



U.S. Citizenship
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Services

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[REDACTED]

FILE: [REDACTED]
EAC 05 253 52649

Office: VERMONT SERVICE CENTER

Date: **MAY 28 2008**

IN RE: Petitioner: [REDACTED]

PETITION: Petition for 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:

[REDACTED]

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 an 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 an alien battered or subjected to extreme cruelty by a United States citizen.

The director denied the petition, noting the petitioner's failure to respond to the director's Notice of Intent to Deny (NOID), and finding that the petitioner failed to establish that he was a person of good moral character and that he was battered or subjected to extreme cruelty by his 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).

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).

Section 204(a)(1)(J), 8 U.S.C. § 1154(a)(1)(J) of the Act states, in pertinent part:

In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) or clause (ii) or (iii) of subparagraph (B), 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:

(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.

(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 person who was subjected to abuse in the form of forced prostitution or who can establish that he or she was forced to engage in other behavior that could render the person excludable under section 212(a) of the Act would not be precluded from being found to be a person of good moral character, provided the person has not been convicted for the commission of the offense or offenses in a court of law. A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she willfully failed or refused to support dependents; or 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. If the results of record checks conducted prior to the issuance of an immigrant visa or approval of an application for adjustment of status disclose that the self-petitioner is no longer a person of good moral character or that he or she has not been a person of good moral character in the past, a pending self-petition will be denied or the approval of a self-petition will be revoked.

* * *

(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 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.

* * *

(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.

(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.

* * *

(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 provides the following pertinent facts and procedural history of this case. The petitioner is a native and citizen of Brazil who entered the United States on March 17, 2001 as a nonimmigrant visitor (B-2), with permission to remain in the United States until September 16, 2001. On March 20, 2003, the petitioner married S-S-¹ a United States citizen in New Jersey. S-S- filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf on March 1, 2004. The petitioner and S-S- were divorced on April 26, 2005.² The petitioner withdrew the Form I-485 on August 9, 2005 and Citizenship and Immigration Services (CIS) terminated action on the Form I-130. The petitioner filed the instant petition on September 19, 2005. On April 27, 2006, the director issued a Request for Evidence (RFE) to establish the requisite battery or extreme cruelty and good moral character. On August 31, 2006, after receiving no response to the RFE, the director issued a NOID again notifying the petitioner of the deficiencies in the record regarding his claim of battery or extreme cruelty and his good moral character. The director denied the petition on February 14, 2007, finding that the petitioner failed to establish that he was battered or subjected to extreme cruelty by his spouse during their marriage and that he was a person of good moral character.

The petitioner, through counsel, filed a timely appeal. On the Form I-290B, counsel states:

This denial does not make sense. All the documents were timely sent. We have proof. We are submitting herein the letters and documents as sent to you. Somehow it seems you never received them. We even have the certified mailings vouching for the same. Everything was submitted, and timely. See the attached documents herein.

Despite counsel's assertion regarding having attached the "certified mailings," he submits no certified mail receipt or other documentation to support his claim that additional evidence was timely submitted in response to the director's RFE or NOID. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec.

¹ Name withheld to protect individual's identity.

² Final Judgment, Action for Divorce, Superior Court of the State of New Jersey, County of Atlantic, Family Part, Docket No. FM-01-301-05B.

503, 506 (BIA 1980).

As the record demonstrates that the petitioner was properly notified of the deficiencies in the record and failed to respond, the AAO will not accept the evidence submitted on appeal. In instances such as this one, where a petitioner has been put on notice of deficiencies in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988).

As will be discussed, upon review of the record as it was constituted before the director, we concur with the finding of the director that the petitioner failed to establish that he is a person of good moral character and that he was battered or subjected to extreme cruelty by his spouse during their marriage.

Battery or Extreme Cruelty

At the time of filing, the petitioner submitted no personal statement or statements from witnesses regarding S-S-'s alleged battery or extreme cruelty. He also submitted no documentary evidence of the claimed abuse. The petitioner failed to submit any evidence in response to the director's RFE and NOID. Accordingly, we concur with the director's determination, based on the record before him, that the petitioner failed to establish that his spouse subjected him or his child to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Good Moral Character

The regulation at 8 C.F.R. § 204.2(c)(2)(v) states that primary evidence of a petitioner's good moral character is an affidavit from the petitioner, accompanied by local police clearances or state-issued criminal background checks 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. The director specifically notified the petitioner of these regulatory requirements in both the RFE and the NOID. In addition, the director indicated that if the petitioner had been arrested or charged with any crime, he was also required to submit copies of the arrest reports and court documents showing the final disposition of the charges. The petitioner failed to submit an affidavit describing his good moral character and any discussion of his criminal history at the time of filing or in response to the RFE or NOID. Moreover, the record contained no police clearance or state-issued criminal background check. Accordingly, we concur with the director's finding that the petitioner failed to establish that he is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.³

³ Although we have not considered the additional evidence submitted on appeal as part of this decision, we note that if considered, the evidence further precludes a finding of the petitioner's good moral character. Specifically, the petitioner submitted police reports indicating that he was arrested on three different occasions, with the most recent arrest occurring on March 3, 2006. He did not, however, submit evidence of the final court dispositions for any of his arrests or an affidavit which

Beyond the decision of the director, we additionally find that the petitioner has failed to establish that he had a qualifying relationship as the spouse of a United States citizen, that he is eligible for immigrant classification based upon that relationship, that he resided with his spouse, and that he entered into his marriage in good faith.

