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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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Services

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FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: MAY 26 2009

EAC 07 153 50066

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:

[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 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 The director's decision will be withdrawn and the matter remanded for further action.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 that his ex-wife subjected him to battery or extreme cruelty.

The petitioner submitted a timely appeal on September 26, 2008.¹

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:

- (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

¹ On January 15, 2009, the director issued a decision affirming his denial of the petition. In that decision, the director found that a Form I-290B filed by the petitioner on October 2, 2008 had been untimely filed. However, the record indicates that the Form I-290B to which the director was referring in that decision, was in fact filed in response to the director's September 4, 2008 denial of the petitioner's Form I-485, Application to Register Permanent Residence or Adjust Status, and was *not* filed in response to the instant Form I-360. The Form I-290B pertaining to the instant Form I-360 was, as noted, in fact timely filed on September 26, 2008. Accordingly, the petitioner is entitled to a full adjudication of his September 26, 2008 appeal.

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

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

Evidence for a spousal self-petition –

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

* * *

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

The petitioner is a citizen of Lebanon who entered the United States in F-1 status on May 12, 1999. He married J-M-², a citizen of the United States, on August 31, 2004. They divorced on September 25, 2007.

The petitioner filed the instant Form I-360 on May 1, 2007. On January 9, 2008, the director issued a request for additional evidence, and requested additional evidence to establish that J-M- subjected the petitioner to battery or extreme cruelty, and that the petitioner married J-M- in good faith. The petitioner responded on April 3, 2008.

After considering the evidence of record, the director denied the petition on August 26, 2008.

Battery or Extreme Cruelty

The sole issue on appeal is whether the petitioner has established that J-M- subjected him to battery and/or extreme cruelty. The record contains the following evidence relevant to the petitioner's claim of battery or extreme cruelty:

- Counsel's April 30, 2007 letter in support of the petition;
- The petitioner's undated self-affidavit, which was submitted at the time the petition was filed;
- J-M-'s April 25, 2007 affidavit;
- An affidavit from [REDACTED], dated April 25, 2007;
- An affidavit from [REDACTED], dated April 25, 2007;
- An affidavit from [REDACTED], dated April 27, 2007;
- A second undated self-affidavit from the petitioner, which was received at the service center on April 3, 2008;
- A handwritten note from [REDACTED] dated March 18, 2008;
- A second handwritten note from [REDACTED], dated September 11, 2008; and
- Counsel's September 24, 2008 appellate brief.

In his April 30, 2007 letter in support of the petition, counsel stated that J-M- psychologically tortured the petitioner; used abusive language toward him; and traumatized him by telling him that she is a homosexual.

In the undated self-affidavit submitted at the time the petition was filed, the petitioner stated that "[t]he worst thing that could ever happen to anyone just happened to me." According to the petitioner, although the relationship began well after their August 31, 2004 wedding, J-M- began "acting weird" in September 2006. The petitioner stated that J-M- began "doing everything possible to irritate me and tick me off." When he told J-M- how lucky he felt to have her in his life, she responded by telling the petitioner that she wished she felt the same way about him. The

² Name withheld to protect individual's identity.

petitioner also testified that J-M- became “careless about her appearance.” On September 30, 2006, the petitioner’s birthday, J-M- told the petitioner that she did not want to go out for dinner with him, and suggested that he meet his friends instead. Finally, J-M- told the petitioner that she “could be gay,” and that she no longer had any interest in a man’s body.

In her April 25, 2007 affidavit, J-M- stated that she began pushing the petitioner away, which was unfair and painful to him. J-M- stated that she knew learning the truth about her sexual orientation would be hard for the petitioner, and that he was in fact shocked and hurt when she told him. She also stated that she knows she caused the petitioner a great deal of pain and stress.

In his April 25, 2007 affidavit, [REDACTED] stated that when he and the petitioner went into business together, the petitioner was highly-motivated, hard-working, and efficient. However, over time he became lethargic and sad. [REDACTED] testified that the petitioner blamed himself for J-M-’s sexual orientation, and that the petitioner felt that he had been mentally abused by J-M-.

In her April 25, 2007 affidavit, [REDACTED] stated that although J-M- and the petitioner put a great deal of energy into their relationship, J-M- did not seem happy with herself. She stated that, eventually, J-M- told her that “her sex preference has changed.”

In her April 27, 2007 affidavit, [REDACTED], the petitioner’s sister, stated that when J-M- told the petitioner that she was a homosexual, the petitioner was shocked, devastated, depressed, and completely lost.

