



U.S. Citizenship
and Immigration
Services

(b)(6)

Date:

SEP 25 2014

Office: VERMONT SERVICE CENTER

File:

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)

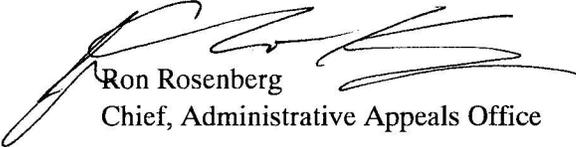
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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 Vermont Service Center director ("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 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 based on the petitioner's failure to establish that he was battered or subjected to extreme cruelty by his spouse, and that he resided with her during their marriage.

On appeal, the petitioner, through 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 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)(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.

(v) *Residence*. . . . The self-petitioner is not required to be living with the abuser when the petition is filed, but he or she must have resided with the abuser . . . in the past.

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:

(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.

* * *

(iii) *Residence*. One or more documents may be submitted showing that the self-petitioner and the abuser have resided together Employment records, utility receipts, school records, hospital or medical records, birth certificates of children . . . , deeds, mortgages, rental records, insurance policies, affidavits or any other type of relevant credible evidence of residency may be submitted.

(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, a citizen of India, entered the United States in 1996 without inspection, and was placed in deportation proceedings upon personal service of an Order to Show Cause on July 3, 1996. The petitioner married V-Z¹, a U.S. citizen, on March 3, 2004 in Las Vegas, Nevada. He filed the instant Form I-360 self-petition on January 24, 2012. Upon review of the initial submission, the director issued a Request for Evidence (RFE) of battery or extreme cruelty and joint residence. The petitioner timely responded with additional evidence. Based on a review of the entire record of proceeding, the director found that the evidence did not establish eligibility for the benefit sought and denied the petition. Counsel timely submitted a Form 1-290B (Notice of Appeal), a brief, and additional evidence.

¹ Name withheld to protect the individual's identity.

We review these proceedings *de novo*. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon a full review of the record, including the arguments and evidence presented on appeal, we find that the petitioner has not overcome all of the director's grounds for denial. The appeal will be dismissed for the following reasons.

Battery or Extreme Cruelty

The director's ultimate determination that the petitioner did not establish that his wife battered him or subjected him to extreme cruelty was correct, and the arguments and evidence submitted on appeal do not overcome this ground for denial. In his first affidavit, dated December 22, 2011, the petitioner briefly stated that he and V-Z- had problems in their marriage, including several arguments. The petitioner indicated that V-Z- hit him and their son, but did not describe any specific incidents of abuse. The petitioner provided an affidavit from V-Z-'s mother, in which she described V-Z- as a "gold digger" who engaged in an extramarital affair. She recounted that the petitioner and V-Z- had many arguments, and that she personally attempted to help them settle their marital disputes. The petitioner's mother-in-law did not indicate that the petitioner was either battered or subjected to extreme cruelty by his wife.

In response to the RFE, the petitioner submitted a second affidavit, dated September 11, 2013, in which he recounted that he was detained by immigration officials in April 2006 and was not released from detention until November 2007. An Order of the Immigration Judge, provided in the previous submission, confirmed that the petitioner was released from custody on November 27, 2007. In his September 11, 2013 affidavit, the petitioner indicated that upon his release from detention, he learned that his wife had moved in with another man. The petitioner recounted that he and his wife moved back in together after she separated from her boyfriend in 2009. He stated that, unbeknownst to him, his wife brought the boyfriend over to the house when he was at work. The petitioner stated that his son told him that the boyfriend had been over, and when V-Z- heard their son's disclosure, she yelled at their son. At that point, V-Z- was pregnant with what the petitioner believed to be his child, but subsequently learned that his wife's boyfriend was the father. After three months, V-Z- moved out of the home she shared with the petitioner to her mother's home. The petitioner stated that the ordeal took an emotional toll on him, but he did not seek counseling due to the expense. He further stated that he did not report V-Z-'s verbal abuse to the police. The petitioner did not specifically describe instances of verbal abuse, nor did he elaborate on his previous claim that V-Z- hit him and his son.

