

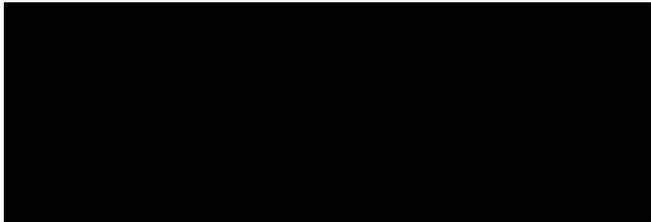


U.S. Citizenship
and Immigration
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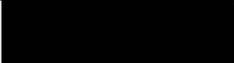
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FILE:



Office: VERMONT SERVICE CENTER

Date:

JUL 07 2009

EAC 07 152 50016

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.


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 The director's decision will be withdrawn and the matter remanded for further action.

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 his wife subjected him to battery or extreme cruelty; and (2) that he married his wife in good faith.

Counsel submitted a timely appeal on July 25, 2008.

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:

(ii) *Legal status of the marriage.* The self-petitioning spouse must be legally married to the abuser when the petition is properly filed with the Service. A spousal self-petition must be denied if the marriage to the abuser legally ended through annulment, death, or divorce before that time. . . .

* * *

(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.

* * *

- (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.
- (ii) *Relationship.* A self-petition file by a spouse must be accompanied by evidence of . . . the relationship. Primary evidence of a marital relationship is a marriage certificate issued by civil authorities, and proof of the termination of all prior marriages, if any, of both the self-petitioner and the abuser. . . .

* * *

- (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.

* * *

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

The petitioner is a citizen of Egypt who entered the United States in B-1 visitor status on July 29, 1998. He married M-D,¹ a citizen of the United States, on June 23, 2004. M-D- filed Form I-130, Petition for Alien Relative, on behalf of the petitioner on July 22, 2004. The petitioner filed Form I-485, Application to Register Permanent Residence or Adjust Status, on that same date. The Forms I-130 and I-485 were denied on August 25, 2006.

The petitioner filed the instant Form I-360 on April 30, 2007. The director issued a request for additional evidence on May 8, 2007, and requested additional evidence to establish that the petitioner had a qualifying relationship with a U.S. citizen spouse; that M-D- is a citizen or lawful permanent resident of the United States; that the petitioner and M-D- shared a joint residence; that the petitioner was subjected to battery and/or extreme cruelty by M-D-; that the petitioner is a person of good moral character; and that the petitioner married M-D- in good faith. The petitioner responded to the director's request on October 19, 2007.

The director issued a second request for additional evidence on December 19, 2007, and requested additional evidence to establish that the petitioner has a qualifying relationship with M-D-; that he was subjected to battery and/or extreme cruelty by M-D-; and that he married M-D- in good faith. The petitioner responded to the director's request on March 12, 2008.

After considering the evidence of record, the director denied the petition on June 27, 2008.

¹ Name withheld to protect individual's identity.

Upon review of the entire record of proceeding, the AAO agrees with the director's decision to deny the petition.

Battery or Extreme Cruelty

The first issue on appeal is whether the petitioner has established that M-D- subjected him to battery or extreme cruelty.

In his October 11, 2007 self-affidavit, which was submitted in response to the director's May 8, 2007 request for additional evidence, the petitioner stated that although M-D- preferred intimate relations that were "weird," "strange," and "uncomfortable," they were nonetheless "so happy together" after their June 23, 2004 marriage. The petitioner stated that after he received his advance parole travel document in October 2004, the couple traveled to Egypt to visit his family. Although the petitioner's family did not approve of M-D-, and treated her poorly, the couple visited a resort area while in Egypt, and M-D- "was really enjoying herself then, smiling and laughing." However, according to the petitioner, after they returned from Egypt in January 2005, "my nightmare began." The petitioner stated that M-D- was short-tempered, and had a chip on her shoulder. He stated that M-D- would not talk to him; that she criticized Egypt and Egyptian culture; that she started arguments during dinner and then threw plates at him; that M-D- was rude to his friends; and that M-D- was verbally abusive toward his friends' wives. One night he came home from work early, and discovered M-D- having sexual relations with another man. The petitioner stated that, when he discovered M-D- with her lover, she yelled and screamed at him, and told him that she did not love him because he would not have sex on demand, and buy her things on demand. The petitioner stated that he knew he could not win the argument, and so he left the apartment. When he returned, he found that M-D- had packed all of his belongings into a suitcase. The petitioner stated that he later found that M-D- had filed for an annulment, and forged his signature on the paperwork, which enabled the court to award M-D- an annulment.²

