

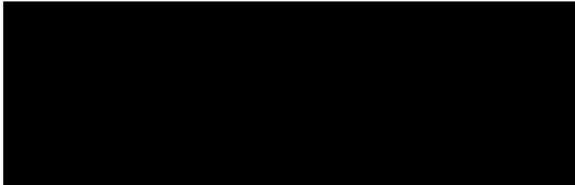
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

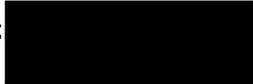
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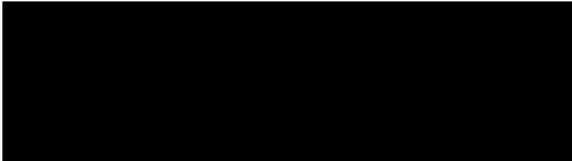
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MAY 24 2011

IN RE: Petitioner: 

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:

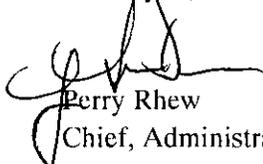


INSTRUCTIONS:

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 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 determined that the petitioner had not established that: he had a qualifying relationship with a United States citizen; he is eligible for immediate relative classification based on the qualifying relationship; he had been subjected to battery or extreme cruelty perpetrated by a United States citizen, or that he had entered into the marriage in good faith. The director also found that section 204(g) of the Act applied and that the petitioner had not submitted evidence that he qualified for an exemption and that the petition must be denied on this additional basis. 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.

* * *

(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 –

(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.

Facts and Procedural History

The petitioner is a native and citizen of Ecuador. He entered the United States without inspection in 1995. On January 27, 1995, he was apprehended and placed in removal proceedings before an immigration judge. On September 20, 1995, the petitioner was notified that arrangements had been made for his departure from the United States to Ecuador on October 11, 1995. The petitioner failed to appear for the arranged departure. The record does not reveal that the petitioner voluntarily left the United States. On August 30, 2003, the petitioner married L-N-¹, the claimed abusive United States citizen in New Jersey. On April 6, 2009, the petitioner filed the instant Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant. On December 10, 2009, the director issued a request for evidence (RFE). Upon review of the record, including the petitioner's response to the RFE, the director determined that the petitioner had not established a qualifying relationship with a United States citizen and eligibility for immediate relative classification based on a qualifying relationship. The director also determined that the petitioner had not established that he had been subjected to battery or extreme cruelty perpetrated by L-N- or had established that he entered into the marriage in good faith. The director also found that section 204(g) of the Act precluded the petitioner from establishing eligibility for this benefit. Counsel for the petitioner timely submits a Form I-290B, Notice of Appeal or Motion, and a brief in support of the appeal.

Preliminarily, the AAO observes that section 204(a)(1)(J) of the Act requires United States Citizenship and Immigration Services (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 and good faith 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), and (vii). 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)

¹ Name withheld to protect individual's identity.

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 and good faith, 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.

Qualifying Relationship

The director determined that the petitioner had not established that his spouse is a United States citizen or lawful permanent resident. Upon review of the record, the record includes a copy of the petitioner's spouse's birth certificate showing that she was born in the State of New York and accordingly is a United States citizen. There is nothing in the record that casts doubt on the validity of the petitioner's spouse's birth certificate. The director's determination that the petitioner had not established that his spouse is a United States citizen is withdrawn. Upon review of the record, the petitioner has established that he entered into a qualifying relationship with the claimed abusive United States citizen spouse.

Battery or Extreme Cruelty

In the petitioner's affidavit, dated June 19, 2009, he stated that he met L-N- in 1996 and that after a month they decided to live together² but he did not have enough money to rent an apartment so they moved into her father's house. The petitioner indicated that when they moved into her father's house, things began to change and she would not let him speak his language, he had to pay all the bills but that he was not allowed to use the services for which he had paid, and he could not drive the cars he had purchased. The petitioner described an incident when he decided to visit his brother's house in order to see his mother, and L-N- "went crazy" and "started to hit [him] with a candle and the remote control." The petitioner noted that his spouse would call him derogatory names and that she spit in his face, yelled at him in public, and told him he had to do what she said. The petitioner reported that he tried to get away but she knew where he worked and would tell him if he did not live with her she would report him to the police and tell them he was not legal in the United States. The petitioner declared that on March 21, 2009, he was watching television after a hard day at work and L-N- wanted to talk and he did not and he turned his back on her and she hit him in the ear. The petitioner stated that he left and while in the middle of the street decided to not look back and never return to that house.

