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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
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APR 28 2009

FILE: [Redacted] Office: VERMONT SERVICE CENTER Date:
EAC 07-180-50327

IN RE: Petitioner: [Redacted]

PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(B)(ii) of the
Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(B)(ii)

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.

John F. Grissom
Acting Chief, 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 AAO will withdraw the director's decision. Because the petition is not approvable, however, it will be remanded for further action.

The petitioner seeks classification as a special immigrant pursuant to section 204(a)(1)(B)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(B)(ii), as having been battered or subjected to extreme cruelty by his spouse, a lawful permanent resident of the United States. The petitioner, through counsel, submitted a Form I-360 Petition on June 11, 2007. The director denied the petition finding that the petitioner failed to establish that he was battered or subjected to extreme cruelty by his spouse during their marriage. The petitioner filed a timely appeal on September 29, 2008.

We concur with the director's determination that the petitioner has not established that he was battered or subjected to extreme cruelty by his lawful permanent resident spouse. Counsel's claims and additional affidavits submitted on appeal do not overcome this ground for denial. Beyond the director's decision, we also find that the petitioner did not establish that he is a person of good moral character. Nonetheless, the case must be remanded because the director denied the petition without first issuing a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

Eligibility for Immigrant Classification Under Section 204(a)(1)(B)(ii) of the Act

Section 204(a)(1)(B)(ii) of the Act provides that the spouse of a U.S. lawful permanent resident may self-petition for immigrant classification if the petitioner demonstrates that he or she entered into the marriage with the lawful permanent resident spouse in good faith and that, during the marriage, the petitioner or a child of the petitioner was battered or subjected to extreme cruelty perpetrated by the petitioner's spouse. In addition, the petitioner must show that he or she is eligible to be classified as the spouse of a U.S. lawful permanent resident under section 203(a)(2)(A) of the Act, 8 U.S.C. § 1153(a)(2)(A), resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(B)(ii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(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 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 regulation at 8 C.F.R. § 204.2(c)(1) provides guidance on relevant eligibility requirements:

(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 under section 204(a)(1)(B)(ii) 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.

Procedural History and Pertinent Facts

The petitioner is a native and citizen of Ecuador. He was admitted to the United States on October 10, 2001 as a B-2 nonimmigrant visitor. On January 24, 2003, the petitioner married E-I,¹ a lawful permanent resident of the United States, in Florida.

The petitioner filed the instant I-360 Petition on June 11, 2007. On March 13, 2008 the director issued a Request for Evidence (RFE) of battery or extreme cruelty, noting that the evidence previously submitted, the petitioner's self-affidavit and a psychological evaluation by ██████████ ██████████ contained different versions of the circumstances surrounding the petitioner's relationship with his wife. In response, on June 9, 2008, the petitioner, through counsel, submitted two affidavits from acquaintances, ██████████ and ██████████, dated June 2 and June 3, 2008, respectively; and a statement from counsel; he also submitted copies of drug

¹ Name withheld to protect individual's identity.

prescriptions and a copy of a police report for an incident at his residence on December 4, 2006. The director found that counsel's assertions of the similarities in the petitioner's accounts – his own petition and his statements as reported by [REDACTED] – did not substantiate the petitioner's claims; that the affidavits from his acquaintances were vague; that drug prescriptions did not indicate any relationship to alleged abuse by the petitioner's spouse; and that the police incident report, which repeated the petitioner's explanation at the time of the incident, did not include any reference to his spouse.

The director found that the evidence did not establish that the petitioner had been battered or subjected to extreme cruelty by his spouse. Accordingly, on August 27, 2008, the director denied the petition on that basis.

On appeal, the petitioner, through counsel, submits additional affidavits from [REDACTED] and [REDACTED], and another statement from the petitioner. Counsel again includes his own statement, asserting that the petitioner has met his burden of proof.