In a supplemental filing, the petitioner provided a letter from licensed clinical social worker [REDACTED] dated September 26, 2013. In the letter, Mr. [REDACTED] recounted the petitioner's marital problems as reported by the petitioner. Mr. [REDACTED] indicated that V-Z- was rude to the petitioner's parents when they visited early in his marriage. He noted the petitioner's detention by immigration authorities and his wife's extramarital affair that began while the petitioner was detained. Mr. [REDACTED] stated that after the couple moved back in together in 2009, the petitioner's wife would insult the petitioner. He recounted that after V-Z- moved out, V-Z- obtained a court order for child support. Mr. [REDACTED] indicated that V-Z- tried to "turn his son against [the petitioner]" and continued to request additional financial support from the petitioner beyond the court ordered amount, which the petitioner

often provided. Mr. [REDACTED] asserted that V-Z- was "nasty and belligerent" to the petitioner, but did not provide examples of such behavior. Mr. [REDACTED] concluded that the petitioner suffered psychological consequences from his wife's treatment.

In his decision, the director indicated that the petitioner's statements in the instant matter would not be deemed credible due to an immigration judge's 2003 adverse credibility finding on the petitioner's testimony in a separate proceeding. The director determined that the record did not contain satisfactory evidence to demonstrate that the petitioner was battered or subjected to extreme cruelty by his spouse.

On appeal, counsel asserts that the director failed to accord sufficient weight to Mr. [REDACTED] letter, which is sufficient to establish the requisite abuse. However, a review of the letter reveals no description of specific instances of battery or extreme cruelty. Mr. [REDACTED] recounted circumstances surrounding V-Z-'s extramarital affair, and indicated that V-Z- called the petitioner names, requested money from him, and was "nasty and belligerent" to the petitioner. While Mr. [REDACTED] concluded that the petitioner suffered anxiety and depression as a result of his marital difficulties, the letter does not indicate that battery or extreme cruelty, to either the petitioner or his son, were sources of the petitioner's mental health issues.

The director erred in imputing the immigration judge's adverse credibility finding in a separate proceeding to the instant matter. However, a full review of the relevant evidence submitted below and on appeal does not establish by a preponderance of the evidence that the petitioner's wife battered him or his son, or subjected either to extreme cruelty. In his initial affidavit, the petitioner briefly stated that V-Z- hit him and his son, but did not substantively discuss any specific incidents of battery. The petitioner's mother-in-law referenced arguments between the petitioner and his wife, but did not attest to any instances of abuse in her affidavit. In his second affidavit, submitted in response to the RFE, the petitioner did not mention any physical abuse, but rather indicated that V-Z- yelled at him and his son. The petitioner did not provide further information regarding these incidents. In a later filing, the petitioner provided the letter from Mr. [REDACTED] which discussed difficulties in the petitioner's marriage, but did not detail any specific instances of battery or extreme cruelty. On appeal, the petitioner submits a third affidavit, dated November 25, 2013, in which he states that he was severely abused by his wife, but does not provide a description of the abuse. The petitioner must demonstrate that his spouse battered or threatened him or his child with violence, psychologically or sexually abused him or his child, or otherwise subjected him or his child to extreme cruelty as that term is defined in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). The relevant evidence submitted below and on appeal, reviewed above, does not so demonstrate.

Accordingly, the petitioner has not shown that his spouse subjected him or his child to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Joint Residence

A preponderance of the evidence submitted below and on appeal establishes that the petitioner resided with his spouse as required by section 204(a)(1)(A)(iii)(II) of the Act. On the Form I-360, the petitioner claimed to have resided with V-Z- between 2004 and 2007 and identified their last shared residence on as an apartment on [REDACTED]. In his initial affidavit, the petitioner

stated that he lived with his wife after they married in March 2004 and indicated that they resided together until sometime in 2007. The petitioner provided a birth certificate for his and V-Z-'s son, born on April 29, 2005. In her affidavit dated December 16, 2011, the petitioner's mother-in-law recounted that her daughter lived with the petitioner on and off during their marriage. The petitioner's brother, in an affidavit dated December 17, 2011, stated that although V-Z- left the petitioner while he was detained, the couple eventually reconciled and rented an apartment together. In addition to the affidavits, the petitioner provided a lease, dated May 15, 2009, signed by both V-Z- and the petitioner, for an apartment on [REDACTED]. The petitioner also submitted a utility bill, dated December 5, 2009, listing him and V-Z- at the [REDACTED] address.

