

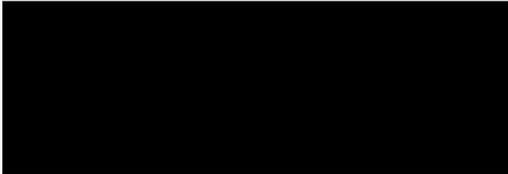
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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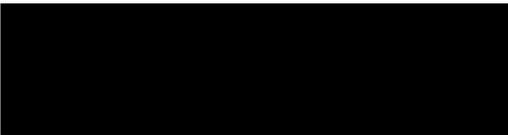
DATE: MAY 25 2011 OFFICE: VERMONT SERVICE CENTER

FILE: 

IN RE: 

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:

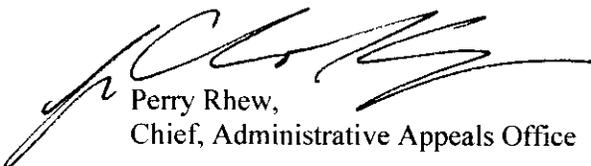


INSTRUCTIONS:

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 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 service center director denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 an alien battered or subjected to extreme cruelty by a United States citizen.

The director denied the petition on the basis of his determination that the petitioner had failed to establish that his wife subjected him to battery or extreme cruelty during their marriage. On appeal, counsel submits additional evidence.

Applicable Law

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, 8 U.S.C. § 1154(a)(1)(J) states, in pertinent part, the following:

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 further at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part, the following:

- (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.

The evidentiary standard and guidelines for a self-petition filed under section 204(a)(1)(A)(iii) of the Act are explained further at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part, the following:

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.

Pertinent Facts and Procedural History

The petitioner, a citizen of Kenya, married C-P-¹ a citizen of the United States, on March 15, 2004. He filed the instant Form I-360 on November 2, 2009. The director issued two subsequent requests for additional evidence to which the petitioner, through counsel, filed timely responses. After considering the evidence of record, including counsel's responses to the requests for additional evidence, the director denied the petition on July 22, 2010.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition.

¹ Name withheld to protect individual's identity.

Evidentiary Standard and Burden of Proof

On appeal, counsel makes the implicit argument that the director incorrectly applied the “any credible evidence” standard and that he denied the petition for lack of documentary evidence. To the extent that the director implied documentary evidence of battery or extreme cruelty is required, that portion of his July 22, 2010 decision is hereby withdrawn. Self-petitioners may, but are not required, to submit primary, corroborative evidence. *See* 8 C.F.R. §§ 103.2(b)(2)(iii), 204.1(f)(1), 204.2(c)(2)(i).

However, counsel appears to have conflated the evidentiary standard set forth by section 204(a)(1)(J) of the Act with the petitioner’s burden of proof. Section 204(a)(1)(J) of the Act requires U.S. Citizenship and Immigration Services (USCIS) to “consider any credible evidence relevant to the petition.” *Id.* 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 [agency’s] sole discretion.” 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 establishing the petitioner’s claim list examples of the types of documents that may be submitted and reiterates, “All forms of relevant credible evidence will be considered.” 8 C.F.R. § 204.2(c)(2)(iv). However, 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 Chawathe*, 25 I&N Dec. 369 (AAO 2010). 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.

Battery or Extreme Cruelty

In his October 24, 2009 self-affidavit, the petitioner stated that C-P- abused alcohol and was unable to work; kept to herself and withdrew from him; and verbally abused him when he refused to give her money for alcohol. According to the petitioner, C-P-’s alcohol abuse caused him to suffer physically: he stated that he lost his appetite and could not eat at home because the sight of C-P- made him sick and the house smelled of alcohol and vomit. The petitioner also described an incident during which C-P- hit him with an empty bottle after he tried to take a drink from her hand. He stated that after the bottle fell to the ground and shattered, C-P- picked up shards of glass and threw them at him.

The record also contains documentation indicating that the petitioner attended five counseling sessions between December 2009 and February 2010. In his December 19, 2009 “Adult Admission Assessment Tool,” ██████████ stated that the petitioner told him that C-P- abused alcohol, kept to herself, and withdrew from him. ██████████ diagnosed the petitioner with major depressive disorder and identified his situational stressors as, in part, “trouble dealing with his wife[’s] addictions problems.”

In her September 24, 2010 letter submitted on appeal, ██████████ stated that the petitioner told her that C-P- abused alcohol; was abusive and controlling; pushed him; cursed at him and called him names; and misused family funds to buy alcohol. ██████████ also stated that the petitioner had endured “many forms” of emotional, mental, and physical abuse by C-P-.

Finally, the petitioner also submitted a picture of five empty liquor bottles and a discharge report from a January 2008 visit to a doctor for a headache.

Considered in the aggregate, the relevant evidence fails to establish that C-P- subjected the petitioner to battery or extreme cruelty during their marriage. The testimonial evidence of record regarding the alleged battery is inconsistent: for example, ██████████ stated that C-P- subjected the petitioner to “many forms” of physical abuse but she did not discuss any specific forms or incidents of such abuse. The only incident of physical abuse discussed by the petitioner was the occasion on which C-P- allegedly hit him with a bottle after he tried to grab a drink from her and subsequently threw shards of glass from the broken bottle at him. We also note that ██████████ stated twice in his “Adult Admission Assessment Tool” that the petitioner had “adamantly denie[d] history of trauma and abuse.” Nor do any of the documents regarding the other counseling sessions discuss any incidents of battery.² Finally, although ██████████ claimed that C-P- pushed the petitioner, he made no such assertion himself. As the evidence of record regarding the alleged physical abuse is inconsistent, the petitioner has not established that he was the victim of battery perpetrated by C-P-.

Nor does the relevant evidence establish that C-P-’s non-physical behavior constituted extreme cruelty. To qualify for immigrant classification under section 204(a)(1)(A)(iii) of the Act, the statute and regulation require that the non-physical cruelty be extreme. *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)). While the record in this case shows that the petitioner suffered from depression and migraine headaches, the relevant evidence does not establish that these conditions were attributable to his wife’s battery or extreme cruelty rather than his wife’s alcoholism, his financial challenges, and other life stressors. The claims that C-P- cursed at the petitioner, called him names, and took money to pay for alcohol lack sufficient probative detail to show that such actions constituted psychological abuse, included threatened violence, or were otherwise part of an overall pattern of violence or coercive control. The remaining actions of C-P- described by the petitioner and ██████████ are not comparable to the types of behaviors listed at 8 C.F.R. § 204.2(c)(1)(vi) as examples of extreme cruelty.

Counsel’s claims and the relevant evidence fail to demonstrate that, during their marriage, C-P- subjected the petitioner to battery or extreme cruelty, as that term is defined in the regulation at 8 C.F.R. § 204.2(c)(1)(vi) and as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

² Counsel stated on the Form I-290B, Notice of Appeal, that a “psychological evaluation” would “soon come.” However, to date, nearly nine months later, we have received no such document.

Conclusion

The petitioner has failed to establish that C-P- subjected him to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act. Accordingly, the petitioner is ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act, and this petition must remain denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.