The petitioner also submitted affidavits from [REDACTED] and [REDACTED] in response to the director's May 8, 2007 request for additional evidence. In her August 2, 2007 affidavit, [REDACTED] stated that on one occasion her family was having dinner at a restaurant with the petitioner and M-D-. According to [REDACTED] M-D- began cursing at the petitioner because she did not like the food.

In his August 2, 2007 affidavit, [REDACTED] stated that he was at the couple's home on one occasion when the topic of children came up. According to [REDACTED], the topic made M-D- angry. Mr. [REDACTED] stated that M-D- began arguing with the petitioner, cursed at him, told him that she did not want her children to have an Egyptian father, and threatened to throw her shoe at the petitioner.

² Although a judgment of annulment was granted, the record indicates that that judgment has since been vacated.

In his August 2, 2007 affidavit, [REDACTED] stated that when he visited the couple's home on one occasion, they were arguing about a man who had been alone with M-D- in the apartment the previous day.

In his December 19, 2007 request for additional evidence, the director notified the petitioner that his account of the alleged abuse to which he was subjected by M-D- did not indicate that the petitioner suffered battery and/or extreme cruelty as defined in the statute or regulations. The director stated that while marital tensions and incompatibilities may place severe strains on a marriage, and may lead to the termination of the marriage, such tensions and incompatibilities do not, in and of themselves, constitute extreme cruelty. The director stated that the marital difficulties described by the petitioner and his friends did not appear to go beyond the scope of common marital strife. The director stated that although M-D-'s behavior as described in the petition may have been unpleasant to bear, it appeared to have been associated with a deteriorating marriage rather than abuse.

The petitioner responded to the director's request for additional evidence on March 12, 2008. In response to the director's request for additional evidence, the petitioner's claims of abuse by M-D- escalated. For example, he submitted an evaluation from [REDACTED], who interviewed the petitioner on March 4, 2008. In his evaluation, [REDACTED] states that, during his interview with the petitioner, the petitioner told him that after the couple returned from Egypt, M-D- began abusing the petitioner verbally, physically, sexually, and psychologically. [REDACTED] testified that the petitioner told him that M-D- called him names; grabbed him; slapped him; pushed him; spit on him; kicked him; threw plates of food on him; forced him to have sexual intercourse with her; and had an extramarital affair before telling him to go away because she no longer loved him. [REDACTED] stated that the petitioner "developed a Major Depressive Disorder during the time he was married to her."

The petitioner also submitted a second self-affidavit in response to the director's request for additional evidence. In his March 5, 2008 self-affidavit, the petitioner stated that M-D- filed a petition to have the marriage annulled without his knowledge, which "was part of her plan to abuse me and claimed it was a fraudulent marriage." The petitioner stated that "he did everything for her and was so nice" to M-D-, but that "she did not appreciate anything" and "just took and took."

The director found the petitioner's submission in response to his December 19, 2007 request for additional evidence insufficient, and denied the petition on June 27, 2008. In his denial, the director took note of the escalation in the petitioner's claim of abuse between his initial submissions and his submission in response to the director's December 19, 2007 request for additional evidence. For example, the director noted that although the petitioner had stated that M-D-'s sexual demands were "weird," "strange," and "uncomfortable," he made no indication that he was forced to participate, as he later told [REDACTED]. The director also noted that in his first self-affidavit, the petitioner made no mention of M-D- grabbing him, slapping him, pushing him, kicking him, or spitting on him. Rather, this testimony only appeared in the record when [REDACTED]'s evaluation was submitted, which occurred after the director had placed the petitioner on notice that his previous testimony was insufficient to establish that he had been abused. Finally, the director noted that the "Affirmation" filed by the petitioner on December 4, 2007, which requested that the court vacate its June 3, 2005 judgment

annulling the marriage, was not filed until two and a half years after the original judgment, and that the court had not yet issued a decision on the matter.

