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U.S. Citizenship
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FILE:

EAC 03 081 50061

Office: VERMONT SERVICE CENTER

Date: OCT 13 2006

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.

A handwritten signature in black ink, appearing to read "D. King".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director (Director), Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the AAO's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.

The petitioner seeks classification as a special immigrant pursuant to section 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii), as the battered spouse of a United States citizen. The director denied the petition on June 30, 2004, finding that the evidence did not establish that the petitioner was battered by or subjected to extreme cruelty by his spouse. The petitioner's subsequent appeal to the AAO was summarily dismissed on February 9, 2005. On motion, counsel for the petitioner asserts that the AAO's summary dismissal of the petitioner's appeal was in error as the petitioner's former counsel,¹ had timely submitted a brief in support of the appeal. A review of the record confirms counsel's statements. Accordingly, the matter will be reopened.

Section 204(a)(1)(A)(iii) of the Act provides, in pertinent part, that an alien who is the spouse of a citizen of the United States, who is a person of good moral character, who is eligible to be classified as an immediate relative, and who has resided with his or her spouse, may self-petition for immigrant classification if the alien demonstrates to the [Secretary of Homeland Security] that—

- (aa) the marriage or the intent to marry the 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

¹ The term "former counsel" refers to Hardeep Singh Rai, the attorney who represented the petitioner at the time the appeal was filed.

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.

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.

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.

According to the evidence contained in the record, the petitioner entered the United States on December 14, 1997 as a K-1 nonimmigrant. The petitioner married [REDACTED], a United States citizen, on March 8, 1998 in Bakersfield, California. The petitioner filed a Form I-485, Application to Adjust Status, on May 20, 1998.

The petitioner filed the instant Form I-360 self-petition on January 13, 2003, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, his spouse during their marriage.² On October 27, 2003, the director requested, inter alia, further evidence to

² The director's decision mistakenly indicates that the petition was filed on January 13, 2002.

establish that the petitioner was battered by or subjected to extreme cruelty by his spouse and that he is a person of good moral character. The petitioner, through counsel requested an additional 60 days in which to respond to the request for evidence. The director granted the request for additional time on January 29, 2004. The petitioner submitted additional evidence on February 20, 2004. On June 30, 2004, after reviewing the evidence contained in the record, the director denied the petition without the issuance of a Notice of Intent to Deny (NOID) in accordance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii),³ finding that the petitioner failed to establish that he was battered by or subjected to extreme cruelty by his spouse. Although we subsequently dismissed the petitioner's appeal on the director's decision, we have reopened our previous decision in order to review the petitioner's appellate submission which was timely received prior to the issuance of our summary dismissal.

In his appellate brief, former counsel argues that the petitioner's spouse's behavior, while not physically abusive, is sufficient to establish that the petitioner was humiliated, degraded, and threatened, and as such, should be considered extreme cruelty as part of an overall pattern of violence "designed to dominate and control" the petitioner's behavior. To support the appeal, the petitioner submits a new personal statement and a statement from an acquaintance. Upon review of the appellate submission, we concur with the director's determination regarding the petitioner's failure to establish his claim of abuse and find that the submission is not sufficient to overcome the director's decision.⁴

As constituted before the director, the evidence in the record related to the petitioner's claim of abuse consisted of a statement from the petitioner and a statement from two of the petitioner's friends. In his statement, the petitioner claimed:

Our marriage seemed to work fine till [sic] September 2000. Her attitude changed towards me. She started fighting with me every other day.

I tried to ask her about this change in her attitude, but she told me to keep shut and mind my own business. She said she was bored of me Earlier she used to be home by 6 p.m. but these days she came late around 10 p.m. or sometimes she did not come home at all.

* * *

³ The regulation at 8 C.F.R. § 204.2(c)(3)(ii) states, in pertinent part:

Notice of intent to deny. If the preliminary decision on a properly filed self-petition is adverse to the self-petitioner, the self-petitioner will be provided with written notice of this fact and offered an opportunity to present additional information or arguments before a final decision is rendered.

⁴ It is noted that in instances where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO does not usually accept evidence offered for the first time on appeal. If the petitioner had wanted the submitted evidence to be considered, he should have submitted the documents in response to the director's request for evidence. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). In this instance, however, because the petitioner was not provided with the NOID required by regulation, we have reviewed the petitioner's appellate submission in order to determine whether such evidence overcomes the director's stated grounds for denial and could be sustained without remanding to the director for further action.

