



U.S. Citizenship  
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FILE:

EAC 04 027 52449

Office: VERMONT SERVICE CENTER

Date: MAR 10 2006

IN RE:

Petitioner:



PETITION: Petition for Special Immigrant Battered 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.

Robert P. Wiemann, Director  
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 The decision of the director will be withdrawn and the petition will be remanded for further action.

The petitioner is a native and citizen of Colombia who seeks classification as a special immigrant 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 subjected to battery or extreme cruelty by his United States citizen spouse. The petitioner filed his Form I-360 on November 5, 2003. Finding the evidence submitted with the Form I-360 insufficient to establish the petitioner's eligibility, the director issued a notice requesting the petitioner to submit evidence that his former wife subjected him to battery or extreme cruelty, that he resided with his former spouse and that he entered into their marriage in good faith. The petitioner, through counsel, requested an additional 60 days to respond to the notice and on December 21, 2004, submitted additional evidence. On June 16, 2005, the director denied the petition because the record failed to establish that the petitioner was subjected to battery or extreme cruelty by his former wife during their marriage. On appeal, counsel submits a letter and additional documents. For the reasons discussed below, we concur with the director's determination that the petitioner did not establish the requisite battery or extreme cruelty and find that counsel's claims and the evidence submitted on appeal do not overcome this basis for denial. However, the case will be remanded for issuance of a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

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 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).

The corresponding regulation at 8 C.F.R. § 204.2(c)(1)(vi) states, in pertinent part:

*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 . . . , 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 under section 204(a)(1)(A)(iii) of the Act are contained 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.

In this case, the record shows that the petitioner married [REDACTED] United States citizen, on May 5, 2000 in New York City. On his Form I-360, the petitioner wrote a one-paragraph statement entitled "Substantial Abuse," but submitted no documentation to support his claim. Accordingly, the director issued a notice on August 5, 2004 asking the petitioner to submit evidence that he had been battered or subjected to extreme cruelty by Ms. [REDACTED]. The notice listed the specific types of evidence that the petitioner could submit to support his claim and page two of the notice described the specific aspects of abuse that could be addressed in testimony and other corroborative evidence to establish extreme cruelty. The petitioner, through counsel, requested and was granted an additional 60 days to respond to the director's notice.

On December 21, 2004, the petitioner submitted his own affidavit, an assessment of his condition written by Irene Torres, a licensed clinical social worker, and documents relating to the petitioner's divorce from Ms. [REDACTED] on October 26, 2004. In his affidavit, the petitioner explains that shortly after his marriage to Ms. [REDACTED] on May 5, 2000, he had to return to Colombia to attend to personal and legal matters. The petitioner states that Ms. [REDACTED] agreed to live with his sister in New York during his absence, but that she would constantly call him and was impatient with the delay in his return to the United States. By September 2000, the petitioner states that Ms. [REDACTED] had moved out of his sister's apartment and told him that she wanted to end their marriage. He reports, "She stated that she felt betrayed by me and that I lied to her and that I was living with another woman in Colombia. Something which was true." According to the petitioner, he returned to New York on May 5, 2001 and the couple soon reconciled.

The petitioner states that Ms. [REDACTED] insisted on having sexual relations at all times, even when the petitioner's son (from his previous marriage) was at their home. The petitioner explains that he thought her behavior was abnormal and asked her many times to go to marital counseling, but that she refused, said that he was old and did not function well and that on more than one occasion she became very upset and said profanities to the petitioner in front of his son. The petitioner reports feeling ashamed and states that he continued to have sexual relations with Ms. [REDACTED] to avoid her insults and tirades. The petitioner states that he went to see a doctor who told him that he had a swollen prostate and that his headaches and back pains were due to stress.

After September 11, 2001, the petitioner explains that Ms. [REDACTED] stopped working, he was laid off from his job, and that they had to ask the Red Cross for help to pay their rent and buy food. The petitioner states that despite their financial problems, Ms. [REDACTED] refused to file his immigration petition so that he could obtain employment authorization. The petitioner states that Ms. [REDACTED] wanted more and more money from him and threatened to report him to the immigration authorities because he had overstayed his visitor's visa.

