

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY PUBLIC COPY

Bg



U.S. Citizenship
and Immigration
Services



FILE: [REDACTED]
EAC 05 164 52794

Office: VERMONT SERVICE CENTER

Date: JAN 13 2009

IN RE: [REDACTED]

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)

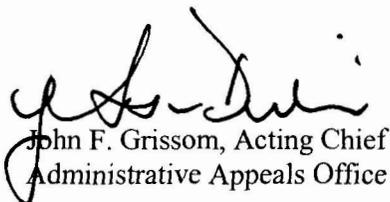
ON BEHALF OF PETITIONER:



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: (1) that he had resided with his wife; and (2) that his wife subjected him to battery or extreme cruelty.

Counsel submitted a timely appeal on August 21, 2006.

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:

- (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 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.

* * *

- (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 record of proceeding establishes the following pertinent facts and procedural history. The petitioner is a citizen of the Dominican Republic. He had a son with S-H-,¹ in the Dominican Republic on September 7, 1990. The petitioner and S-H-, by that time a lawful permanent resident of the United States, married in the Dominican Republic on March 11, 1997. S-H- filed Form I-130, Petition for Alien Relative, on behalf of the petitioner on March 31, 1997. The Form I-130 was approved on June 18, 1999, and the petitioner entered the United States in V-1 status on July 4, 2001. S-H- became a naturalized citizen of the United States in 2002. The petitioner and S-H- divorced on February 14, 2003. S-H- withdrew the Form I-130 in October 2003, and U.S. Citizenship and Immigration Services (USCIS) issued a letter confirming revocation of the Form I-130's approval on November 5, 2004.

The petitioner and S-H- remarried on May 8, 2004. S-H- filed a new Form I-130 on behalf of the petitioner on June 21, 2004, and the petitioner filed Form I-485, Applicant to Register Permanent Residence or Adjust Status, on the same date.

The petitioner filed the instant Form I-360 on May 18, 2005. On August 30, 2005, the director issued a request for additional evidence, and requested additional evidence to establish whether the petitioner had resided with S-H-; and whether the petitioner had been subjected to battery and/or extreme cruelty by S-H-. The petitioner responded on December 19, 2005, and submitted additional evidence. The director issued a notice of intent to deny (NOID) the petition on March 3, 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 S-H-; and that the petitioner had been subjected to battery and/or extreme cruelty by S-H-. However, the petitioner did not respond to the director's

¹ Name withheld to protect individual's identity.

NOID. After considering the evidence of record, the director denied the petition on July 21, 2006. On appeal, counsel submits a brief and supporting documentation.

Joint Residence

The first issue on appeal is whether the petitioner has established that he shared a joint residence with S-H- during their marriage. In finding the evidence of record insufficient to establish this criterion, the director stated that the affidavits of record before him were too vague and that the letter from the New Jersey Re-Insurance Company does not state or demonstrate that the couple shared a joint residence.

On appeal, counsel submits five additional affidavits, and argues in his brief that “proof of this is that they have a son within the marriage.” The AAO disagrees. First, the AAO finds the five additional briefs submitted on appeal deficient. The five affidavits are identical to each other, which raises questions as to who actually wrote them, which diminishes their probative value. Nor does the AAO agree with counsel’s contention that the fact that the couple had a son together in 1990 demonstrates they shared a joint residence. Counsel’s statement that the couple “procreated within their marriage a son” is incorrect. S-H- and the petitioner have been married twice, and divorced once, since the birth of their son in 1990. The marriage at issue here occurred in 2004, nearly fourteen years after the birth of their son. That they had a son together in 1990 does not demonstrate that they shared a residence after their second marriage on May 8, 2004.

The AAO also agrees with the director’s finding that the evidence of record before him at the time he issued his decision failed to demonstrate that the petitioner and S-H- shared a joint residence. As noted by the director, the two affidavits submitted in response to the director’s request for additional evidence failed to establish that the couple shared a joint residence: one affidavit was insufficiently vague, and the other did not mention joint residence. Nor does the letter from the New Jersey Re-Insurance Company demonstrate that they shared a joint residence, as it simply indicates that the petitioner was insured under S-H-’s automobile insurance policy for a period of three months in 2004. It does not state that they lived together.

