

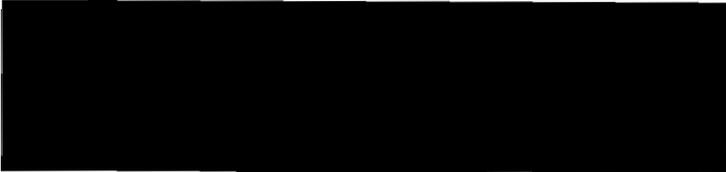
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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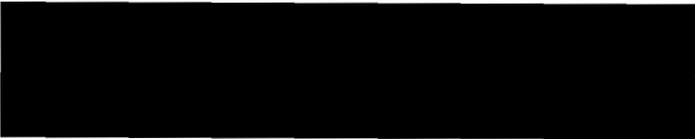
IN RE:

Petitioner:



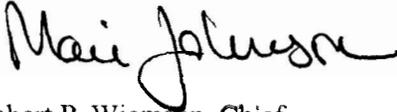
PETITION: Petition for Special Immigrant Abused Spouse Pursuant to Section 204(a)(1)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

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 immigrant classification under 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 battered or subjected to extreme cruelty by a United States citizen spouse.

The director denied the petition finding that the petitioner failed to establish that she was battered or subjected to extreme cruelty by her spouse during her 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, 8 U.S.C. § 1154(a)(1)(J), 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].

An alien who has divorced a United States citizen may still self-petition under this provision of the Act if the alien demonstrates “a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse.” Section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc).

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

(v) *Residence.* . . . The self-petitioner is not required to be living with the abuser when the petition is filed, but he or she must have resided with the abuser . . . in the past.

(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 . . . spouse, must have been perpetrated against the self-petitioner . . . and must have taken place during the self-petitioner's marriage to the abuser.

* * *

(ix) *Good faith marriage.* A spousal self-petition cannot be approved if the self-petitioner entered into the marriage to the abuser for the primary purpose of circumventing the immigration laws. A self-petition will not be denied, however, solely because the spouses are not living together and the marriage is no longer viable.

The evidentiary 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.

* * *

(iii) *Residence.* One or more documents may be submitted showing that the self-petitioner and the abuser have resided together Employment records, utility receipts, school records, hospital or medical records, birth certificates of children . . . , deeds, mortgages, rental records, insurance policies, affidavits or any other type of relevant credible evidence of residency may be submitted.

(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.

* * *

(vii) *Good faith marriage.* Evidence of good faith at the time of marriage may include, but is not limited to, proof that one spouse has been listed as the other's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding

courtship, wedding ceremony, shared residence and experiences. Other types of readily available evidence might include the birth certificates of children born to the abuser and the spouse; police, medical, or court documents providing information about the relationship; and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered.

The record in this case provides the following pertinent facts and procedural history. The petitioner is a native and citizen of Vietnam. The petitioner entered the United States on April 7, 2003. On May 9, 2003, the petitioner married S-N-¹ a United States citizen, in California. On June 18, 2003, S-N- filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf. The petitioner concurrently filed a Form I-485, Application to Adjust Status, on that same date. The Forms I-130 and I-485 were denied on March 11, 2004.

The petitioner filed the instant Form I-360 on October 20, 2005. On February 14, 2006, the director issued a request for further evidence to establish the petitioner's good moral character and that she was battered or subjected to extreme cruelty by her spouse during their marriage. The petitioner responded to the director's request on March 23, 2006. On April 10, 2006, the director issued a Notice of Intent to Deny (NOID) that advised the petitioner of deficiencies in the record and afforded her the opportunity to submit further evidence of her good moral character and her claim of abuse. The petitioner responded to the NOID on June 5, 2006. The director denied the petition on September 7, 2006, finding that the petitioner failed to establish that she was battered or subjected to extreme cruelty by her spouse during their marriage. The petitioner, through counsel, timely appealed.