In an affidavit dated June 22, 2009, the petitioner repeated the information previously provided. The petitioner also indicated that after three years L-N- said that they should live in her father's house and threatened that if he did not do what she wanted she would call immigration. The petitioner added that he never left because of L-N-'s threats that she would call the police who would report him to immigration and also because he loved her.

² In the petitioner's statements he notes that he lived with L-N- beginning in 1996, while she was still married to her second husband. The record reveals that L-N- divorced her second husband on June 8, 1998.

In a January 25, 2010 affidavit, the petitioner explained that while living together, he told L-N- that he did not drive because he did not have legal papers in the United States and subsequently she took advantage of this knowledge by threatening him and his family with calling immigration whenever she was mad. The petitioner added that once L-N- pressed charges against him for domestic violence but he did not understand anything that was happening because he did not speak English and since then he never called the police because he was scared. The petitioner referenced an incident when L-N- grabbed a candle stick and hit him in the ribs with the candle which was witnessed by L-N-'s daughter who tried to defend the petitioner and L-N- threw them both out of the house. The petitioner reported that L-N- asked for forgiveness and both he and his stepdaughter moved back in the house and L-N- suggested that her father also move into the house. The petitioner also noted that he started to get worried when a psychiatrist determined that L-N- was bipolar but that he could not do anything because whenever he would leave the house she would threaten him. The petitioner reiterated that whenever he fought with L-N- and left she would call his family and threaten them and show up at his work and threaten to call the police and immigration. The petitioner also noted that he never left L-N- because he loved her until he decided he needed to step up for his rights and so on March 21, 2009, when she yelled at him and punched him, he decided to leave.

In a February 27, 2010 report prepared by [REDACTED], based on his four-hour interview of the petitioner, [REDACTED] reported information similar to that which the petitioner provided in his January 25, 2010 statement. [REDACTED] indicated that in 2002 the petitioner's wife was found to suffer from chronic depression and she was eventually placed on permanent disability. [REDACTED] also noted that the petitioner reported that after their marriage in 2003, the relationship quickly deteriorated and that L-N- treated the petitioner like a slave and took possession of all the money often leaving the petitioner without adequate funds. [REDACTED] noted that the petitioner also reported that L-N- told him that she was going to kill him in his sleep and that she embarrassed him in public, and she would slap and spit on him. [REDACTED] referenced the court summons³ issued to the petitioner and the judgment that he must pay \$180 per week in spousal support to L-N-. [REDACTED] opined: "as a result of the experiences reported, test findings and the symptom picture evident, [the petitioner] has endured significant psychological harm." [REDACTED] noted further that despite the abuse the petitioner suffered, there was no concrete evidence that he aggressed against his wife. [REDACTED] concluded that the petitioner had been traumatized by his marital experience. [REDACTED] also indicated that the petitioner had followed up with medical treatment and had been placed on an antidepressant and an anxiolytic.

The record also included a May 9, 2009 affidavit signed by the petitioner's stepdaughter who declared that: her mother and the petitioner had been together for 14 years; on several occasions her mother had kicked the petitioner out and the petitioner would leave; when bills came due, her mother would insist that the petitioner return to pay the bills and would threaten that she would call immigration if he did not; her mother was very controlling of the petitioner and ordered him not to speak Spanish, or see his family; and she was verbally and/or physically abusive if the petitioner did not obey her mother's demands. The petitioner's stepdaughter repeated the

³ The record includes a copy of a June 9, 2009 civil action summons for a hearing regarding spousal support to take place on July 7, 2009. The record does not include a final court order.

incident the petitioner described as occurring on March 21, 2009. In a May 2, 2009 affidavit signed by [REDACTED] declared that the petitioner told her of the abuse he received from his wife.

The director determined that the petitioner had not provided sufficient information regarding specific incidents of abuse and thus the petitioner had not established that he had been subjected to battery or extreme cruelty perpetrated by his spouse.

On appeal, counsel for the petitioner asserts that the petitioner describes verbal and emotional abuse ranging from insults to threats to public humiliation and that his wife isolated him in their home in Phillipsburg, New Jersey. Counsel contends that the petitioner's wife purposely attempted to control him via psychological attacks, threats with deportation, and economic coercion and that USCIS erred when concluding that her acts did not go beyond the marital difficulties encountered in many marriages. Counsel references the evaluation prepared by [REDACTED] and the statement of the petitioner's stepdaughter and [REDACTED] in support of the petitioner's claim.

