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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

[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: FEB 22 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.

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 AAO will withdraw the director's decision; however, because the petition is not approvable, it will be remanded for further action and consideration.

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 a qualifying relationship or eligibility for immigrant classification based on a qualifying relationship.

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:

> (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.
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> (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.
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> (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 set forth in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

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

> (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 China. He entered the United States on or about September 15, 2001 as a B-1 visitor. On May 9, 2007, the petitioner married B-D-[1], the claimed abusive United States citizen. On or about July 31, 2007, B-D- filed a Form I-130 petition on the petitioner's behalf. The Form I-130 was denied on June 30, 2009 based on a determination that the petitioner and B-D- had not established a bona fide marriage. On or about August 27, 2009, the petitioner was placed in proceedings before an immigration judge. On November 30, 2009, the petitioner filed the instant Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant. The petitioner indicated on the Form I-360 that he resided with B-D- from May 2007 to December 2008. On April 30, 2010, the director issued a request for evidence (RFE) on the issues of abuse, the termination of the petitioner's prior marriages, and the current status of the petitioner's marriage to B-D-. Upon review of the record, including the petitioner's response to the RFE, the director denied the petition on August 17, 2010, determining that the petitioner had not established a qualifying relationship or eligibility for immigrant classification based on a qualifying relationship. Counsel for the petitioner submits a timely filed Form I-290B, Notice of Appeal or Motion.

The sole basis for the director's decision stems from a reference in the June 30, 2009 decision denying the Form I-130, Petition for Alien Relative, in which the New York District Director stated that the petitioner claimed one prior marriage. A review of the Form I-130 in the record, however, does not reveal a claim made by the petitioner that he had been previously married. Neither on the Form I-130 nor in the accompanying Form G-325A, Biographic Information Sheet, did the petitioner claim a prior marriage. Thus, the New York District Director's reference to a prior marriage of the petitioner was in error and the petitioner is not required to offer evidence of the termination of a prior marriage. The director's decision to the contrary is withdrawn. However, the current record does not establish the petitioner's eligibility for this benefit. For this reason, the matter must be remanded for entry of a new decision.

Residence

The petitioner in this matter indicates on the Form I-360 that he jointly resided with B-D- from May

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[1] Name withheld to protect the individual's identity.

2007 to December 2008. In the petitioner's November 23, 2009 statement in support of the Form I-360, he indicated that B-D- moved to his rented apartment in Flushing, New York. He indicates the B-D- wanted to move to Albany, New York and that he eventually rented a house, shared with another individual, so that B-D- could move to Albany while he kept his apartment in Flushing, New York. The petitioner noted that B-D- lied at the immigration interview conducted on October 22, 2008, when she stated that she moved to Albany, New York in 2006. The petitioner does not provide a timeline of the dates he resided in the Albany house, if at all, or any further detail regarding the allegedly shared apartment in Flushing, New York, or the house in Albany, New York. The petitioner's 2007 and 2008 Internal Revenue Service (IRS) 1040 Forms show that he lived in Flushing, New York. The record includes other documentation showing that the petitioner lived in Flushing, New York during the marriage. The record does not include sufficient documentary evidence to establish that B-D- lived at the same residence as the petitioner in Flushing, New York or in Albany, New York. While, the lack of documentary evidence in this matter is not controlling, the petitioner's failure to provide probative testimony regarding the claimed joint residence precludes a determination that he jointly resided with B-D- at any time during the marriage.

Abuse

In the petitioner's initial November 23, 2009 statement, he indicated that B-D- became unhappy when he would not move to Albany, New York, she appeared to be addicted to gambling and threw tantrums when he confronted her with her problem, and in July 2008 claimed that she was pregnant and extorted money from him in order for her to not have an abortion. The petitioner noted that she called him names, made fun of his anatomy, refused to have sex with him, and eventually told him the child had been aborted but did not tell him the circumstances of the pregnancy termination. The petitioner also indicated that prior to the immigration interview on October 22, 2008, B-D- demanded money and he believes that she deliberately altered aspects of their relationship at the interview because he would not give in to her demand. The initial record also included a psychological evaluation prepared by icensed psychologist, dated October 6, 2009. provided a similar overview of the petitioner's difficulties with B-D- and concluded that the petitioner suffered from major depressive disorder, single episode, severe without psychotic features. however, did not causally connect the petitioner's disorder to any specific act or acts of the petitioner's spouse.

In response to the director's RFE, the petitioner provided a second statement dated June 27, 2010. The petitioner repeated that B-D- had subjected him to verbal abuse, added that she was controlling and possessive and isolated and alienated him from his friends, and indicated that she psychologically and financially abused him. The petitioner provided a second psychological evaluation prepared by ated July 14, 2010. found that the petitioner's self-report suggested that he had a victim of his wife's marital aggression which seemed to border on domestic violence that was psychological in nature.

The petitioner also provided several statements from friends who noted that B-D- yelled at the petitioner, that she gambled, and that the petitioner had told them that B-D- had tried to extort money from him.

The petitioner does not claim that he was subjected to battery perpetrated by B-D- but rather bases his claim on actions by B-D- that constitute extreme cruelty. Upon review of his statements, the petitioner has not provided probative testimonial evidence establishing that B-D-'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 B-D-'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)). Moreover, the initial psychological evaluation provided by Dr. Jin did not causally connect the petitioner's depression to specific acts or behavior exercised by B-D- but rather noted the petitioner's stress regarding his immigration situation. In [redacted] low-up evaluation, he found that the petitioner's self-report suggested that B-D-'s behavior bordered on domestic violence. Again, however, [redacted] did not indicate that there were specific incidents or events of abuse that were causally connected to the petitioner's mental health condition and more importantly, [redacted] failed to provide any description of specific behavior that constituted extreme cruelty as defined in the statute and regulation. [redacted] oes not find that the petitioner was the victim of any act or threatened act of physical violence or extreme cruelty, that B-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 affidavits submitted on the petitioner's behalf are general and do not provide the requisite detail establishing that specific incidents of battery or extreme cruelty as defined in the statute or regulation occurred.

Upon review of the totality of the record, the petitioner has not offered probative testimony or other evidence that B-D- subjected him to battery or that her actions constituted extreme cruelty as defined in the statute and regulation. The record is simply insufficient in this regard.

Good Faith Entry Into the Marriage

The petitioner has not provided sufficient probative and consistent information regarding his courtship with and eventual marriage to B-D-. 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 petitioner has not set forth his intent in consistent and probative detail in a statement to U.S. Citizenship and Immigration Services (USCIS). The current record

does not provide the essential detail necessary to demonstrate that the petitioner's intent to enter into the marriage was in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Conclusion

As the petitioner has overcome the stated ground for denial but the record does not establish that he is eligible for the benefit he is seeking, the matter must be remanded to the director for entry of a new decision. As always, 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, and the matter remanded for entry of a new decision, which if adverse to the petitioner, shall be certified to the AAO for review.