

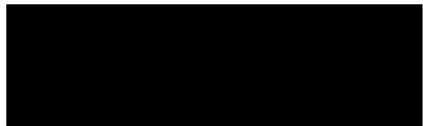
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



B9

DATE: **JUL 12 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:

SELF-REPRESENTED

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 a fee of \$630. 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, denied the immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequently filed appeal. The service center director entered an adverse decision in response to a subsequently filed motion to reopen. The matter is again before the AAO. The matter will be reopened. The AAO's previous decision is affirmed and the petition will remain 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.

Applicable 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 based on his or her relationship to the abusive spouse, 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 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 explained 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.

(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 set forth 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.

(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.

Facts and Procedural History

The petitioner is a citizen of Brazil who entered the United States as a nonimmigrant visitor on or about March 27, 2004. He married K-M-,¹ the claimed abusive United States citizen, on May 11, 2007. He filed the Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant, on June 18, 2008. The director issued a request for evidence (RFE) on July 28, 2009. Upon review of the record, including the petitioner's response to the RFE, the director denied the petition on December 3, 2009, after determining that the petitioner had failed to establish that he had been subjected to battery and/or extreme cruelty by his United States citizen spouse. Counsel for the petitioner timely submitted a Form I-290B, Notice of Appeal or Motion, a brief and additional evidence. Upon review, the AAO dismissed the appeal, concurring with the director's decision that the petitioner had not established that he had been subjected to battery and/or extreme cruelty. The AAO also found that the record lacked evidence of the petitioner's good moral character. Counsel for the petitioner submitted a Form I-290B, checking the box indicating that he was filing a motion to reopen the matter and submitted a police clearance letter as evidence of the petitioner's good moral character and a psychological evaluation in support of the petitioner's claim regarding abuse. Counsel asserted that applying the credible evidence standard, the petitioner had established that he had been subjected to abuse during his marriage to the United States citizen. The director, without jurisdiction of the matter, granted the motion to reopen, considered the evidence submitted, and found that the petitioner had submitted evidence establishing that he is a person of good moral character but again determined that the petitioner had not established that he had been subjected to battery or extreme cruelty perpetrated by the United States citizen spouse. The petitioner submits a Form I-290B appealing the director's decision on the motion and provides a personal statement.

¹ Name withheld to protect the individual's identity.

The AAO withdraws the director's decision on the motion, and grants the initial motion to reopen to consider all the evidence provided subsequent to its August 3, 2010 decision.

Good moral character

The petitioner on motion submitted a September 1, 2010 police clearance letter provided by the Tucson, Arizona Police Department indicating that the petitioner did not have an arrest history or outstanding warrants in Tucson. This letter completes the local police clearances required by the statute and regulation. The AAO's decision on the issue of good moral character is withdrawn.

Battery or Extreme Cruelty

The AAO previously discussed the petitioner's three statements, the statements of [REDACTED] and [REDACTED] and the two statements prepared by [REDACTED] a licensed clinical social worker. The AAO set out the deficiencies of the statements submitted and will not repeat the deficiencies here.

Counsel asserts on motion that using the any "credible evidence" standard, the petitioner has established that he was subjected to battery and/or extreme cruelty. We disagree. We acknowledge that section 204(a)(1)(J) of the Act requires United States Citizenship and Immigration Services (USCIS) to "consider any credible evidence relevant to the petition." Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J). This mandate is reiterated in the regulation at 8 C.F.R. § 204.2(c)(2)(i). However, this mandate establishes an evidentiary standard, not a burden of proof. Accordingly, "[t]he determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of [USCIS]." 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). 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 matter, as in all visa petition proceedings, the petitioner bears the burden of proof to establish 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 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). To require otherwise would render the adjudicatory process meaningless.

