

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B9

FILE:

[REDACTED]
EAC 05 196 52029

Office: VERMONT SERVICE CENTER

Date: **MAR 26 2008**

IN RE:

Petitioner: [REDACTED]

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:

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.

Maura D. Leadnick

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition. On appeal, the Administrative Appeals Office (AAO) remanded the matter for further action. The matter is now before the AAO upon certification of the director's subsequent, adverse decision. The decision of the director will be affirmed and the petition will be 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.

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).

An alien who has divorced a United States citizen may still self-petition under this provision of the Act if the alien demonstrates "a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse." Section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc).

Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J), states, in pertinent part:

In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) or clause (ii) or (iii) of subparagraph (B), 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].

In this case, the director initially denied the petition on January 24, 2006 for failure to establish the requisite battery or extreme cruelty. In its October 20, 2006 decision on appeal, the AAO concurred with the director's determination and further found that the petitioner had not established a qualifying relationship with his former wife, his corresponding eligibility for immediate relative classification and that he was not subject to the bar to approval of petitions based on marriages entered into while the alien was in proceedings at section 204(g) of the Act. The AAO nonetheless remanded the petition for issuance of a Notice of Intent to Deny (NOID) in compliance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii). Upon remand, the director issued a NOID on January 18, 2007, which informed the petitioner, through counsel, of his ineligibility under the four grounds cited in the AAO's remand decision. The petitioner, through counsel, responded to the NOID with further evidence, which the director found insufficient to establish his eligibility. Accordingly, the director denied the petition on

May 11, 2007 on the grounds cited in the NOID. On certification, counsel submits a brief and additional evidence.

The pertinent facts and relevant evidence submitted below were discussed in our prior decision, incorporated here by reference. Accordingly, we will only address the relevant evidence submitted after that decision was issued.

Battery or Extreme Cruelty

In response to the NOID, the petitioner submitted supplementary statements from himself, his friends [REDACTED] and [REDACTED], [REDACTED]'s mother and a copy of a prescription for [REDACTED] for the petitioner with an illegible date. We concur with the director's determination that these documents fail to establish that the petitioner's former wife subjected him or his child to battery or extreme cruelty during their marriage.

As noted by the director, the testimony of the petitioner and his friends provides inconsistent reporting of the alleged abuse. On page seven of our prior decision, we discussed four significant inconsistencies in the testimony submitted below of the petitioner, his friends and his psychologist. The statements submitted in response to the NOID do not resolve all of the discrepancies in the record. Specifically, in our prior decision, we noted that although [REDACTED] and [REDACTED] stated that they saw the petitioner with scratches on his face that they believed were inflicted by his former wife and [REDACTED] described an occasion where the petitioner's wife threw hot soup at him, the petitioner, [REDACTED] and his psychologist did not state that his former wife physically assaulted him. In their declarations submitted in response to the NOID, the petitioner and [REDACTED] for the first time, state that the petitioner's former wife physically abused him, but only confirm that the petitioner's former wife once threw a bowl of hot soup at him causing a light burn on his legs. The petitioner explains that no one knew of his wife's abuse until some of his friends saw scratches on his face. Yet the petitioner does not describe any particular incident where his former wife injured his face. The failure of the affiants to provide a consistent, detailed account of the alleged physical abuse throughout these proceedings detracts from the credibility of their statements.

In our prior decision, we discussed the relevant evidence regarding the alleged extreme cruelty. The testimony submitted in response to the NOID provides no new, probative information sufficient to establish that the behavior of the petitioner's former wife rose to the level of extreme cruelty. The copied prescription is of no probative value because the date is illegible and is accompanied by no evidence linking the petitioner's need for the medication to his former wife's abuse. In addition, in our prior decision, we specifically noted that the petitioner never stated that his wife threatened him with divorce every time they argued or that she always threatened to leave him, as attested by [REDACTED] in his testimony submitted below. The statements of the petitioner and [REDACTED] submitted in response to the NOID fail to resolve this discrepancy. Accordingly, we concur with the director's determination that the petitioner failed to demonstrate that his former wife subjected him or his child to

battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

On certification, counsel claims that the director failed to consider the evidence submitted below because he did not address it in his May 11, 2007 decision. Yet on pages one to two of his May 11, 2007 decision, the director addressed the relevant testimony submitted below, specifically, the prior statements of the petitioner, [REDACTED] and [REDACTED]. The remaining relevant evidence was fully discussed in the prior decisions of the AAO and the director. We find no error in the director's decision not to repeat those discussions in the interest of administrative economy.