The petitioner states that on December 8, 2001, he and Ms. [REDACTED] went to a celebration at a friend's house. He reports that Ms. [REDACTED] got drunk and started to throw dishes on the floor. When the petitioner ordered her to stop, he states that Ms. [REDACTED] smacked him in the face and insulted him in front of everyone and that she said the petitioner was too old for her, that he did not satisfy her sexually and that she regretted the day she married him. The petitioner explains that this incident was very painful for him and that Ms. [REDACTED] never apologized to him.

The petitioner states that on January 17, 2002, Ms. [REDACTED] became upset when his sister and an old classmate of the petitioner's named [REDACTED] visited their home and [REDACTED] told Ms. [REDACTED] that she had a crush on the petitioner when he was young. The petitioner reports that Ms. [REDACTED] said that [REDACTED] could take the petitioner, that he was good for nothing, referred to [REDACTED] in a profane manner, accused the petitioner's sister of bringing Martha to their home to seduce the petitioner, and then threw the petitioner, his sister and [REDACTED] out of their home.

The petitioner explains that in April 2002, Ms. [REDACTED] told the petitioner that she would like to have a child with him and that she told him she was pregnant in May 2002. However, the petitioner reports that another man later contacted him and claimed to be the father of the child Ms. [REDACTED] was carrying. The petitioner explains that he later learned that his wife was having an affair with this man and that when he asked her to have an AIDS test, she refused and also told him she was certain that the petitioner was not the baby's father.

Ms. [REDACTED] January 17, 2004 assessment summarizes the petitioner's background and marital relationship as described to her by the petitioner. The assessment diagnoses the petitioner with generalized anxiety disorder and lists the petitioner's stressors as "Uncertain immigration status[,] Unresolved feelings of guilt due to wife's infidelity[,] Feelings of depression and anxiety[,] Sexual Dysfunctional [sic], Separation from children[,] [and] Estranged wife's continued financial manipulation." The assessment states that the petitioner was prescribed medication for insomnia by his physician, but that he denied having any health problems. In her notes from the petitioner's subsequent visit on February 17, 2004, Ms. [REDACTED] states that the petitioner was tearful during the interview and described his depressed mood, lack of motivation, insomnia and social isolation in order to avoid telling his "humiliating story" to others. Ms. [REDACTED] also states that the petitioner was upset by his inability to communicate in English and his relationship with his parents and children.

The petitioner's verified complaint for divorce filed with the Supreme Court of New York, New York County states the first cause of action as abandonment and the second cause of action as "cruel and inhuman treatment." The complaint states that since approximately June 2002, Ms. [REDACTED]

engaged in a course of cruel and inhuman treatment of plaintiff [the petitioner], consisting of treating plaintiff with hostility and contempt, humiliating, demeaning and vilifying plaintiff; verbally abusing and arguing with plaintiff; constantly criticizing and denigrating plaintiff; engaging in tirades; criticizing plaintiff in public; behaving in a cold and withdrawn manner to plaintiff; refusing to engage in sexual relations with plaintiff for extended periods of time; alienating plaintiff from his friends and

family by her constant derogatory remarks; instigating arguments with plaintiff; persecuting plaintiff; engaging in temper tantrums, harangues, quarrels, displays of irritability, and abusive language towards the plaintiff, sometimes accompanied by threats; subjecting plaintiff to oppressive behavior; and embarrassing the plaintiff and otherwise making life intolerable and miserable for him.

This cause of action also cites Ms. [REDACTED] infidelity and states that she lives with another man and their child. The petitioner also submitted a copy of his affidavit filed with his divorce complaint, which substantially repeats the claims made in the complaint; a copy of Ms. [REDACTED] affidavit in the divorce case; and the court's divorce judgment, entered on October 26, 2004, which states that the petitioner was granted a divorce based "on the evidence found in the Findings of Fact and Conclusions of Law based upon DRL § 170(2)." Counsel did not submit the Findings of Fact and Conclusions of Law or the statutory section referenced in the court order. We nonetheless take notice of the fact that section 170 of the New York Domestic Relations Law states, in pertinent part:

An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

\* \* \*

(2) the abandonment of the plaintiff by the defendant for a period of one or more years.

N.Y. Dom. Rel. Law § 170(1) (McKinney 2003). Consequently, the submitted evidence shows that the petitioner's divorce judgment was granted on the basis of Ms. [REDACTED]'s abandonment, not her allegedly cruel and inhuman treatment.

