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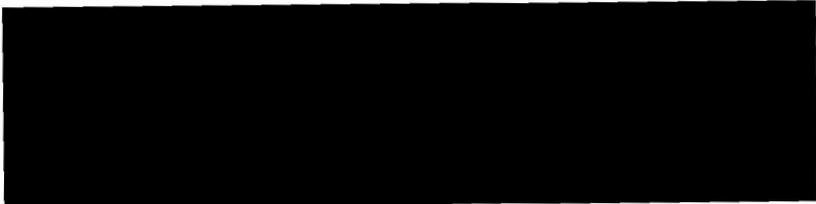
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**

**B9**



FILE:



EAC 07-098-50052

Office: VERMONT SERVICE CENTER

Date: **APR 06 2009**

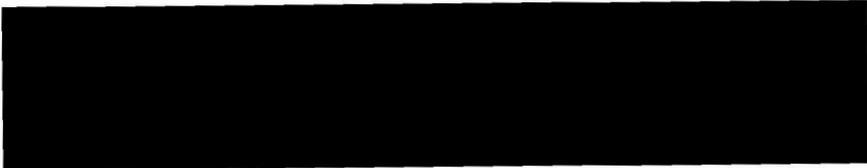
IN RE:

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.

John F. Grissom  
Acting 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. Because the petition is not approvable, however, it will be remanded for further action.

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 having been battered or subjected to extreme cruelty by his U.S. citizen spouse.

The director denied the petition finding that the petitioner failed to establish that he was battered or subjected to extreme cruelty by his spouse during their marriage. The petitioner, through counsel, submits a timely appeal.

We concur with the director's determination that the petitioner has not established that he was battered or subjected to extreme cruelty by his U.S. citizen spouse. Counsel's claims on appeal do not overcome this ground for denial. Beyond the director's decision, we also find that the petitioner did not establish that he resided with his spouse or that he is a person of good moral character. 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).

*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 the spouse of a U.S. citizen may self-petition for immigrant classification if the petitioner demonstrates that he or she entered into the marriage with the U.S. citizen spouse in good faith and that, during the marriage, the petitioner or a child of the petitioner was battered or subjected to extreme cruelty perpetrated by the petitioner's spouse. In addition, the petitioner 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].

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.

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.

(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.

#### *Procedural History and Pertinent Facts*

The record in this case provides the following pertinent facts and procedural history. The petitioner is a native and citizen of the Democratic Republic of the Congo. He was last admitted to the United States on December 24, 2000 as a P-1 nonimmigrant visitor as part of an internationally recognized

entertainment group, and had traveled to the United States previously. On May 13, 1998 the petitioner married B-S-<sup>1</sup> a U.S. citizen, in California. They were divorced on March 7, 2005.

The petitioner filed the instant I-360 Petition on February 20, 2007. On March 6, 2007 the director issued a Request for Evidence (RFE) that the petitioner married his spouse in good faith; in response, the petitioner submitted a copy of a dental insurance card for his spouse and six affidavits from acquaintances regarding the couple's relationship, both before and during their marriage. The director issued a second RFE on September 11, 2007 asking for, *inter alia*, evidence that the petitioner had been battered or subjected to extreme cruelty by his U.S. citizen spouse and additional evidence that he married his spouse in good faith. The petitioner responded on December 7, 2007 by submitting copies of credit cards, an identification card, a bill, website information about his wife's business, and medical and social security correspondence. All of the documents had his wife's name on them showing that she used the petitioner's name as her last name; none of the documents included the petitioner's name or any address; the bill is dated September 10, 2007, almost four years after the couple separated and over two years after they were divorced. Other than a statement from his attorney, no additional evidence of abuse was submitted.

The director found that the petitioner had established all of the eligibility requirements except the requirement to show that he had been battered or subjected to extreme cruelty by his U.S. citizen spouse. Accordingly, on January 2, 2008 the director denied the petition on that basis.

The petitioner, through counsel, submits a timely appeal. Counsel again includes his own statement but no additional evidence. Counsel asserts that the director's decision is unintelligible and incoherent, referring to an error in one sentence; he also claims that it fails to consider in good faith the evidence submitted and incorrectly applies the standard for extreme cruelty.