Counsel and the petitioner have failed to overcome the director’s denial of the petition on this ground. Accordingly, the petitioner has not established by a preponderance of the evidence that he resided with S-H-, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

Battery or Extreme Cruelty

In finding the evidence of record insufficient to establish that the petitioner was subjected to battery and/or extreme cruelty by S-H-, the director stated that, although the record of proceeding contains a “Victim Notification Form,” dated May 11, 2005, that form provided no detail regarding the alleged abuse. The director also stated that the two affidavits submitted by the petitioner were insufficiently vague with regard to the alleged abuse. Finally, the director noted that, although his

March 3, 2006 NOID requested a statement from the petitioner detailing the alleged abuse, the petitioner elected not to submit such a statement.

On appeal, counsel contends that “[i]t is a real fact that [S-H-] did psychologically abuse her husband. . . .” Counsel makes no further argument to support this assertion, and submits no evidence beyond the five affidavits which, as discussed previously, are defective in that they are identical to one another, which raises questions as to who wrote them. Further, the AAO agrees with the director’s statements regarding the inadequacy of the “Victim Notification Form,” as it contains no information regarding the alleged abuse. With regard to the two affidavits submitted in response to the director’s request for additional evidence, the AAO finds them insufficiently vague and lacking in detail.

In a case such as this, where there is little or no physical evidence of battery and/or extreme cruelty, the petitioner’s affidavit is crucial. However, despite the director’s repeated requests for an affidavit from the petitioner describing the alleged abuse in detail, the petitioner has chosen not to submit such an affidavit. Further, while S-H-’s actions as described in the affidavits that were submitted 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 S-H-’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. 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.

For the reasons set forth in the preceding discussion, the AAO affirms the director’s decision to deny the petition. Beyond the decision of the director, the AAO finds that the petition may not be approved for two additional reasons.

Good Moral Character

The regulation at 8 C.F.R. § 204.2(c)(2)(v) states that primary evidence of a petitioner’s good moral character is an affidavit from the petitioner, accompanied by local police clearances or state-issued criminal background checks from each place the petitioner has lived for at least six months during the three-year period immediately preceding the filing of the self-petition (in this case, during the period beginning in May 2002 and ending in May 2005).

Primary evidence of a petitioner’s good moral character is an affidavit from the petitioner, accompanied by the requisite local police clearances or state-issued criminal background checks. However, as noted previously, the record lacks an affidavit from the petitioner. For this reason alone, the record fails to demonstrate that the petitioner is a person of good moral character.

Further, the single police certificate submitted by the petitioner, issued by the City of Paterson, New Jersey, is insufficient. As noted previously, the petitioner in this particular case must submit local police clearances or state-issued criminal background checks to cover the period May 2002 through May 2005. However, the record indicates that the petitioner was not living in Paterson, New Jersey during this entire time. Further, the police certificate itself states that it does not cover any period of time after December 23, 2004. For all of these reasons, the petitioner has failed to establish that he is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act. For this additional reason, the petition may not be approved.

Good Faith Entry into Marriage

As discussed previously, the petitioner and S-H- were married in 1997, divorced in 2002, and re-married in 2004. The record, however, contains no evidence that the petitioner entered the 2004 marriage in good faith. As noted previously, counsel states that there can be no question as to the validity of the marriage because the petitioner and S-H- have a son together. The AAO, however, rejects counsel's assertion. In this particular case, S-H- and the petitioner have been married twice, and divorced once, since the birth of their son in 1990. The marriage at issue here occurred in 2004, nearly fourteen years after the birth of their son. The record lacks such information as details surrounding the courtship that led to the couple's decision to remarry; how they dealt with the issues that had led to the dissolution of their first marriage; and how they ultimately came to the decision to marry a second time. The petitioner also fails to indicate whether the abuse he allegedly suffered during the second marriage also occurred during the first marriage. The evidence of record fails to demonstrate that the petitioner entered into marriage with S-H- in 2004 in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act. For this additional reason, the petition may not be approved.

Conclusion

The AAO agrees with the director's determination that the petitioner has failed to establish that he and his wife shared a joint residence and that his wife subjected him to battery or extreme cruelty. Beyond the decision of the director, the AAO also finds that the petitioner has failed to demonstrate that he is a person of good moral character and that he entered into marriage with his wife in good faith. 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 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.