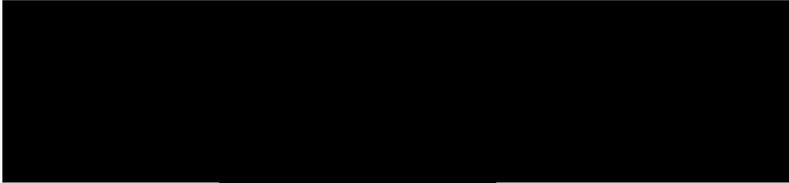


PUBLIC COPY

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



**U.S. Citizenship
and Immigration
Services**



57

FILE: [REDACTED]
EAC 07 063 50109

Office: VERMONT SERVICE CENTER

Date: **FEB 24 2009**

IN RE: [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.

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


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 appeal will be dismissed.

The petitioner seeks immigrant classification under section 204(a)(1)(B)(ii) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii), as an alien battered or subjected to extreme cruelty by a lawful permanent resident of the United States.

The director denied the petition on the basis of his determination that the petitioner had failed to establish that her husband subjected her to battery or extreme cruelty.

Counsel submitted a timely appeal on May 29, 2007

Section 204(a)(1)(B)(ii) of the Act provides that an alien who is the spouse of a United States lawful permanent resident may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the United States lawful permanent resident 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)(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 (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)(B)(ii) 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 record of proceeding establishes the following pertinent facts and procedural history. The petitioner is a citizen of Colombia who entered the United States in B-1 status on June 6, 1999. He married A-O-,¹ a lawful permanent resident of the United States, on December 16, 2002. He filed Form I-485, Applicant to Register Permanent Residence or Adjust Status, on February 10, 2003. They divorced on November 28, 2006.

The petitioner filed the instant Form I-360 on December 28, 2006. The director issued a notice of intent to deny (NOID) the petition on February 6, 2007, which notified the petitioner of deficiencies in the record and afforded him the opportunity to submit further evidence to establish that the petitioner had been subjected to battery and/or extreme cruelty by A-O-; and that the petitioner had entered into

¹ Name withheld to protect individual's identity.

the marriage in good faith. The petitioner responded on April 6, 2007 and submitted additional evidence.

After considering the evidence of record, the director denied the petition on April 25, 2007

Battery or Extreme Cruelty

The sole issue on appeal is whether the petitioner has established that he was the victim of battery and/or extreme cruelty perpetuated by A-O-. In support of his assertion that he was the victim of battery and/or extreme cruelty, the petitioner submits affidavits, evidence he has sought counseling, and medical records.

In his March 25, 2007 affidavit, the petitioner states that the first year of the marriage was normal, but after that time A-O- began staying out with friends for two day at a time; began screaming at the petitioner, telling him he was not “enough man for her,” calling him names, and telling him that he was “good for nothing”; began coming home intoxicated; and began smoking in the bedroom. The petitioner states that A-O- developed stomach cancer in February 2005, and had a tumor removed. The petitioner states that during her period of recovery, from the procedure, A-O- became very jealous when the petitioner visited his children or gave money to them. The petitioner claims that during a family gathering to celebrate the birth of A-O-'s grandchild, A-O- invited an ex-boyfriend and showered him with a great deal of attention, which humiliated the petitioner, and made him depressed. The petitioner relates another instance of humiliation on one of A-O-'s birthdays: the couple made plans to go out for dinner, but when the petitioner arrived home from work he discovered that A-O- had already left to celebrate with friends. Later, A-O- “started breaking any object” and burning clothing. Finally, A-O- told the petitioner that she was having an affair, and told the petitioner that she did not know why she had married a man like him, and screamed in his face.

The record also contains two “Psychosocial Consultation Reports” from [REDACTED], a clinical psychologist. In her first report, which was prepared on November 24, 2006 and submitted at the time the petition was filed, [REDACTED] states that the petitioner contacted her in order to procure a report for his application. [REDACTED] states that the petitioner told her that the marital relationship had deteriorated in the past year; that A-O- refuses to attend therapy; that A-O- rejects the petitioner, pushes him away, and puts him down; that A-O- told the petitioner that she regretted marrying him and wishes she had married a “real man”; that A-O- ridicules the petitioner; that A-O- is usually out with friends when he comes home from work; that on one occasion the couple made plans to go out for dinner, but when the petitioner arrived home from work he discovered that A-O- had already left to celebrate with friends; that the petitioner feels powerless and hopeless; that the petitioner has difficulty sleeping and seems “on edge”; and that A-O- has refused to assist the petitioner in completing his immigration processing, as she fears losing medical benefits if he becomes a lawful permanent resident of the United States. [REDACTED] recommends that the petitioner consider the possibility of psychotherapy.

