

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B₉

FILE:

EAC 05 246 52559

Office: VERMONT SERVICE CENTER

Date:

JAN 07 2005

IN RE:

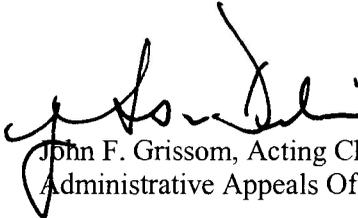
PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(A)(iii) of the
Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON BEHALF OF PETITIONER:

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)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien battered or subjected to extreme cruelty by a United States citizen.

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

Although counsel submitted a Form I-290B on November 3, 2007, it was rejected as improperly filed,¹ and the appeal was not properly filed until December 8, 2007. Although the director dismissed counsel's filing as an appeal he accepted, and adjudicated, counsel's submissions as a motion to reconsider. The director made a decision on the case based upon the record before him and, on February 13, 2007, affirmed his previous decision to deny the petition. Counsel submitted a timely appeal on March 16, 2007.

Section 204(a)(1)(A)(iii) of the Act provides that an alien who is the spouse of a United States citizen may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the United States citizen spouse in good faith and that during the marriage, the alien or a child of the alien was battered or subjected to extreme cruelty perpetrated by the alien's spouse. In addition, the alien must show that he or she is eligible to be classified as an immediate relative under section 201(b)(2)(A)(i) of the Act, resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(A)(iii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II).

Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J) states, in pertinent part:

In acting on petitions filed under clause (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 explained further at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part, the following:

* * *

¹ See the director's Rejection Notice, dated November 30, 2006, which stated the following: "The application or petition cannot be accepted because it has not been properly signed. Since the case is not properly filed, a priority date or processing date cannot be assigned. . . ."

- (vi) *Battery or extreme cruelty.* For the purpose of this chapter, the phrase “was battered by or was the subject of extreme cruelty” includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. **Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence.** Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence. The qualifying abuse must have been committed by the citizen . . . spouse, must have been perpetrated against the self-petitioner . . . and must have taken place during the self-petitioner’s marriage to the abuser.

The evidentiary guidelines for a self-petition filed under section 204(a)(1)(A)(iii) of the Act are explained further at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part, the following:

Evidence for a spousal self-petition –

- (i) *General.* Self-petitioners are encouraged to submit primary evidence whenever possible. The Service will consider, however, any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service.

* * *

- (iv) *Abuse.* Evidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel. Persons who have obtained an order of protection against the abuser or have taken other legal steps to end the abuse are strongly encouraged to submit copies of the relating legal documents. Evidence that the abuse victim sought safe-haven in a battered women’s shelter or similar refuge may be relevant, as may a combination of documents such as a photograph of the visibly injured self-petitioner supported by affidavits. Other forms of credible relevant evidence will also be considered. Documentary proof of non-qualifying abuses may only be used to establish a pattern of abuse and violence and to support a claim that qualifying abuse also occurred.

The record of proceeding establishes the following pertinent facts and procedural history. The petitioner is a citizen of Poland who entered the United States with a B-1/B-2 visa on September 19, 2001. He married A-T-² a United States citizen, on September 8, 2004 in Wheaton, Illinois. A-T- filed Form I-130, Petition for Alien Relative, on behalf of the petitioner on June 22, 2005. The petitioner filed Form I-485, Applicant to Register Permanent Residence or Adjust Status, on that same date.

The petitioner filed the instant Form I-360 on September 5, 2005. On March 21, 2006, the director issued a request for additional evidence, and requested additional evidence to clarify whether the petitioner had resided with A-T-; whether the petitioner had been subjected to battery and/or extreme cruelty by A-T-; whether the petitioner is a person of good moral character; and whether the petitioner married A-T- in good faith. The petitioner responded on May 22, 2006, and requested additional time in which to submit additional evidence.

The director issued a notice of intent to deny (NOID) the petition on July 5, 2006, which notified the petitioner of the deficiencies in the record and afforded him the opportunity to submit further evidence to establish that the petitioner had resided with his wife; that the petitioner had been subjected to battery and/or extreme cruelty by his wife; that the petitioner is a person of good moral character; and that the petitioner had married his wife in good faith. The petitioner responded to the NOID on September 5, 2006, and submitted additional evidence. After considering the evidence of record, the director found that although the petitioner had established that he had resided jointly with A-T-; that the petitioner is a person of good moral character; and that the petitioner had married A-T- in good faith; he found that the petitioner had nonetheless failed to establish that A-T- had subjected him to battery and/or extreme cruelty. Accordingly, the director denied the petition on October 6, 2006. After considering a late-filed appeal as a motion to reconsider, the director affirmed his decision to deny the petition on February 13, 2007.