In response to the RFE, the petitioner provided a second affidavit in which he stated that he was arrested and detained in April 2006, and when he was released in 2007, discovered that V-Z- had left him for another man. The petitioner asserted that in 2009, V-Z- left her boyfriend and moved into the [REDACTED] apartment with the petitioner. The petitioner stated that V-Z- lived with him for about three months. The relationship deteriorated when the petitioner learned that V-Z- was pregnant by her boyfriend, not the petitioner. V-Z- then moved in with her mother. The petitioner provided additional utility bills from the [REDACTED] apartment from 2009 in the names of both V-Z- and the petitioner, and a rent account statement indicating that the petitioner vacated the apartment in February 2010. In response to the RFE, the petitioner also provided affidavits from his mother-in-law, father-in-law, and brother-in-law all attesting that V-Z- and her two children resided briefly with the petitioner after their reconciliation. In addition, the petitioner submitted a second affidavit from his brother stating that the petitioner briefly resided with his wife before she left him.

In his decision, the director indicated that the evidence did not demonstrate that the petitioner resided with his wife at the [REDACTED] apartment, as he claimed on the Form I-360 self-petition, and also that the petitioner submitted evidence regarding a different address. The director found that the evidence did not establish a timeline of when the petitioner resided at the various addresses.

On appeal, counsel provides a timeline of the petitioner's various residences, and notes the evidence submitted in support of the petitioner's claim that he resided at the [REDACTED] apartment with his wife. The petitioner submits a third affidavit on appeal, dated November 25, 2013, in which he again attests to residing with his wife immediately after their March 2004 marriage. He states that he does not have documents from the [REDACTED] apartment because he was detained shortly after they moved there, and his wife moved out while he was in detention. The petitioner again asserts that he resided with his wife at the [REDACTED] apartment after he reconciled with his wife in 2009.

A preponderance of the relevant evidence submitted below and on appeal establishes that the petitioner resided with V-Z- during their marriage. The director did not err in finding that the petitioner submitted insufficient evidence to demonstrate that he resided with V-Z- at the [REDACTED] apartment; however, the statute does not require that the petitioner have resided with his wife at a particular residence or for a specified length of time. Section 204(a)(1)(A)(iii)(II)(dd) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(dd). The preponderance of the evidence shows that the

petitioner resided with his wife in 2009. The petitioner has consistently represented that he resided with his wife and their son at the [REDACTED] apartment for a brief period in 2009. The record supports his claim and includes a lease and utility bills for this residence in the names of the petitioner and V-Z-, as well as numerous affidavits from his and V-Z-'s family members attesting to the petitioner's brief reconciliation and residence with his wife.

Section 204(g) of the Act Applies to the Instant Self-Petition

Beyond the decision of the director, the record in this case indicates that the petitioner was in deportation proceedings at the time of his marriage. In such a situation, section 204(g) of the Act prescribes:

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 regarding the alien's right to remain in the United States], until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.

The record does not indicate that the petitioner resided outside of the United States for two years after his marriage. Accordingly, section 204(g) of the Act bars approval of this petition unless the petitioner can establish eligibility for the bona fide marriage exemption at section 245(e) of the Act, which states in pertinent part:

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.

8 U.S.C. § 1255(e) (emphasis added).

The corresponding regulation at 8 C.F.R. § 204.2(a)(1)(iii) states, in pertinent part:

Marriage during proceedings – general prohibition against approval of visa petition. A visa petition filed on behalf of an alien by a United States citizen . . . shall not be approved if the marriage creating the relationship occurred on or after November 10, 1986, and while the alien was in . . . deportation . . . proceedings, or judicial proceedings relating thereto. . . . [T]he burden in visa petition proceedings to establish eligibility for the exemption . . . shall rest with the petitioner.

(A) *Request for exemption.* . . . The request must be made in writing The request must state the reason for seeking the exemption and must be supported by documentary evidence establishing eligibility for the exemption.