In her second report, which was prepared on March 20, 2007, [REDACTED] states that the petitioner began receiving psychotherapy on February 20, 2007, and began taking anti-depressive medication on February 28, 2007. She recommends that the petitioner continue with ongoing therapies.

In his April 25, 2007 denial, the director found the evidence of record insufficient to establish that the petitioner had been the victim of battery and/or extreme cruelty perpetrated by A-O-. The director found that the events described by the petitioner were evidence of marital discord and, although unpleasant, those events were indicative of a deteriorating marriage rather than battery and/or extreme cruelty. The director stated that marital tensions and incompatibilities which serve to place strains on a marriage, and in fact may be the root of the marriage's disintegration, do not, by themselves, constitute extreme cruelty, and that this immigrant visa classification was not intended to encompass the mental anguish generally associated with marital difficulties or abandonment.

On appeal, counsel contends that the director erred in denying the petition. Counsel asserts that although the events described in the petition may seem indicative of marital discord, the overall pattern was one of nonphysical violence that qualifies for classification as extreme cruelty under the regulations.

Upon review, the AAO agrees with the director's decision to deny the petition. [REDACTED] "Psychosocial Consultation Reports" do not establish that the petitioner's wife subjected him to extreme cruelty. The record indicates that the petitioner has seen [REDACTED] for the sole purpose of procuring documentation to support his immigration claim. Again, the record contains two reports from [REDACTED] – one dated November 24, 2006, and one dated February 20, 2007. [REDACTED] states in her first report that the petitioner "came in for a psychological consultation, in order to provide a report that will be presented to the Department of Homeland Security." The director took note of this fact in his February 6, 2007 NOID, and also noted that, since [REDACTED]'s report was based upon a single evaluation, it held little evidentiary weight. The petitioner then attended five sessions of psychotherapy and began receiving anti-depressive medication, and [REDACTED] prepared her second report. As noted by the director in his denial, none of this occurred until after the issuance of the NOID. While the AAO does not question the expertise of [REDACTED] her testimony fails to establish that the behavior of A-O- rose to the level of battery and/or extreme cruelty as defined at 8 C.F.R. § 204.2(c)(1)(vi). As noted by the director, the petitioner did not attend any psychotherapy sessions, or take any medications, until after the director's NOID. The director noted this fact in his denial, and counsel has provided no explanation on appeal. The AAO, therefore, will discount the evidence of the petitioner's psychotherapy and anti-depressive medication.

On appeal, counsel makes assertions that go beyond those of the record. For example counsel states that the petitioner's son would not visit him due to the abusive situation. The petitioner, however, made no such assertion in his affidavit. Counsel also states that, according to the petitioner's supervisor, A-O- "made a scene" at a company event and threw a drink into the petitioner's face. The record, however, contains no such statement from the petitioner's supervisor. 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).

On appeal, counsel raises *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2004). However, counsel's citation to *Hernandez* is not persuasive. The actions and incidents described in the affidavits of record fail to meet the standard described in the *Hernandez*. In *Hernandez*, the petitioner had been violently physically assaulted by her spouse on several occasions. After two assaults, which took place while Hernandez resided with her spouse in Mexico, Hernandez fled to the United States fearing that her spouse would be able to find her in Mexico. After a time, the petitioner's spouse obtained Hernandez's phone number in the United States and persuaded her to let him visit her in the United States. Once in the United States, Hernandez's spouse convinced Hernandez of his remorse and agreed to marriage counseling. The two returned to Mexico where, after a brief period, Hernandez was again brutally attacked by her spouse. After receiving medical treatment for her injuries, the petitioner returned to the United States. The petitioner was placed in proceedings and sought suspension of deportation. The immigration judge denied Hernandez's suspension request finding that her testimony lacked credibility and that she failed to prove that she was a victim of domestic violence. On appeal to the BIA, the BIA reversed the IJ's adverse credibility determination but concluded that because the physical violence occurred in Mexico, Hernandez was unable to show that she had been battered by or subjected to extreme cruelty in the United States.² In reviewing the BIA's decision, the Ninth Circuit found there was no dispute that the abuse suffered by the petitioner in Mexico would qualify as battery or extreme cruelty. The sole question considered by that Court was whether Hernandez's spouse's actions "in seeking to convince [her] to leave her safe haven in the United States in which she had taken refuge can be deemed to constitute extreme cruelty." *Id.* at 836. In determining that the petitioner had been subjected to extreme cruelty, the court found that the "interaction between Hernandez and her spouse in Los Angeles made up an integral stage in the cycle of domestic violence, and thus the actions taken by Hernandez's spouse in order to lure Hernandez back to the violent relationship constitute extreme cruelty." *Id.*