#### *Evidence of Battery or Extreme Cruelty*

The evidence of battery or extreme cruelty in this case is comprised solely of the petitioner's statement and the statements of his friends. At the time of filing, the petitioner submitted a declaration, dated April 18, 2006. He claimed that he is a professional musician who has performed with a world-famous group called the [REDACTED] since 1989, and that he used his stage name, [REDACTED], when he performed. He said he first met his wife, B-S-, at one of his shows in San Jose, California in 1990; she bought him a cola and he told her he was from Oakland, and the next time they played in Oakland, she was there; he described how they continued their relationship by telephone when he left for Paris and that they spoke almost every day between 1990 and 1996 and B-S- would write to him, helping him improve his English. He added that she was very kind and he loved her letters; that she helped him find his daughter, with whom he had lost contact; and that in April 1998, she suggested they get married. He stated that he moved from New Jersey to join her in California; they were married in a church and honeymooned in the mountains; and he moved into her

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<sup>1</sup> Name withheld to protect individual's identity.

home at [REDACTED] in Fremont.

He then described the problems in his marriage, claiming that they began about three months after they were married. He said B-S- would insult his children and him, calling them monkeys and insulting him as a African, saying he was an animal and slept in trees; he would leave at those times, go for walks or sleep in the garage to avoid her. He claimed that the first time she hit him was about three months after they got married, when she came home from work and was furious that he had not done the housework, and she insulted him and he cried; she would call him a thief in front of his friends and call him a parasite; she was controlling and would not let him speak on the phone to his friends and would start a fight with him if he wanted to go out. He claimed she was responsible for a burglary at their home in 2001 and that two weeks later they moved together to a different residence at [REDACTED] in Modesto California, but their relationship did not improve. He stated that she would force him to sleep in the garage and would sometimes refuse to let him into the house; and that she never stopped hitting or insulting him and that she broke his new bass guitar. He claimed that one of the most painful things was that his wife was unfaithful to him and he could do nothing about it. He added that the final straw was that she sold his and his friend's car without asking him, and that that he left her after that, but that she continued to harass him and his friends, calling him names and insulting him.

In addition to his personal declaration, the petitioner initially submitted declarations from four acquaintances: (1) [REDACTED] in a statement dated May 10, 2006, said that he was a professional musician and friend and band mate of the petitioner and had known him more than 25 years; and that when they were playing shows, B-S- would come looking for the petitioner and curse at everyone and be rude to everyone in the band, and once he saw her slap the petitioner when he was visiting at their home; (2) [REDACTED] in a statement dated November 25, 2005, described B-S- as excessively possessive and claimed that she once disrupted their work at the recording studio and that the petitioner would call him from home to help calm B-S- down during her tantrums; (3) [REDACTED] in a statement dated November 30, 2005, claimed that he helped promote the petitioner's band and had become friends with him in the last few years; he said the petitioner had told him he was experiencing difficulties with his wife; and (4) [REDACTED] in a statement dated November 4, 2005, claimed to be the petitioner's friend for 15 years and described B-S- as abusive to [REDACTED] and his wife and that the petitioner reported that she had been verbally and sometimes physically abusive to the petitioner. In response to the RFE issued on March 6, 2007 the petitioner submitted an additional seven affidavits, all either undated or dated in April or June 2007; while they were submitted as evidence that the petitioner entered into his marriage in good faith, some of them referred to problems in the marriage. The problems described were that B-S- would kick the petitioner out of the house, insult him and his friends, or was possessive and jealous; one claimed that B-S- went to the extent of starving the petitioner. No further details or specific description of the alleged abuse were provided.

The director found that the statements and affidavits that were submitted without corroborating evidence to substantiate battery or extreme cruelty were insufficient evidence in support of the

petitioner's claim; and that the behavior described did not amount to extreme cruelty. On appeal, counsel asserts that the director's statement regarding the lack of documentation to substantiate battery or extreme cruelty is untrue because the petitioner submitted sufficient evidence; counsel goes on to describe the emotional damage the petitioner suffered from his wife's abuse. Counsel also refers to an error in one sentence in the director's decision to support his argument that the decision is unintelligible and incoherent.

Upon review, we note that the lack of corroborating evidence is not a sufficient reason to discount evidence. However, the director did not discount the evidence in this case. Rather, he accurately indicated that the statements and affidavits were submitted without corroborating evidence and they were insufficient. We acknowledge that the director wrote, regarding the petitioner's response to an RFE, "In response, you submitted a statement you're your attorney." He should have referred to a statement from your attorney. As our review encompasses an assessment of all of the evidence submitted by the petitioner, we find this error to be harmless.