Upon review of the petitioner's statements, the two incidents of battery that are described do not include sufficient descriptive information to conclude that the petitioner was subjected to battery. In addition, the first incident appears to have occurred prior to the marriage. The remaining portion of the petitioner's statements refers to L-N-'s control of the petitioner, calling him derogatory names, spitting on him, throwing things, and threatening him and his family with calling immigration. Upon review of the totality of the information provided by his statements, there is sufficient detailed information regarding specific instances of his wife's behavior to conclude that her actions constitute extreme cruelty under the statute and regulation. The petitioner's description of his wife's emotional abuse and her continuous threats that if he left she would report him to immigration, coupled with her actions of kicking him out of the house until she required money establishes an overall pattern of coercion and violence. The petitioner's testimony and that of his stepdaughter regarding these actions is sufficient to conclude that the petitioner was an actual victim of extreme cruelty as set out in the statute and regulation. The petitioner described in sufficient detail specific incidents and behaviors of his wife to conclude that his wife attempted to control him through her threatening and violent behavior.

When evaluating the record as a whole, the AAO finds the record includes sufficient definitive information regarding specific instances of abuse that should be categorized as extreme cruelty. The petitioner has established an overall pattern of abuse in his marriage which is sufficient to constitute extreme cruelty as defined in the statute and regulations. The director's decision to the contrary is withdrawn.

Good Faith Entry Into Marriage

The petitioner provided a cursory description of his initial meeting and subsequent interaction with L-N-, other than as his interactions relate to the claims of abuse. The petitioner does not provide consistent information regarding when and where the couple initially resided, when they

moved to an apartment and when they moved to her father's house. For example, in some versions of the petitioner's testimony, he does not indicate that they lived in an apartment prior to establishing a household with L-N-'s father. The petitioner sometimes indicates that L-N- wanted the couple to move into her father's house and sometimes L-N- wanted her father to move into their house. The record does not include supporting documentation regarding a house owned by either the petitioner or the petitioner and L-N- and the length of time the house was owned and the circumstances of its sale. The petitioner's statements are insufficient to establish that he entered into the marriage with L-N- in August 2003 in good faith. Subsequent to the marriage, the petitioner provides no probative information regarding the circumstances of the relationship, the emotional ties, or the couple's daily routines. The petitioner's testimony does not establish his good faith in entering into the marriage.

As the director noted, the tax forms submitted do not include evidence the tax forms were actually filed. The petitioner does not explain why evidence of filing was not provided on appeal. The bank statements show minimal activity and are not accompanied by any evidence demonstrating that the petitioner and L-N- used the account throughout their marriage. The photographs show the petitioner and his wife together on their wedding day but this evidence fails to establish the petitioner's intent when entering into the marriage. The statements of the petitioner's stepdaughter and [REDACTED] do not provide the probative details regarding their observations of the petitioner's allegedly good faith entry into marriage. The June 9, 2009 civil action summons for a spousal support hearing addressed to the petitioner is insufficient to establish the petitioner's intent when entering into the marriage. The record does not include evidence of a final order or other documents pertinent to resolving the issue of spousal support. Moreover, the issue of spousal support, alone without testimony from the petitioner does not establish his good faith in 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). Upon review of the totality of the evidence in the record, the petitioner has not described the couple's mutual interests, he has not described their daily routines in detail, and he has not provided other probative information for the record that assists in ascertaining his intent when entering into the marriage in 2003. In this matter, the record does not include sufficient relevant evidence establishing that the petitioner entered into marriage with L-N- 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 it appears that section 204(g) of the Act 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 record does not include sufficient information to determine that the bona fide marriage exception to section 204(g) of the Act applies to this 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.

Although the record includes some testimony and documentation regarding the bona fides of marriage, eligibility for the bona fide marriage exemption pursuant to section 245(e)(3) of the

Act, imposes a heightened burden of proof. *Matter of Arthur*, 20 I&N Dec. 475, 478 (BIA 1992). 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 his marriage with his wife 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 requires the denial of this petition.

Immediate Relative Classification

The present record also fails to establish that the petitioner was eligible for immediate relative classification based on his relationship with L-N-, 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)(iv) requires compliance with the provisions of section 204(g) of the Act. As discussed earlier, the petitioner has not established his eligibility for the bona fide marriage exception under section 245(e)(3) of the Act and therefore, section 204(g) bars approval of this petition.

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.