In his August 25, 2005 affidavit, submitted at the time the Form I-360 was filed, the petitioner states that he was introduced to A-T- by her father, who had asked the petitioner to fix a problem with A-T-'s computer; and that he moved into her family's home in November 2002. He states that he and A-T- were married in September 2004 and moved into their own condominium in December 2004. They filed his permanent residency paperwork in June 2005 but, soon afterward, A-T- told him that she no longer wished to be married. Although they had had "little disagreements," A-T-'s pronouncement that she wanted to divorce him left the petitioner "stunned." The petitioner states that after A-T- told him of her desire to divorce, "my whole world was turned inside out," that "[m]y wife's declaration that she was going to seek a divorce devastated me," and that he "could not go to work for seven weeks" due to the stress caused by A-T-'s pronouncement. The petitioner states that he wishes to continue the marriage; and that he has attempted to reconcile with A-T-. He says he does not understand why A-T- wants a divorce: although they may have had "pointed discussions on the issue of money," he has never raised his voice or hit her. The AAO notes that the petitioner does not discuss battery or extreme cruelty in this affidavit.

² Name withheld to protect individual's identity.

The petitioner also submitted an evaluation from [REDACTED] a licensed clinical social worker, at the time the Form I-360 was filed. In her August 27, 2005 evaluation, which was based on three interviews with the petitioner, [REDACTED] offers further testimony from the petitioner. Specifically, [REDACTED] states that the petitioner told her that he moved in with A-T- and her parents in January 2003; that he married A-T- in September 2004; that they moved into their condominium in December 2004; and that A-T- moved out of the couple's condominium in February 2005; that the marriage "fell apart completely" after he and A-T- moved into the condominium; that A-T- began threatening to call immigration authorities if he does not agree to divorce her; and that A-T- sends voicemails and text messages telling him to have his belongings packed because he is going back to Poland. [REDACTED] also states that the petitioner told her that the couple separated numerous times prior to A-T-'s leaving in February 2005; that A-T- was telling the petitioner to pack his bags and telling him to leave "every other week"; that most of their separations lasted 4-5 days; and that A-T- struck the petitioner in the face 2-3 times. [REDACTED] states that the petitioner told her that he still calls A-T- and asks her to return.

[REDACTED] also states that the petitioner told her that A-T- was an extremely jealous and insecure spouse: she would park across the street from his job to make sure he did not talk with other women; listened to telephone conversations; drove next to him on the highway to make sure he was not looking at other women; regularly checked his underwear for sperm in order to ascertain whether he had been cheating on her; and threatened to poke out his eyes or cut off his penis if he ever cheated on her. [REDACTED] also states that the petitioner told her that he was often afraid of his wife; for example, he was afraid she would attack him with a knife while she was cooking. [REDACTED] also states that the petitioner told her that A-T- would pressure him for sex and refuse to talk to him if he refused.

[REDACTED] also states that the petitioner told her that he found out that A-T- was "with another man" in May 2005, and that he stopped functioning completely. She states that the petitioner exhibits passive behavior, which is a classic symptom of abuse.

In his July 5, 2006 NOID, the director noted inconsistencies between the petitioner's version of events with regard to his assertion of battery and/or extreme cruelty as recounted in his own affidavit and those as told to [REDACTED] stating the following:

As proof to satisfy this requirement, you submitted a self-affidavit. According to this document, you had little disagreements [sic] with your spouse, she left you stating she wants a divorce, and she behaves like a spoiled child and not an adult.

You also submitted a psychosocial assessment dated August 27, 2005 from [REDACTED]. According to this evaluation, you alleged that your wife has another man, that every week she was packing your bags, telling you to leave, throwing your clothes on the floor, and two or three times she hit you in the face. You alleged that your spouse would follow you to make sure you didn't talk with other women and threatened physical harm if you cheat on her or look at another woman. You claim that

your wife would stand in the kitchen with a knife in her hand while cooking and you were afraid she would attack you if she became angry. You also claim she had an abortion in 2003 against your wishes. Finally, you claim that your spouse threatened to have you deported if you don't agree to a divorce. As one example, you claim that she said she would call INS if you didn't sign divorce papers by a certain time, however you also claim that you have never been served with divorce papers.