The evidentiary guidelines for demonstrating the requisite battery or extreme cruelty lists examples of the types of documents that may be submitted and states, "All credible relevant evidence will be considered." 8 C.F.R. § 204.2(c)(2)(iv). In this case, as in all visa petition proceedings, the petitioner bears the burden of proof to establish his eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The mere submission of relevant evidence of the types listed in the regulation at 8 C.F.R. § 204.2(c)(2) will not necessarily meet the petitioner's burden of proof. While the U.S. Citizenship and Immigration Services (USCIS) must consider all credible evidence relevant to a petitioner's claim of abuse, the agency is not obligated to determine that all such evidence is credible or sufficient to meet the petitioner's burden of proof. Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J); 8 C.F.R. § 204.2(c)(2)(i).

In this case, we do not find the evidence sufficient to meet the petitioner's burden of proof. First, the petitioner has submitted only his own statement and those of friends, and these statements fail to provide sufficient relevant details of the events described, lacking credibility for that reason. Neither the petitioner nor his friends who provided statements on his behalf included the dates of any alleged abusive event; some do not claim to have witnessed the event they describe but to have heard about it from the petitioner; and none, other than the petitioner, include a reference to any address or residence where the couple resided at any time. Moreover, other than these general statements from the petitioner that his wife would hit him at various times, and the statement of one friend who claimed that he saw the petitioner's wife slap him, the statements failed to allege any threat of or actual physical act of abuse perpetrated against the petitioner by B-S-. The petitioner's allegation of extreme cruelty is based upon the claims noted above that his spouse would yell at him and have tantrums; insulted him and his friends; called him names; disrupted his work place; stole from him; would kick him out of their home; and, she was unfaithful.

The descriptions of B-S-'s actions either lack credibility or do not rise to the level of the acts

described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi), which include forceful detention, psychological or sexual abuse or exploitation, rape, molestation, incest, or forced prostitution. The claims made by the petitioner and the general statements submitted on his behalf fail to establish that the petitioner was the victim of any act or threatened act of physical violence or extreme cruelty, that B-S-'s non-physical 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.

Accordingly, the petitioner has failed to establish that he was battered or subjected to extreme cruelty during his marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

#### *Evidence of Joint Residence*

Beyond the decision of the director, we note that the petitioner claimed to have resided with his wife at two separate addresses. However, he has submitted no evidence in support of his claim. Neither the statements described above nor any document submitted in support of his petition, other than the couple's marriage certificate, includes an address for the petitioner or his wife.

Documents may be submitted as evidence of joint residency, including 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. 8 C.F.R. § 204.2(c)(2)(iii). In this case, although the petitioner and B-S- were married in May 1998 and the petitioner claimed on his I-360 Petition to have resided with her from May 1998 to November 2003, not one document has been submitted that notes the petitioner's or B-S-'s address during that time.

While the petitioner is not required to have lived with his wife for any specific amount of time, the lack of relevant information provided in supporting affidavits, and the failure to provide any documentary evidence detract from the credibility of his claim. Consequently, the petitioner has not established by a preponderance of the evidence that he resided with his wife, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

#### *Evidence of Good Moral Character*

Beyond the decision of the director, we also note that the petitioner failed to submit sufficient evidence of 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 petitioner submitted a police clearance for New York, but no police clearance or state-issued criminal background check for California; although the petitioner submitted a copy of a request for FBI records, no FBI report was submitted. The petitioner lists his residence in California on his request to enter a default divorce order, which was filed with the Superior Court of California

on January 28, 2005, indicating that he resided in California during the three-year period immediately preceding the filing of his I-360 Petition. Although he has submitted his own statement and numerous affidavits from friends regarding his good moral character, he has failed to provide all of the required police clearances or state-issued criminal background checks.

Accordingly, the petitioner has 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.

### *Conclusion*

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).

For the reasons noted above, the AAO concurs with the director's decision that the petitioner has failed to establish by a preponderance of the evidence that he was battered or subjected to extreme cruelty by his U.S. citizen spouse. Beyond the director's decision, we also find that the petitioner did not establish that he resided with his spouse or that he is a person of good moral character. Consequently, he is ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act. The petition is not approvable for the above stated reasons, with each considered as an independent and alternative bar to approval.

Nonetheless, the case will be remanded because the director denied the petition without first issuing a NOID as required under former 8 C.F.R. § 204.2(c)(3)(ii)(2006). While it is no longer a regulatory requirement for petitions filed on or after June 18, 2007, a NOID is required in this case, as it was filed on February 20, 2007.

As always, the burden of proof in visa petition proceedings remains entirely with the petitioner Section 291 of the Act.

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