Evidence of Battery or Extreme Cruelty

The evidence of battery or extreme cruelty in this case is comprised solely of the petitioner's statements, statements of two friends, and statements of [REDACTED]. At the time of filing, the petitioner submitted an undated declaration in which he claimed that he first noticed problems in his marriage when he started spending extra time at work so that he could provide for his wife financially, and he realized that he should have spent more time with her. He claimed that E-I- began to go out with her friends and come home late, they spent less and less time together and would argue over insignificant things, and they stopped being intimate. He stated that E-I- moved out of their home and stayed with her mother for a while; he was devastated and did not want to be home alone, decided to go out and drink, and spent the night with a person he did not know; he regretted that because later on he found out that that person infected him with HIV. He claimed that his relationship with E-I- did not improve and they were like strangers living in the same house; that later, when he found out that he was HIV-positive, he told E-I- what had happened and the test result, and she started to insult him and call him names, screaming and yelling at him, saying that she regretted the day she met him, that she did not care what happened to him because he was infected. He claimed that his life turned around that day and he knew E-I- would never forgive him; when it was time for his immigration appointment, she did not talk to him. He stated that because of his problems he started to see [REDACTED], who gave him hope and helped him manage "with his separation."

Although the petitioner did not provide any timeframe for the events he described in his statement, the record shows that he was married on January 24, 2003; he was diagnosed HIV-positive in May 2006; on February 15, 2007 he and E-I- were scheduled for an interview with U.S. Citizenship and Immigration Services (USCIS) regarding his I-485 Application to Adjust Status under the Cuban Adjustment Act, at which time he explained his wife's absence, stating that they were having marital problems but were trying to work them out; and he started seeing

██████████ on February 5, 2007. The record also shows that his I-485 Application was denied on May 8, 2007, and he filed the instant I-360 Petition on June 11, 2007. On his I-360 Petition, he claimed to have resided with his wife from January 2003 until May 2007.

Along with his statement, described above, the petitioner submitted a psychological report by ██████████ dated May 18, 2007, based on "Dates of Evaluation" on February 5, 12, and 19, 2007. ██████████ stated that the reason for the petitioner's referral was the following:

[The petitioner] presented for an initial intake session on 02/05/07 with significant depressive and anxious symptoms in response to ongoing problems and difficulties in his marital relationship as well as other related life circumstances. He explained that while he entered into his marriage in good faith, when his wife became angry with him, she threatened, and ultimately refused, to appear at his scheduled interview with the U.S. Citizenship and Immigration Services. He noted that, as a result, he may face deportation which would result not only in financial hardship, but inaccessibility to necessary specialized medical care.

██████████ then provided "Background Information and History of Marital Relationship" as told to her by the petitioner. ██████████ reported that the petitioner complained that E-I- made excessive financial demands on him; was manipulative regarding their sexual relationship; threatened to deliberately cause problems for his pending immigration case; would insult him regarding his country of origin, his cultural background, and his manhood; and told him he was weak and not a man when she disapproved of his decisions. ██████████ concluded with "Clinical Observations and Findings," based on the results of testing and "interpreted within the context of his current/recent life situation." ██████████ found that the petitioner's "interpersonal style has been significantly altered in response to his diagnosis of HIV as well as his recent experience of rejection and abandonment by his wife" and that his "reported history indicates that he was, indeed, the victim of his wife's extreme cruelty in the form of ongoing verbal, emotional, and psychological abuse." She added that the petitioner was "severely depressed and clinically anxious. . . . [and] also lives in constant (and reasonable) fear that, if deported, he will be subjected to discrimination, financial hardship, and, as a result, lack of the specialized medical care necessary to his health."

While we do not doubt the expertise of ██████████ or her diagnosis of depression and anxiety, we do not find that the marital problems the petitioner described amounted to "extreme cruelty" by his wife. Moreover, the petitioner failed to mention in his own statement the incidents he described to ██████████ and the petitioner contradicted his prior statement regarding his wife's initial offer of emotional support when he told her about his HIV-positive status. As we find his statements not entirely credible for these reasons, ██████████ reliance on his statements is misplaced regarding the alleged abuse that he suffered at the hands of his wife. We note, however, that the failure of his marriage, and his fears regarding potential loss of immigration status, medical care and discrimination against him as a result of his medical diagnosis form a reasonable basis for his depression and anxiety.

