

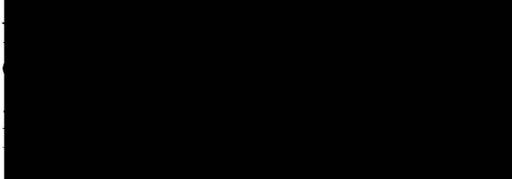
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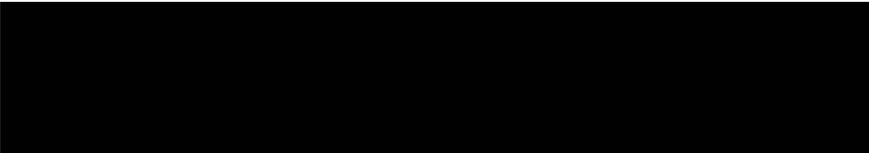


FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: **MAR 26 2008**
EAC 06 031 51374

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:



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.

Naura Deadnck
for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition. On appeal, the Administrative Appeals Office (AAO) remanded the matter for further action. The matter is now before the AAO upon certification of the director's subsequent, adverse decision. The decision of the director will be affirmed and the petition will be denied.

The petitioner seeks immigrant classification 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.

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 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].

In this case, the director initially denied the petition on February 6, 2006 due to the petitioner's failure to establish a qualifying relationship with his former wife because the petition was filed more than two years after their divorce. In its November 6, 2006 decision on appeal, the AAO concurred with the director's determination and further found that the petitioner had failed to establish his eligibility for immediate relative classification based on a qualifying relationship, battery or extreme cruelty, and his good moral character. The AAO nonetheless remanded the petition for issuance of a Notice of Intent to Deny (NOID) in compliance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

On remand, the director issued a NOID on January 23, 2007, which informed the petitioner that he had not established the requisite qualifying relationship, battery or extreme cruelty, good moral character and entry into the marriage in good faith. The petitioner did not respond to the NOID. Accordingly,

the director denied the petition on July 5, 2007 on the grounds cited in the NOID and certified his decision to the AAO for review.

The pertinent facts and relevant evidence submitted below were discussed in our prior decision, incorporated here by reference. Accordingly, we will only address the evidence properly placed in the record after that decision was issued. On his Form I-290B, Notice of Appeal, the petitioner did not indicate that he would be filing an additional brief or evidence. However, the record contains an untimely filed brief and evidence submitted by counsel to the AAO on November 9, 2006, which was three days after the AAO issued its decision on appeal and 276 days after the director's initial decision was issued. As the petitioner did not request additional time to file these materials and the AAO did not find good cause for acceptance of a late filing, the AAO was under no obligation to consider these materials on appeal. *See* 8 C.F.R. § 103.3(a)(2)(vii). Nonetheless, we will consider the materials on certification as they were in the record, but not considered by the director at the time of his July 5, 2007 decision. On certification, counsel submits copies of documents previously submitted and one new affidavit of the petitioner.

Entry into the Marriage in Good Faith

The materials submitted on November 9, 2006 include copies of documents showing that the petitioner's former wife was the beneficiary of his life insurance policy; electricity, telephone and cable television statements jointly addressed to the former couple and dated during their marriage; joint bank account statements dated during their marriage and copies of cancelled checks drawn on the joint account and signed by both the petitioner and his former wife. These documents demonstrate that the petitioner entered into marriage with his wife in good faith, as required by section 204(a)(1)(A)(iii)(A)(I)(aa) of the Act.

Battery or Extreme Cruelty

On November 9, 2006, the petitioner also submitted an October 4, 2006 letter from his psychotherapist confirming that he began weekly psychotherapy treatment on September 7, 2006 due to symptoms of depression and sleeping problems. Copies of prescriptions and receipts showing that the petitioner was prescribed Fluoxetine and Ambien in October 2006 accompany this letter. Yet these documents fail to demonstrate that the petitioner's depression and insomnia were caused by his former wife's battery or extreme cruelty. Rather, the documents simply confirm that the petitioner sought mental health treatment over three years after he separated from his former wife and while his appeal was pending.

