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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B9

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: FEB 15 2011

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 petition remains denied.

The petitioner seeks immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien battered or subjected to extreme cruelty by his United States citizen spouse.

The director denied the petition on August 17, 2010, determining that the petitioner had not: established that he had been subjected to battery or extreme cruelty by the United States citizen spouse; established that he entered into the marriage in good faith; or requested an exemption to section 204(g) of the Act.

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 based on his or her relationship to the abusive spouse, 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 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 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.

* * *

(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 explained 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.

(ii) *Relationship.* A self-petition filed by a spouse must be accompanied by evidence of citizenship of the United States citizen or proof of the immigration status of the lawful permanent resident abuser. It must also 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 . . . the self-petitioner

* * *

(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 matter provides the following pertinent facts and procedural history. The petitioner is a native and citizen of Peru. The petitioner entered the United States in or about June 1993 without inspection. On January 19, 1996, the petitioner married E-M-¹, a United States citizen. On August 26, 1996, the petitioner's status was adjusted to a permanent resident on a conditional basis based on his marriage to E-M-. On October 23, 2001 a Final Judgment terminating the marriage was entered in the Superior Court of New Jersey, County of Hudson. On January 12, 2004, the petitioner's status was terminated by the District Director because the petitioner failed to establish that his marriage to E-M- was in good faith. A Form I-751, Petition to Remove the Condition on Residence, was again denied on April 27, 2006 and the petitioner was placed in immigration proceedings on May 18, 2006. On October 2, 2007, while in immigration proceedings, the petitioner married F-D-², the claimed abusive United States citizen spouse. A Form I-130, Petition for Alien Relative, filed on behalf of the petitioner was approved on January 17, 2008. On June 4, 2008, the marriage between the petitioner and F-D- was terminated. On March 9, 2009, the petitioner was ordered removed from the United States. On March 10, 2009, the petitioner filed the Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant. The petitioner noted on the Form I-360 that he had resided with F-D- from August 2007 to January 2008. The director issued a request for evidence (RFE) on April 30, 2010. Upon consideration of the evidence in the record, including the response to the RFE, the director denied the petition on August 17, 2010, determining that: the petitioner had not established that he had been subjected to battery or extreme cruelty by the United States citizen spouse; the petitioner had not established that he entered into the marriage in good faith; and the petitioner had not requested an exemption to section 204(g) of the Act. Counsel timely submits a Form I-290B, Notice of Appeal or Motion, and subsequently submits a brief in support of the appeal.

Abuse

The petitioner initially did not submit any information demonstrating that he had been subjected to battery or extreme cruelty perpetrated by his former spouse. In response to the director's RFE, the petitioner submitted a personal statement. The petitioner declared that: initially everything was fine between he and F-D-; in December his former spouse started yelling and tried to strike him many times; his former spouse started to have control over him, prohibited him from receiving friends at his home, and isolated him from his friends; his former spouse acted jealous, took control of his money, and ordered him to do the housework; and he suspected that she became unfaithful to him. The petitioner also indicated that his former spouse called him

¹ Name withheld to protect the individual's identity.

² Name withheld to protect the individual's identity.

derogatory names, that she said she was embarrassed by him, and that she threatened to call immigration so that he would be deported to his country.

The record also included a July 15, 2010, evaluation prepared by [REDACTED] [REDACTED] referenced a previous report provided to the petitioner's counsel's office in May 2009; however, the record does not include a copy of the May 2009 report. [REDACTED] noted that the petitioner had returned to his office on May 27, 2010 and was seen in short term treatment on a weekly basis and that last contact with the petitioner was on July 24 of the same year.³ [REDACTED] paraphrases the petitioner's statement to United States Citizenship and Immigration Services (USCIS) and concludes that the petitioner is the victim of spousal abuse. [REDACTED] diagnosed the petitioner with Major Depression, Moderate and noted the petitioner's stressors as: fear that his request for residency would be denied, fear of deportation, parental abandonment of a child if deported, spousal abuse-mental cruelty, and spousal abandonment.

On appeal, counsel for the petitioner asserts that the "any credible evidence" standard must be applied to all elements of the petition and that the petitioner has met his burden of establishing that he has been subjected to battery or extreme cruelty.

