

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

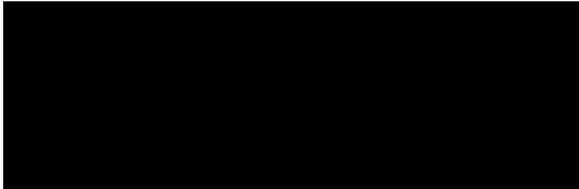
PUBLIC COPY

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: MAR 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:



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 June 18, 2010, determining that the petitioner had not established a qualifying relationship or eligibility for immigrant classification based on a qualifying relationship. The director references that the petitioner has also failed to establish that he was subjected to battery or extreme cruelty perpetrated by his U.S. citizen spouse, but did not further address the issue as the petition was not approvable based on the petitioner's failure to establish a qualifying relationship and corresponding eligibility for immigrant classification. On appeal, counsel submits a brief.

Applicable Law and Regulations

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.

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 –

- (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.

Pertinent Facts and Procedural History

The petitioner is a native and citizen of Vietnam. He entered the United States on or about [REDACTED] 2000 on a G-1 visa. On [REDACTED] 2007, the petitioner married [REDACTED]¹, the

¹ Name withheld to protect the individual's identity.

claimed abusive United States citizen. On or about [REDACTED] 2007, [REDACTED] filed a Form I-130 petition on the petitioner's behalf and the petitioner concurrently filed a Form I-485, Application for Permanent Residence or Adjust Status. On [REDACTED] 2009, the petitioner filed the instant Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant. On [REDACTED] 2009, [REDACTED] withdrew the Form I-130 petition. On [REDACTED] 2009, United States Citizenship and Immigration Services (USCIS) denied the Form I-130 based on the withdrawal and also denied the petitioner's Form I-485. The petitioner was placed in removal proceedings on July 28, 2009.

On [REDACTED] 2009, a Final Judgment of Divorce terminating the marriage between the petitioner and [REDACTED] was issued in the Superior Court of New Jersey Chancery Division: Family Part Monmouth County, Docket No. [REDACTED]. On [REDACTED] 2009 the petitioner entered into a second marriage. On January 4, 2010, the director issued a request for evidence (RFE). Upon review of the record, including the petitioner's response to the RFE, the director denied the petition on June 18, 2010, determining that the petitioner had not established a qualifying relationship or eligibility for immigrant classification based on a qualifying relationship because of his remarriage while his I-360 petition was pending. Counsel for the petitioner submits a timely filed Form I-290B, Notice of Appeal or Motion.

Counsel asserts that the petitioner's divorce from the claimed abusive spouse and second marriage while the instant Form I-360 was pending does not affect his eligibility because the petitioner's Form I-360 was filed while he was still married to his abusive spouse but before reaching the two-year anniversary of the divorce. Counsel contends that the petitioner's remarriage is only one basis for the denial of the Form I-360 and while the remarriage may be used as a negative discretionary factor, it does not preclude approval. Counsel claims that the petitioner was not accorded due process as he was not given a meaningful opportunity to be heard.

The Act Does Not Permit Remarriage of the Self-Petitioner Prior to the Approval of the Petition

The regulatory language at 8 C.F.R. § 204.2I(1)(ii) states:

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. After the self-petition has been properly filed, the legal termination of the marriage will have no effect on the decision made on the self-petition. *The self-petitioner's remarriage, however, will be a basis for the denial of a pending self-petition.* (Emphasis added)

In this matter, the petitioner was married to the claimed abuser when he filed the petition and he divorced thereafter. He, however, remarried while the Form I-360 was pending. Thus, the language of the implementing regulation cited above, which clearly states that a petitioner's remarriage will be the basis for the denial of the petition, mandates the denial of the instant petition.

On appeal, counsel concedes that the regulation at 8 C.F.R. § 204.2I(1)(ii) requires the denial of the petition when a petitioner has remarried, but claims that “because relief under the VAWA provisions is largely discretionary, [the director] abused [his] discretion in relying solely on that one factor.” In support of her claims, counsel cites two Board of Immigration Appeals (BIA) decisions: *Matter of Martinez*, 25 I&N Dec. 66 (BIA 2009)² and *Matter of Sotelo*, 23 I&N Dec. 204 (BIA 2001).

Counsel’s statement regarding the director’s discretion to approve a Form I-360 that is filed with U.S. Citizenship and Immigration Services (USCIS) is misguided. The aliens in counsel’s cited BIA decisions sought cancellation of removal for battered spouses under section 240A(b)(2) of the Act. Cancellation of removal is a discretionary form of relief that is applied for in removal proceedings before an immigration judge. *Matter of Martinez, supra*. As the petitioner filed a Form I-360 with USCIS pursuant to section 204(a)(1)(A)(iii) of the Act and was not seeking relief under section 240A(b)(2)(A) of the Act, the director was not required to balance the positive factors against the negative factors in the petitioner’s case. As stated earlier, the regulation at 8 C.F.R. § 204.2(c)(1)(ii) mandates the denial of the petition based upon the petitioner’s remarriage. Accordingly, we concur with the director’s determination that the petitioner has not established a qualifying relationship, as required by section 204(a)(1)(A)(iii)(II)(aa) of the Act due to his divorce from H-T-M- and his remarriage to H-T-N- while this petition was pending.

Eligibility for Immediate Relative Classification under Section 201(b)(2)(A)(i) of the Act

The petitioner has also failed to demonstrate his eligibility for immigrant classification based on a qualifying relationship. The regulation at 8 C.F.R. § 204.2I(1)(i)(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. During the pendency of this petition, the petitioner and [REDACTED] divorced and the petitioner remarried another individual. Accordingly, he is ineligible for immediate relative classification under section 204(b)(2)(A)(i) of the Act based on his relationship with [REDACTED] as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act.

Battery or Extreme Cruelty

As observed above, the director referenced that the petitioner failed to establish that he had been subjected to battery or extreme cruelty, but did not address the issue in detail as the petition was not approvable on other grounds. Counsel does not address this issue on appeal. The AAO concurs with the director’s determination that the record does not establish that the petitioner was subjected to battery or extreme cruelty perpetrated by his former spouse. The petitioner in a July 25, 2009 brief statement declared that his former wife would yell and scream at him, that she threatened that if he did not comply with her wishes she would not help him get a green card, and that his life with his former wife was horrible. The petitioner’s statement is not detailed and does not provide probative evidence of events or incidents that demonstrate he was subjected to

² In her brief, counsel incorrectly refers to *Matter of Martinez* as *Matter of A-M-*.

battery or extreme cruelty as defined in the statute and regulation. In an undated psychological evaluation report prepared by [REDACTED] Ph.D., Dr. [REDACTED] provided additional information regarding the petitioner's interactions with [REDACTED] however, the information provided varies from the statement provided to USCIS. Thus, the record does not include sufficient consistent probative testimony from the petitioner regarding the details and circumstances of his former spouse's alleged behavior. The record is insufficient to establish the petitioner was subjected to battery or extreme cruelty.

The Petitioner was Not Denied Due Process

Counsel's claim that the petitioner was not accorded due process is without merit. As stated earlier, the director was not required to weigh the positive and negative factors in the petitioner's case because the petitioner is not seeking cancellation of removal pursuant to section 240A(b)(2) of the Act, which is a discretionary form of relief. A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to this matter, and notified the petitioner of the deficiencies in the record before ultimately denying the petition. The petitioner has not met his burden of proof and the denial of the instant petition is the proper result under the statute and regulations.

Conclusion

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

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