

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 20 2012** 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 AAO inappropriately applied the law 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 in accordance with the instructions on Form I-290B, Notice of Appeal or motion, with a fee of \$630, or a request for a fee waiver. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion to reopen will be granted. The appeal will remain dismissed 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

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 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].

Section 204(g) of the Act, 8 U.S.C. § 1154(g), prescribes:

Restriction on petitions based on marriages entered while in exclusion or deportation proceedings. – Notwithstanding subsection (a), except as provided in section 245(e)(3), a petition may not be approved to grant an alien immediate relative status or preference status by reason of a marriage which was entered into during the period [in which administrative or judicial proceedings are pending], until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.

Section 245(e) of the Act, 8 U.S.C. § 1255(e), provides an exception to section 204(g) of the Act as follows:

Restriction on adjustment of status based on marriages entered while in exclusion or deportation proceedings –

(1) Except as provided in paragraph (3), an alien who is seeking to receive an immigrant

visa on the basis of a marriage which was entered into during the period described in paragraph (2) may not have the alien's status adjusted under subsection (a).

- (2) The period described in this paragraph is the period during which administrative or judicial proceedings are pending regarding the alien's right to be admitted or remain in the United States.
- (3) Paragraph (1) and section 204(g) shall not apply with respect to a marriage if the alien establishes by clear and convincing evidence to the satisfaction of the [Secretary of Homeland Security] that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition under section 204(a) . . . with respect to the alien spouse or alien son or daughter. In accordance with the regulations, there shall be only one level of administrative appellate review for each alien under the previous sentence.

The corresponding regulation at 8 C.F.R. § 245.1(c)(8)(v) states, in pertinent part:

Evidence to establish eligibility for the bona fide marriage exemption. Section 204(g) of the Act provides that certain visa petitions based upon marriages entered into during deportation, exclusion or related judicial proceedings may be approved only if the petitioner provides clear and convincing evidence that the marriage is bona fide. . . .

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.

* * *

(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 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:

(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.

Facts and Procedural History

The petitioner is a citizen of India who claims to have entered the United States in 1992. An Immigration Judge ordered the petitioner excluded from the United States in 1995, and the order became final on June 21, 2007. The petitioner married A-K-,¹ a U.S. citizen, on February 28, 1999. The petitioner and his wife divorced on May 10, 2011.

The petitioner filed the instant Form I-360 on May 3, 2010. The director denied the petition for failure to establish the requisite battery or extreme cruelty and entry into the marriage in good faith. The

¹ Name withheld to protect the individual's identity.

director also denied the petition pursuant to section 204(g) of the Act. The AAO dismissed the petitioner's subsequent appeal. In its January 30, 2012, decision on appeal, incorporated here by reference, the AAO upheld the director's decision regarding the lack of battery or extreme cruelty and entry into the marriage in good faith, as well as for the bar at section 204(g) of the Act.

Preliminarily, counsel incorrectly noted in his brief on motion that the AAO decision found that the director had not followed the "all credible evidence standard." In fact, the AAO decision upheld the director's findings and explained that the evidentiary standard should not be conflated with the burden of proof, which remains with the petitioner. The AAO explained that the mere submission of relevant evidence does not necessarily meet the petitioner's burden of proof.

Counsel's claims on motion are essentially the same arguments made on appeal. Counsel's brief cites no specific incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy in the AAO dismissal as required for a motion to reconsider at 8 C.F.R. § 103.5(a)(3). Counsel's brief also fails to establish that the AAO's prior decision was incorrect based on the evidence of record at the time. *See* 8 C.F.R. § 103.5(a)(3) (prescribing this additional requirement). Consequently, the motion to reconsider must be dismissed. *See* 8 C.F.R. § 103.5(a)(4).

Counsel's submission does, however, meet the requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(2). Counsel submits an addendum to the petitioner's affidavits. Accordingly, the motion to reopen is granted.

Analysis

Battery or Extreme Cruelty

In its prior decision, the AAO determined that the petitioner had not established the requisite battery or extreme cruelty because the petitioner did not provide detailed testimony of specific incidents that constituted battery or extreme cruelty, as the term is defined at 8 C.F.R. § 204.2(c)(1)(vi). The other evidence provided similarly did not provide sufficiently detailed and probative accounts of specific incidents of battery or extreme cruelty.