The AAO acknowledges that section 204(a)(1)(J) of the Act requires USCIS to "consider any credible evidence relevant to the petition." Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J). This mandate is reiterated in the regulation at 8 C.F.R. § 204.2(c)(2)(i). However, this mandate establishes an evidentiary standard, not a burden of proof. Accordingly, "[t]he determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of" USCIS. Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J); 8 C.F.R. § 204.2(c)(2)(i). The evidentiary guidelines for demonstrating the requisite battery or extreme cruelty lists examples of the types of documents that may be submitted and states, "All credible relevant evidence will be considered." 8 C.F.R. § 204.2(c)(2)(iv). In this matter, as in all visa petition proceedings, the petitioner bears the burden of proof to establish eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The mere submission of relevant evidence of the types listed in the regulation at 8 C.F.R. § 204.2(c)(2) will not necessarily meet the petitioner's burden of proof. While USCIS must consider all credible evidence relevant to a petitioner's claim of abuse, the agency is not obligated to determine that all such evidence is credible or sufficient to meet the petitioner's burden of proof. Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J); 8 C.F.R. § 204.2(c)(2)(i). To require otherwise would render the adjudicatory process meaningless.

The petitioner in this matter does not provide detailed, probative statements regarding the behavior of his former spouse. Because the petitioner's statements are critical in establishing extreme cruelty or battery, his statement must include sufficient detail of specific events and incidents to result in a conclusion that he suffered such abuse. In this matter, the petitioner does not provide the requisite probative detail describing any specific event or incident of battery or of extreme cruelty. The petitioner does not explain how his former spouse controlled his money

³ [REDACTED] does not explain why his report is dated July 15, 2010, if he continued to see the petitioner to July 24, 2010.

and does not describe how his former spouse prohibited him from receiving friends at his home or otherwise isolated him from his friends. Although the petitioner indicated that his wife threatened him with deportation, he does not describe the particular circumstances of this incident and does not indicate that his former spouse's verbal threat was accompanied by any coercive actions or threats of harm or that her actions were aimed at insuring dominance or control over him.

The petitioner has failed to establish that his former spouse's actions were comparable to the types of 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 his former spouse's behavior was part of an overall pattern of violence or coercion. As noted by the Ninth Circuit Court of Appeals, "[b]ecause every insult or unhealthy interaction in a relationship does not rise to the level of domestic violence . . . , Congress required a showing of extreme cruelty in order to ensure that [the law] protected against the extreme concept of domestic violence, rather than mere unkindness." See *Hernandez v. Ashcroft*, 345 F.3d 824, 840 (9th Cir. 2003) (interpreting the definition of extreme cruelty at 8 C.F.R. § 204.2(c)(1)(vi)). In this matter, the petitioner's testimony is insufficient to establish that he was subjected to battery or extreme cruelty perpetrated by his former spouse.

Upon review of the evaluation prepared by [REDACTED] does not provide examples of the causal relationship of specific abuse that is consistently detailed to his conclusion that the petitioner is the victim of spousal abuse. [REDACTED] does not describe any specific incident reported by the petitioner that constitutes battery or extreme cruelty as set out in the statute and regulation. The petitioner's spouse's abandonment is not a form of extreme cruelty as described in this matter. Similarly, the petitioner's description of his former spouse's behavior as reported to [REDACTED] does not constitute a form of extreme cruelty as defined in the statute and regulation. The evaluation prepared by [REDACTED] lacks probative value as it does not include a reasoned opinion based on facts and clinical observations of the petitioner's behavior and affect during the evaluation that support a conclusion that the petitioner presented with symptoms and characteristics of a battered spouse as those terms are set forth in the statute and regulation.

Upon review of the petitioner's testimony and the evaluation, the record does not demonstrate that the petitioner was the victim of any act or threatened act of physical violence or extreme cruelty, that F-D-'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's statements and the statements he made to others lack the consistent detail necessary to establish that F-D- subjected him to battery or that her actions constitute extreme cruelty as defined in the statute and regulation.

Good Faith Entry into Marriage

The petitioner has failed to establish that he entered into the marriage in good faith. The petitioner in his statement indicates generally that: he met F-D- in January 2007; he started visiting her every day since that date; in June 2007, F-D- accepted him as her fiancé; they

decided to live together in August 2007 and he moved to her apartment; and in October they married. The petitioner indicated that he married F-D- in good faith and that they always had dinner together, went to their families and friends' reunions, enjoyed taking their kids to the park, to the movies, to shopping, and that they were a real family.