On appeal, counsel states that S-N-'s "deceiving behavior," his "extensive control" over the petitioner's career and personal life, and his control over the immigration process were acts of extreme cruelty and that the director "violated [the] Petitioner's due process by determining that the behavior of [the] Petitioner's spouse did not qualify as an act of extreme cruelty." Upon review, as will be discussed, we are not persuaded by counsel's arguments and concur with the finding of the director that the petitioner has failed to establish that she was battered or subjected to extreme cruelty by S-N- during their marriage.

At the time of filing, the petitioner submitted a personal statement, a psychological evaluation, and statements from friends and family. In her personal statement, dated October 11, 2005, the petitioner claims that she was "deceived and psychologically abused by [S-N-] because he had led [her] to believe that he truly loved and cared about [her] when in fact he was only looking for someone to call a wife." The petitioner states that despite his statements to the contrary, S-N- was not serious about moving out of his parents home and that after a disagreement, S-N- and his mother cancelled their wedding ceremony. The petitioner also claims that "at some point" after their civil marriage, S-N- ignored her feelings and forced her to have sex with him despite her belief that they should not have been intimate with each other until after their church ceremony. The psychological evaluation from [REDACTED], dated September 22, 2005, which is based upon a single interview with the petitioner, indicates that the petitioner gave up her job in Canada to be with S-N-, describes S-N-'s mother as "domineering and controlling," and S-N- as having "rejected [the petitioner's] pleas for support and . . . her wish to postpone sex until after their religious wedding." The petitioner's parents state that the petitioner's "marital collapse" and divorce put the petitioner "in a helpless situation." The petitioner's grandmother states that the petitioner "has gone through great pains and suffering" during her marriage. The petitioner's aunt states that two weeks before their scheduled wedding ceremony, the petitioner and S-N- had a "serious, irreconcilable

¹ Name withheld to protect individual's identity.

disagreement” and describes the petitioner as being “deeply hurt by this breakup.”

In response to the director’s NOID, the petitioner submitted a second statement, dated May 27, 2006, and a statement from her uncle, [REDACTED]. In her second statement, the petitioner reiterates her claims that S-N- deceived her about their living arrangements and that S-N-’s mother interfered in the petitioner’s marriage and states that S-N- broke her trust by asking for a divorce. [REDACTED] explains that the “main disagreement” between the petitioner and S-N- was centered on where they would live after their marriage and states that their disagreement came to a head on September 19, 2003 when S-N- called off the wedding and then, a few weeks later, sought a divorce.

Upon review, we find the evidence contained in the record is insufficient to establish the petitioner’s claim of abuse. The petitioner describes a single instance where S-N- slammed his hands on a table and shouted and unspecified occasions where she and S-N- had sexual relations despite the petitioner’s desire to wait until after they had a religious ceremony. The petitioner does not describe being fearful of or intimidated by S-N- or provide any other information which demonstrates that she was physically forced, threatened, or otherwise coerced into having sex with S-N-. Rather, she states that although already civilly married, S-N- ignored her wishes to wait until after their church ceremony. The remaining allegations from the petitioner and her family and friends who state that the petitioner was forced to live in a crowded house despite her desire to move out on her own, that she had to participate in S-N-’s family’s household activities, and that S-N- cancelled their wedding ceremony with no notice, do not establish that S-N-’s actions rose to the level of extreme cruelty, as described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi), which includes (but is not limited to) actions such as forceful detention, psychological or sexual abuse or exploitation, rape, molestation, incest, or forced prostitution. We note that while the petitioner also makes claims regarding S-N-’s mother, such as that she did S-N-’s laundry, interfered in their married life, expected the petitioner to drive her to the grocery store and medical appointments, to cook and clean after parties, and that she was jealous and controlling, are insufficient to establish a claim of abuse. Moreover, the statute and the regulation require that the abuse be perpetrated against the petitioner *by his or her spouse*, not a third party. See section 204(a)(1)(A)(iii)(I)(bb) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(I)(bb), 8 C.F.R. § 204(c)(1)(vi). The petitioner does not indicate that S-N- condoned his mother’s behavior or that he was a precipitating factor in his mother’s relationship with or requests of the petitioner.