On appeal, counsel contends that the director erred in denying the petition. On appeal, counsel submits an article from the “Dear Abby” newspaper column, and cites to it in support of the petitioner’s claim. However, the criteria for establishing that the petitioner was subjected to battery or extreme cruelty are set forth in the statute and in the regulations. The petitioner must establish his claim under those criteria, which were set forth earlier in this decision, and not under the “Dear Abby” article, which has no binding effect here. The AAO, therefore, need not address the “Dear Abby” article.

With regard to the inconsistencies identified by the director between the testimony of the petitioner as provided in his first self-affidavit and his later testimony to ██████████, counsel submits two additional letters from health professionals. According to counsel, these inconsistencies were “due to a misinterpretation of translation, and nothing else.” However, the AAO finds counsel’s explanation deficient. There is no testimony from the petitioner or from ██████████ clarifying these inconsistencies: counsel offers no support for his testimony. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

As was noted by the director, the petitioner’s initial testimony made no mention of grabbing, slapping, pushing, kicking, or spitting. These elements were only introduced into the record of proceeding after the director notified the petitioner that the treatment he received as set forth in his previous testimony did not amount to battery or extreme cruelty. These inconsistencies undermine the credibility of the petitioner’s testimony.

As noted previously, counsel submits two additional psychological evaluations on appeal. In his July 14, 2008 letter, ██████████ states that the petitioner is under his care, and that he shows signs of agitated depression. He recommends that the petitioner continue treatment for six months. He does not indicate how long, or how many times, he has seen the petitioner. In his July 18, 2008 letter, Dr. ██████████ states that he saw the petitioner for psychotherapy related to feelings of depression and anxiety. ██████████ states that the petitioner told him that M-D- frequently taunted him, telling him that he could be sent back to Egypt if not for her. The AAO notes that this is the first time such an allegation of abuse has been made; the petitioner had not mentioned threats to his immigration status until he spoke to ██████████

The three psychological affidavits of record do not establish the petitioner’s claim of battery or extreme cruelty. First, the AAO notes that neither ██████████ nor ██████████ indicate the length of their relationship with the petitioner, and ██████████’s evaluation was based upon one interview. The record fails to reflect an ongoing relationship between a mental health professional and the petitioner. Further, the conclusions reached in the submitted evaluation, being based, in the case of ██████████ on a single interview and, in the case of ██████████ and ██████████, on an unspecified number of visits, do not reflect the insight and elaboration commensurate with an established relationship with a mental health professional, thereby rendering their findings speculative. Finally, the AAO notes

that none of these three individuals personally witnessed any of the events described in their evaluations; their evaluations are based upon the testimony of the petitioner. However, the inconsistencies between the testimony of the petitioner in his self-affidavits and to the mental health professionals undermine the credibility of his testimony. Furthermore, the AAO notes that the petitioner did not make contact with a mental health professional until March 2008, more than three years after he and M-D- ended their joint residence, and after he had filed the instant petition. While the AAO does not question the professional qualifications of [REDACTED] or [REDACTED] it does question the testimony of the petitioner.

Counsel also looks to [REDACTED] July 24, 2008 letter which, according to counsel, “clearly demonstrates” that the petitioner was subjected to “extreme cruelty and abuse.” The AAO disagrees. According to [REDACTED], the petitioner discovered M-D- in bed with another man, and that M-D- engaged in other “outrageous conduct.” The AAO notes that, although it can cause a great deal of pain, adultery does not rise to the level of “extreme cruelty.”

