

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B9

APR 21 2009

FILE:

EAC 04 037 51545

Office: VERMONT SERVICE CENTER

Date:

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:

SELF-REPRESENTED

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition. A subsequent appeal filed by the petitioner was rejected as not timely filed. The director granted a subsequent motion to reopen and issued a notice of intent to deny (NOID) to the petitioner, allowing the petitioner a total of 60 days to submit additional evidence. The petitioner's submission did not overcome the grounds of denial and the director again denied the petition. 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 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 because the petitioner did not establish that he is a person of good moral character and that that his wife subjected him to battery or extreme cruelty during their marriage.

On January 22, 2009, this office mailed a letter to the petitioner notifying him that the attorney who represented him in these proceedings has been suspended by the Board of Immigration Appeals and is not permitted to represent him. As we will not recognize the attorney's appearance, the petitioner was requested to advise this office of the mailing address that he wished for U.S. Citizenship and Immigration Services (USCIS) to use for all future correspondence with him. The petitioner did not respond, however.

On appeal, the petitioner submits an addendum. The petitioner checked the block indicating that he would be sending a brief and/or evidence to the AAO within 30 days. However, no further documents have been received by the AAO to date. The record is thus considered complete.

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 (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 further explicated in the regulation at 8 C.F.R. § 204.2(c)(1), which

states, in pertinent part:

(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.

(vii) *Good moral character.* A self-petitioner will be found to lack good moral character if he or she is a person described in section 101(f) of the Act. Extenuating circumstances may be taken into account if the person has not been convicted of an offense or offenses but admits to the commission of an act or acts that could show a lack of good moral character under section 101(f) of the Act. A person who was subjected to abuse in the form of forced prostitution or who can establish that he or she was forced to engage in other behavior that could render the person excludable under section 212(a) of the Act would not be precluded from being found to be a person of good moral character, provided the person has not been convicted for the commission of the offense or offenses in a court of law. A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she willfully failed or refused to support dependents; or committed unlawful acts that adversely reflect upon his or her moral character, or was convicted or imprisoned for such acts, although the acts do not require an automatic finding of lack of good moral character. A self-petitioner's claim of good moral character will be evaluated on a case-by-case basis, taking into account the provisions of section 101(f) of the Act and the standards of the average citizen in the community. If the results of record checks conducted prior to the issuance of an immigrant visa or approval of an application for adjustment of status disclose that the self-petitioner is no longer a person of good moral character or that he or she has not been a person of good moral character in the past, a pending self-petition will be denied or the approval of a self-petition will be revoked.

The evidentiary guidelines for a self-petition filed under section 204(a)(1)(A)(iii) of the Act are further explicated 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.

(v) *Good moral character*. Primary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit. The affidavit should be accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. Self-petitioners who lived outside the United States during this time should submit a police clearance, criminal background check, or similar report issued by the appropriate authority in each foreign country in which he or she resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. If police clearances, criminal background checks, or similar reports are not available for some or all locations, the self-petitioner may include an explanation and submit other evidence with his or her affidavit. The Service will consider other credible evidence of good moral character, such as affidavits from responsible persons who can knowledgeably attest to the self-petitioner's good moral character.

The record in this case provides the following pertinent facts and procedural history. The petitioner is a native and citizen of Chile who was admitted into the United States on March 25, 1996 as a nonimmigrant F-1 student for duration of status (D/S). On December 9, 1998, the petitioner married K-K-¹, a U.S. citizen, in San Francisco, California. On January 12, 2000, K-K- filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf, which was denied due to abandonment. On December 16, 2002, the petitioner's I-485, Application to Register Permanent Residence or Adjust Status, was denied, due to the denial of the I-130 petition.