On appeal, counsel cites to *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003) and argues that S-N-’s behavior is sufficient to establish that the petitioner was subjected to extreme cruelty. Counsel argues that S-N- “lured” the petitioner to give up her career and family in Canada to come to the United States and concealed his living conditions, while promising an “independent marriage life” to the petitioner. Counsel then points to the claims that the petitioner was required to perform daily chores and that her marriage was cancelled without any advance notice to the petitioner or her family as further support that S-N- and his mother exercised “extensive control” over the petitioner. We are not persuaded by counsel’s arguments.

At the outset, we note *Hernandez* addressed an alien’s eligibility for suspension of deportation under former section 244(a)(3) of the Act, 8 U.S.C § 1245(a) (3)(1996), a different statutory provision than that involved in this case, namely section 204(a)(1)(A)(iii) of the Act. Further, while we acknowledge that the *Hernandez* court gave deference to the regulation at 8 C.F.R. § 204.2(c)(1)(vi) in its interpretation of the term “extreme cruelty” as used in former section 244(a)(3) of the Act, the court applied the term to facts that are clearly

distinguishable from those in this case. *Id.* at 839. In *Hernandez*, the alien's husband severely beat her repeatedly in Mexico and once attacked her with a knife, cutting the alien's hand to the bone. *Hernandez*, 345 F.3d at 829-30. Her husband's battery resulted in extensive physical injuries that left visible scars on the alien's head and hand that were observed by the Immigration Judge. *Id.* at 830-31. After one severe beating, the alien fled to her sister's home in the United States. *Id.* at 830. Her husband called her repeatedly and then came to the United States to see her, apologized and promised to see a marriage counselor if the alien returned to Mexico with him. *Id.* Yet when the alien returned to Mexico, her husband became violent again and eventually attacked the petitioner with a knife. *Id.*

The pertinent issue in *Hernandez* was whether the alien was "subjected to extreme cruelty *in the United States* [emphasis added]" by her husband, as required by the former section 244(a)(3) of the Act, although her husband never physically assaulted her in this country. The *Hernandez* court held that the alien's husband subjected her to extreme cruelty in the United States because although not overtly violent, his actions were part of a contrite phase in his cycle of domestic violence and hence fit the regulatory description of extreme cruelty as acts that, in and of themselves, "may not initially appear violent but that are part of an overall pattern of violence." *Id.* at 840-41 (quoting 8 C.F.R. § 204.2(c)(1)(vi)).

In this case, S-N-'s behavior, as described by the petitioner, does not rise to the level of domestic harm described in *Hernandez*. Further, S-N-'s non-physical actions do not demonstrate that his behavior was accompanied by any coercive actions or threats of harm or that his actions were aimed at insuring dominance or control over the petitioner. The allegations that S-N-'s mother was domineering and interfered in their marriage does not establish that S-N- himself subjected the petitioner to harm. As noted by *Hernandez* the court, because Congress "required a showing of extreme cruelty in order to ensure that [a petitioner is] protected against the extreme concept of domestic violence, rather than mere unkindness," not "every insult or unhealthy interaction in a relationship [rises] to the level of domestic violence"

As such, the petitioner failed to establish that she was battered or subjected to extreme cruelty by her spouse during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Beyond the director's single stated ground for denial, we find additional issues that preclude approval of the petition.