The gradual escalation in the severity of the reported maltreatment reported by the petitioner during the time in which the instant petition has been pending undermines the credibility of the petitioner’s testimony. As was noted previously, the petitioner made no mention of M-D- grabbing him, slapping him, pushing him, kicking him, or spitting on him until the director notified him in the second request for evidence that the maltreatment described in his previous testimony did not rise to the level of battery or extreme cruelty. On appeal, the petitioner alleged for the first time that M-D- threatened his immigration status. Again, the AAO agrees with the director’s conclusion that this escalation amounts to inconsistent testimony on the part of the petitioner, which undermines the credibility of his testimony.

Finally, although counsel states that “[i]t is discriminatory to think that because [the petitioner] is a man that he cannot be subject to extreme cruelty,” the AAO notes that the director made no such statement or finding.

As noted by the court in *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2004), 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. . . .” The petitioner has failed to overcome the director’s concerns regarding the issue of battery and/or extreme cruelty. He has failed to establish that M-D- subjected him to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Good Faith Entry into Marriage

The second issue on appeal is whether the petitioner has established that he married M-D- in good faith. With regard to his intentions upon entering into the marriage, the petitioner stated in his October 11, 2007 self-affidavit that he met M-D- at a restaurant in New York at which they both patronized frequently. They introduced themselves and, three weeks later, the petitioner asked her

out on a date. They had dinner together, and the petitioner learned that M-D- knew a great deal about Egyptian culture. The petitioner stated that during their courtship, he took M-D- out to eat, out to shop, and bought her jewelry. He stated that she knew how to make him happy, and that he wanted to make her happy as well. The petitioner stated that, on April 23, 2004, M-D- wanted to engage in sexual activity, but that he did not wish to do so until after the couple was married. As such, M-D- proposed marriage, and told the petitioner that she would ask his family for permission to marry him. However, the petitioner told her that his family frowned on interracial marriage, and that they would only accept her if she and the petitioner were already married when they met her. They married on June 23, 2004 and, on November 1, 2004, traveled to Egypt to visit the petitioner's family. The petitioner also submitted pictures of the couple, as well as banking and utility statements.³

On appeal, counsel has elected not to address the petitioner's intentions upon entering into the marriage.

Upon review of the entire record of proceeding, the AAO agrees with the director's decision to deny the petition on this ground. Although the petitioner has described the couple's first date, the AAO finds his testimony with regard to their courtship vague and lacking in details. His testimony lacks probative, detailed information with regard to his first impressions of M-D-; their courtship; specific types of activities they enjoyed together; their decision to move in together; their decision to marry; and their wedding. Such information would allow the AAO to examine the petitioner's intentions upon entering into the marriage. The evidence of record fails to demonstrate that the petitioner entered into marriage with M-D- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Conclusion

The AAO agrees with the director's determination that the petitioner has failed to establish that M-D- subjected him to battery or extreme cruelty; and that he entered into marriage with M-D- in good faith. However, the record indicates that the director did not issue a notice of intent to deny the petition (NOID) before he issued his decision. Although the record establishes that the petitioner is ineligible for the benefit sought, the petition must be remanded, solely on procedural grounds, so that the petitioner has the opportunity to respond to a NOID. The petition must be remanded to the director for issuance of a NOID in compliance with the regulation in effect at 8 C.F.R. § 204.2(c)(3)(ii)⁴ on the date this petition was filed, and the director must afford the petitioner the opportunity to submit a response. On remand, the director need only address the

³ Of the 16 AT&T statements submitted by the petitioner, 15 were issued after the couple's separation. Of the 16 ConEdison statements submitted by the petitioner, 10 were issued after their separation.

⁴ USCIS promulgated a rule on April 17, 2007 related to the issuance of requests for evidence and NOIDs. 72 Fed. Reg. 19100 (Apr. 17, 2007). The rule became effective on June 18, 2007, *after* the filing of this petition on April 30, 2007.

issues before the AAO on appeal; i.e., whether the petitioner has demonstrated that he was subjected to battery or extreme cruelty by M-D-; and whether he married M-D- in good faith.

As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's May 1, 2008 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.