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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]
EAC 04 262 52419

Office: VERMONT SERVICE CENTER

Date: **MAR 30 2009**

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:

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 Director, Vermont Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action.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 because the petitioner did not establish that he married his wife in good faith, that she battered or subjected him to extreme cruelty during their marriage and that he resided with her.

On appeal, counsel submits a brief and additional evidence.

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:

(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.

* * *

(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 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.

* * *

(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.

* * *

(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 in this case provides the following pertinent facts and procedural history. The petitioner is a native and citizen of Ecuador who states on the Form I-360 that he entered the United States in December 1998. On March 6, 2001 the petitioner married R-T-¹, a U.S. citizen, in New York. R-T- subsequently filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf, which was denied on May 10, 2004.

On May 13, 2004 the petitioner was served with a Notice to Appear for removal proceedings (NTA) charging him as an alien present in the United States without having been admitted or paroled. On September 30, 2005, an immigration judge ordered the petitioner removed to Ecuador. On August 20, 2007, the Board of Immigration Appeals (BIA) dismissed the petitioner's appeal.

The petitioner filed this Form I-360 on September 20, 2004. On September 28, 2004, the director issued a Request for Evidence (RFE) of the petitioner's entry into his marriage in good faith. The petitioner timely responded with additional evidence. On May 19, 2005, the director issued a second RFE for further evidence of the petitioner's residence with his wife, her battery or extreme cruelty, his entry into their marriage in good faith and the petitioner's good moral character. The petitioner timely responded to the second RFE with additional evidence, which the director found insufficient to establish the petitioner's eligibility. On August 31, 2005, the director denied the petition for failure to demonstrate the requisite good-faith entry into the marriage, joint residence and battery or extreme cruelty.

On appeal, counsel asserts that the petitioner has explained the inconsistencies cited by the director and that the evidence submitted below and on appeal establishes the petitioner's eligibility. We concur with the director's conclusions and find that counsel's claims and the evidence submitted on appeal do not overcome the grounds for denial. Nonetheless, the petition will be remanded because the director denied the petition without first issuing a Notice of Intent to Deny (NOID) pursuant to the former regulation at 8 C.F.R. § 204.2(c)(3)(ii) (2005).

Entry into the Marriage in Good Faith

The record contains the following evidence relevant to the petitioner's claim of entering into marriage with his wife in good faith:

- The petitioner's undated statement and his July 27, 2005 affidavit submitted below and his September 26, 2005 affidavit submitted on appeal;

¹ Name withheld to protect individual's identity

- Affidavits of the petitioner's brother, [REDACTED] and his friends, [REDACTED] and [REDACTED]
- Copies of unsigned, joint federal income tax returns; and an Internal Revenue Service (IRS) transcript, which shows that the petitioner and his wife jointly filed federal income tax returns for the years 2001 and 2002; and a copy of a New York State Tax Department Form 1099-G, which shows that the petitioner and his wife jointly filed a New York income tax return for 2002;
- Copies of telephone bills addressed to the petitioner and his wife individually at their purportedly shared residences between 2001 and 2003;
- April 2, 2002 letter from Chase Bank verifying that the petitioner and his wife opened a joint checking account on April 2, 2002 and an April 11, 2003 letter from Chase Bank stating that the petitioner and his wife opened joint checking and savings accounts on March 28, 2003;
- Chase Bank joint checking account statements dated September 2001 to March 2002, which list ending balances between -\$26.75 and \$428; a joint checking and savings accounts statement dated March 19 to April 16, 2002, which shows a combined ending balance of \$376.16; statements for two other checking and savings accounts dated between March and December 2003, which state a combined ending balance between \$9.00 and \$18.00; and a statement for April 14 to May 13, 2004, which states an ending balance of \$103.03 for the savings account and contains no information regarding the checking account; and
- A copy of a residential lease beginning in November 2003 listing the petitioner and his wife as tenants, but signed only by the petitioner.

In his first, undated statement, the petitioner stated that after their marriage, he and his wife "lived the first 6 months well." The petitioner did not describe how he met his wife, their courtship, wedding, or any of their shared residences and experiences. In his July 27, 2005 affidavit, the petitioner asserted that his marriage was bona fide and claimed, "I loved my wife and entered in to the marriage with the intent to remain with my wife as long as we both will live." The petitioner also explained that he declined to press charges against his wife after an alleged incident of abuse in 2002 because he still loved her. The petitioner failed to provide any probative details regarding their relationship, apart from the alleged abuse. On appeal, the petitioner explains certain inconsistencies noted by the director, but again does not provide any probative information regarding his intentions in marrying his wife. The petitioner's brief assertions are insufficient to establish the requisite good-faith entry into his marriage.