Qualifying Relationship and Eligibility for Immigrant Classification

Beyond the director's decision, the record also fails to demonstrate that the petitioner had a qualifying relationship as the spouse of a United States citizen and that she was eligible for immediate relative classification based on such a relationship. Section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act requires that a self-petitioner who is divorced from her spouse at the time of filing demonstrate that the divorce occurred within two years of the petition filing date and that there was a connection between the divorce and the former spouse's battery or extreme cruelty. Although the petitioner was divorced from S-N- within the two years preceding the filing of this petition, as discussed above, the petitioner has failed to establish that she was battered or subjected to extreme cruelty. As such, she is unable to demonstrate a connection between her divorce and S-N-'s alleged abuse. Accordingly, the petitioner has not demonstrated that she had a qualifying relationship with S-N-, as required by section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act. As the petitioner has failed to establish that she had a qualifying relationship as the spouse of a United States citizen, she is not able to establish that she is eligible for immediate relative classification under section 201(b)(2)(A)(i) based upon that relationship, as

required by section 204(a)(1)(A)(iii)(II)(cc) of the Act.

Residence with Spouse

On the Form I-360, the petitioner claims to have resided with S-N- from April 2003 until September 2003 and that she and S-N- last resided together at [REDACTED] in Santa Clara, California. Although the petitioner submits copies of two bank statements and car and health insurance information which list the petitioner and S-N- at the claimed address, the petitioner's testimony contradicts her claim of residence with S-N-.

In her May 27, 2006 statement, the petitioner describes the living arrangement in S-N-'s home. She states that S-N-'s home has three bedrooms, one for S-N-'s sister and two that were rented to tenants. Although the petitioner further indicates that S-N- and his parents slept in the family room, she does not indicate her own sleeping arrangement in the home. The petitioner then states that as their wedding day neared, one of the rented rooms was being renovated so that it could be used by the petitioner and S-N- after their wedding day, but again fails to indicate that she actually resided in the home with S-N-. In fact, to the contrary, the petitioner claims that "*if* [she] had moved in and lived with [S-N-'s mother], there would be no doubt that the petitioner would have been asked to perform additional chores [emphasis added]." Further, in her discussion regarding their break-up, the petitioner again indicates that she did not actually reside in the home with S-N-. She states:

I came over to see Son as usual . . . We were in the bedroom (the renovated bedroom where we would be staying) as we discuss many things about the religious wedding ceremony . . . [when] S-N- became angry . . . S-N-'s cousins . . . wanted to speak to me . . . I did not want to share my problems with them so I just said I was ok . . . Eventually, as time went by I said goodbye to the guests and [S-N-'s] family and went home.

That night I came home and cried all night . . . The next day . . . [S-N-] called to tell me that he had already cancelled the wedding . . . After hanging up the phone with [S-N-], I told my uncle, aunt, brother and grandmother about what had happened . . .

* * *

About two weeks later [S-N-] came by and asked me to go to lunch . . . after lunch was over . . . he said that he wanted a divorce . . . I cried and said I did not want a divorce . . . He pressed on, but I was crying and so he drove me home.

In the following week, [S-N-] called me once in while [sic] and persisted on asking me to go with him to sign the divorce papers.

* * *

In [s]ummary, the house where [S-N-] and I would stay was very crowded.

[Emphasis added].

It is clear from the petitioner's testimony that she and S-N- did not reside together in the home that S-N- shared with his family, but rather that the petitioner lived in a home with her own family. The petitioner repeatedly references her own home, the fact that S-N- would call her at her at that home, would drive her back to her own home, and uses terms such as "if" she lived with the petitioner's family and that she "would" live with S-N- at some unknown date in the future. Accordingly, despite the petitioner's documentary evidence which reflects that the petitioner and S-N- received mail at S-N-'s parents' home, the petitioner's own testimony indicates that the petitioner did not move into S-N-'s parents' home but resided with her own family. We, therefore, withdraw the director's determination on this issue and find that the petitioner failed to establish that she resided with S-N- during their marriage, as required by 204(a)(1)(A)(iii)(II)(dd) of the Act.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied for the reasons stated above, 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.