

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

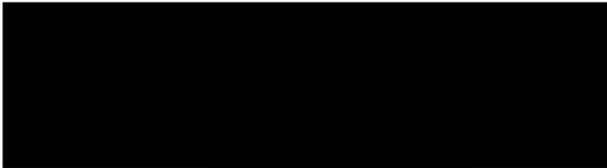
PUBLIC COPY

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



U.S. Citizenship
and Immigration
Services

H4



FILE: 
EAC 04 244 52729

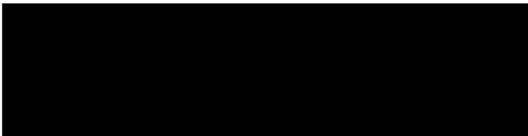
Office: VERMONT SERVICE CENTER

Date: **APR 03 2008**

IN RE: Petitioner: 

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:



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
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 AAO will withdraw the director's decision; however, because the petition is not approvable, it will be remanded for further action and consideration.

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.

The director denied the petition for failure to establish the requisite battery or extreme cruelty.

On appeal, counsel submits a brief.

We concur with the director's determination that the petitioner has not established the requisite battery or extreme cruelty. Beyond the director's decision, we find four additional grounds for denial of the petition based on the present record. First, section 204(c) of the Act mandates the denial of this petition because the record contains a sworn admission by the petitioner that he committed marriage fraud in an attempt to gain an immigration benefit through his second wife. Second, the petitioner has failed to establish that he entered into his second marriage in good faith. Third, the petitioner has not established a qualifying relationship with his second spouse. Fourth, the petitioner has not demonstrated his corresponding eligibility for immigrant classification as an immediate relative. Nonetheless, the case must be remanded because the director denied the petition without first issuing a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

I. Pertinent Facts and Procedural History

The record in this case provides the following relevant facts and procedural history. The petitioner is a native and citizen of Sri Lanka who entered the United States as a nonimmigrant visitor (B-2) on March 17, 2001. On February 10, 2003, the petitioner divorced his first wife and on February 25, 2003, the petitioner married L-S-¹, a U.S. citizen, in Nevada. L-S- subsequently filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf, which she withdrew at an interview with Citizenship and Immigration Services (CIS) on May 24, 2004. At the interview, the petitioner signed a sworn Memorandum Record of Interview admitting that the Form I-130 and Form I-485 were submitted in connection with marriage fraud. On the same day, the Las Vegas District Director denied the petitioner's corresponding Form I-485, Application to Adjust Status. In his decision, the district director informed the petitioner that L-S- had withdrawn her Form I-130 petition and stated that the petitioner married her solely to obtain lawful permanent residency. The district director consequently determined that the petitioner had married L-S- for the primary purpose of circumventing the immigration laws.

¹ Name withheld to protect individual's identity.

On May 25, 2004, the petitioner was served with a Notice to Appear for removal proceedings charging him under section 237(a)(1)(C)(i) of the Act as an alien who failed to comply with the conditions of his nonimmigrant status and section 237(a)(1)(G)(i) of the Act as an alien who engaged in marriage fraud. The petitioner remains in proceedings before the Las Vegas Immigration Court.

On July 16, 2004, the petitioner and L-S- were divorced.² This Form I-360 petition was filed on August 24, 2004. On May 19, 2005, the director issued a Request for Evidence (RFE) that L-S- had subjected the petitioner to battery or extreme cruelty during their marriage. The petitioner, through counsel, timely responded with additional evidence that the director found insufficient to establish the petitioner's eligibility. The director denied the petition for failure to establish the requisite battery or extreme cruelty and the petitioner, through counsel, timely appealed.

II. The Petition is Not Approvable Pursuant to Section 204(c) of the Act

Beyond the director's decision, we find that section 204(c) of the Act bars approval of this petition. Section 204(c) of the Act, 8 U.S.C. § 1154(c), states, in pertinent part:

[N]o petition shall be approved if –

- (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative . . . status as the spouse of a citizen of the United States . . . by reason of a marriage determined by the [Secretary of Homeland Security] to have been entered into for the purpose of evading the immigration laws[.]

