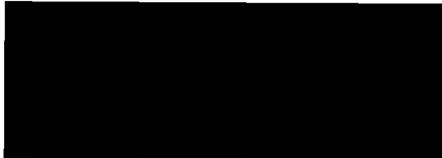


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



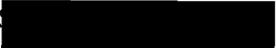
**U.S. Citizenship
and Immigration
Services**



B9

Date: **DEC 21 2011**

Office: VERMONT SERVICE CENTER File: 

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:

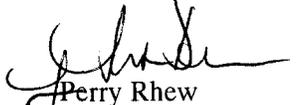


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, (“the director”) denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action.

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 his U.S. citizen spouse.

The director denied the petition for failure to establish that the petitioner entered into marriage with his second wife in good faith.

On appeal, counsel submits a two-paragraph statement and additional evidence.

Relevant Law and Regulations

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).

Section 204(a)(1)(J) of the Act further 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:

(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 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.

* * *

(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.

Pertinent Facts and Procedural History

The petitioner is a citizen of India who entered the United States in 1997, as a nonimmigrant visitor. The petitioner married his second wife, a U.S. citizen, on August 12, 2005 in Hempstead, New York. After U.S. Citizenship and Immigration Services (USCIS) denied the petition for alien relative (Form I-130), filed by the petitioner's second wife and the petitioner's corresponding application to

adjust status (Form I-485), the petitioner was placed in removal proceedings.¹ The petitioner filed the instant Form I-360 on December 15, 2008. The director subsequently issued a Request for Evidence (RFE) of the petitioner's good-faith entry into the marriage and his second wife's battery or extreme cruelty. The petitioner, through counsel, timely responded with additional evidence which the director found insufficient to establish the petitioner's good-faith entry into the marriage. The director denied the petition on that ground and counsel timely appealed.

On appeal, counsel submits a brief statement and additional evidence. The AAO reviews these proceedings *de novo*. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Although the petitioner has now established that he entered the marriage in good faith, the petition may not be approved because the record fails to demonstrate that the petitioner's second wife subjected him to battery or extreme cruelty during their marriage. As the petitioner was not afforded the opportunity to address this deficiency on appeal, the petition will be remanded to the director for further action.

No Notice of Intent to Deny was Required

On appeal, counsel claims that the director violated the regulation at 8 C.F.R. § 204.2(c)(3)(ii) by failing to issue a Notice of Intent to Deny (NOID) before denying the petition. Counsel is mistaken. Although the regulations previously required the issuance of a NOID before a petition could be denied, the regulation was amended to remove that requirement on June 18, 2007, a year and a half before this petition was filed. See 72 Fed. Reg. 19100, 19107 (Apr. 17, 2007). The current regulation at 8 C.F.R. § 204.2(c)(3)(ii) only prescribes that "the self-petitioner will be notified in writing of the reasons for the denial and of the right to appeal the decision." The director's May 28, 2010 decision complied with the regulation.

Entry into the Marriage in Good Faith

In his decision, the director determined that the petitioner had submitted insufficient evidence of his good faith in entering his second marriage. In particular, the director noted that the petitioner had submitted only one joint banking account statement dated August 15, 2006 and copies of joint federal income tax forms for 2005 and 2006, but no evidence that the returns had actually been filed with the Internal Revenue Service (IRS). On appeal, the petitioner submits copies of 16 monthly joint bank account statements dated during his marriage between September 2005 and December 2007, which show frequent deposits and withdrawals from the account. The petitioner also submits his IRS tax transcript, which shows that he jointly filed income taxes with his second wife in 2005, 2006 and 2007. In addition, the record contains evidence that the petitioner jointly held utilities accounts and an automobile insurance policy with his second wife during their marriage. In his December 9, 2008 affidavit, the petitioner also described in probative detail how he met his wife, their courtship and wedding. In sum, the relevant evidence submitted below and on appeal demonstrates that the petitioner entered his second marriage in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act, and the director's determination to the contrary is hereby withdrawn.

¹ The petitioner's next hearing before the New York City Immigration Court is scheduled for January 12, 2012.