The petitioner submitted an August 1, 2006 letter from [REDACTED] President of the Sikh Cultural Society, Incorporated in Richmond Hill, New York who states that in 2003, the petitioner told [REDACTED] that his former wife was "fighting with him and misbehaving." [REDACTED] reports that when he called the petitioner's wife to counsel her, she replied that she did not care. [REDACTED] also states that the petitioner told him that his wife cheated on him with her brother and would not have sexual relations with him. [REDACTED] repeats claims made in the testimony submitted below, which

was found insufficient to establish battery or extreme cruelty, and he provides no further, probative information.

The petitioner also submitted a copy of his verified complaint in his divorce case, which alleges, under the ground of cruel and inhuman treatment (section 170(1) of the New York Domestic Relations Law) that the petitioner's former wife physically assaulted him on two occasions in April 2003. However, neither the petitioner nor the affiants whose testimony was submitted below discussed these incidents. In addition, the record indicates that the petitioner's former wife waived service of the petitioner's complaint and did not respond. In sum, the evidence submitted on November 9, 2006 fails to demonstrate that the petitioner's former wife subjected him 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) prescribes that primary evidence of a self-petitioner's good moral character is her or her affidavit accompanied by local police clearances or state criminal background checks for every location in which the self-petitioner has resided for at least six months during the three years preceding the filing of the petition. If such documents are not available, the regulation allows the self-petitioner to submit an explanation and other evidence of his or her good moral character. 8 C.F.R. § 204.2(c)(2)(v). Here, the petitioner submitted no evidence of his good moral character below.

On certification, the petitioner submits an affidavit dated August 16, 2007 in which he attests to his good moral character. The petitioner provides no explanation of his failure to provide local police clearances, state criminal background checks or other evidence as specified in the regulation. The petitioner also fails to explain why he did not submit an affidavit regarding his good moral character below, despite being advised of the need for such evidence in the AAO's prior decision and the director's NOID.

Where, as here, 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 will not accept evidence offered for the first time on appeal or certification. *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). The petitioner has provided no explanation and documentation of why the evidence submitted on certification was not available for submission below. Accordingly, the AAO need not and will not consider the evidence submitted for the first time on certification. The petitioner has failed to demonstrate that he is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

Qualifying Relationship and Corresponding Eligibility for Immediate Relative Classification

The petitioner submitted a copy of the certified mail receipt and the domestic return receipt for his Form I-360, which show that the petition was mailed on October 27, 2005, but was not received by

Citizenship and Immigration Services (CIS) until October 31, 2005, which was three days after the second anniversary of his divorce. As explained in our prior decision, a petition is not properly filed until it is received by CIS. 8 C.F.R. § 103.2(a)(7)(i). In his November 6, 2006 letter, counsel does not address this regulatory requirement, but merely asserts that the petition was timely filed. Counsel is mistaken. **The petition was filed over two years after the petitioner's divorce.** In addition, the petitioner has failed to establish his former wife's battery or extreme cruelty or that their divorce was connected to such abuse. For both of these reasons, the petitioner has not demonstrated that he had a qualifying relationship with his former wife at the time this petition was filed, as required by section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act.

Beyond the director's decision, the record also fails to establish that the petitioner was eligible for immediate relative classification based on his relationship with his former wife, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act. 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 spouse. Because the petitioner failed to establish both a qualifying relationship and battery or extreme cruelty, he was ineligible for immediate relative classification based on his former marriage.

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 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). The AAO maintains plenary power to review each case 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 July 5, 2007 decision of the director denying the petition is affirmed, as modified by the foregoing discussion. The petitioner has not demonstrated that he had a qualifying relationship with his former wife at the time his petition was filed, that he was eligible for immediate relative classification based on such a relationship, that his former wife subjected him to battery or extreme cruelty during their marriage and that he is a person of good moral character. The petitioner is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

The denial of the petition will be affirmed for the above reasons, with each considered 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. The petitioner has not sustained that burden.

ORDER: The director's decision of July 5, 2007 is affirmed. The petition is denied.