The regulation corresponding to section 204(c) of the Act, at 8 C.F.R. § 204.2(a)(ii), states:

Fraudulent marriage prohibition. Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

A decision that section 204(c) of the Act applies must be made in the course of adjudicating a subsequent visa petition. *Matter of Rahmati*, 16 I&N Dec. 538, 539 (BIA 1978). CIS may rely on any relevant evidence in the record, including evidence from prior CIS proceedings involving the

² District Court of Clark County, Nevada, Case Number [REDACTED]

beneficiary. *Id.* However, the adjudicator must come to his or her own, independent conclusion and should not ordinarily give conclusive effect to determinations made in prior collateral proceedings. *Id.*; *Matter of Tawfik*, 20 I&N Dec. 166, 168 (BIA 1990).

Evidence that a marriage was not entered into for the primary purpose of evading the immigration laws may include, but is not limited to, proof that the beneficiary has been listed as the petitioner'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 together. *Matter of Phillis*, 15 I&N Dec. 385, 386-87 (BIA 1975).

Our independent review of the record in this case indicates that the petitioner's marriage to L-S- was entered into for the purpose of evading the immigration laws and section 204(c) of the Act consequently mandates the denial of the petition. The record contains a Form I-648, Memorandum Record of Interview, signed by the petitioner under oath on May 24, 2004 at the interview for his Form I-485 application, which states: "Subject [the petitioner] admits that his current I-130 and I-485 was submitted in connection with marriage fraud. Subject married U.S.C. [L-S-] to attempt to gain an immigration benefit through fraud. Subject willfully and voluntarily gives this statement."

We acknowledge the relevant evidence submitted by the petitioner, which includes his July 14, 2005 declaration and his undated and unsigned statement; photographs of the petitioner and L-S- at their wedding; letters from the petitioner's friends, pastor and brother; documentation of joint health and automobile insurance; an unsigned copy of their 2003 joint federal income tax return; a joint residential lease, lease renewal agreement and rent receipts; and joint telephone and electric bills. In his statements, the petitioner does not describe his courtship, marriage or any of his shared experiences with L-S- in probative detail. His friends, brother and pastor also fail to specifically describe his interactions with L-S- or any other relevant aspects of his behavior at the time of his courtship, wedding and marriage.

While most of the remaining, relevant documents are dated during the petitioner's marriage to L-S-, the materials do not outweigh the petitioner's sworn, willful and voluntary admission that their marriage was fraudulent and that he married L-S- to gain an immigration benefit. The petitioner's documented admission of marriage fraud is substantial and probative evidence of his attempt to be accorded immediate relative status through a marriage that was entered into for the purpose of evading the immigration laws. Section 204(c) of the Act consequently bars approval of the instant petition.

III. Eligibility for Immigrant Classification Under Section 204(a)(1)(A)(iii) of the Act

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) 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].

The eligibility requirements are 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 . . . 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 standard and guidelines are 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.

* * *

(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.

A. Entry into the Marriage in Good Faith

As discussed in the preceding section, the record contains a sworn admission by the petitioner that his marriage to L-S- was fraudulent and contracted in an attempt to gain an immigration benefit. Although the petitioner submitted relevant testimony and documentation, that evidence does not outweigh the petitioner's knowing and voluntary admission of his fraudulent marriage. Based on the present record, the petitioner has consequently not demonstrated that he married L-S- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

B. Battery or Extreme Cruelty

The petitioner submitted the following evidence relevant to his claim that L-S- subjected him to battery or extreme cruelty during their marriage:

- The petitioner's July 14, 2005 declaration and his undated and unsigned statement;
- Letters from the petitioner's friends, [REDACTED] and [REDACTED]; and
- The August 11, 2004 letter from [REDACTED] M.A., MFT, of the Help Center in Las Vegas.

In his undated statement, the petitioner reports that L-S- demanded money from him and he found out that she was gambling and “carrying on with other women.” The petitioner states that at his adjustment of status interview, L-S- told the officer that their marriage was not genuine and he was taken into custody. The petitioner does not acknowledge his own, documented admission that their marriage was fraudulent. In his July 14, 2005 declaration submitted in response to the director’s RFE, the petitioner states that the decline in their intimate relations became a “source of frustration” for him, that L-S- used “foul words” against him, criticized his low income, made him quit school to work full-time and told him he “owed her” because he was getting lawful permanent residency through her. The petitioner also reports that L-S- insulted his masculinity and had a homosexual relationship with her girlfriend. Finally, the petitioner states that L-S- threw things at him, causing him “minor injuries . . . on a couple of occasions” and once slapped his face in front of his friends. The petitioner does not describe any of these incidents in probative detail.