In response to the director's request for additional evidence of abuse, the petitioner provided two affidavits from friends, ██████████ and ██████████; a police incident report; and counsel's statement explaining the inconsistencies noted by the director and also explaining why the police incident report did not correctly reflect what happened. The petitioner did not respond with his own explanations or additional probative evidence. We note that the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). ██████████ and ██████████ confirmed that they heard E-I- call the petitioner insulting names; and ██████████ added that she worked in the same office with E-I- and the petitioner and that E-I- would ask for money, threaten to call immigration if the petitioner could not provide the money and would scream in front of their customers. They did not claim to have personal knowledge of any other actions by E-I-.

On appeal, counsel asserts that "[t]he allegations contained in the petitioner's affidavit are unrefuted evidence of extreme cruelty and may not, and should not, be summarily disregarded." Also submitted on appeal are an additional statement by ██████████ and additional affidavits by the petitioner, ██████████ and ██████████. ██████████ asserts that "[a]ll of the information available to me suggests that [the petitioner's] clinical symptomatology is the direct result of the extreme cruelty to which he was subjected." This statement is inconsistent with ██████████ initial findings that the petitioner was depressed and anxious for various reasons, including his medical condition and potential loss of immigration status. We also find the petitioner's allegations of abuse, which were relied on by ██████████ to be lacking in credibility for the reasons noted above and to be insufficient to establish the requisite battery or extreme cruelty.

In her second affidavit, ██████████ adds that she has "witnessed in many instances the humiliation and exploitation [the petitioner's] wife has used against him" and lists the names E-I- would call him when she did not get her way and claims that E-I- would threaten to report him to the authorities so he would be deported; she describes one time when a client was shocked to witness E-I- verbally abuse the petitioner in their office. In her second affidavit, ██████████ adds a description of what she witnessed at a Christmas dinner at her home in 2006, when E-I- spoke to the petitioner in a "very vulgar and nasty way" and that E-I- was drunk and left without him.

On appeal, the petitioner also submitted his own statement, claiming that his wife hurt him permanently, both emotionally and psychologically. He repeats the insulting names and other insults E-I- would use against him and adds that, after he was diagnosed with HIV, the support he hoped to receive from his wife became only insults, abuses, manipulation and humiliation; E-I- threatened to tell his elderly mother and others about his condition if he "did not meet her whims" and would move away from him as if to avoid infection; and that he had to pretend that her infidelity never happened because she threatened to call immigration. He added that the day the police came to his house he found E-I- with a male friend; that E-I- told the petitioner to say nothing because she could make up a story of abuse and he could go to jail; and that is why he did not tell the police the whole story.

The petitioner claims on appeal to have suffered humiliating treatment and threats from his wife; treatment that he failed to mention previously; he also claims that his story to the police when they came to his house after an altercation in 2006, and documented in the police report in the record, was not true because his wife threatened to turn him in to immigration authorities; he also fails to explain his statement to [REDACTED] that his wife offered him emotional support when he was first diagnosed with HIV. It is notable that the petitioner's initial statement, while reporting that his wife would not talk to him when it was time for his immigration appointment, never alleged that she threatened to call immigration authorities at any time; it also never mentioned the 2006 incident described in the police report. The inconsistencies in the petitioner's accounts of his wife's behavior raise questions about the credibility of his claims of abuse by his wife. Moreover, his wife's actions, as described by him and others, do not rise to the level of "extreme cruelty."

Upon review of the entire record, we find insufficient evidence to establish the requisite battery or extreme cruelty. The evidentiary guidelines for demonstrating the requisite battery or extreme cruelty lists examples of the types of documents that may be submitted and states, "All credible relevant evidence will be considered." 8 C.F.R. § 204.2(c)(2)(iv). In this case, as in all visa petition 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 Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The mere submission of relevant evidence of the types listed in the regulation at 8 C.F.R. § 204.2(c)(2) will not necessarily meet the petitioner's burden of proof. While USCIS must consider all credible evidence relevant to a petitioner's claim of abuse, the agency is not obligated to determine that all such evidence is credible or sufficient to meet the petitioner's burden of proof. Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J); 8 C.F.R. § 204.2(c)(2)(i).