The director found the petitioner’s evidence insufficient to establish that he had been subjected to battery or extreme cruelty by J-M- and, on January 9, 2008, requested additional evidence. The director notified the petitioner that marital tensions which place severe strains on a marriage, and may lead to the disintegration of the marriage, do not, in and of themselves, constitute extreme cruelty. The director stated that the definition of “extreme cruelty” does not encompass the anguish often associated with common marital difficulties, infidelity, abandonment, or separation. According to the director, the issues identified by the petitioner appeared to indicate that J-M- no longer wished to be married to the petitioner, and she may have been uncertain of her sexual orientation. They did not, however, constitute extreme cruelty as defined by the regulation. In response, the petitioner submitted, among other items, another self-affidavit and a note from a physician.

In his undated self-affidavit, which was received at the service center on April 3, 2008, the petitioner explains the mental suffering he had endured as a result of J-M-’s sexual orientation. He stated that he still hurts every day; that he had endured nightmares, sleeplessness, and chest pain; that he is humiliated; and that he has been deprived of his self-worth and self-respect.

In his March 18, 2008 handwritten note, [REDACTED] stated that the petitioner had been under his care since February 11, 2008 “due to emotional problems arising out of his divorce.”

The director found counsel's submission insufficient, and denied the petition on August 26, 2008. The director stated that abandonment and infidelity do not rise to the level of extreme cruelty, and that J-M-'s alleged homosexuality and desire to end the marital relationship was a form of abandonment. The director found that, despite the petitioner's mental anguish over the failed relationship, the behavior of J-M- did not rise to the level of extreme cruelty. The director also noted that the petitioner did not begin his relationship with [REDACTED] until after the issuance of the request for additional evidence.

On appeal, counsel submits another note from [REDACTED] and a brief. In his September 11, 2008 handwritten note, [REDACTED] states that since his separation and divorce from J-M-, the petitioner has been isolated, and has been experiencing mental and emotional suffering. In his September 24, 2008 appellate brief, counsel states that the petitioner has been traumatized both psychologically and emotionally, and that he has lost confidence in himself and does not trust women. According to counsel, the emotional pain and suffering experienced by the petitioner as a result of J-M-'s revelation of her sexual orientation would have caused any person standing in the petitioner's shoes to be seriously shocked and traumatized. He contends that the emotional pain and suffering inflicted upon the petitioner by J-M-'s revelation reaches "far beyond the scope of marital difficulties that are often associated with unhappy marriages." With regard to the director's observation that the petitioner did not meet with a physician regarding his mental anguish until after the request for additional evidence had been issued, counsel states that due to the "extraordinary nature" of the petitioner's anguish, the petitioner was ashamed to talk to others about his wife, and tried to resolve the matter himself, until it became completely unbearable and unmanageable.

The AAO agrees with the director. As the evidence of record fails to describe the allegations of verbal abuse by J-M- in any meaningful way, the petitioner's claim of abuse consists of J-M-'s revelation to the petitioner that she is a homosexual and the resultant disintegration of their marriage. However, this action by J-M- falls far short of extreme cruelty as that term is defined for immigration purposes. As noted by the director, the meaning of the phrase "extreme cruelty" does not encompass the mental anguish that typically accompanies the breakdown of a marriage. Nor does it encompass the mental anguish associated with abandonment by a spouse.

Nor do [REDACTED]'s notes establish that the petitioner was subjected to extreme cruelty. First, Dr. [REDACTED]'s notes are too general: for example, he provides no information regarding how often, or many times he has met with the petitioner; whether a formal diagnosis has been made; or whether the petitioner had been prescribed medication to treat his condition. Second, the AAO shares the director's concern with regard to the timing of the petitioner's commencement of treatment: as noted by the director, the petitioner did not begin seeing [REDACTED] until after the request for evidence had been issued. Although counsel states on appeal that the petitioner only began seeing [REDACTED] after his mental anguish had become completely unbearable and unmanageable, the AAO finds counsel's assertion unconvincing. Given that the petitioner's mental anguish did not become unbearable and unmanageable until after the director had issued a request for additional evidence, the AAO questions whether the petitioner in fact sought the services of [REDACTED] in order to bolster his case before U.S. Citizenship and Immigration Services (USCIS).

Upon review of the entire record of proceeding, the AAO agrees with the director's determination that the petitioner has failed to establish that he was abused by J-M-. As no allegations of battery have been made, the petitioner must establish that he was subjected to extreme cruelty by J-M-. 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 establish that J-M-'s actions rose 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. Nor has the petitioner established that J-M-'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. He has failed to overcome the director's concerns regarding the issue of battery and/or extreme cruelty. The petitioner has failed to establish that his ex-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 AAO agrees with the director's determination that the petitioner has failed to establish that his wife subjected him to battery or extreme cruelty. 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)³ 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 issue before the AAO on appeal; i.e., whether the petitioner has established that his ex-wife subjected him to battery or extreme cruelty.

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 August 26, 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.

³ 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 May 1, 2007.