Battery or Extreme Cruelty

The appeal may not be sustained and the petition may not be approved, however, because the relevant evidence does not establish that the petitioner's second wife subjected him to battery or extreme cruelty during their marriage. In his December 9, 2008 affidavit, the petitioner recounted that soon after their marriage, his second wife began demanding money from him and he had to work extra hours to comply with her requests. The petitioner stated that his second wife stopped cooking for him, refused to have intimate relations with him and threatened to get him deported when he did not comply with her financial demands. The petitioner further reported that his second wife slapped him on two occasions, went out with her friends on the weekends and stayed at her mother's home. The petitioner eventually discovered that she was having intimate relations with other men. The petitioner recounted that he was hospitalized in late January 2007 after he slipped and fell in the bathroom and that his second wife never visited him at the hospital and when he returned home, he found that she had taken his passport and other valuables. The petitioner's second wife then told him that she would return his belongings if he agreed to divorce. The petitioner reported that he agreed to end the marriage and he had no further contact with his second wife.

In his March 13, 2010 affidavit submitted in response to the RFE, the petitioner added that his second wife called him derogatory names, made fun of his accent and verbally abused him with racial slurs. The petitioner also stated that in January 2007, his second wife pushed him while he was in the bathtub, which caused him to hit and cut his head and he had to go to the emergency room. However, in his 2008 affidavit, the petitioner previously indicated that his second wife was not home when he fell in the bathroom and that he went to the hospital only after he awakened and found that he was bleeding. The petitioner submitted a letter from the Jacobi Medical Center stating that he was a patient at the hospital on January 23 and 30, 2007, although the letter does not describe the reason for his visit or any diagnosis or treatment he received. The letter also shows that the petitioner was seen on two different days and was not an inpatient at the hospital as indicated in his affidavits.

In response to the RFE, the petitioner also submitted letters from his friend, [REDACTED] and his employer, [REDACTED]. [REDACTED] stated that she was a customer at the gas station where the petitioner worked and that she often saw the petitioner arguing with his second wife. On one unspecified occasion, [REDACTED] reported that she heard the petitioner's second wife tell him to forget about the "green-card" because he would get nothing from her, after which the petitioner's second wife pushed him and walked away. When [REDACTED] later asked the petitioner what had happened, he told her that his second wife had taken his passport and other documents because he had refused to attend a party with her. The petitioner's employer, [REDACTED] also stated that on an unspecified date, the petitioner's second wife came to the gas station and told the petitioner she had taken his passport and other documents and would not return them until the petitioner agreed to a divorce. The statements of [REDACTED] and [REDACTED] are inconsistent with the petitioner's 2010 affidavit in which he stated that his second wife took his passport while he was in the hospital (not while he was working) to make him agree to a divorce, not, as stated by [REDACTED] because he refused to attend a party with her.

When considered in the aggregate, the relevant evidence fails to establish that the petitioner's second wife subjected him to battery or extreme cruelty during their marriage. The letter from the hospital

shows that the petitioner was seen on two dates in January 2007, but provides no information regarding the reasons for the petitioner's visit or any diagnosis or treatment that would support the petitioner's claim. In his affidavits, the petitioner provides two significantly different accounts of the January 2007 incident, which further detracts from the credibility of his claim that he was hospitalized due to his wife's battery. The statements of the petitioner, [REDACTED] and [REDACTED] are inconsistent and do not provide detailed, probative information sufficient to establish that the petitioner's second wife battered him or that her behavior involved threatened violence, psychological or sexual abuse, or otherwise constituted extreme cruelty, as that term is defined at 8 C.F.R. § 204.2(c)(1)(vi).

Accordingly, the petitioner has not established that his second 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.² Because the petitioner was not apprised of this deficiency in the director's decision, the petition will be remanded for the director to request additional evidence of battery or extreme cruelty and issue a new decision upon receipt of the petitioner's response or the lapse of the time allotted for such a response.

Conclusion

On appeal, the petitioner has overcome the director's ground for denial and demonstrated that he entered into his second marriage in good faith. However, beyond the director's decision, the petitioner has not established that his second wife subjected him to battery or extreme cruelty. He is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act and the petition may not be approved based on the current record. Because the petitioner was not apprised of this ground of ineligibility in the director's decision, the petition will be remanded for the director to request additional evidence of battery or extreme cruelty and issue a new decision.

In these 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 Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Here, that burden has not been met.

ORDER: The May 28, 2010 decision of the director is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.

² A 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).