

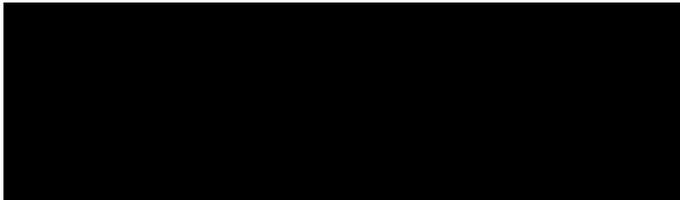
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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**U.S. Citizenship
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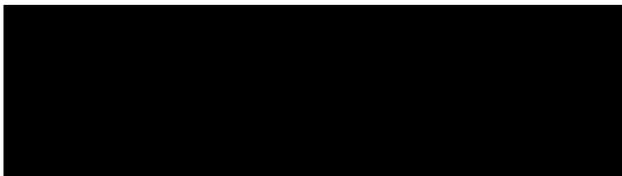
MAR 17 2011

IN RE:



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 service center director denied the immigrant visa petition and the Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. The matter is again before the AAO on motion to reconsider. The motion will be granted. Upon reconsideration and review of the record, the appeal will remain dismissed.

The petitioner seeks immigrant classification under 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 a United States citizen.

The director denied the petition on the basis of his determination that the petitioner had failed to establish that her husband subjected her to battery or extreme cruelty during their marriage.

Counsel filed a timely appeal, which we summarily dismissed on September 8, 2010 without addressing the merits of the case. On motion to reconsider, counsel submits a brief reasserting the petitioner's eligibility and additional documentation. Counsel's submission qualifies as a motion to reconsider under the requirements set forth at 8 C.F.R. § 103.5(a)(3).

Applicable Law

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, the following:

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 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 standard and 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.

Pertinent Facts and Procedural History

The petitioner, a citizen of Grenada, married R-R,¹ a citizen of the United States, on October 20, 2003. She filed the instant Form I-360 on October 7, 2008. The director issued two subsequent requests for additional evidence to which the petitioner, through counsel, filed timely responses. After considering

¹ Name withheld to protect individual's identity.

the evidence of record, including the petitioner's responses to the requests for additional evidence, the director denied the petition on February 16, 2010, and we summarily dismissed the petitioner's timely appeal on September 8, 2010.

Counsel filed the instant motion on October 12, 2010. The AAO reviews these matters on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon reconsideration and review of the entire record, we find that the petitioner has failed to overcome the director's ground for denying this petition.

Administrative Error

Counsel asserts in her October 8, 2010 letter that our September 8, 2010 decision summarily dismissing the appeal was issued in administrative error. The record does not support counsel's assertion.

Counsel filed Form I-290B, Notice of Appeal, to appeal the director's decision denying the petition on March 19, 2010. However, she did not submit any supporting evidence in support of her appeal. In such a situation, the instructions to the Form I-290B, at page 2, state the following:

You may submit a brief and evidence with Form I-290B. Or you may send these materials to the AAO within 30 days of filing the appeal. You must send any materials you submit after filing the appeal to [the AAO].

Furthermore, counsel marked the box at Part 2 of the Form I-290B to state that "[m]y brief and/or additional evidence will be submitted to the AAO within 30 days."

Despite the Form I-290B's clear instruction that any brief or supporting evidence submitted after submission of the Form I-290B be filed directly to the AAO, and her statement on the Form I-290B that she would send a brief and/or additional evidence directly to the AAO within 30 days, counsel did not send her brief directly to the AAO. Rather, she submitted her brief to the Vermont Service Center, and it was not before the AAO when we adjudicated the appeal. Accordingly, we summarily dismissed the appeal pursuant to 8 C.F.R. § 103.3(a)(1)(v).

Although counsel's brief is now part of the record and will be considered in our adjudication of the motion to reconsider, counsel's assertion that we committed administrative error in summarily dismissing the appeal is incorrect. Rather, counsel erred by misfiling the brief to an incorrect address, which prevented its consideration when we adjudicated the appeal.

Battery or Extreme Cruelty

The sole, substantive matter before the AAO on motion to reconsider is whether the petitioner has established that R-R- subjected her to battery or extreme cruelty during their marriage. In her July 21, 2008 self-affidavit, the petitioner stated that R-R- showed little interest in the couple's infant son and

refused to help her in his care; left their home without telling her where he was going; and had an extramarital affair. The petitioner stated that when she questioned R-R- about where he had been and about the affair, he became hostile and verbally assaulted her. She recounted that R-R- stopped contributing to the financial support of the household and, when she asked him for money, he threatened to leave her. She also stated that R-R- did not invite her or their son to a ceremony marking his graduation from police academy; canceled the couple's cable television and gas service; moved out of the home; removed his name from the lease; filed for divorce; had little contact with their son; and withdrew his support of her immigration petition.