In this case, we do not find the evidence sufficient to meet the petitioner's burden of proof. First, the petitioner has submitted only his own statements, the statements of two friends and a psychological evaluation describing his wife's behavior as reported by the petitioner. The petitioner's claims are inconsistent and lack credibility for the reasons noted. The petitioner's friends claim only to have witnessed disrespectful language and threats to call immigration authorities. The petitioner does not allege any threat of or actual physical act of abuse perpetrated against the petitioner by E-I-. The petitioner's allegation of extreme cruelty is based upon the claims noted above that his spouse would yell at him; insult him; call him names; make excessive financial demands; was unfaithful and more insulting after he was diagnosed with HIV; and would threaten to call immigration authorities if he did not do as she wanted.

The descriptions of E-I-'s actions either lack credibility or do 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 claims made by the petitioner and the general statements submitted on his behalf fail to establish that the petitioner was the victim of any act or threatened act of physical violence or

extreme cruelty, that E-I-'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. No additional relevant documentation is included in the record that demonstrates abuse in this case.

Accordingly, the petitioner has failed to establish that he was battered or subjected to extreme cruelty during his marriage, as required by section 204(a)(1)(B)(ii)(I)(bb) of the Act.

Good Moral Character

The record in this case indicates that (1) the petitioner was arrested on January 2002, charged with driving under the influence of alcohol, and later pled *nolo contendere* and was found guilty of the charge; his license was suspended for six months; and (2) the petitioner was arrested on May 30, 2003 and charged with three counts: sexual battery (a felony), false imprisonment (a felony) and simple battery (a misdemeanor); the first two counts were dismissed, and the petitioner pled *nolo contendere* and was found guilty of simple battery; he was placed on probation for one year. A police report shows that the police were called to the petitioner's residence on December 4, 2006, and the petitioner explained at that time that he and a friend had a physical altercation. These incidents, two of which resulted in convictions, cannot be overlooked. Regarding the convictions, although they occurred outside of the three-year period for which the petitioner is required to provide criminal background checks, the statute does not state a time period during which the self-petitioner must demonstrate his good moral character. See Section 204(a)(1)(B)(ii)(II)(bb) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(II)(bb). Although the regulation at 8 C.F.R. § 204.2(c)(2)(v) requires police clearances or criminal background checks for the three-year period preceding the filing of a petition under section 204(a)(1)(B)(ii) of the Act, the regulation's designation of the three-year period does not limit the temporal scope of USCIS's inquiry into the petitioner's good moral character. The agency may investigate the self-petitioner's character beyond the three-year period when there is reason to believe that the self-petitioner lacked good moral character during that time.

In this case, the petitioner has failed to address the incidents described above other than to explain that he provided false information to the police regarding the 2006 incident, as noted in the previous section. The charges and circumstances surrounding the prior convictions were never addressed by the petitioner. In his statements, he also does not address his good moral character other than to provide a list of crimes for which he has never been convicted.

Accordingly, the petitioner has failed to establish that he is a person of good moral character, as required by 204(a)(1)(B)(ii)(II)(bb) of the Act.

Conclusion

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would

have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

For the reasons noted above, the AAO concurs with the director's decision that the petitioner has failed to establish by a preponderance of the evidence that he was battered or subjected to extreme cruelty by his lawful permanent resident spouse. Beyond the director's decision, we also find that the petitioner did not establish that he is a person of good moral character. Consequently, he is ineligible for immigrant classification under section 204(a)(1)(B)(ii) of the Act. The petition is not approvable for the above stated reasons, with each considered as an independent and alternative bar to approval.

Nonetheless, the case will be remanded because the director denied the petition without first issuing a NOID as required under former 8 C.F.R. § 204.2(c)(3)(ii)(2007). While it is no longer a regulatory requirement for petitions filed on or after June 18, 2007, a NOID is required in this case, as it was filed on June 11, 2007.

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; however, the petition is currently not approvable for the reasons discussed above. Because the petition is not approvable, the petition is remanded to the director for issuance of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.