



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: **APR 20 2009**

EAC 07 007 50761

IN RE:

[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:

[REDACTED]

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.

John F. Grissom
Acting 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 The director's decision will be withdrawn and the matter remanded for further action.

The petitioner seeks immigrant classification under section 204(a)(1)(A)(iii) of 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.

Counsel filed a timely appeal on September 28, 2007.

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:

In acting on petitions filed under . . . 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].

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 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.

The petitioner is a citizen of Guatemala who entered the United States in K-3 status on March 10, 2006.¹ He married Y-A-², now a United States citizen, on July 7, 2001. Y-A- filed Form I-130, Petition for Alien Relative, on behalf of the petitioner on August 11, 2004, and it was approved on August 20, 2004. The petitioner filed Form I-485, Application to Register Permanent Residence or Adjust Status, on April 14, 2006. Approval of the Form I-130 was revoked, at Y-A-'s request, on August 23, 2006. The Form I-485 was denied on July 25, 2006.

The petitioner filed the instant Form I-360 on October 5, 2006. On April 24, 2007, the director issued a request for additional evidence, and requested additional evidence to establish that approval of the petition is not barred under section 204(g) of the Act, as well as evidence to demonstrate that the

¹ The petitioner had previously lived in the United States from January 1993 until July 2004.

² Name withheld to protect individual's identity.

petitioner is a person of good moral character, and that he was subjected to battery and/or extreme cruelty by Y-A-. The petitioner responded on June 22, 2007. After considering the evidence of record, the director denied the petition on August 28, 2007.

Battery or Extreme Cruelty

The sole issue on appeal is whether the petitioner has established that he was subjected to battery and/or extreme cruelty by Y-A-. In support of his assertion that he was the victim of battery and/or extreme cruelty, the petitioner submits two self-affidavits and a psychological evaluation.

In his September 11, 2006 affidavit, the petitioner stated that he and Y-A- met in July 1999, and dated for two years before marrying on July 7, 2001. They started a cleaning business together in March 2002, and their son was born in September 2002. After Y-A- became a citizen of the United States, she filed the Form I-130 on his behalf, and the petitioner returned to Guatemala to wait for its approval. He was granted a K-3 visa in March 2006, and he returned to the United States.

According to the petitioner, in May 2006 he and Y-A- had a “strong argument” at his cousin’s home. Y-A- wanted the petitioner to return home early, but he did not want to do so. The petitioner stated that Y-A- used offensive language toward him in front of everyone. The petitioner stated that he became very upset; that he and Y-A- nearly had a physical altercation; and that one of his cousins took Y-A- to another room in order to calm her down. Although they returned home in silence, they were able to reconcile their differences the following day.

The petitioner reported that “the situation became very serious” on June 10, 2006, when he gave his sister a gift of cash for her fifteenth birthday. According to the petitioner, “this rough time” lasted until June 20, 2006. In July 2006, he and Y-A- took a trip to Reno, Nevada, and had a nice trip. However, the petitioner reported that, after they returned from the trip, Y-A- began complaining that the petitioner was not taking care of the family, and that he had only married her for immigration status. He stated that Y-A- told him to move into another room and, for the very first time, threatened his immigration status.

The petitioner stated that Y-A- was always upset with him over money. He stated that Y-A- controlled his expenses and, although she would entrust members of her own family with their credit cards, she did not want them to help his family. The petitioner testified that Y-A- became very upset with him on July 9, 2006, when he told her that he had invited his brothers, his cousins, and his brother-in-law to the house to watch the final game of the World Cup. She asked him why he did not also invite her family. After this incident, Y-A- began leaving the house every afternoon around four or five o'clock, and would not return home until midnight or one o'clock in the morning.

The petitioner was scheduled to appear for an interview in connection with his Form I-485 on July 24, 2006. According to the petitioner, his mother-in-law came to the house on July 15, and told him that Y-A- had begun the divorce process, and that she had withdrawn his immigration paperwork.

On July 21, Y-A- told him not to go to the interview, because he would be deported. On July 23, Y-A- did not return to the house. The petitioner did not attend the interview.

The petitioner reported that Y-A- told him to leave their residence in August 2006, and told him to wait for divorce papers. The petitioner testified that Y-A- had been sending him threatening messages, telling him that she knows many of his relatives do not have immigration status, and that she is going to report them to immigration authorities. She also sends the petitioner threatening messages telling him that if he is not careful, he could end up in jail.

In his April 24, 2007 request for additional evidence, the director stated that, while the evidence of record indicated that he and Y-A- had experienced marital tensions, it did not demonstrate that the petitioner was the victim of battery or extreme cruelty. In response, the petitioner submitted another affidavit.

In his June 20, 2007 affidavit, the petitioner repeated the assertions of his previous affidavit, and added testimony stating that, in 2006, after they had bought a van to enlarge their cleaning business, Y-A- made the petitioner install a "ship" in the van so that she knew where he would be. Y-A- had accused the petitioner of not reporting to her where he was working during the day. When the "ship" did not work properly, Y-A- accused him of disconnecting it, which was not true.