These facts are not applicable to the instant case in which the petitioner has not shown that there was any cycle of domestic violence. The Ninth Circuit recognized that the interaction that took place between Hernandez and her spouse in the United States was during "a well-recognized stage within the cycle of violence," known as the "contrite" phase, which is both "psychologically and practically crucial to maintaining the batterer's control." *Id.* at 828.

In this case, the evidence of record fails to demonstrate that the petitioner was forced to submit to the control of A-O-. Nor do claims that A-O- called the petitioner names, humiliated him by showering attention on an old boyfriend, had an extra-marital affair, drank too much, smoked in the bedroom, told him he was not man enough for her, became jealous of his children, or failed to show

² Although the current law does not contain the requirement that the abuse have occurred in the United States, the law applicable at the time of Hernandez's petition did include this requirement.

up for a planned dinner together demonstrate that his actions amounted to extreme cruelty. As noted by the court in *Hernandez*, because Congress “required a showing of extreme cruelty in order to ensure that [a petitioner is] protected against the extreme concept of domestic violence, rather than mere unkindness,” not “every insult or unhealthy interaction in a relationship [rises] to the level of domestic violence” Again, such acts 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.

While A-O-’s actions as described in the affidavits may have been unkind and inconsiderate, they 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 affidavits submitted on behalf of the petitioner fail to establish that the petitioner was the victim of any act or threatened act of physical violence or extreme cruelty, that A-O-’s non-physical behavior was accompanied by any coercive actions or threats of harm, or that his actions were aimed at insuring dominance or control over the petitioner. The petitioner has failed to establish that his wife subjected him to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Beyond the decision of the director, the AAO finds that the petition may not be approved for an additional reason.

Qualifying Relationship and Eligibility for Classification as an Immediate Relative

The instant petition was filed on December 28, 2006, one month after the marriage ended on November 28, 2006. Section 204(a)(1)(A)(ii)(II)(aa) of the Act states, in pertinent part, that an individual who is no longer married to a citizen of the United States is eligible to self-petition under these provisions if he or she is an alien:

- (CC) who was a bona fide spouse of a United States citizen within the past 2 years and –
 - (aaa) whose spouse lost status within the past 2 years due to an incident of domestic violence
 - (bbb) whose spouse lost or renounced citizenship status within the past 2 years related to an incident of domestic violence; or
 - (ccc) who 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. . . .

As set forth previously, the petitioner has failed to demonstrate that he suffered battery and/or extreme cruelty by A-O-. Therefore, he has also failed to demonstrate a connection between the

termination of the marriage and any battery or extreme cruelty he was subjected to by A-O-. If the petitioner was divorced from A-O- at the time the petition was filed, the record then fails to establish that he had a qualifying relationship with a United States citizen on the date the petition was filed, as it fails to demonstrate a connection between the termination of the marriage and any battery or extreme cruelty he was subjected to by A-O-. The petitioner has failed to establish a qualifying relationship, as required by section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act. He is, therefore, ineligible for classification as an immediate relative under section 201(b)(2)(A)(i) of the Act. For this additional reason, the petition may not be approved.

Conclusion

The AAO concurs with the director's determination that the petitioner has failed to demonstrate that A-O- subjected him to battery or extreme cruelty. Beyond the decision of the director, the AAO finds that the petitioner has failed to establish that he had a qualifying relationship with a lawful permanent resident of the United States. Accordingly, based on the present record, the petitioner is ineligible for immigrant classification under section 204(a)(1)(B)(ii) of the Act, and the AAO agrees with the director's decision to deny the petition. For all of these reasons, the AAO will not disturb the director's denial of the petition.

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 and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

ORDER: The appeal is dismissed.