The petitioner’s friends also provide insufficient information to establish his claim. [redacted] reports that on one occasion when he was visiting their home, L-S- slapped the petitioner, but [redacted] does not describe the incident in detail or provide any further, probative information. [redacted] states that the petitioner and L-S- had heated arguments when he visited their home and that on one, unspecified occasion, L-S- slapped the petitioner’s face. [redacted] does not describe this or any other incidents of alleged abuse in detail and he provides no further, probative information. Mr. [redacted] states that as a result of L-S-’s gambling and homosexuality, she and the petitioner had “heated arguments,” but [redacted] also fails to describe in detail any particular incidents of abuse that he witnessed and he provides no further, probative information.

[redacted] states that L-S- was emotionally abusive and screamed at the petitioner, but she does not describe any particular incidents of abuse. [redacted] also reports that L-S- “tried to slap [the petitioner] on several occasions.” Her statement is inconsistent with the testimony of the petitioner, and [redacted] that L-S- actually slapped the petitioner on one occasion. [redacted] diagnoses the petitioner with Post Traumatic Stress Disorder, but she does not indicate the assessment tools used, if any, and the length, date or frequency of any interview(s) or counseling session(s) with the petitioner on which her diagnosis is based. While we do not question [redacted]’s expertise, her letter lacks detailed and probative information sufficient to **establish the requisite battery** or extreme cruelty.

On appeal, counsel asserts that the submitted testimony established L-S-’s physical assaults against the petitioner. Yet counsel does not acknowledge or offer any explanation for the aforementioned discrepancy between [redacted] report and the testimony of the petitioner and his friends regarding the alleged physical abuse. Counsel also claims that L-S-’s gambling problem and homosexual affair psychologically damaged and emasculated the petitioner. While counsel expresses his disagreement with the director’s assessment of the relevant evidence, he fails to articulate any specific factual or legal errors in the director’s decision and submits no further evidence on appeal.

In sum, the relevant evidence fails to demonstrate that the behavior of the petitioner’s second wife rose

to the level of the acts described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi), which include forceful detention and psychological or sexual abuse or exploitation. The inconsistent testimony about L-S-'s alleged slap of the petitioner is equivocal and the petitioner has not established that her other, nonviolent actions were part of an overall pattern of violence. Accordingly, we concur with the director's determination that the petitioner has failed to demonstrate that L-S- subjected him to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

C. Qualifying Relationship

Beyond the director's decision, we also find that the petitioner has not established that he had a qualifying relationship with his second wife at the time this petition was filed. 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), requires that an alien who has divorced his or her spouse within two years prior to filing demonstrate a connection between the divorce and the former spouse's battery or extreme cruelty. As discussed in the preceding section, the petitioner has failed to establish that L-S- subjected him to battery or extreme cruelty during their marriage. Because he has not established the requisite abuse, the petitioner has also failed to demonstrate a connection between such abuse and his divorce from L-S-. The petitioner consequently has not established a qualifying relationship, as required by section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act.

D. Eligibility for Immigrant Classification

Beyond the director's decision, we further find that the petitioner has failed to demonstrate the requisite eligibility for immigrant classification as an immediate relative based on his former marriage to L-S-. The regulation at 8 C.F.R. § 204.2(c)(1)(i)(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 U.S. citizen spouse. As discussed in the preceding section, the petitioner has failed to establish both battery or extreme cruelty and a qualifying relationship with L-S-. The regulation at 8 C.F.R. § 204.2(c)(1)(iv) also states that in order to establish eligibility for immigrant classification, a self-petitioner "is required to comply with the provisions of section 204(c) of the Act" In section II of this decision, we discussed the petitioner's sworn admission of marriage fraud, which invoked the prohibition against approval of the instant petition under section 204(c) of the Act. Accordingly, the petitioner has failed to demonstrate his eligibility for immigrant classification, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act.

IV. Conclusion

We concur with the director's determination that the petitioner has not demonstrated the requisite battery or extreme cruelty. Counsel's claims on appeal do not overcome this ground for denial of the petition. Beyond the director's decision, we find that the petitioner has also failed to establish a qualifying relationship with his second wife and his corresponding eligibility for immigrant classification as an immediate relative. Accordingly, based on the present record, the petitioner is

ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act. Beyond the director's decision, we also find that section 204(c) of the Act bars approval of this petition.

We note that 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).

Despite the petitioner's ineligibility based on the present record, this case must be remanded to the director for issuance of a NOID in compliance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii). On remand, the director should address all five grounds for the intended denial of the petition as cited in the foregoing discussion.

As always 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.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.