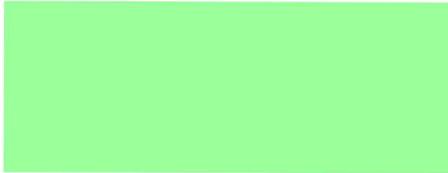




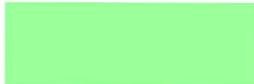
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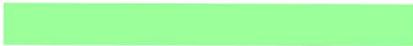


Date: OCT 22 2013

Office: VERMONT SERVICE CENTER

FILE: 

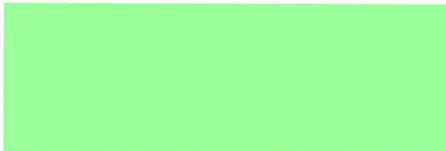
IN RE:

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (the director), denied the immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion to reopen will be granted. The appeal will remain dismissed and the petition will remain 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 a United States citizen spouse. On motion, counsel submits new evidence.

Applicable Law

Section 204(a)(1)(A)(iii) of the Act provides, in pertinent part, 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).

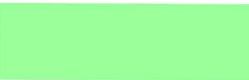
Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J) states, in pertinent part:

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 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 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.

Facts and Procedural History

As the facts and procedural history were adequately documented in our prior decision, we shall repeat only certain facts as necessary. The petitioner filed the instant Form I-360 on February 28, 2011. The director subsequently issued a request for additional evidence (RFE) of, *inter alia*, the petitioner’s wife’s battery or extreme cruelty. The director found the petitioner’s response to the RFE insufficient and denied the petition for failure to establish the requisite battery or extreme cruelty. On appeal, counsel asserted that the evidence submitted demonstrated that the petitioner’s wife subjected him to battery and extreme cruelty during their marriage.

The AAO dismissed the appeal in a decision dated October 26, 2012, incorporated here by reference. On motion, counsel cites no binding case law or precedent decisions to establish that the AAO’s prior decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy, as required for a motion to reconsider at 8 C.F.R. § 103.5(a)(3). Counsel also fails to establish that the AAO’s prior decision was incorrect based on the evidence of record at the time. *See* 8 C.F.R. § 103.5(a)(3) (prescribing this additional requirement). Consequently, the motion to reconsider must be dismissed. *See* 8 C.F.R. § 103.5(a)(4).

Counsel’s submission does, however, meet the requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(2). Counsel submits a new mental health evaluation from  a licensed professional counselor. Counsel claims the evaluation shows that the petitioner suffered “mental abuse and some physical abuse” which has resulted in mental injury. Accordingly, the motion to reopen is granted. However, a full review of the record fails to demonstrate the petitioner’s eligibility for the following reasons.

Analysis

In its prior decision, the AAO determined that the petitioner had not established the requisite battery or extreme cruelty because the petitioner did not provide sufficient evidence of any battery or behavior that involved 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). The petitioner's and his family and friend's affidavits did not contain probative information sufficient to establish battery or extreme cruelty. The psychological evaluation and medical certificate for the petitioner's son did not provide any substantive description of abuse against the petitioner or his son and the letter from the petitioner's psychologist's office stated that his anxiety was marked by his concern for his diabetes and heart problems.

On motion, counsel submits a mental health evaluation by a licensed professional counselor, [REDACTED] who states that the petitioner told him that his wife yelled at him, humiliated him, threw things at him, gambled and threatened to have him deported. The counselor notes that the petitioner believes his medical issues, such as diabetes, headaches, dizziness, and cardiovascular problems, are related to stress from his wife's mistreatment. The counselor also states that the petitioner reported that he has trouble sleeping because he worries about how he will support his children and being sent back to the Philippines. He found that the petitioner exhibits symptoms of depression and suffers from severe anxiety. However, this evaluation does not provide any new facts or information, nor does it contain a probative description of any abuse or extreme cruelty perpetrated against the petitioner. As such, the evidence provided on motion still does not establish that the petitioner's wife's behavior involved 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 his wife subjected him to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion is granted. The AAO's prior decision, dated October 26, 2012, is affirmed. The appeal remains dismissed and the petition remains denied.