The statements of the petitioner's friends and brother also lack probative details sufficient to establish his claim. In his first affidavit, [REDACTED] states that before their marriage and for about half a year afterwards, the petitioner and his wife were "a happy couple." In his July 8 and August 22, 2005 letters, [REDACTED] confirms that he attended the petitioner's wedding, but he provides no further, relevant information. [REDACTED] states that the petitioner "showed he loved his wife very much" and at the beginning of their marriage, "they were very happy." [REDACTED] does not describe her observations of the petitioner and his wife in any probative detail and provides no further, relevant information. [REDACTED] and [REDACTED] state that the petitioner's marriage was "okay" in the beginning, but they provide no relevant, detailed information. The petitioner's brother asserts that the

petitioner and his wife resided with him from March 1, 2001 to October 31, 2003, but he does not describe their relationship or his observations of the petitioner's feelings for his wife.

The remaining, relevant evidence shows that the petitioner and his wife jointly filed income tax returns in 2001 and 2002 and used the same address for two joint bank accounts. However, the tax transcript shows that the petitioner and his wife had adjusted gross income of \$23,248 in 2002 and \$31,481 in 2001, sums which are equivalent to \$1,937 per month in 2002 and \$2,623 per month in 2001. The bank letters and statements do not reflect individual deposits that would correspond to the average monthly income reflected in the 2001 and 2002 income tax returns. Apart from the tax returns, there is no evidence that the petitioner and his wife shared financial assets and liabilities or other, significant marital responsibilities. Only five of the 12 bank statements reflect an ending balance over \$100. The remaining account statements show a combined ending balance of the checking and savings accounts between -\$26.50 and \$18.00. The statements do not indicate that the petitioner and his wife regularly used the accounts to deposit income and pay household or other shared expenses. Specifically, none of the statements reflect a withdrawal in the amount of rent specified in the letters of the petitioner's brother or the lease.

As will be further discussed below, the relevant evidence also does not indicate that the petitioner and his wife resided together. The telephone bills were addressed to the petitioner and his wife individually and the residential lease is signed only by the petitioner. The letters of the petitioner's brother stating that he lived with the petitioner and his wife are unsupported by any evidence of, for example, rent payments or detailed testimony of the purportedly shared residences.

Considered in the aggregate, the relevant evidence fails to demonstrate that the petitioner entered into marriage with his wife in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Joint Residence

The evidence listed in the preceding section is also relevant to the petitioner's alleged residence with his wife with the addition of the birth certificate of the son of the petitioner's wife and her October 1, 2003 arrest report. On the Form I-360, the petitioner stated that he resided with his wife from March 2001 to May 2004 and that their last shared address was on [REDACTED] in Woodhaven, New York. The only joint document bearing this address is the residential lease, which lists the petitioner and his wife as tenants, but is signed only by the petitioner. In his July 27, 2005 affidavit, the petitioner states that his wife refused to sign the lease, but he provides no explanation or further, relevant information.

The petitioner's brother stated that the petitioner and his wife lived with him in Brooklyn, New York from March 2001 to April 2002 in an apartment on [REDACTED] and from May through October 2002 in an apartment on [REDACTED]. The petitioner did not describe his residence with his wife at either of these addresses in any probative detail. The only joint documents listing these addresses are the bank statements, the unsigned tax returns and the tax transcript. As discussed in the preceding section, the bank statements do not reflect any deposits that correspond to the average monthly income of the

petitioner and his wife as indicated in the tax transcript, or any withdrawals that correspond to their monthly rent or other household expenses. While the bank statements, tax transcript and telephone bills show that the petitioner and his wife both used the [REDACTED] and [REDACTED] addresses, these documents do not demonstrate that the petitioner and his wife actually resided together. Rather, the evidence shows that the petitioner and his wife had individual telephone accounts and did not use their joint bank accounts for household or other significant joint living expenses.

In addition, as noted by the director, the October 1, 2003 arrest booking report and the birth certificate of the son, [REDACTED], of the petitioner's wife lists a different address for the petitioner's wife. In his July 27, 2005 affidavit, the petitioner stated that his wife was staying at her uncle's home at the time of her arrest and when she gave birth to [REDACTED]. However, the petitioner's 2001 Forms W-2 present another discrepancy in the petitioner's purported residence with his wife as the forms list his address in [REDACTED] not Brooklyn, New York.