These documents differ drastically in regards to your allegations of battery and extreme cruelty. Both pieces of evidence are based solely on your word. Therefore, it is unclear to the Service how much evidentiary weight should be placed on them. . . .

In response, the petitioner submitted another affidavit and several affidavits from friends. In his August 26, 2006 affidavit, the petitioner stated that he continuously resided with his wife between November 2002 and July 2005. He states that although A-T- hired an attorney who sent papers to be signed for a divorce, he has not been served with "formal papers." The petitioner also states that he understands that his earlier affidavit does not contain the details set forth in [REDACTED]'s evaluation, but that the factual statements he made to [REDACTED] are "true and correct."

In his affidavit, [REDACTED] states that A-T- was not friendly; that the petitioner was happy before the marriage but miserable during the marriage; that the petitioner was screamed and yelled at every day on the telephone; and that, today, he is finally able to see the petitioner smile again. In his affidavit, [REDACTED] speaks to the petitioner's good character, but does not indicate that he witnessed any interactions between the petitioner and A-T-. In his affidavit, [REDACTED] stated that he had very few personal contacts with A-T-, but that his impression from talking with others is that she is jealous, overbearing, distrustful, and spiteful; and states that he heard the petitioner engaging in heated telephone conversations in the Polish language. In his affidavit, [REDACTED] states that A-T- would not allow the petitioner to spend time with friends; that she was controlling and manipulative; that she destroyed the petitioner's self-confidence; and that A-T- extorted money from the petitioner. In his affidavit, [REDACTED] speaks to A-T-'s general poor character, and states that she tried to get the petitioner fired from his job.

In his October 6, 2006 denial of the petition, the director reiterated his earlier concerns regarding inconsistencies among the various affidavits, stating again that the documents "differ drastically in regards to your allegations of battery and extreme cruelty," and added the following:

Marital tensions and incompatibilities which serve to place severe strains on a marriage, and in fact may be the root of the marriage's disintegration, do not, by themselves, constitute extreme cruelty. The evidence provided in the present case, though indicative of a discordant marriage does not establish extreme cruelty by the stated actions of your spouse.

In his first appellate brief, which was treated by the director as a motion to reconsider, counsel contends that the director "did not make a specific finding as to the credibility of the assessment

conducted by [REDACTED],” and that the director “cannot summarily dismiss the findings of a professional reaching his own conclusions as to psychological events and ramifications.” Counsel stated that the director “viewed new facts as ‘inconsistencies’ and wholly failed to review the evidence presented in its totality.”

The director was not convinced by counsel’s arguments and, on February 13, 2007, affirmed his decision to deny the petition. In pertinent part, the director dismissed counsel’s assertions as follows:

The Service notes that the mere assertion of the truth of some of your statements is not sufficient to make a positive finding for this requirement [that the petitioner demonstrate battery and/or extreme cruelty]. Corroborative evidence is necessary to establish where in fact the truth lies.

Counsel argues that the Service did not make a specific finding as to the credibility of the assessment conducted by [REDACTED]. The Service contends that the evaluation is based solely on [the petitioner’s] statements. As [the petitioner’s] statements have been found to lack credibility, any evidence based on your own testimony alone is not sufficient to establish your eligibility for this requirement. . . .

* * *

The evidence of record does not establish that [the petitioner has] been subjected to extreme cruelty as defined for immigration purposes.

In his second submission, counsel argues that the director did not address any of the legal issues presented on appeal in his February 13, 2007 affirmation of his decision to deny the petition. He states that the director arbitrarily imposed conclusions of fact not supported by the record, and substituted his own opinion for that of a duly licensed health care professional. Counsel contends that the director’s decisions of October 6, 2006 and February 13, 2007 are not supported by credible evidence; are contrary to the record of credible evidence; and constitute a denial of due process.

Section 204(a)(1)(J) of the Act requires U.S. Citizenship and Immigration Services (USCIS) to “consider any credible evidence relevant to the petition.” Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J). This mandate is reiterated in the regulation at 8 C.F.R. § 204.2(c)(2)(i). However, this mandate establishes an evidentiary standard, not a burden of proof. Accordingly, “[t]he determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of USCIS.” 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). 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 forms of relevant credible 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 her 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). To require otherwise would render the adjudicatory process meaningless.

