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FILE:



EAC 06 190 52241

Office: VERMONT SERVICE CENTER

Date:

FEB 11 2009

IN RE:

Petitioner:



PETITION: Petition for 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)

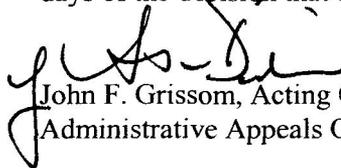
ON BEHALF OF PETITIONER:

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 and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to 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 her United States citizen spouse.

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 submits a timely appeal.

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:

(v) *Residence.* . . . The self-petitioner is not required to be living with the abuser when the petition is filed, but he or she must have resided with the abuser . . . in the past.

(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.

* * *

(ix) *Good faith marriage.* A spousal self-petition cannot be approved if the self-petitioner entered into the marriage to the abuser for the primary purpose of circumventing the immigration laws. A self-petition will not be denied, however, solely because the spouses are not living together and the marriage is no longer viable.

The evidentiary guidelines for a self-petition 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.

* * *

(iii) *Residence.* One or more documents may be submitted showing that the self-petitioner and the abuser have resided together Employment records, utility receipts, school records, hospital or medical records, birth certificates of children . . . , deeds, mortgages, rental records, insurance policies, affidavits or any other type of relevant credible evidence of residency may be submitted.

(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.

* * *

(vii) *Good faith marriage.* Evidence of good faith at the time of marriage may include, but is not limited to, proof that one spouse has been listed as the other's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. Other types of readily available evidence might include the birth certificates of children born to the abuser and the spouse; police, medical, or court documents providing

information about the relationship; and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered.

The petitioner in this case is a native and citizen of Peru who claims to have first met his spouse in 2003 at an “office of tax declarations.” The petitioner says that he and his spouse met again at a “social event” and initiated a friendship that changed into an “emotional relationship.” On September 26, 2003, the petitioner married C-R-¹, a U.S. citizen, in New York.² On November 24, 2003, C-R- filed a Form I-130, Petition for Alien Relative, on the petitioner’s behalf. The petitioner concurrently filed a Form I-485, Application to Adjust Status, on that same date. On June 20, 2006, the director denied petitioner’s Form I-485 for failure to appear for his June 20, 2006 interview.

The petitioner filed the instant Form I-360 on June 5, 2006. On January 11, 2007, the director issued a Request for Evidence (RFE), of *inter alia*, battery or extreme cruelty and evidence of the petitioner’s good moral character. The petitioner timely submitted a request for additional time to respond to the RFE. The director granted the petitioner an additional period of 60 days in which to respond to the RFE. On April 6, 2007, the director issued a Notice of Intent to Deny (NOID) the petition, notifying the petitioner of the deficiencies in the record and affording him the opportunity to submit further evidence to establish, *inter alia*, his claim of battery or extreme cruelty and evidence of the petitioner’s good moral character. The petitioner responded to the NOID on May 9, 2007. The director denied the petition on June 15, 2007, finding that the petitioner failed to establish that he was battered or subjected to extreme cruelty by his citizen spouse during their marriage.

The petitioner submits a timely appeal and argues that he suffered “psychological abuse from [his] wife,” that he is “still traumatized,” and that in addition, he is “ill.” In addition, the petitioner submitted another letter from [REDACTED]. As will be discussed, upon review, we concur with the director’s finding that the petitioner failed to establish that he was battered or subjected to extreme cruelty by his spouse.

Battery or Extreme Cruelty

In his May 8, 2007 affidavit, the petitioner states that his marriage started off well and his “economic situation was stable.” The problems began after a “few week[s]” of marriage because he and his spouse had “different point[s] of view.” The petitioner states that his spouse’s priorities were “parties and social events” and his were his “job and house.” The petitioner states that he asked his wife to change her attitude and she responded with statements such as “I’m not your servant,” “I don’t want to stay [] home,” “I’m [too] young to stay inside [the] home,” and “[It] is not my fault [that] you’re a[n] old man.” According to his affidavit, the petitioner became ill in October 2004 and was diagnosed with colon cancer in November 2004. The petitioner states that his spouse “didn’t

¹ Name withheld to protect individual’s identity.

² The AAO notes that in his affidavit dated May 8, 2007, the applicant stated that he married C-R- in “October 2003.”

care about [his] health” and would not go with him to the hospital because she found hospitals depressing. The petitioner states that he was “devastated” by his cancer diagnosis and his spouse’s response to the news was that because “cancer [is] a mortal sickness” he was “sentenced to die soon.” The petitioner states that he had surgery on December 17, 2004 and December 21, 2004 and his spouse never visited him during the time that he was convalescing in the hospital. The petitioner also states that he was depressed because of his illness and because his spouse left him. The petitioner adds that he attends “psychological therapy” once a week.