The petitioner filed the instant Form I-360 on November 18, 2003. On August 19, 2004, the director issued a Request for Evidence (RFE) of, *inter alia*, the requisite battery or extreme cruelty and good

¹ Name withheld to protect individual's identity.

moral character. The petitioner requested additional time to respond, which was granted by the director. A second request for an additional extension was denied and the petition was adjudicated based on the evidence in the record. On January 27, 2005, the director denied the petition on the two aforementioned grounds. On March 22, 2005, the petitioner filed an appeal of the director's January 27, 2005 denial. On May 17, 2005, the director rejected the appeal as untimely filed. On August 2, 2005, the petitioner's I-485, Application to Register Permanent Residence or Adjust Status, was denied, due to the denial of the I-360 petition. On February 6, 2006, the petitioner filed a motion to reopen the director's May 17, 2005 rejection of the appeal. On June 16, 2006, the director granted the motion and issued a NOID for lack of, *inter alia*, the requisite battery or extreme cruelty and good moral character. The petitioner timely responded to the NOID, stating, in part, that because of the FBI report and record clearances, no additional evidence was required to show the petitioner's good moral character and that, despite the report and clearances, the petitioner would provide the requested clearances within 30 days to comply with the director's request. The petitioner also cited the Ninth Circuit Court of Appeals' decision in *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003), to state that the director erred in finding there was insufficient evidence of abuse. On February 12, 2007, the director again denied the petition finding that the petitioner had not overcome the grounds for denial, namely that the petitioner had failed to establish the requisite battery or extreme cruelty and good moral character.

On appeal, the petitioner submits an addendum, stating that the director abused his discretion in denying the petition. The petitioner also states that no additional evidence of good moral character is necessary because the FBI report and record clearances show that the petitioner has no arrests or convictions. The petitioner also cites the Ninth Circuit Court of Appeals' decision in *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003), to state that the director erred in finding there was insufficient evidence of abuse.

Battery or Extreme Cruelty

We affirm the director's determination that the petitioner did not establish the requisite battery or extreme cruelty. The record contains the following, relevant evidence:

- The petitioner's affidavit dated November 14, 2003; and
- A Forensic Psychological Evaluation dated October 22, 2003 from [REDACTED]

In his November 14, 2003 affidavit, the petitioner states that he met K-K- at a Christmas party (year unspecified) and that they moved in together at the beginning of 1998. The petitioner explains that K-K- proposed marriage to him around June 1998, that at first he was reluctant because he had plans to finish his studies and return to Chile, but that she insisted and he accepted. The petitioner states that soon after their marriage his wife opened a coffee shop, which he managed because she did not want to quit her job. The petitioner states that his wife became possessive and demanded that everything be done her way, and that she raised her voice at him and yelled at him in the coffee shop. The petitioner states his wife mimicked his accent, berated him, slammed the door in his face, and

came close to hitting him a few times. The petitioner also reports that she invited people over to their house without mentioning it to him and corrected his pronunciation in front of them, and that one of her male guests threatened to hit him. The petitioner states that his wife threatened to have him deported and that after they separated, she called him at his new job and left threatening messages, demanding that he not only pay for their divorce, but also pay her an additional \$1,000. The petitioner reports that his wife wanted to get rid of him because she had met someone else.

The petitioner does not explicitly state or otherwise indicate that his wife subjected him to battery. Accordingly, we will only discuss the petitioner's claim of extreme cruelty. The petitioner's testimony does not indicate that his wife's behavior toward him rose to the level of extreme cruelty, as that term is defined in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). The petitioner does not describe in probative detail any particular incidents where his wife threatened him with physical or mental injury. The petitioner's statements regarding his wife yelling at him, mimicking his accent, berating him, slamming the door in his face, inviting people over to their house without mentioning it to him, correcting his pronunciation, threatening to have him deported, leaving threatening messages at his new job, and demanding that he pay for their divorce and give her an additional \$1,000, do not establish that his wife subjected him to psychological, sexual abuse or exploitation, or that her actions were part of an overall pattern of violence. In addition, although the director requested additional evidence to support the petitioner's claim, and granted the petitioner's numerous requests for additional time to obtain the additional documentation, the petitioner did not provide any further testimonial or documentary evidence to support his claim.