In the addendum submitted on motion, the petitioner repeats much of his previous statements, but adds that on one occasion, A-K- did not show up for their New Year plans and when they argued the next morning, A-K- hit the petitioner with her right hand with a closed fist on the left side of his chest. The petitioner recounts that he had bruises as a result. The petitioner also states generally that his former wife "never hesitated to physically strike [him]," cursed at him in both English and Punjabi, and that she slapped him when they had friends over. The petitioner also asserts that on one occasion, his niece was staying with them and that in front of his niece, his ex-wife "slapped [him] in the face and shoved [him]."

While the petitioner describes three specific occasions where his wife used physical violence against him, this is insufficient to meet his burden of proof in this case. Where USCIS can articulate a material

doubt regarding the petitioner's eligibility, the agency may either request additional evidence or deny the application if the material doubt indicates that the claim is probably not true. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Here, the petitioner had previously submitted three statements. In the first statement, the petitioner stated that his wife emotionally, mentally, financially, and psychologically abused him, but made no mention of any physical abuse. In his second statement, the petitioner claimed that his wife pushed him in front of his niece, but did not say that she slapped him, as he claims in his most recent addendum. In his affidavit on appeal, the petitioner did not mention his ex-wife pushing or slapping him in front of his niece. Furthermore, in the affidavit submitted by his niece, she makes no mention of any physical abuse she observed, and stated only that A-K- did not allow the petitioner to make decisions and "would use abusive and foul language towards him." Given these contradictions and the lack of sufficient relevant evidence as previously described in the prior AAO decision, the petitioner's addendum on motion is insufficient to establish that his ex-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.

Entry into the Marriage in Good Faith

The addendum submitted on motion fails to establish the petitioner's entry into his marriage in good faith. In the addendum, the petitioner repeats much of what was conveyed in his previous statements, and adds that in addition to their initial half hour meeting, the petitioner and his ex-wife and her relatives had another meeting several days later that lasted for two hours during which they talked and "[got] to know each other." The petitioner also states that they talked on the telephone daily about A-K-'s son's future and buying a home. The petitioner briefly describes their religious wedding ceremony and various activities he and his former wife's son participated in together as well as his likes and dislikes. The petitioner does not further describe his and his former wife's weddings or any of their shared experiences, apart from the alleged abuse.

On motion, counsel asserts that the petitioner "went into great detail about the beginning of his relationship" with his ex-wife and that the petitioner and his former wife "courted on several occasions prior to their marriage", as well as having two wedding ceremonies and sharing finances and living together for over nine years. Counsel claims that "there is an overwhelming amount of evidence which compels a finding that [the petitioner] entered into his marriage in good faith," but he fails to cite to any specific evidence. Counsel also fails to address the deficiencies noted by the AAO in its previous decision. Further, the petitioner has not described courting his former wife on several occasions, as counsel claims on motion. To the contrary, the record indicates that the petitioner met his ex-wife prior to their wedding twice. The petitioner's descriptions of those two meetings, as well as his and his ex-wife's daily telephone conversations, lack probative detail. In his addendum submitted on motion, the petitioner describes various activities he undertook with his ex-wife's son, as well as his likes and dislikes, but fails to describe his relationship to his wife in similar detail. Accordingly, the petitioner has not demonstrated that he entered into marriage with his ex-wife in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Furthermore, as already discussed in the AAO's dismissal of the previous appeal, because the petitioner

has failed to establish that he entered into the marriage with his spouse in good faith by a preponderance of the evidence, he has also failed to demonstrate he qualifies for the bona fide marriage exemption from the bar to approval of petitions based on marriages contracted while the alien spouse is in removal or exclusion proceedings under the heightened standard of proof required under section 245(e)(3) of the Act. Accordingly, this petition must also remain denied under section 204(g) of the Act.

Conclusion

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. at 375. Here, that burden has not been met. Upon reopening, the prior decision of the AAO will be affirmed.

ORDER: The appeal remains dismissed and the petition remains denied.