The record of proceeding contains three letters from the petitioner’s therapist, [REDACTED]. In her May 26, 2006 letter, [REDACTED] states that the petitioner “came to therapy in deep distress looking for help with two very important issues: the effects of a very serious life-threatening illness at the end of 2004, and the subsequent abandonment by his wife.” [REDACTED] states that the petitioner attends weekly one hour therapy sessions. [REDACTED] adds that the petitioner is “working very hard to understand and overcome the effects of these two devastating events in his life.” In her letter dated April 19, 2007, [REDACTED] stated that the petitioner “came to psychotherapy in deep despair looking for help after being deserted by his wife.” [REDACTED] also stated that being abandoned by his spouse “had a profound devastating effect on [the petitioner’s] emotional and psychological health.” On appeal, the only evidence submitted by the petitioner was a letter from [REDACTED] dated July 10, 2007. [REDACTED] states that “the therapeutic treatment plan for [REDACTED] has focused entirely on helping him heal the humiliation and deep pain caused by his wife’s extreme cruelty toward him throughout his cancer ordeal.” This statement contradicts [REDACTED]’s statements in her letter dated May 26, 2006 in which she states that the petitioner also sought therapy to help him with the “effects of a very serious life-threatening illness at the end of 2004.” 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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). [REDACTED] also states that the petitioner “related an incident when [his spouse] threw a glass of water in his face during a reunion at his place of employment because he objected to her excessive drinking.” The AAO notes that the petitioner does not mention this incident in any of his statements. Finally, [REDACTED] states that “while [the petitioner] was hospitalized undergoing surgery, [his spouse] took all [of] her belongings and left him.”

The petitioner also submitted affidavits from acquaintances. The affidavits from [REDACTED] and [REDACTED] describe the petitioner’s spouse as “cruel” and “inhuman” because she did not support the petitioner during his illness and left him during a difficult time in his life. The affidavits submitted also state information not mentioned by the petitioner in his statements. [REDACTED]

[REDACTED] describes the petitioner’s spouse as a “dominant woman” because she did not allow the petitioner to see his friends. [REDACTED] also mentions that C-R- threw water in the petitioner’s face. [REDACTED] states that C-R- “got drunk and humbled [the petitioner] in public.” [REDACTED] and [REDACTED] both state that during a party at the Hyatt Hotel, C-R- “got drunk and started

screaming,” “trie[d] to beat” the petitioner, and threatened to leave him. [REDACTED] and [REDACTED] also state that the petitioner “was very ashamed” and “was always polite with [his spouse].” Neither [REDACTED] nor [REDACTED] describes what they mean by “trie[d] to beat him.” However, their choice of wording implies that C-R- did not actually physically harm the petitioner.

There is no evidence in the record of proceeding that the petitioner was physically harmed by his spouse. While the AAO understands that the petitioner has gone through a difficult time due to his illness and his spouse’s abandonment, the testimony presented indicates that the petitioner’s spouse was insensitive to the petitioner’s needs during his illness and left him during that time. However, the testimony presented regarding C-R-’s behavior does not amount to extreme cruelty. The testimony regarding the petitioner’s spouse’s non-physical behavior does not indicate that her actions were coercive, threatened harm or were aimed at ensuring dominance or control over the petitioner.

Upon review, we do not find the evidence submitted by the petitioner and on his behalf sufficient to demonstrate that he was battered or subjected to extreme cruelty during his marriage. The petitioner does not allege that he was threatened or actually physically harmed by his spouse. As such, the petitioner’s claims do not rise to the level of extreme cruelty as those acts are 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. Accordingly, we concur with the findings of the director that the petitioner failed to establish that he was battered or subjected to extreme cruelty by his former spouse during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act. Consequently, the petitioner is ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act and his petition must be denied.

Beyond the decision of the director, we note that on the petitioner’s Form I-360, the petitioner indicated that he and C-R- had each been married on two occasions. The record, however, only contains documentation of the termination of C-R-’s prior marriage. Without further explanation regarding this inconsistency and relevant documentation which establishes either, the termination of the prior marriage, or that the information contained in the Form I-360 is erroneous, the petitioner has failed to establish that he had a qualifying relationship as the spouse of a United States citizen and that he was eligible for immediate relative classification based upon that relationship.

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).

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.