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

U.S. Citizenship and Immigration Services

B9

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JAN 30 2009

EAC 07 038 50848

IN RE: Petitioner: [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:

[redacted]

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 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 because the petitioner did not establish that his wife subjected him to battery or extreme cruelty during their marriage.

On appeal, counsel submits a brief and copies of documents previously submitted.

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:

> (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 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.
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> * * *
>
> (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 in this case provides the following pertinent facts and procedural history. The petitioner is a native and citizen of Morocco who was admitted into the United States on February 1, 2000, as a B-1 nonimmigrant visitor. He applied for and was granted an extension of stay until July 30, 2000. On May 30, 2001, the petitioner married D- M-, a U.S. citizen, in New York City. D- M- subsequently filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf, which was denied on March 17, 2003, pursuant to section 204(c) of the Act. On July 19, 2005, the petitioner was served with a Notice to Appear for removal proceedings charging him as subject to removal under section 237(a)(1)(B) of the Act, as amended, in that after admission as a nonimmigrant under Section 101(a)(15) of the Act, he remained in the United States for a time longer than permitted, in violation of this Act or any other law of the United States. The petitioner, through counsel, subsequently filed a Form EOIR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents, under the provisions of section 240A(b) of the Act, as having been battered or subjected to extreme cruelty by a U.S. citizen. The petitioner remains in proceedings before the New York Immigration Court and his next hearing is scheduled for February 4, 2009.

The petitioner filed the instant Form I-360 on November 20, 2006. On June 11, 2007, the director issued a Request for Evidence (RFE) of, *inter alia,* the requisite battery or extreme cruelty. The petitioner, through prior counsel, requested additional time to respond. On September 5, 2007, the director issued a Notice of Intent to Deny (NOID) the petition for lack of, *inter alia*, the requisite battery or extreme cruelty. The petitioner, through prior counsel, timely responded to the NOID with

additional evidence. On March 11, 2008, the director denied the petition on the aforementioned ground. Counsel timely appealed.

On appeal, counsel cites to *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2004), claiming that the evidence, in its totality, presented by the petitioner establishes that he was the subject of extreme cruelty perpetrated by his wife. As we discuss in detail below, *Hernandez* is not a precedent binding on this case and we find no error in the director's discretionary determination that the petitioner's wife did not subject him to extreme cruelty.

Battery or Extreme Cruelty

We affirm the director's determination that the petitioner did not establish the requisite battery or extreme cruelty. The record contains the following, relevant evidence:

- The petitioner's affidavits dated October 25, 2006 and August 10, 2007;
- An undated statement from ; and
  An October 17, 2006 psychosocial report of the petitioner by

In his October 25, 2006 affidavit, the petitioner states that he met D- M- in January 2001 at the house of his friend in Brooklyn, New York and that in March 2001, D- M- invited him to her house where she lived with her mother and brother. The petitioner states that D- M- called him often and went out with him, and that she felt sorry for him because, without immigration papers, he could work only in a car wash. He also states that in April 2001, when he offered to help D- M- because she was having problems with her mother and needed a place to live, she expressed her love for him and proposed marriage. He states further that around the first week of May 2001, D- M- moved in with him at his apartment located at , in Brooklyn, New York, and that on May 30, 2001, they were married. The petitioner explains that their marriage went smoothly until the end of August 2001, when his wife found a job, and started asking him for money to send to her grandmother and brother in Florida. The petitioner states that his wife also started coming home late, staying gone for weeks at a time, and calling him names like "stupid" and "disabled," and that around September 2001, she moved out. The petitioner further explains that sometime in 2002, his wife lost her job and moved back in with him, that she called him "stupid" and "disabled" when he did not give her money, and threatened to have him deported. The petitioner states that after about a month, his wife did not return to his apartment and that around November 2002, he was notified of her hospitalization, at which time he began to see her again and give her money. On March 17, 2003, the petitioner's wife withdrew the I-130 petition that she had filed on his behalf. The petitioner states that his wife lied when she told the immigration officer that she had never lived with him.

In his August 10, 2007 affidavit regarding extreme cruelty, the petitioner reiterates that his wife would insult him by calling him "stupid" and "disabled." The petitioner claims that his wife embarrassed and taunted him in front of other people, including his friends and co-workers, and that

she started calling him vulgar names as well. The petitioner states that he felt insulted, humiliated and helpless. The petitioner describes one incident of going to an apartment to pick up his wife and feeling that her friends could hurt him because they were intoxicated, but he does not describe any particular incidents or threats in probative detail. The petitioner also reports that he wanted to see a doctor for his depression but could not afford to and, moreover, feared losing his job if his boss found out. He reports that his immigration attorney told him to go to for an evaluation. The petitioner concludes, "I have been devastated by the extreme mental and emotional abuse perpetrated against me by my wife. Now my future is being threatened because of my failed marriage to my abusive wife." In his August 10, 2007 affidavit, the petitioner does not further discuss the alleged abuse.

The petitioner does not explicitly state or otherwise indicate that his wife subjected him to battery. Accordingly, we will discuss only the petitioner's claim of extreme cruelty. The petitioner's testimony does not indicate that his wife's behavior rose to the level of extreme cruelty, as that term is defined in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). The petitioner does not describe in probative detail any particular incidents where his wife threatened him with physical or mental injury. The petitioner's statements regarding his wife insulting his feet and the way he walked, his manhood, his intelligence, and threatening to have him deported to Morocco, do not establish that she subjected him to psychological, sexual abuse or exploitation, or that her actions were part of an overall pattern of violence.

