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

(b)(6)

U.S. Citizenship and Immigration Services

Date: AUG 13 2014 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 (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 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 his U.S. citizen spouse.

The director denied the petition for failure to establish that the petitioner was subjected to battery or extreme cruelty by his wife during their marriage. On appeal, counsel submits a brief and additional evidence.

Relevant Law and Regulations

Section 204(a)(1)(A)(iii)(I) 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 explained in 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)(I) of the Act are further explained in 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

> (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.
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> (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 citizen of Turkmenistan who entered the United States on August 10, 2003, using a nonimmigrant visa. The petitioner married N-R-[1], a U.S. citizen, on January 12, 2011, in New York City. The petitioner filed the instant Form I-360 on August 1, 2011. The director subsequently issued a Request for Evidence (RFE) of, among other things, N-R-'s her battery or extreme cruelty. The petitioner, through counsel, timely responded to the RFE with additional evidence, which the director found insufficient to establish the petitioner's eligibility. The director denied the petition and counsel filed a timely appeal.

We conduct appellate review on a *de novo* basis. *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 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

In his first affidavit, the petitioner described how a few weeks after their marriage, N-R- humiliated him during her son's birthday party. He recounted that she delivered a speech in front of friends and family, including his mother, stating that she expects to be treated like a queen and that he does not have the brain to make enough money to support her. The petitioner explained that his mother started to cry, and he and his mother left the party. He also described that N-R- would come home very late, sometimes

[1] Name withheld to protect the individual's identity.

drunk, told him that her son did not like him just to hurt him, and complained that he did not satisfy her sexually. The petitioner described an incident on May 25, 2011, when N-R- was very aggressive, yelled at him, insulted him, and demanded money. He explained that he called his friend who advised him to file a police report of the incident, a copy of which is in the record. He recounted that he was referred to a shelter, but because he could not get in to the shelter that night, he stayed at a motel and then stayed at the shelter the following night. In the petitioner's subsequent affidavit in response to the RFE, the petitioner asserted that his wife's acts were intentional and calculated to destroy him. He stated he suffers from severe depression and is receiving psychiatric treatment as a result of his wife's cruel and inhumane treatment.

A declaration from the petitioner's friend, described how the petitioner changed during the spring of 2011. According to Mr. the petitioner told him that his wife was abusing him, calling him names, prohibiting him from watching Russian television, limiting his communication with his friends, and not allowing him to see her son. The record also contains a copy of an Appointment Slip from , an agency that provides social services to the homeless, that is dated May 27, 2011, as well as a copy of the police report from May 25, 2011, which states that the petitioner reported that N-R-'s demand for money escalated into a verbal dispute.

In his evaluation of the petitioner, certified psychiatrist Dr. described the petitioner as a victim of emotional, sexual, and financial abuse by his wife. Dr. stated that the petitioner's wife reportedly publicly humiliated him in front of friends and family on several occasions. Dr. also recounted that N-R- initially came home very late, then did not come home until the morning, and finally would disappear for days at a time. In addition, Dr. contended that N-R- sent her husband several text messages demanding money, extorting him, and threatening him. Describing the incident on May 25, 2011, Dr. asserted that N-R-'s "verbally aggressive outbursts became violent when she proceeded to throw household items in her husband's direction." The petitioner reported that after staying in a motel and then a shelter, he stayed with his mother for a couple of days before returning home to see that N-R- had left the apartment with her belongings. When the petitioner attempted to reconcile with his wife, she purportedly demanded excessive amounts of money. Dr. diagnosed the petitioner with Major Depressive Disorder, Adjustment Disorder with Anxiety and Depression, Panic Attacks, and Insomnia due to Mental Disorder. In response to the RFE, Dr. reiterated that the petitioner continues to attend counseling sessions and take psychotropic medications for his symptoms of anxiety and depression.

The petitioner's affidavits are inconsistent with Dr. psychiatric evaluation. For instance, Dr. stated that N-R- sent the petitioner several text messages demanding money, extorting him, and threatening him, but the petitioner's affidavits make no mention of these threats or text messages. Similarly, Dr. recounted that N-R- became violent during the incident on May 25, 2011, and that she threw household items at her husband. However, the petitioner does not allege that his wife became violent or threw things at him at any time and the police report makes no mention of any violence. Dr. also reported that the petitioner was sexually abused, but provides no probative details regarding this allegation and the petitioner himself makes no claim of sexual abuse.

The petitioner submits a third affidavit on appeal, reiterating his prior assertions and stating that his wife insulted and humiliated him. He claims her painful actions caused him anxiety and unspecified fears. He explains that he cannot discuss his issues within his community because it is a great shame for a man to be abused and kicked out by a woman, especially by a spouse, and being overly sensitive for a man is a sign of weakness. The petitioner also submits an affidavit from his mother who reiterates that N-R- made such a demeaning speech about her son in front of friends and family that it made her cry. She recounts that her son told her that N-R- was treating him more like a slave than a husband.