(B) *Evidence to establish eligibility for the bona fide marriage exemption.* The petitioner should submit documents which establish that the marriage was entered into in good faith and not entered into for the purpose of procuring the alien's entry as an immigrant. The types of documents the petitioner may submit include, but are not limited to:

- (1) Documentation showing joint ownership of property;
- (2) Lease showing joint tenancy of a common residence;
- (3) Documentation showing commingling of financial resources;
- (4) Birth certificate(s) of child(ren) born to the petitioner and beneficiary;
- (5) Affidavits of third parties having knowledge of the bona fides of the marital relationship (Such persons may be required to testify before an immigration officer as to the information contained in the affidavit. Affidavits must be sworn to or affirmed by people who have personal knowledge of the marital relationship. Each affidavit must contain the full name and address, date and place of birth of the person making the affidavit and his or her relationship to the spouses, if any. The affidavit must contain complete information and details explaining how the person acquired his or her knowledge of the marriage. Affidavits should be supported, if possible, by one or more types of documentary evidence listed in this paragraph); or
- (6) Any other documentation which is relevant to establish that the marriage was not entered into in order to evade the immigration laws of the United States.

Because the petitioner married his wife while he was in deportation proceedings and did not remain outside of the United States for two years after their marriage, his self-petition cannot be approved pursuant to section 204(g) of the Act unless he establishes the bona fides of his marriage by clear and convincing evidence pursuant to section 245(e)(3) of the Act. While identical or similar evidence may be submitted to establish a good faith marriage pursuant to section 204(a)(1)(A)(iii)(I)(aa) of the Act and the bona fide marriage exception at section 245(e)(3) of the

Act, the latter provision imposes a heightened burden of proof. *Matter of Arthur*, 20 I&N Dec. 475, 478 (BIA 1992). See also *Pritchett v. I.N.S.*, 993 F.2d 80, 85 (5th Cir. 1993) (acknowledging “clear and convincing evidence” as an “exacting standard.”) To demonstrate eligibility under section 204(a)(1)(A)(iii)(I)(aa) of the Act, the petitioner must establish his or her good-faith entry into the qualifying relationship by a preponderance of the evidence and any credible evidence shall be considered. Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J); *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). However, to be eligible for the bona fide marriage exemption under section 245(e)(3) of the Act, the petitioner must establish his or her good-faith entry into the 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.

While the petitioner demonstrated his good-faith entry into the marriage by a preponderance of the evidence, he has not done so by clear and convincing evidence. In the RFE, the director noted that the petitioner's wife's Form I-130, Petition for Alien Relative, filed on behalf of the petitioner, was subject to section 204(g) of the Act, but did not discuss the requirements with respect to the instant self-petition. The record in these proceedings does not contain a written request for an exemption pursuant to section 245(e) of the Act, and the evidence is insufficient to establish the petitioner's eligibility for the exemption. The petitioner has provided a birth certificate for his and V-Z-'s son, born in April 2005, and evidence of their joint residence in 2009, but has provided inconsistent accounts of when he met his wife and began residing with her. In his December 22, 2011 affidavit, the petitioner stated that he met V-Z- in March 2003 and immediately began residing with her after they married in March 2004. The petitioner also provided no details regarding their courtship. In his September 11, 2013 affidavit, the petitioner claimed that he met V-Z- through his brother in 2002, and that they dated for a year before moving in together in 2003, prior to their marriage. The various affidavits submitted by the petitioner's brother and in-laws do not contain probative details regarding the petitioner's intent in marriage, nor do they conform to the requirements for third party affidavits specified in the regulation at 8 C.F.R. § 204.2(a)(1)(iii)(B)(5). The petitioner has provided no documentation of commingling of financial resources or joint ownership of property. Both of the tax returns provided by the petitioner show a filing status of "Married filing separately."

As the petitioner has not requested a bona fide marriage exemption, or established his eligibility for such an exemption by clear and convincing evidence, section 204(g) of the Act bars approval of his self-petition. The appeal will be dismissed for this additional reason.

Conclusion

The petitioner has not overcome all of the director's grounds for denial on appeal. While the petitioner has demonstrated that he resided with his wife, he has not established by a preponderance of the evidence that his spouse subjected him or his child to battery or extreme cruelty. He has also failed to establish by clear and convincing evidence his eligibility for the bona fide marriage exemption from section 204(g) of the Act at section 245(e) of the Act. The petitioner is therefore ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act on these two grounds.

The burden of proof in these proceedings rests solely with the petitioner. 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. The appeal will be dismissed and the petition will remain denied for the above-stated reasons.

ORDER: The appeal is dismissed.