In addition to his personal declarations, the petitioner submitted an undated statement from a friend, , who claims that he heard the petitioner's wife scream and shout at the petitioner and use bad words. He claims further that the petitioner told him how his wife had changed, that she asked him for money a lot, and that she told him she had made a mistake by marrying a disabled man. claims further that the petitioner was depressed and afraid because his wife threatened to call the police. concludes that the petitioner has lost all hope in his marriage and is afraid to remarry. Again, this testimony does not indicate that the behavior of the petitioner's wife rose to the level of extreme cruelty, as that term is defined in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). statements regarding the behavior of the petitioner's wife, which included shouting and screaming, name calling, money demands, and threats to call the police, do not establish that she subjected the petitioner to psychological, sexual abuse or exploitation, or that her actions were part of an overall pattern of violence.

The petitioner also submitted a psychosocial report from with listed as the translator. s report also fails to establish that the petitioner's wife subjected him to extreme cruelty. states that the petitioner was referred by his counsel and that his report is based on one interview of unspecified length on October 16, 2006, more than three years and seven months since the petitioner claims he had last spoken with his wife. diagnoses the petitioner with Posttraumatic Stress Disorder (PTSD) and depression, resulting from emotional, verbal, and financial abuse. does not indicate that he treated or recommended any treatment for the petitioner's condition. r identifies the underlying trauma of the petitioner's PTSD as his

threatened safety and physical integrity and his repeated emotional and other abuses from his wife while they lived together. conveys the petitioner's description of his wife's loss of interest in their relationship and her increasing anger and irritability with him. reiterates the petitioner's claim that his wife distanced herself and stayed away for long periods of time. also reports several behaviors of the petitioner's wife that the petitioner himself does not discuss in his affidavits. For example, states that the petitioner suggested that he and wife undergo counseling, but that his wife "appeared to have no interest in counseling and seemed to fear that she would have to speak about issues that were too private for her to reveal." also states that the petitioner reported that, due to her violent behavior, his wife had been arrested on several occasions and even incarcerated for at least a brief period, and that the petitioner feared for his life when riding in a car with his wife, as she would drive without a license or insurance and steer the car in a reckless manner. Yet the petitioner discusses none of these latter three behaviors of his wife in his own statements. In addition, r reports, "[The petitioner] says that the trauma he experienced has become part of himself and greatly informs how he thinks and behaves, especially as [his wife] still contacts him for money." This conflicts with information provided by the petitioner in his October 25, 2006 statement that he and his wife have not called one another since their immigration interview on March 17, 2003, at which time she withdrew the I-130 petition she had filed on his behalf. 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).

While we do not question the expertise of r, his testimony fails to establish that the behavior of the petitioner's wife rose to the level of extreme cruelty, as defined in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). As discussed above, discusses actions of the petitioner's wife that the petitioner himself does not mention in the petitioner's own testimony and/or conflict with the petitioner's own testimony, which creates inconsistencies that detract from the probative value of . testimony.

On appeal, counsel claims that the petitioner established extreme cruelty under the standards construed by the Ninth Circuit Court of Appeals in *Hernandez v. Ashcroft*, 345 F.3d 824, 833-35 (9th Cir. 2003). In *Hernandez*, the court held that extreme cruelty can be assessed under objective standards and is a clinical, nondiscretionary determination subject to judicial review. As this case arose outside of the Ninth Circuit, *Hernandez* is not a binding precedent. Moreover, the Fifth and the Tenth Circuit Courts of Appeals have come to a contrary conclusion. *Wilmore v. Gonzales*, 455 F.3d 524, 527-28 (5th Cir. 2006); *Perales-Cumpean v. Gonzales*, 429 F.3d 977, 982-984 (10th Cir. 2005). Although *Wilmore* and *Perales-Cumpean* concerned applications for cancellation of removal, the both courts cited the definition of battery or extreme cruelty for self-petitioners at 8 C.F.R. § 204.2(c)(1)(vi) and found the definition "far from algorithmic" because it "requires consideration of many discretionary factors" and "does not provide a binding, objective standard that would channel the [agency's] discretion in a manner making it subject to judicial review." *Perales-Cumpean*, 429 F.3d at 984. *Accord Wilmore*, 455 F.3d at 527-28.

Even if *Hernandez* were binding on this case, the relevant evidence fails to establish that the petitioner's wife subjected him to extreme cruelty under the clinical and legal standards cited by the Ninth Circuit. As discussed above, the petitioner failed to describe in probative detail any specific threatening or controlling behavior of his wife. Nor did the petitioner demonstrate that her nonviolent actions constituted psychological or sexual abuse or were otherwise part of an overall pattern of violence. *See Hernandez*, 345 F.3d at 836–41 (describing the cycle of domestic violence and interpreting the phrase "acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence" in 8 C.F.R. § 204.2(c)(1)(vi)).

The petitioner does not claim and the record does not indicate that the petitioner's wife subjected him to battery. The relevant evidence also fails to demonstrate that the petitioner's wife subjected him to extreme cruelty during their marriage. Accordingly, the petitioner has not established battery or extreme cruelty, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

The petitioner has not demonstrated that his wife subjected him to battery or extreme cruelty during their marriage. He is consequently ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act and his petition must be denied.

As always, the burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.