The director found the petitioner's additional testimony insufficient to establish that he had been subjected to battery or extreme cruelty, and denied the petition on August 28, 2007. In his denial letter, the director stated that although there was no doubt that Y-A-'s suspiciousness with regard to his whereabouts during the day, as well as her hostile behavior at family gatherings created a stressful situation, the evidence of record indicated that it was more an issue of incompatible characters rather than extreme cruelty as envisioned by Congress when it created the immigrant classification.

On appeal, counsel submits a psychological evaluation from [REDACTED] dated October 12, 2007. [REDACTED] states that the petitioner told her that he met Y-A- in 2000, married in 2001, started a cleaning business in March 2002, and had a child in September 2002. The petitioner testified to [REDACTED] that their happiness was short-lived, however, as Y-A- soon began obsessing over her weight, and that she became increasingly insecure and jealous.

[REDACTED] reported that the petitioner testified to her that when he returned to the United States in March 2006, Y-A- had grown even more jealous and possessive. As Y-A- became increasingly controlling, the relationship continued to deteriorate. Y-A- became skeptical of what the petitioner was doing during the day, so she placed a tracking device on the company van he drove. The petitioner also told [REDACTED] that the couple continued having problems in their relationship, particularly with regard to financial issues and the petitioner's attitude toward Y-A-'s family. She also stated that the petitioner told her that Y-A- occasionally tried to keep him from seeing his family; that she threatened his immigration status; that she threatened to not allow the petitioner to see his son; and that she prevented the petitioner from sending money to his parents. The petitioner

also reported to [REDACTED] that Y-A- cut up his employment authorization document, as well as his pictures, with scissors, and that she has refused to return personal papers she is withholding from him. The petitioner also reported to [REDACTED] that he was taking medication to control his depression. [REDACTED] concludes by stating her opinion that the petitioner has been emotionally battered, financial abused and manipulated, and subjected to extreme cruelty. She also recommended that the petitioner attend counseling to address depression, anxiety, and suicidal ideation.

Upon review of the entire record of proceeding, the AAO agrees with the director's determination that the petitioner has failed to establish that he was subjected to battery or extreme cruelty. The AAO notes several inconsistencies between the petitioner's testimony in his affidavits, and his testimony to [REDACTED]. The petitioner stated in his affidavits that he met Y-A- in 1999, but he testified to [REDACTED] that they met in 2000. The petitioner testified to [REDACTED] that the couple's problems began in 2002, but the first incidents of abuse reported by the petitioner in his affidavits occurred in 2006. The petitioner testified to [REDACTED] that Y-A- installed the tracking device on the company van, but he reported in his second affidavit that he had installed it at the direction of Y-A-. The AAO also notes that the petitioner testified to [REDACTED] that Y-A- destroyed pictures and his employment authorization document with scissors, but he made no such allegations in his affidavits. The petitioner also testified to [REDACTED] that he was taking medication to control his depression, but he made no such statement in his affidavits. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Further, with regard to the testimony of [REDACTED], the AAO notes that it appears as though she has only met with the petitioner on one occasion. The conclusions reached in her evaluation, being based on a single interview, do not reflect the insight and elaboration commensurate with an established relationship with a mental health professional, thereby rendering her findings speculative and diminishing her evaluation's value to a determination of extreme cruelty in this case.

The AAO does not dispute that the breakdown of a marriage can cause a great deal of mental anguish and distress. However, the AAO agrees with the director's statement that the testimony of the petitioner indicates that that the conflict between himself and Y-A- was the result of marital incompatibility rather than extreme cruelty.

While the actions of Y-A- as described by the petitioner may have been cruel and unkind they did not rise to the level of the 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. The testimony of the petitioner fails to establish that he was the victim of any

act or threatened act of physical violence or extreme cruelty, that Y-A-'s non-physical behavior was accompanied by any coercive actions or threats of harm, or that her actions were aimed at insuring dominance or control over the petitioner. He has failed to overcome the director's concerns regarding the issue of battery and/or extreme cruelty.

The petitioner has failed to establish that Y-A- subjected him to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Conclusion

The AAO concurs with the director's determination that the petitioner has failed to demonstrate that Y-A- subjected him to battery and/or extreme cruelty. However, the record indicates that the director did not issue a notice of intent to deny the petition (NOID) before he issued his decision. Although the record establishes that the petitioner is ineligible for the benefit sought, the petition must be remanded, solely on procedural grounds, so that the petitioner has the opportunity to respond to a NOID. The petition must be remanded to the director for issuance of a NOID in compliance with the regulation in effect at 8 C.F.R. § 204.2(c)(3)(ii)³ on the date this petition was filed, and the director must afford the petitioner the opportunity to submit a response within the 60-day period. On remand, the director need only address the issues before the AAO on appeal; i.e., whether the petitioner has demonstrated that he was subjected to battery or extreme cruelty by Y-A-.

As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's August 28, 2007 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

³ USCIS promulgated a rule on April 17, 2007 related to the issuance of requests for evidence and NOIDs. 72 Fed. Reg. 19100 (Apr. 17, 2007). The rule became effective on June 18, 2007, *after* this petition was filed on October 5, 2006.