In this matter, the petitioner submits a September 1, 2010 a report prepared by [REDACTED] Ph.D., licensed psychologist and [REDACTED] Ph.D., Case Manager. [REDACTED] notes that a diagnostic and clinical interview of the petitioner was conducted on August 31, 2010 and September 1, 2010. [REDACTED] indicated that the petitioner reported that after six months of marriage, his wife started coming home late and would disappear and not fulfill her responsibilities as a mother. [REDACTED] also indicated that the petitioner reported that he discovered that his wife was bisexual and a "swinger" and he felt humiliated by this because everyone else knew but he did not, and that he was surprised and upset to find out that she had an operation to not have more children because they had

planned to have children together. [REDACTED] further indicated that the petitioner reported his wife called him derogatory names, threatened not to give him his immigration papers, and told him that bisexuality was the norm in the United States and if he did not like it he would have to return to Brazil. [REDACTED] noted the petitioner's report that his wife tried to pressure him to engage in sexual practices in which she was involved and that at times she would push him, punch him or grab his arm. [REDACTED] noted further the petitioner's report that K-M- drank alcohol and was out of control a couple of times and on one occasion purposefully broke his car window. [REDACTED] found that the petitioner had symptoms of moderate to severe depression as well as anxiety, social isolation, and low self-esteem and that based on the diagnostic interview he appeared to be suffering from untreated depression and anxiety. [REDACTED] opined: "[t]he relationship with his wife would be described as emotionally and psychological abusive" and according to the petitioner's reports, her actions and treatment of him would be classified as emotional cruelty and his loss of self-esteem, depression, and anxiety would be consistent with experiencing such abuse.

In the petitioner's personal statement on appeal, he indicates his belief that what happened in his marriage was psychological extreme cruelty and that all his goals and dreams were destroyed by what happened in his marriage. The petitioner notes his extreme humiliation and embarrassment, not just by her sexual orientation, but by her manipulation, control and threats in front of friends and family.

A review of the additional evidence submitted fails to establish that the petitioner was subjected to battery or extreme cruelty. Although [REDACTED] references the petitioner's report that at times K-M- would push and punch him or grab his arm, the record does not include consistent detail of specific incidents or events that involve battery. The petitioner does not reference any incident of battery or clarify the previous inconsistencies noted by the AAO regarding his claim that he was subjected to battery. The record does not establish that the petitioner was subjected to battery. Similarly, the petitioner fails to provide probative testimony regarding any incident of extreme cruelty as defined in the statute and regulation. Although the petitioner claims that he was manipulated, controlled and threatened by K-M-, he fails to describe this behavior in probative detail. The petitioner's testimony fails to establish that K-M-'s actions were comparable to the types of 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. Nor has the petitioner established that K-M-'s behavior was part of an overall pattern of violence or coercion. As we previously observed, the Ninth Circuit Court of Appeals noted "[b]ecause every insult or unhealthy interaction in a relationship does not rise to the level of domestic violence . . . , Congress required a showing of extreme cruelty in order to ensure that [the law] protected against the extreme concept of domestic violence, rather than mere unkindness." See *Hernandez v. Ashcroft*, 345 F.3d 824, 840 (9th Cir. 2003) (interpreting the definition of extreme cruelty at 8 C.F.R. § 204.2(c)(1)(vi)). In this matter, the petitioner has not provided testimony that describes conduct perpetrated by K-M- that constitutes extreme cruelty as set out in the statute and regulation.

The AAO accepts [REDACTED] professional training and accepts that his report was based on clinical observations of the petitioner's behavior and affect during the evaluation as well as the petitioner's statements. The AAO finds, however, that his report does not provide examples of

specific conduct that constitutes battery or extreme cruelty as defined in the statute and regulation.

Conclusion

Upon review of the evidence submitted subsequent to the AAO's August 3, 2010 decision, the testimony and evaluation fail to provide the necessary probative evidence that the petitioner was subjected to battery or extreme cruelty perpetrated by K-M-. The record remains deficient in this regard. 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. Here that burden has not been met.

ORDER: The director's December 6, 2010 decision is withdrawn. The petitioner's motion is granted. The AAO's August 3, 2010 decision on the issue of battery and/or extreme cruelty is affirmed and the petition remains denied.