The record also included:

- Wedding photographs and photographs of the couple on other occasions;
- Utility bills for service in September and October 2007;
- An October 12, 2007 letter from [REDACTED] noting that a checking account had been opened since February 26, 1998. The letter does not indicate when F-D- was added to the account;
- Bank statements from [REDACTED] for December 2007 and January 2008 with copies of checks written on the account. All the checks show the petitioner as the signor, except one dated October 13, 2007 issued to the Department of Homeland Security for the Form I-130 filed on the petitioner's behalf. Bank statements from [REDACTED] for March 2008 through June 2008.
- A July 10, 2010 affidavit signed by [REDACTED] stating that the couple got "married in good faith on October 2007 to present;"
- A July 10, 2010 affidavit signed by [REDACTED] certifying that the couple got "married in good faith on October 2007 to present;"
- Envelopes and the petitioner's earnings and leave statement showing that he received mail at the claimed marital address.

On appeal, counsel for the petitioner asserts that the photographs, the information showing the petitioner lived at the same address as F-D-, the utility bills and bank statements, and the statements of [REDACTED] and [REDACTED] show that the petitioner and F-D- intended to establish a life together. Counsel contends that because of the nature of the abusive relationship, the petitioner was unable to obtain further documentation.

Upon review of the petitioner's testimony, the petitioner has not included any probative information regarding his intent to enter into the marriage in good faith. The petitioner's statements do not include probative information regarding the couple's interactions prior to or during their marriage. The petitioner does not provide the requisite type of detail that allows an adequate assessment of his intent when entering into the marriage. The key factor in determining whether a petitioner entered into a marriage in good faith is whether he or she intended to establish a life together with the spouse at the time of the marriage. *See Bark v. INS*, 511 F.2d 1200 (9th Cir.1975). In this matter, the record is simply insufficient for such an evaluation. The petitioner's testimony does not establish that he entered into the marriage in good faith. Similarly, the two affiants who submit testimony on the petitioner's behalf provide only a conclusive statement that the couple got "married in good faith on October 2007 to present" and do not report any observations of the petitioner and F-D-'s interactions before or during the marriage. The affiants although signing the affidavit in July 2010 do not acknowledge that the marriage was dissolved on June 4, 2008.

Upon review of the documentation submitted, the bank statements, relating to an account opened in 1998, do not reveal that the petitioner and F-D- used the account for the necessities of maintaining their life together and similarly, do not assist in establishing the petitioner's intent in entering into the marriage. The photographs and marriage certificate confirm the marital relationship, but do not establish the petitioner's own good faith in entering the marriage. Utility service for a two-month time period, envelopes, and the petitioner's earnings and leave statement sent to the claimed marital residence, while showing the petitioner may have received mail at the address, does not establish the petitioner's own intent in entering into the marriage. While the lack of documentary evidence is not necessarily disqualifying, the petitioner's testimonial evidence and the limited testimony submitted on his behalf also fail to support a finding that he entered into the marriage in good faith.

The AAO acknowledges that a Form I-130 filed on behalf of the petitioner was approved; however, while relevant, such approval is not prima facie evidence of the petitioner's good faith in entering the marriage, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act. The fact that a visa petition or application based on the marriage in question was previously approved does not automatically entitle the beneficiary or applicant to subsequent immigrant status. See *INS v. Chadha*, 462 U.S. 919, 937 (1983); *Agyeman v. I.N.S.*, 296 F.3d 871, 879 n.2 (9th Cir. 2002) (In subsequent proceedings, "the approved petition might not *standing alone* prove by a preponderance of the evidence that the marriage was bona fide and not entered into to evade immigration laws."). In this matter, the petitioner provided only a cursory description of his courtship and subsequent marriage and the remaining, relevant evidence lacks probative information sufficient to meet his burden of proof. Considered in the aggregate, the relevant evidence fails to demonstrate that the petitioner entered into marriage with F-D- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Section 204(g) of the Act

As the director determined, section 204(g) of the Act further bars approval of this petition. Section 204(g) of the Act states:

Restriction on petitions based on marriages entered while in exclusion or deportation proceedings. – Notwithstanding subsection (a), except as provided in section 245(e)(3), a petition may not be approved to grant an alien immediate relative status by reason of a marriage which was entered into during the period [in which administrative or judicial proceedings are pending], until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.