She started throwing things at me. She called me names and insulted me in front of my friends. She told me if I said anything then she would send me back to India . . . She started treating me like a slave.

* * *

That sometime in July 2000 I started to believe that my wife was having illicit extra marital relations with another man.

* * *

We started fighting every single day about this issue. I had to go through mental torture everyday and felt my life was like a hell. She started insulting me in public and treated me like her slave.

* * *

She expected me to cook for her when she came home. If I did not do, she abused me. She started yelling at me on even small things. When I tried to sort out these things I was called by bad names and verbally abused.

* * *

Whenever I had any friends or relatives visiting me, she insulted them. She would tell them that I was good for nothing and being fed by her. She called me names [sic] in front of my friends and relatives.

The statements submitted by the petitioner’s friends contain identical wording and indicate that the petitioner’s spouse would insult the petitioner, call him names, and treated him like a slave. They also confirm the petitioner’s claim that his spouse was having an affair.

In denying the petition, the director found that the statements from the petitioner’s friends did not appear to document each affiant’s individual account regarding the petitioner’s spouse’s behavior. Additionally, the director determined that the petitioner’s statement was “very general” and did not “give specific detail to any one account.” We concur with these findings.

On appeal, as it relates to the statements made by the petitioner’s friends, counsel states that because the petitioner’s friends were present and observed the same activities and abusive behavior, it “is only reasonable that in their affidavits they use the same language.” We do not agree. While it is reasonable to assume that their descriptions of a particular event would be similar, one would not expect their language to be identical, right down to *grammatical, punctuation, and spelling errors*. It is not clear who is the actual author of the common passages, but it is highly improbable that both individuals independently formulated the exact same

wording. Given that the statements are indistinguishable from one another, it is clear that that at least one of these individuals did not independently choose the wording of his letter. Regardless, the language contained in the statements is too vague to make any determination regarding abuse. The general claim that the petitioner was insulted and called names and that his spouse had an affair is not sufficient to establish that the petitioner was subjected to extreme cruelty. The statement submitted by the petitioner's friend, Amandeep Singh, on appeal contains the same general claims that the petitioner's spouse was "rude," would call the petitioner names and insult him, and that she had an affair.

On appeal, the petitioner also submits a new personal statement in which he reiterates his previous claims that his spouse would throw objects at him and would threaten to have him "sent back to India." Again, however, the petitioner fails to provide a description of any specific event or occurrence. While the petitioner asserts that his spouse's "violent outbreaks occurred three to four times a month," his statement lacks sufficient detail to make a determination that the petitioner was subjected to extreme cruelty. The claims that the petitioner's spouse was rude, insulted the petitioner and called him names, and that she had an affair, are not sufficient to establish a claim of abuse as described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). While the petitioner also indicates that his spouse would throw objects and threaten him with deportation, he does not provide details regarding any specific incident to establish that these incidents rose to the level of extreme cruelty. Based upon the above discussion, we concur with the finding of the director that at the time of his decision, the record was not sufficient to establish that the petitioner had been battered or subjected to abuse by his spouse. The evidence did not demonstrate that the petitioner was threatened, forcefully detained, psychologically or sexually abused or exploited or that his spouse's actions were part of an overall pattern of violence. The evidence submitted on appeal does not overcome the director's findings.

However, despite our support of the director's findings, the director's decision cannot stand because of her failure to issue a NOID to the petitioner prior the issuance of the denial. Accordingly, the decision of the director must be withdrawn and the case remanded for the purpose of the issuance of a NOID as well as a new final decision. The new decision, if adverse to the petitioner, shall be certified to this office for review.

Although the director's decision was based upon the single issue addressed above, we find additional issues beyond the director's decision that must be addressed on appeal. Specifically, the present record fails to establish that the petitioner had a qualifying relationship with a U.S. citizen under section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act and that he was eligible for immediate relative classification under section 201(b)(2)(A)(i) of the Act based on such a relationship. The record reflects that the petitioner's marriage was legally terminated on July 11, 2002. The Form I-360 petition was filed on January 13, 2003. As concluded in the previous section, the present record does not demonstrate that the petitioner's former wife battered or subjected him to extreme cruelty during their marriage. Consequently, the petitioner has not established that the legal termination of their marriage was connected to his former wife's battering or extreme cruelty, as required by section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act. Additionally, because the petitioner did not have a qualifying relationship with his former wife under section 204(a)(1)(A)(iii)(II) of the Act, he has also not established that he is eligible for immediate relative classification based on such a relationship, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act.

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 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 which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.