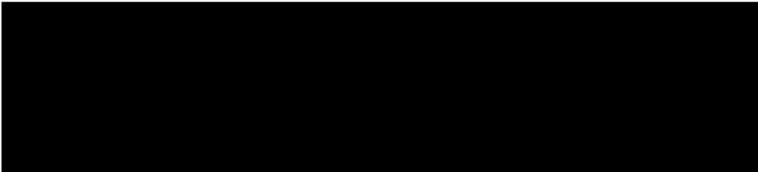
IN RE:

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 Acting Director, Vermont Service Center, denied the preference 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 The decision of the director will be withdrawn and the petition will be remanded for further action.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 is a native and citizen of Peru 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 denied the petition, finding that the petitioner failed to establish that he had been battered or the subject of extreme cruelty perpetrated by his U.S. citizen spouse.

On appeal, counsel for the petitioner submits a letter brief.

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 spouse, may self-petition for immigrant classification if the alien demonstrates to the Attorney General that—

(aa) the marriage or the intent to marry the United States 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.

According to the evidence on the record, the petitioner wed U.S. citizen M- P-¹ on August 22, 2002 in Fairview Borough, New Jersey. Subsequently, the petitioner's spouse filed a Form I-130 petition on the petitioner's behalf. The petitioner filed a Form I-485 concurrently with the Form I-130. On February 14, 2003, the U.S. citizen spouse notified Citizenship and Immigration Services (CIS) that she wanted to withdraw the Form I-130 petition. On March 31, 2003, the petitioner's spouse informed CIS that she wanted to retract her request to withdraw the petition. On September 9, 2003, the director denied the Form I-130 and Form I-485. On September 17, 2003, the petitioner filed a self-petition, 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.

Because the petitioner furnished insufficient evidence to establish that he had resided with his spouse, had been battered by, or the subject of extreme cruelty by his spouse, entered into the marriage in good faith and is a person of good moral character, the director requested that he submit additional evidence on July 19, 2004.

The director, in his decision, reviewed and discussed the evidence furnished by the petitioner, including the evidence furnished in response to his request for additional evidence. The discussion will not be repeated here.

The director determined and the AAO concurs that the petitioner failed to establish that he has been battered by or has been the subject of extreme cruelty perpetrated by his citizen spouse. The regulation at 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).

The evidence relating to the abuse is as follows:

- Affidavits from the petitioner's sister, C- S- and her sister's husband, E- S-.
- Affidavits from the petitioner's sister, S-B- and her fiancé, M-S-.
- An affidavit written by the petitioner's friend, S-P-.
- The petitioner's affidavit.
- A change of address notification written by the petitioner's spouse to CIS.

¹ Names are abbreviated for confidentiality reasons.

- A letter written to the Social Security Administration by the petitioner's spouse asking them to disregard the petitioner's request.
- Letters from the petitioner's spouse to CIS advising them of her desire to withdraw the Form I-130 petition and to retract the withdrawal.
- An order dismissing the petitioner's wife's petition for a temporary restraining order against the petitioner with the court's determination of "no finding of domestic violence established."

The affidavits from the petitioner's sisters and their husband and fiancé are almost identical. Although they are considered, they would have been greater weight if they had been written in the affiants' own words. The affidavits are conclusory, e.g. they refer to the petitioner's wife's "extreme cruelty," and do not describe specific incidents of abuse in any detail.

The petitioner described his wife's behavior towards him. He said that she would berate him then ignore him for long periods of time. He said that she tried to prevent him from going out with his friends and accused him of having a homosexual relationship. He complained that she accompanied him to CIS for an interview and disappeared for an hour in the bathroom. He said that she threatened to tear up his passport, and she withdrew the Form I-130 petition. He advised that they planned to purchase an apartment together, but behind his back she contracted to buy it alone. He stated that she falsely accused him of hitting her and sought to obtain a temporary restraining order.

The evidence is insufficient to establish that the petitioner has been battered by, or the subject of extreme mental cruelty by his citizen spouse. The harm complained of does not rise to the level described in the pertinent regulations.

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 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.

While it is not required, it is noted that the petitioner failed to file a complaint with the police against his spouse. He did not submit evidence that he sought refuge in a shelter or elsewhere. He did not obtain an order of protection against her spouse or take other legal steps to end the abuse. While the CIS will consider all credible evidence, the remaining evidence is insufficient to establish an overall pattern of violence.

On appeal, counsel for the petitioner submits a brief and asserts that “the cruelty that the [petitioner] experienced at the hand of his wife was one of domestic violence and torture” and that his wife “would punish him by smoking in the house” and by “leav[ing] the house for hours or days at a time.” Counsel for the petitioner cited divorce court decisions as proof that the courts use the terms “extreme cruelty,” “cruel and inhuman treatment” and “cruel and inhuman treatment” interchangeably. Counsel cited two divorce court decisions for the proposition that false and denigrating comments are tantamount to extreme cruelty. The AAO is not prepared to make a per se rule that all false and denigrating comments constitute extreme cruelty. CIS and AAO consider the facts of each petition on a case by case basis. The petitioner has not established that his wife’s conduct toward him rises to the level of extreme cruelty as defined in the regulations. Counsel asserts that CIS should follow state divorce court decisions that involve “cruel and inhuman treatment” when evaluating “extreme cruelty.” Counsel’s assertion is not persuasive. “Extreme cruelty” is defined in the pertinent federal regulations. “Cruel and inhuman treatment” as a ground for divorce has evolved in state courts, applying state law. Even if CIS did accept this argument, which it does not, the cases that are cited by counsel are from Michigan, Mississippi, Louisiana, and New York, whereas the petitioner lives in New Jersey and is still married. No court has granted him a divorce based on a determination that he suffered cruelty or battery by his wife. The CIS will not substitute state court decisions for its own analysis based upon binding regulations.

Beyond the director’s decision, the petitioner failed to establish that he is a person of good moral character as required by the regulation at 8 C.F.R. § 204.2(c)(1)(i)(F). In a request for additional evidence, the director specifically requested that the petitioner submit police clearances or records from each place he had resided for at least six months during the 3-year period before filing the Form I-360 petition. The director stated that if the police clearance is researched by name only, he must supply the law enforcement agency with all aliases he has used. The petitioner submitted a police clearance researched by the name [REDACTED] only, even though he also goes by the name of [REDACTED]. The director also informed the petitioner that if he had ever been arrested or charged with any crime, to submit copies of the arrest reports, copies of court documents showing the final disposition of the charges and relevant excerpts of law for that jurisdiction showing the maximum possible penalty for each charge. The petitioner had submitted to fingerprint checks in relation to the Form I-130/I-485. The result of the FBI fingerprint reveal that on July 26, 2000, the petitioner was arrested for an offense committed on May 18, 2000.² The petitioner was charged with endangering the welfare of children (2C:24-4A). Although the results of his fingerprint check suggest that on October 17, 2000, a new charge of simple assault in violation of 2C:12-1A(1) was dismissed, there is no final court disposition to establish that the initial charge was amended or dismissed. The petitioner did not submit arrest records, final dispositions, or excerpts of the relevant law. For this additional reason, the petition may not be approved.

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

² Warrant No. [REDACTED]

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 petitioner has failed to establish that he is a person of good moral character and that he was battered by, or was the subject of extreme cruelty perpetrated by, his U.S. citizen spouse. Consequently, the petitioner is ineligible 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 proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1362. Here, that burden has not been met.

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.