The record in this matter shows that the petitioner married his spouse after being placed in removal proceedings before an immigration judge. The record does not indicate that the petitioner resided outside of the United States for two years after his marriage. The AAO finds that the bona fide marriage exception to section 204(g) of the Act does not apply to the petitioner. Section 245(e) of the Act states:

Restriction on adjustment of status based on marriages entered while in admissibility or deportation proceedings; bona fide marriage exception. –

- (1) Except as provided in paragraph (3), an alien who is seeking to receive an immigrant visa on the basis of a marriage which was entered into during the period described in paragraph (2) may not have the alien's status adjusted under subsection (a).
- (2) The period described in this paragraph is the period during which administrative or judicial proceedings are pending regarding the alien's right to be admitted or remain in the United States.
- (3) Paragraph(1) and section 204(g) shall not apply with respect to a marriage if the alien establishes by clear and convincing evidence to the satisfaction of the [Secretary of Homeland Security] that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition under section 204(a) . . . with respect to the alien spouse or alien son or daughter. In accordance with the regulations, there shall be only one level of administrative appellate review for each alien under the previous sentence.

The corresponding regulation at 8 C.F.R. § 245.1(c)(9)(v) states, in pertinent part:

Evidence to establish eligibility for the bona fide marriage exemption. Section 204(g) of the Act provides that certain visa petitions based upon marriages entered into during deportation, exclusion or related judicial proceedings may be approved only if the petitioner provides clear and convincing evidence that the marriage is bona fide.

While identical or similar evidence may be submitted to establish a good faith marriage pursuant to section 204(a)(1)(A)(iii)(I)(aa) of the Act and eligibility for the bona fide marriage exemption at section 245(e)(3) of the Act, the latter provision imposes a heightened burden of proof. *Matter of Arthur*, 20 I&N Dec. 475, 478 (BIA 1992). To demonstrate eligibility for immigrant classification under section 204(a)(1)(A)(iii) of the Act, the petitioner must establish his or her good faith entry into the qualifying relationship by a preponderance of the evidence and any relevant, credible evidence shall be considered. Sections 204(a)(1)(A)(iii)(I)(aa) and 204(a)(1)(J) of the Act, 8 U.S.C. §§ 1154(a)(1)(A)(iii)(I)(aa), 1154(a)(1)(J); *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774, 782-83 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965). However, to be eligible for the bona fide marriage exception under section 245(e)(3) of the Act, the petitioner must establish his or her

good-faith entry into marriage by clear and convincing evidence. Section 245(e)(3) of the Act, 8 U.S.C. § 1255(e)(3); 8 C.F.R. § 245.1(c)(9)(v). "Clear and convincing evidence" is a more stringent standard. *Arthur*, 20 I&N Dec. at 478. See also *Pritchett v. I.N.S.*, 993 F.2d 80, 85 (5th Cir. 1993) (acknowledging "clear and convincing evidence" as an "exacting standard").

As the petitioner has failed to establish that he entered into marriage with his former spouse in good faith by a preponderance of the evidence, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act, he has also failed to demonstrate that he qualifies for the bona fide marriage exemption under the heightened standard of proof required by section 245(e)(3) of the Act. Accordingly, section 204(g) of the Act also requires the denial of this petition.

Beyond the decision of the director, the petitioner has also failed to establish that he has a qualifying relationship with a United States citizen. The language of the statute clearly states that an alien *who is the spouse of a United States citizen* may self-petition for immigrant classification. The language of the statute also clearly provides that to remain eligible for classification despite no longer being married to a United States citizen, an alien must have been the bona fide spouse of a United States citizen "within the past two years" and demonstrate a connection between the abuse and the legal termination of the marriage. 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc). As the petitioner's marriage was terminated on June 4, 2008 and he did not file the Form I-360 until almost a year later, and as the petitioner has not established that he had been subjected to battery or extreme cruelty by the United States citizen spouse, the petitioner may not establish eligibility under this requirement. As the petitioner does not have a qualifying relationship with a United States citizen, he is also precluded from establishing that he is eligible for immediate relative classification based on his relationship with F-D-, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act. The regulation at 8 C.F.R. § 204.2(c)(1)(B) requires that a self-petitioner be eligible for immediate relative classification under section 201(b)(2)(A)(i) of the Act based on his or her relationship to the abusive spouse.

Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons. 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.

ORDER: The appeal is dismissed. The petition remains denied.