In reaching its decision on this matter, the AAO has reviewed the entire record of proceeding, and finds that the director properly denied the petition. In conducting its own analysis of this case, the AAO turns first to the inconsistencies contained in the petitioner's version of events.

The record contains three items explaining the petitioner's version of events: (1) his first affidavit, dated August 25, 2005; (2) [REDACTED] August 27, 2005 evaluation; and (3) his second affidavit, dated August 26, 2006. However, these three documents are inconsistent with each other. For example, in his first affidavit the petitioner stated that he met A-T- in December 2002, but he told [REDACTED] they met in January 2003. The petitioner stated in his first affidavit that although he and A-T- had had "little disagreements" over issues of money and how much time she spent with her parents, he was stunned when A-T- told him she wanted a divorce, but the petitioner told [REDACTED] that the marriage fell apart completely after the couple moved into the condominium in December 2004, and that A-T- was packing the petitioner's bags and telling him to leave every other week, throwing his clothes on the floor, and hitting him in the face. The petitioner told [REDACTED] that A-T- moved out of the condominium in February 2005, which is not consistent with the petitioner's statement that he was stunned when A-T- asked for a divorce "not long after" the Forms I-130 and I-485 were filed in June 2005.

The petitioner's second affidavit, which was submitted in response to the director's request in the NOID for clarification of these inconsistencies, offered no such clarifications. Instead of explaining why his accounts to USCIS and to [REDACTED] differed, the petitioner simply stated that what we told [REDACTED] was true and correct. At this time the petitioner also submitted an affidavit from [REDACTED] which obscured the record further. In his affidavit, [REDACTED] stated that the petitioner quit his job in May 2005. This conflicts with the petitioner's timeline of events, which had him quitting his job at some point in June 2005 or later (the Forms I-130 and I-485 were filed on June 22, 2005, the applicant stated in his affidavit that A-T- asked for a divorce "not long after" that date, and that for seven weeks after that time he could not work).

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

The AAO rejects counsel's assertion on appeal that the director "viewed new facts as 'inconsistencies' and wholly failed to review the evidence presented in its totality." There are material differences in the

petitioner's version of events as described in his two affidavits, and as told to [REDACTED]. The petitioner was afforded the opportunity to explain those differences, but declined to do so. Counsel also asserts the following:

It further appeared that the Center Director would only be satisfied by a public demonstration of abusive behavior to substantiate a claim . . . The Center Director wanted witnesses who would describe events of mental cruelty, i.e., a witness catching the predator "in the act" of being psychologically abusive.

The AAO disagrees. In a case such as this, where there is little or no physical evidence of battery and/or extreme cruelty, the petitioner's affidavits are crucial. As has been noted many times, the petitioner's evolving versions of what happened during the marriage are inconsistent with each other, thus undermining their credibility, including his testimony to [REDACTED].

The AAO also disagrees with counsel's assertions regarding [REDACTED]'s evaluation. The AAO does not discount or diminish the qualifications of [REDACTED] to opine on the petitioner's mental state. However, it does question the testimony of the petitioner to [REDACTED] as it differs from the testimony of his affidavits: the AAO does not question her opinions; it questions the validity of the petitioner's testimony to her that formed the basis for such opinions. Again, the petitioner has failed to explain the inconsistencies in his testimony, which diminishes the credibility of that testimony. As there is little documentary evidence of his claims, the primary proof of the petitioner's case is his testimony, which is of questionable probative value due to the inconsistencies contained therein.

While A-T-'s actions as described in the record 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 claims made by the petitioner and the letters 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 V-N-'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. He has failed to overcome the director's concerns regarding the issue of battery and/or extreme cruelty. The petitioner has failed to establish that 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.

Finally, the AAO turns to counsel's contention that the director's decision constitutes a violation of due process. The AAO disagrees. The petitioner has failed to demonstrate that any violation of the regulations resulted in "substantial prejudice." to him. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The petitioner has fallen far short of meeting this standard. A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. The petitioner's primary complaint is that the director denied the petition. As previously discussed, the petitioner has not met his burden of proof and the denial was the proper result under the regulation. Accordingly, this claim is without merit.

The petitioner has failed to establish that his wife subjected him to battery or extreme cruelty. He is, therefore, ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), and the petition must be denied

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.