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).

Qualifying Relationship and Immigrant Classification

Section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act requires that a petitioner who has divorced his abusive spouse 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*. While the petitioner was divorced from S-S- within the two years preceding the filing of this petition, the evidence does not demonstrate a connection between his divorce and S-S-'s alleged abuse. First, as discussed in the preceding section, the petitioner has failed to establish that S-S- battered or subjected him to extreme cruelty during their marriage. In fact, the Final Action Judgment for Divorce submitted by the petitioner indicates that the court granted S-S-'s action for divorce based upon the contention of extreme cruelty made by S-S- *against the petitioner*. The Verified Complaint Action for Divorce filed by S-S- indicates the following allegations as the grounds for her complaint for divorce:

At the following times the [petitioner] committed the following acts which made it unsafe or improper for the [S-S-] to continue to reside with the [petitioner]. On or about June 8, 2003, cruelty began. On January 28, 2003, September 27, 2003, and September 13, 2003 the [petitioner] struck [S-S-] . . . that the [petitioner] was an alcoholic and often abused and embarrassed [S-S-]. On January 28, 2003 [the petitioner] threatened to kill [S-S-] with a knife. Police were called and [the petitioner] was arrested. September the [petitioner] strangled [S-S-] and threw [her] onto the bed where 3 month old baby was laying. September struck, strangled, pulled to the ground by the hair and thrown up against the wall by the [petitioner].

As the petitioner failed to demonstrate that he was battered or subjected to extreme cruelty by S-S- and that S-S-'s abuse was connected to his divorce, the petitioner has not demonstrated that he had a

addresses his criminal history and the facts surrounding each of his arrests.

qualifying relationship with S-S-, as required by section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act. We, therefore, withdraw the director's finding on this issue.

The regulation at 8 C.F.R. § 204.2(c)(1)(B) requires that a self-petitioner be eligible for immediate relative classification under section 201(b)(2)(A)(i) of the Act based on his or her relationship to the abusive spouse. The petitioner was divorced from S-S- before this petition was filed and he has not established that S-S- battered or subjected him to extreme cruelty during their marriage. Consequently, the petitioner was ineligible for immediate relative classification based on his former marriage, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act. We, therefore, withdraw the director's finding on this issue.

Residence

On the Form I-360, the petitioner indicated that he resided with S-S- from January 2002 until January 28, 2004, and that he last resided with her at [REDACTED], in Atlantic City, New Jersey. The petitioner, however, submitted no testimonial or documentary evidence to support this claim. Moreover, other evidence contained in the record contradicts the claim made on the Form I-360. Specifically, the petitioner's Form G-325A, submitted in support of the Form I-130 and Form I-485, indicates that although he resided with his spouse at the [REDACTED] address, they stopped residing there in July 2003. The Form G-325A indicates that beginning in July 2003, the petitioner resided at [REDACTED] in Somers Point, New Jersey. Additionally, the record contains a utility bill and a bank statement both from January 2004, and a lease covering the period from August 2003 to July 2004 for the [REDACTED] address.⁴

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Given the discrepancies noted and the lack of testimonial and documentary evidence regarding his residence with his spouse, the petitioner has failed to establish that he resided with his spouse, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act. We, therefore, withdraw the director's finding on this issue.

Good Faith Marriage

At the time of filing, the petitioner submitted a copy of his daughter's birth certificate evidencing the fact that he and S-S- produced a child during their marriage. Other than undated, uncaptioned photographs, the petitioner submitted no further documentary evidence regarding his good faith marriage. The petitioner also failed to submit any testimonial evidence regarding his good faith marriage, such as details regarding how he met his spouse, their courtship, shared events, his feelings toward his spouse and their child, or other evidence to support a finding of his good faith marriage.

⁴ This evidence was also submitted in support of the Form I-130 and Form I-485.

While we acknowledge that the petitioner and his spouse did produce a child from their relationship, in the absence of any other testimonial or documentary evidence, we find the petitioner has failed to establish that he intended to establish a life with S-S- at the time of their marriage. Accordingly, the petitioner failed to establish that he entered into his marriage in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act. We, therefore, withdraw the director's determination on this issue.

The petition will be denied for all of the reasons cited above, with each considered an independent and alternative basis for denial. 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 appeal is dismissed.