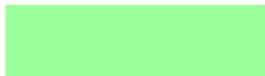


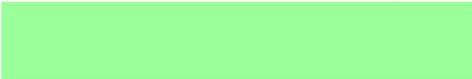


U.S. Citizenship  
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Services

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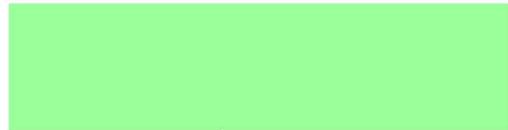


Date: **JAN 09 2013** Office: VERMONT SERVICE CENTER File: 

IN RE: Self-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:

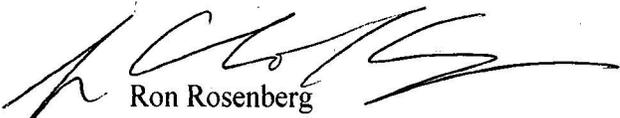


INSTRUCTIONS:

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 AAO inappropriately applied the law 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 in accordance with the instructions on Form I-290B, Notice of Appeal or motion, with a fee of \$630, or a request for a fee waiver. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** 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,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, (the director) denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 her U.S. citizen spouse.

The director denied the petition for failure to establish that the petitioner's husband subjected her to battery or extreme cruelty during their marriage.

On appeal, counsel submits a brief and additional evidence.

*Relevant 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, 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 further 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 further explicated 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 or

the self-petitioner's child, 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 further explicated 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.

\* \* \*

(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.

\* \* \*

*Facts and Procedural History*

The petitioner is a citizen of Brazil who entered the United States on March 1, 2008, as a nonimmigrant student. The petitioner married a U.S. citizen on July 2, 2009, in Minnesota. On January 10, 2011, the petitioner filed the instant Form I-360. The director subsequently issued a Request for Evidence (RFE) of the petitioner's husband's battery or extreme cruelty. The petitioner, through counsel, timely responded with additional evidence which the director found insufficient to establish the petitioner's eligibility. The director denied the petition and counsel timely appealed.

On appeal, counsel submits an update to a prior psychological evaluation and copies of previously submitted evidence. Counsel submits a brief in which he asserts that the director erroneously determined that the petitioner failed to show she was the victim of extreme cruelty and that the director's decision is against the weight of the evidence. Counsel further claims that under the Ninth Circuit Court of Appeals' decision in *Hernandez v. Ashcroft*, 345 F.3d 824 (9<sup>th</sup> Cir. 2003), extreme cruelty is a question of fact and the director failed to apply the appropriate legal standard. As we discuss in detail below, *Hernandez* is not a precedent binding on this case and we find no error in the director's discretionary determination that the petitioner's husband did not subject her to extreme cruelty.

The AAO reviews these proceedings *de novo*. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). A full review of the record fails to establish the petitioner's eligibility. Counsel's claims and the additional evidence submitted on appeal do not overcome the director's ground for denial and the appeal will be dismissed for the following reasons.

#### *Battery or Extreme Cruelty*

We find no error in the director's determination that the petitioner's husband did not subject her to battery or extreme cruelty. In her affidavit, the petitioner stated that her husband missed their immigration interview because he was in Brazil, and could not change the return date of his airline ticket. She described how after he returned from Brazil, her husband was distant and not as intimate with her. She recalled that he insulted and humiliated her and made fun of her family. During one verbal argument, the petitioner's husband admitted to her that he had been using drugs and had been involved with other men sexually. In January 2010, the petitioner's husband left their home after an argument and lived with his mother and friends for several months. The petitioner stated that her husband depleted their bank account and amassed debt because of his drug use. The petitioner allowed her husband to come back into their home for a while, but he eventually asked her for a divorce so she tried to make him leave their home. Her husband would not leave, however, and she called the police to get her husband to leave the apartment. In a subsequent affidavit, dated December 29, 2011, the petitioner repeated much of her prior testimony and added that she believes her relationship was abusive and was "characterized by emotional withholding on his behalf, infidelity, verbal abuse and broken promises." The petitioner stated that her husband insulted her and called her names in front of her friends and other people, which embarrassed her. The petitioner also submitted two affidavits from friends who stated that they were aware of the petitioner's husband's drug abuse and infidelity and that they heard that he insulted her in front of friends. The facts presented do not indicate that any of the petitioner's husband's actions were part of an overall pattern of violence or otherwise constituted psychological abuse. The petitioner's statements do not indicate that her former husband ever battered her or that his behavior involved threatened violence, psychological or sexual abuse, or otherwise constituted extreme cruelty, as that term is defined at 8 C.F.R. § 204.2(c)(1)(vi).