The record contains an affidavit from [REDACTED] the petitioner's mother, who lived with R-R- and the petitioner. [REDACTED] repeated the assertions of the petitioner and added that R-R- changed tremendously after the birth of the couple's son in May 2004: he became distant and withdrawn; began spending more time away from home; and eventually moved out and withdrew his financial support of the family.

The petitioner also submitted a July 25, 2008 affidavit from [REDACTED] her sister. [REDACTED] stated that although she does not live in the United States, she visits frequently and is in regular contact with the petitioner. She repeated the assertions of the petitioner and added that the petitioner told her that she feared R-R- would hurt her, or their son.

The record also contains a May 23, 2008 letter from [REDACTED] psychiatrist-in-charge at the Brooklyn Center. According to [REDACTED] the petitioner attended 18 psychotherapy sessions between October 29, 2004 and April 6, 2005, and discussed R-R-'s infidelity during those sessions. He also recounted that the petitioner stated that R-R- did not communicate with her or with the couple's son. The petitioner also submitted documentation issued by her insurance company as further evidence that she attended these sessions of psychotherapy.

On appeal, counsel argues that the director erroneously denied the petition because the petitioner did not establish that R-R- battered her during their marriage. Counsel's assertion is factually incorrect, as the director specifically discussed both battery and extreme cruelty and why the petitioner had proven neither, in his decision.

Considered in the aggregate, the relevant evidence fails to establish that R-S- subjected the petitioner to battery or extreme cruelty during their marriage. The petitioner does not allege that R-R- battered her during their marriage and, although counsel argues on appeal that the petitioner feared R-R- would subject her to battery, the record lacks a detailed description from the petitioner regarding such fear.

Nor does the record establish that R-R- subjected the petitioner to extreme cruelty during their marriage, as she has not demonstrated that the behavior of R-R- was comparable to the types of behaviors set forth at 8 C.F.R. § 204.2(c)(1)(vi). Although counsel argues that his behavior constituted psychological abuse, the record does not support her assertion. That R-R- removed his name from the lease, moved out of the marital residence, withdrew his support of the petitioner's

immigrant petition, and filed for divorce during the breakdown of the marriage does not constitute psychological abuse. While inconsiderate, his cancellation of gas and cable television service during this period of time does not meet that standard, either. Nor does infidelity or failure to pay child support constitute psychological abuse. Nor do these behaviors constitute control, as asserted by counsel in her brief. To the contrary, the behaviors of R-R- as recounted by the petitioner and her affiants appear to reflect apathy on the part of R-R- rather than an attempt to control the petitioner.

While we do not discount the emotional harm that R-R- caused the petitioner, in order to qualify for immigrant classification under section 204(a)(1)(A)(iii) of the Act, the statute and regulation require that the non-physical cruelty be extreme. The Ninth Circuit Court of Appeals has explained that “[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)).

Counsel argues on appeal that the because the Supreme Court of the State of New York, Kings County, granted the couple’s divorce on the grounds of cruel and inhuman treatment of the petitioner by R-R-, the petitioner was therefore also subjected to extreme cruelty as defined at 8 C.F.R. § 204.2(c)(1)(vi). Counsel is mistaken. According to the transcript of the September 24, 2009 court hearing submitted by the petitioner, “the flaunting of an adulterous relationship, with another, constitutes cruel and inhuman treatment in the State of New York.” The director properly concluded that although the laws of New York may view the flaunting of an adulterous relationship as cruel and inhuman treatment, such behavior does not constitute extreme cruelty under the immigration laws. Counsel claims that the director’s finding violates the principles of federalism because “it is a settled principle that federal immigration statutes that touch on issues of state control unrelated to alienage should defer to such law.” For immigration purposes, state law is generally granted deference when determining the validity of a marriage or divorce under a state’s jurisdiction. However, recognition of the validity of a divorce does not render the underlying grounds for the divorce under state law equivalent to linguistically similar, but legally distinct eligibility grounds under the immigration laws. “Extreme cruelty” is specifically defined at 8 C.F.R. § 204.2(c)(1)(vi) and, as set forth above, the petitioner has not demonstrated that R-R-’s behavior met that standard.

The relevant evidence in this case fails to demonstrate that, during their marriage, R-R- subjected the petitioner or their child to battery or extreme cruelty, as that term is defined in the regulation at 8 C.F.R. § 204.2(c)(1)(vi) and as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Oral Argument

On motion, counsel requests oral argument before the AAO. USCIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). Counsel

identifies no specific, unique factors or issues of law to be resolved, and we find the written record of proceedings to fully represent the facts and issues raised in this case. Consequently, counsel's request for oral argument is denied.

Conclusion

Counsel's motion to reconsider has been granted and, upon reopening and review of this matter, we find that the petitioner has failed to overcome the director's ground for denying the petition. The petitioner has failed to establish that R-R- subjected her or their child to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act. The petitioner, therefore, is ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), and this petition must remain denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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