On appeal counsel asserts that whether a spouse has been subjected to extreme cruelty is a discretionary determination and the director abused his discretion by not "look[ing] for a record as a whole." Counsel states that the Ninth Circuit Court of Appeals has determined that Congress distinguished between battery and extreme cruelty, "reserving the term extreme cruelty for something other than physical assault, presumably actions in some way involving mental or psychological cruelty." *Hernandez v. Ashcroft*, 345 F.3d. 824, 838 (9th Cir. 2003); *Counsel's Brief* at p. 5. Counsel contends that the petitioner was intimidated by his wife to the extent that he fled their home and sought refuge in a homeless shelter which "undoubtedly amount to extreme cruelty." *Counsel's Brief* at p. 5. The record does not support counsel's claims.

First, to establish an abuse of discretion, counsel must demonstrate that "the [agency's] decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements; that is to say, where the [agency] has acted in an arbitrary or capricious manner." *Twum v. I.N.S.*, 411 F.3d 54, 58 (2d Cir. 2005) (quoting *Ke Zhen Zhao v. United States Dep't of Justice,* 265 F.3d 83, 93 (2d Cir. 2001) (internal citations omitted)). The record reveals no such errors in the director's decision. In compliance with the statute and regulations, the director addressed all the relevant evidence submitted by the petitioner below, accurately assessed its weight and credibility and explained why it did not establish battery or extreme cruelty. *See* 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) (mandating the agency's consideration of "any credible evidence relevant to the petition," but reserving the determination of what evidence is credible and its weight to the agency's "sole discretion."). Even if the director had neglected to consider certain relevant evidence, any such error would be corrected on appeal. We have reviewed the record *de novo* and considered the additional statements of the petitioner and his mother submitted on appeal.

Second, the record does not establish that the petitioner's wife subjected him to extreme cruelty as that term is defined by the regulation or that her actions are in any way analogous to the extreme cruelty discussed in *Hernandez*. Counsel claims that "[a]s a result of continued abuse, Petitioner sought refuge in a homeless shelter in order to get away from his spouse[']s continued attacks" and that her actions "undoubtedly amount to extreme cruelty." *Counsel's Brief* at p. 5. There is no evidence that the petitioner fled his home out of fear and stayed in a homeless shelter due to his wife's extreme cruelty. According to the petitioner's statement on the police report, he left the apartment "to avoid further escalation" of an argument over his wife's request for money. The report states that the petitioner was not fearful and that the petitioner's wife was not arrested because no offense was committed. In addition, the petitioner did not discuss his purported stay at a shelter. The Appointment Slip from in New York City is dated May 27, 2011 and states the appointment date as "Drop-In Until 6/5/11." The slip does not show that the petitioner

attended any subsequent appointment or actually resided at any homeless shelter operated by the corporation.

Counsel's reliance on *Hernandez* is also misplaced. In *Hernandez,* the Ninth Circuit Court of Appeals held that extreme cruelty can be assessed under objective standards and is a clinical, nondiscretionary determination subject to judicial review. *Hernandez v. Ashcroft*, 345 F3d. at 833-35. As this case arose outside of the Ninth Circuit, *Hernandez* is not a binding precedent. Moreover, the majority of circuits have held, contrary to *Hernandez*, that extreme cruelty is a discretionary determination not subject to judicial review. *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 (10th Cir. 2005).

Finally, even if we were to defer to *Hernandez* as persuasive authority in this case, the facts constituting extreme cruelty in *Hernandez* are in no way analogous to the actions of the petitioner's wife as described in the record. The plaintiff in *Hernandez* was subject to years of her abusive spouse's cycle of violence including brutal beatings and a stabbing in Mexico, leaving the plaintiff bleeding and locked in the home after the attacks without medical care, constant verbal abuse, periods of contrition and emotional manipulation to convince the petitioner to return to him after she had sought refuge with a relative in the United States. *Hernandez v. Ashcroft*, 345 F.3d at 829-32, 840-41. The *Hernandez* court determined that the plaintiff's husband's non-physical actions "in tracking Hernandez down and luring her from the safety of the United States through false promises and short-lived contrition are precisely the type of acts of extreme cruelty that 'may not initially appear violent but that are part of an overall pattern of violence.' 8 C.F.R. § 204.2(c)(1)(vi)." *Id.* at 840. In this case, the record does not demonstrate that the petitioner's wife's verbal insults and demands were similarly part of any overall pattern of violence or otherwise constituted extreme cruelty under the regulation.

After a careful review of all of the relevant evidence, including the additional statements submitted on appeal, the record does not establish that N-R- subjected the petitioner to battery or extreme cruelty as defined in 8 C.F.R. § 204.2(c)(1)(vi). The record shows that the petitioner's wife humiliated him, yelled at him, and demanded money and that the petitioner received mental health counseling and medication after the breakdown of their marriage. However, the record does not establish that the petitioner's wife ever battered him or that her behavior included other actual or threatened violence, psychological or sexual abuse, or otherwise constituted extreme cruelty as that term is defined in 8 C.F.R. § 204.2(c)(1)(vi) and as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Conclusion

On appeal, the petitioner has failed to establish that he was subjected to battery or extreme cruelty by his wife during their marriage. He is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

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 and the appeal will be dismissed.

ORDER: The appeal is dismissed.