Qualifying Relationship and Eligibility for Immediate Relative Classification

In response to the NOID, the petitioner submitted a copy of his divorce decree entered on March 5, 2004 by the Clark County, Nevada District Court (Number [REDACTED]). Although the petitioner filed his Form I-360 within two years of the legal termination of his marriage, he has failed to establish both his former wife's battery or extreme cruelty and a connection between their divorce and such abuse. We note that the petitioner's divorce decree does not cite the grounds for divorce, but merely states that the divorce was granted on the grounds set forth in the petitioner's complaint. The petitioner did not submit his complaint or other documentation indicating a connection between the divorce and his former wife's battery or extreme cruelty. Accordingly, the petitioner has failed to establish a qualifying relationship, as required by section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act.

The regulation at 8 C.F.R. § 204.2(c)(1)(i)(B) requires that a self-petitioner be eligible for immediate relative classification under section 201(b)(2)(A)(i) of the Act based on his or her qualifying relationship to the abusive spouse. As the petitioner has failed to establish a qualifying relationship with his former wife, he has also not demonstrated his eligibility for immediate relative classification based on their relationship, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act.

Approval of the Petition Further Barred by Section 204(g) of the Act

On certification, counsel reiterates his claim that the petitioner removed himself from the purview of section 204(g) of the Act because he "executed his *in absentia* order of deportation" by departing from the United States on October 31, 1997. The petitioner's 1997 departure is irrelevant. The record shows that the petitioner was ordered deported *in absentia* on November 1, 1994.¹ The record further

¹ On certification, counsel claims the petitioner never received a copy of his deportation order. We lack jurisdiction to consider any collateral challenge to the November 1, 1994 order of the Immigration Judge. The AAO exercises appellate jurisdiction only over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) (with one exception - petitions for approval of schools and the appeals of denials of such petitions are now the responsibility of Immigration and Customs Enforcement).

indicates that the petitioner did not depart from the United States at that time, but remained in this country where he married his former wife on September 23, 1995. Accordingly, the petitioner was married while he was in deportation proceedings and is subject to the bar against approval of petitions based on such marriages pursuant to section 204(g) of the Act. *See* 8 C.F.R. § 245.1(c)(8). The petitioner's brief departure from the United States *after* his marriage does not change the fact that he was in proceedings on the date of his marriage and is subject to section 204(g) of the Act, 8 U.S.C. § 1154(e), which states:

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.

The record does not show that the petitioner was outside of the United States for at least two years after his marriage and he has not established his eligibility for the bona fide marriage exception to section 204(g) of the Act, pursuant to section 245(e)(3) of the Act, which requires “clear and convincing evidence” that the marriage “was entered in good faith and . . . not entered into for the purpose of procuring the alien's admission as an immigrant.” Section 245(e)(3) of the Act, 8 U.S.C. § 1255(e)(3).

In response to the NOID, the petitioner submitted evidence of his joint bank account with his former wife, their joint automobile insurance policy, joint residential lease and evidence that the petitioner's former wife was the beneficiary of his life insurance policy and listed as a contact person on his passport. While the director found this evidence sufficient to demonstrate that the petitioner entered into his marriage in good faith by a preponderance of the evidence, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act, the director determined that the evidence did not meet the heightened standard of proof required by section 245(e)(3) of the Act. We agree.

While identical or similar evidence may be submitted to establish a good faith marriage pursuant to section 204(a)(1)(A)(iii)(I)(aa) of the Act and the bona fide marriage exemption at section 245(e)(3) of the Act, the latter provision imposes a heightened burden of proof. *Matter of Arthur*, 20 I&N Dec. 475, 478 (BIA 1992). *See also Pritchett v. I.N.S.*, 993 F.2d 80, 85 (5th Cir. 1993) (acknowledging “clear and convincing evidence” as an “exacting standard.”) To demonstrate good faith entry into the qualifying relationship for a self-petition under section 204(a)(1)(A)(iii)(I)(aa) of the Act, the petitioner must establish his or her good faith entry into the qualifying relationship by a preponderance of the evidence and any credible evidence shall be considered. 8 C.F.R. § 204.2(c)(2)(i); *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774, 782-83 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965). However, to be eligible for the bona fide marriage exception under section 245(e)(3) of the Act, the petitioner must establish his or her good faith entry into the marriage by clear and convincing evidence. Section 245(e)(3) of the Act, 8 U.S.C.

§ 1255(e)(3); 8 C.F.R. § 245.1(c)(9)(v). “Clear and convincing evidence” is a more stringent standard. *Arthur*, 20 I&N Dec. at 478.

The May 11, 2007 decision of the director denying the petition is affirmed. The petitioner has failed to establish that he had a qualifying relationship with his former wife, that he was eligible for immediate relative classification based on such a relationship and that his former wife subjected him or his child to battery or extreme cruelty during their marriage. The petitioner is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act. Section 204(g) of the Act also bars approval of his petition.

The denial of the petition will be affirmed for the four reasons stated above, with each considered an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The director’s decision of May 11, 2007 is affirmed. The petition is denied.