The divorce documents submitted, the petitioner's affidavit and Ms. [REDACTED] assessment and notes do not establish battery or extreme cruelty as that term is described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). The petitioner states that his wife smacked him on his face on one occasion, but the record contains no corroborative evidence of this incident. The petitioner does not state that on any other occasion, Ms. [REDACTED] used or threatened to use violence against him. The petitioner's affidavit does not establish that Ms. [REDACTED] unkind treatment of him evolved into a pattern of violence that included psychological or sexual abuse. The petitioner states that he and his wife had disagreements about the frequency of their intimate relations, but he does not state that Ms. [REDACTED] ever forcefully coerced him to have sex with her or threatened to harm the petitioner if he did not. Rather, the petitioner states that he continued to have intimate relations with Ms. [REDACTED] in order to avoid her insults and tirades. The petitioner states that Ms. [REDACTED] refused to take an AIDS test after she admitted to having an extramarital affair, but he does not state that he contracted HIV or AIDS or that Ms. [REDACTED] forcefully, maliciously, or recklessly infected him with HIV or any other sexually transmitted disease.

The petitioner also failed to submit persuasive documentation of battery or extreme cruelty of the types listed in the regulation at 8 C.F.R. § 204.2(c)(2)(iv). The record does not indicate that the petitioner ever called the police, sought an order of protection against Ms. [REDACTED] or sought refuge from her alleged abuse. The petitioner submitted no photographs or supporting documents to corroborate his claim that his wife smacked him on one occasion. Although the petitioner states that he saw a doctor who told him he had an enlarged prostate and that his headaches and back pains were due to stress, the petitioner submits no corroborative medical records. Similarly, Ms. [REDACTED] states that the petitioner was prescribed a medication for insomnia by his physician, but the record contains no evidence of that prescription or the reasons why the medicine was prescribed. Ms. [REDACTED] assessment and notes also fail to establish that the petitioner's general anxiety disorder was triggered or

caused by Ms. [REDACTED] battery or extreme cruelty, rather than Ms. [REDACTED] infidelity, the resultant breakdown of their marriage and other stressors in the petitioner's life. Moreover, the record indicates that the petitioner himself had an extramarital affair. On page seven of his affidavit, the petitioner states that he was living with another woman when he returned to Colombia after his marriage to Ms. [REDACTED]. Finally, as discussed above, the court documents show that the petitioner was granted a divorce based on Ms. [REDACTED] abandonment, not her allegedly cruel and inhuman treatment.

On appeal, counsel submits disbursing orders and a check stub, which show that the petitioner received a total of \$8,150 from the American Red Cross between November and December 2001 for rent, food and living expenses. These documents do not establish that the petitioner was forced to obtain assistance from the Red Cross due to Ms. [REDACTED] battery or extreme cruelty. The record contains no evidence to support the petitioner's statement that Ms. [REDACTED] refused to file the documents necessary for him to obtain work authorization. In fact, Citizenship and Immigration Services (CIS) records show that on December 27, 2001, Ms. [REDACTED] filed a Form I-130 on the petitioner's behalf. In addition, the petitioner submitted a copy of his employment authorization card and CIS records show that he was granted employment authorization from October 16, 2003 to October 16, 2005 and again from December 19, 2005 until December 18, 2006 pursuant to a pending adjustment of status application based on the Form I-130 petition filed by Ms. [REDACTED] on his behalf. Accordingly, the Red Cross documents do not have the evidentiary weight ascribed to them by counsel. Counsel makes no other claims on appeal.

The record indicates that Ms. [REDACTED] mistreated the petitioner, had an extramarital affair, left the petitioner to live with another man and bore that man's child. The current record does not establish, however, that Ms. [REDACTED] battered or subjected the petitioner to extreme cruelty during their marriage pursuant to the regulations at 8 C.F.R. §§ 204.2(c)(1)(vi), 204.2(c)(2)(iv). Based on the present record, the petitioner is thus ineligible for classification under section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), and his self-petition must be denied.

However, the case will be remanded because the director failed to issue a NOID pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii), which states, in pertinent part:

*Notice of intent to deny.* If the preliminary decision on a properly filed self-petition is adverse to the self-petitioner, the self-petitioner will be provided with written notice of this fact and offered an opportunity to present additional information or arguments before a final decision is rendered.

The director denied the petition without first issuing a NOID. Consequently, the case must be remanded for issuance of an NOID pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii), which will give the petitioner a final opportunity to overcome the deficiencies of his case.

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.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision that, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.