The petitioner also submitted an evaluation from [REDACTED], a psychologist. The evaluation repeated much of the petitioner's testimony and described how the petitioner's husband did not return from Brazil in time for her immigration interview, used drugs, engaged in homosexual relations, and amassed a massive debt which damaged the petitioner's credit rating. The psychologist noted that the petitioner's husband's problems were largely related to his substance abuse. He stated that the petitioner's husband made derogatory statements about her family, and noted that the petitioner reported that her husband was verbally and emotionally abusive on numerous instances, but failed to describe any particular incident of abuse. The report also noted the petitioner's fear that she may have contracted human immunodeficiency virus (HIV) or a sexually transmitted disease from her husband. The psychologist concluded that the petitioner demonstrated symptoms of chronic adjustment disorder with mixed anxiety and depressed mood. The psychologist did not conclude that the petitioner's husband battered her, and he did not describe any events or actions of her husband that constitute extreme cruelty. The letter from the psychologist

provided on appeal explains his diagnosis, but does not describe any specific incidents of battery or extreme cruelty.

On appeal, counsel claims that the petitioner established extreme cruelty under the standards construed by the Ninth Circuit Court of Appeals in *Hernandez v. Ashcroft*, 345 F.3d 824, 833-35 (9th Cir. 2003). In *Hernandez*, the court held that extreme cruelty can be assessed under objective standards and is a clinical, nondiscretionary determination subject to judicial review. Counsel contends that because a psychologist diagnosed the petitioner as having a chronic adjustment disorder with mixed anxiety and depressed mood, the petitioner clearly demonstrated that she had suffered “extreme emotional cruelty and financial hardship as a result of relational difficulties with her husband.” While we do not question Dr. [REDACTED]’s expertise or his diagnosis of the petitioner’s mental health condition, his evaluation and letter do not establish that the petitioner’s husband’s behavior constituted battery or extreme cruelty, as defined at 8 C.F.R. § 204.2(c)(1)(vi).

Furthermore, as this case arose outside of the Ninth Circuit, *Hernandez* is not a binding precedent on the issue of extreme cruelty as a factual determination. Moreover, the majority of the other circuits have come to a contrary conclusion. *Bedoya-Melendez v. U.S. Att’y Gen.*, 680 F.3d 1321 (11th Cir. 2012); *Rosario v. Holder*, 627 F.3d 58 (2d Cir. 2010); *Johnson v. U.S. Att’y Gen.*, 602 F.3d 508 (3d Cir. 2010); *Stepanovic v. Filip*, 554 F.3d 673 (7th Cir. 2009); *Wilmore v. Gonzalez*, 455 F.3d 524 (5th Cir. 2006); *Perales-Cumpean v. Gonzalez*, 429 F.3d 977 (10<sup>th</sup> Cir. 2005). Although these cases concerned applications for cancellation of removal, each court cited the description of battery or extreme cruelty for self-petitioners at 8 C.F.R. § 204.2(c)(1)(vi) and found that a determination regarding battery or extreme cruelty is discretionary, and not based on any objective standard.

Even if *Hernandez* were binding on this case, the relevant evidence fails to establish that the petitioner’s husband subjected her to extreme cruelty under the clinical and legal standards cited by the Ninth Circuit. As discussed above, the petitioner failed to describe in probative detail any specific threatening or controlling behavior of her husband. Although counsel claims that the petitioner’s failure to appear for her immigration interview was an exercise of control over the petitioner, the petitioner herself noted that the reason her husband did not attend is because he had already purchased tickets to be in Brazil during that time period and did not want to change them. Similarly, while counsel claims that the draining of their financial resources was economic coercion, the petitioner herself repeatedly intimated that her husband drained their resources in order to support his drug habit – there is no support for the contention that he spent their money in order to control the petitioner. Nor did the petitioner demonstrate that her husband’s nonviolent actions, such as drug abuse, name-calling, and spending their money, constituted psychological or sexual abuse or were otherwise part of an overall pattern of violence. See *Hernandez*, 345 F.3d at 836–41 (describing the cycle of domestic violence and interpreting the phrase “acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence” in 8 C.F.R. § 204.2(c)(1)(vi)). The relevant evidence in this case does not establish that the petitioner’s husband’s behavior involved battery, threats of violence, psychological or sexual abuse, or otherwise constituted extreme cruelty, as that term is defined at 8 C.F.R. § 204.2(c)(1)(vi). Accordingly, the petitioner has not established that her husband subjected her to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

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Page 6

*Conclusion*

On appeal, the petitioner has failed to show that her husband subjected her to battery or extreme cruelty during the marriage. She is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

In these proceedings, the petitioner bears the burden of proof to establish her eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Here, that burden has not been met. Accordingly, the appeal will be dismissed and the petition will remain denied.

**ORDER:** The appeal is dismissed.