The evaluation of [REDACTED] also fails to establish that the petitioner's wife subjected him to extreme cruelty. [REDACTED] states that the petitioner was referred by his former counsel and that her report is based on one meeting with the petitioner of approximately four hours on October 14, 2003, two to three years after the petitioner separated from his wife. [REDACTED] reiterates much of the petitioner's testimony and concludes that, in response to his wife's betrayal, the petitioner "developed a major depressive disorder that has substantially interfered with his ability to function." [REDACTED] does not indicate that she treated or recommended any treatment for the petitioner.

While we do not question the expertise of [REDACTED], her testimony fails to establish that the behavior of the petitioner's wife rose to the level of extreme cruelty, as defined in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). While [REDACTED] concludes that the petitioner developed a major depressive disorder in response to his wife's betrayal, she does not provide substantive, probative information indicating that the petitioner's wife's behavior included actual threats, controlling actions or other abusive behavior that was part of a cycle of psychological or sexual violence.

On appeal, the petitioner cites the Ninth Circuit Court of Appeals' decision in *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003), to state that the director erred in finding there was insufficient evidence of abuse. In *Hernandez*, the court held that extreme cruelty can be assessed under objective standards and is a clinical, nondiscretionary determination subject to judicial review. The Fifth and the Tenth Circuit Courts of Appeals, however, have come to a contrary conclusion. *Wilmore v.*

Gonzales, 455 F.3d 524, 527-28 (5th Cir. 2006); *Perales-Cumpean v. Gonzales*, 429 F.3d 977, 982-984 (10th Cir. 2005). Although *Wilmore* and *Perales-Cumpean* concerned applications for cancellation of removal, the both courts cited the definition of battery or extreme cruelty for self-petitioners at 8 C.F.R. § 204.2(c)(1)(vi) and found the definition “far from algorithmic” because it “requires consideration of many discretionary factors” and “does not provide a binding, objective standard that would channel the [agency’s] discretion in a manner making it subject to judicial review.” *Perales-Cumpean*, 429 F.3d at 984. *Accord Wilmore*, 455 F.3d at 527-28.

In the instant case, the relevant evidence fails to establish that the petitioner’s wife subjected him to extreme cruelty under the clinical and legal standards cited by the Ninth Circuit. As discussed above, the petitioner failed to describe in probative detail any specific threatening or controlling behavior of his wife. Nor did the petitioner demonstrate that her nonviolent actions constituted psychological or sexual abuse or were otherwise part of an overall pattern of violence. *See Hernandez*, 345 F.3d at 836–41 (describing the cycle of domestic violence and interpreting the phrase “acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence” in 8 C.F.R. § 204.2(c)(1)(vi)).

The petitioner does not claim and the record does not indicate that his wife subjected him to battery. The relevant evidence also fails to demonstrate that the petitioner’s wife subjected him to extreme cruelty during their marriage. Accordingly, the petitioner has not established battery or extreme cruelty, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Good Moral Character

The regulation at 8 C.F.R. § 204.2(c)(2)(v) states that primary evidence of a petitioner’s good moral character is an affidavit from the petitioner, accompanied by local police clearances or state-issued criminal background checks from each place the petitioner has lived for at least six months during the three-year period immediately preceding the filing of the self-petition. The petitioner submitted no affidavit regarding his good moral character and no police clearance or state-issued criminal background check at the time of filing or in response to the director’s NOID.

The AAO acknowledges the petitioner’s statement that no additional evidence of good moral character is necessary because the FBI report and record clearances show that the petitioner has no arrests or convictions. It is worth emphasizing, however, that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). Moreover, the petitioner stated in response to the NOID that he would provide the requested clearances within 30 days to comply with the director’s request. The petitioner, however, has not done so. Accordingly, the petitioner has failed to establish that he is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act

The petitioner has not demonstrated that his wife subjected him to battery or extreme cruelty during their marriage and that he is a person of good moral character. He is consequently ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act and his petition must be

denied.

The petition will be denied for the above stated reasons, with each considered as 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.