Considered in the aggregate, the relevant evidence fails to demonstrate that the petitioner resided with his wife, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

Battery or Extreme Cruelty

The record contains the following evidence relevant to the petitioner's claim that his wife battered and subjected him to extreme cruelty:

- The petitioner's undated statement and his July 27, 2005 affidavit submitted below and his September 26, 2005 affidavit submitted on appeal;
- Affidavits of the petitioner's friends, [REDACTED] and [REDACTED];
- New York Police Department domestic incident report and arrest report, supplemental worksheet regarding an incident on May 23, 2002; and
- Letters from the petitioner's psychiatrist, [REDACTED]

In his first statement, the petitioner reported that his wife always asked him for money, called the police and told them bad things about him, "misbehaved everywhere," and left him alone at their immigration interview so that he would be deported. The petitioner also stated that during their marriage, his wife became pregnant from an extramarital affair, told him the baby was his, but then told him he was not the father after the baby was born. In his July 27, 2005 affidavit, the petitioner stated that his wife attacked him on May 23, 2002, but he did not press charges after her arrest because she apologized and he still loved her. On appeal, the petitioner explains discrepancies in his prior statements regarding the dates of his wife's attack and their subsequent reconciliation, but he does not further describe the alleged abuse. The petitioner's brief statements do not describe any incident of abuse in probative detail and are insufficient to demonstrate that his wife subjected him to battery or extreme cruelty.

The testimony of the petitioner's friends also does not establish his claim. [REDACTED] states that the petitioner's wife was rude, disrespectful, used inappropriate language and became very aggressive. [REDACTED] also states that the petitioner's wife stole his cash and incurred a large credit card debt in his name. The petitioner himself does not mention the credit card debt. [REDACTED] does not describe any particular incident of abuse in detail. [REDACTED] states that the petitioner's wife told her that she was unfaithful, stole from the petitioner, lied about the father of her baby and left the petitioner for weeks and months. [REDACTED] also fails to describe any incident of abuse in probative detail. [REDACTED] reports that the petitioner's wife was disrespectful, left the petitioner for days, fought with him and stole from him, but she does not discuss these actions in any detail. [REDACTED] merely states that the petitioner's wife was disrespectful and she provides no further, relevant information.

The police report cites the petitioner as stating that "his wife and two others held him down & his wife went through his pockets and removed \$200 and his cell phone, no injuries incurred." Apart from the brief reference in his first statement, the petitioner does not discuss this incident in detail. He does not explain the context, state that two other individuals were involved or even describe his wife's actions as stated in the police report. The record also shows that the petitioner reported the offense five days after its occurrence and declined to press charges against his wife. Absent detailed corresponding testimony from the petitioner regarding the incident, the police report is of little probative value.

While we do not question his expertise, the letters of the petitioner's psychiatrist also fail to provide probative information sufficient to demonstrate that the petitioner's wife subjected him to battery or extreme cruelty during their marriage. In his July 12, 2005 letter, [REDACTED] stated that the petitioner "reports that during his marriage he was continuously verbally abuse [sic] by his wife to the point tat [sic] he became very depressed and stopped functioning. Finally his wife abandoned him and took his child away which cause more depression and despair that prompted the patient to seek help." [REDACTED] diagnosed the petitioner with depression and confirmed that he had been treated with medication and psychotherapy since May 17, 2004. Yet [REDACTED] did not describe any incident of abuse in detail and provided no analysis of the petitioner's condition sufficient to establish battery or extreme cruelty.

On appeal, counsel asserts that the "most significant" instance of the cruel behavior of the petitioner's wife, "which cannot be ignored or diminished in its severity," is her deception of the petitioner regarding the father of her child. We do not discount the emotional harm inflicted on the petitioner by this deception. However, the relevant evidence does not demonstrate that the behavior of the petitioner's wife constituted extreme cruelty, as that term is defined in the regulation at 8 C.F.R. § 204.2(c)(1)(vi).

In sum, the present record fails to establish that the petitioner's 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.

Conclusion

The petitioner has not demonstrated that he married his wife in good faith, resided with her and that she subjected him to battery or extreme cruelty during their marriage. The petitioner is consequently ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act.

Nonetheless, the case will be remanded because the director denied the petition without first issuing a NOID. The regulation in effect at the time of the director's decision at 8 C.F.R. § 204.2(c)(3)(ii) (2005) required USCIS to provide a self-petitioner with a NOID and an opportunity to present additional information and arguments before a final adverse decision was made. Accordingly, the case will be remanded for issuance of a NOID, which will give the petitioner a final opportunity to overcome the deficiencies of his case.

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.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision that, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.