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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



U.S. Citizenship
and Immigration
Services

Date: FEB 26 2015 Office: VERMONT SERVICE CENTER

File: [REDACTED]

IN RE: Self-Petitioner: [REDACTED]

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 Acting Director of the Vermont Service Center (the director) denied the immigrant visa petition (Form I-360) and the Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is presently before the AAO on a motion to reconsider. The motion is dismissed. The AAO decision, dated July 18, 2014, is affirmed. The underlying petition remains denied.

Pertinent Facts and Procedural History

The petitioner is a citizen of the Dominican Republic who entered the United States as a nonimmigrant on May 21, 2009. He 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 former spouse, a United States citizen.

The director denied the petition on July 10, 2013, for failure to establish that the petitioner entered into the marriage with his former spouse in good faith. The director also found that the petitioner failed to establish that his former spouse subjected him to battery or extreme cruelty during the marriage. On appeal, we determined that the petitioner established that he entered into the marriage with his former spouse in good faith. We dismissed the appeal, however, on the ground that the petitioner failed to establish, by a preponderance of the evidence, that his former spouse subjected him to battery or extreme cruelty during the marriage. On motion to reconsider, the petitioner submits a brief.

Applicable law

The regulation provides, in pertinent part, at 8 C.F.R. § 103.5(a):

(3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

(4) *Processing motions in proceedings before the Service.* A motion that does not meet applicable requirements shall be dismissed

Analysis

The petitioner's submission does not meet the requirements for a motion to reconsider. The petitioner indicates on motion that we erroneously failed to take into account that his former spouse committed a federal crime under 18 U.S.C. § 1702, when she allegedly opened the petitioner's mail and took his employment authorization card. The record, however, contains no evidence that the petitioner's former spouse was charged or convicted of a crime under 18 U.S.C. § 1702. Moreover, our decision reflects that we considered and discussed the petitioner's claim that his former spouse withheld his employment authorization card, and that she sent the card to him in January 2010. See page six of our decision, dated July 18, 2014.

The petitioner also asserts that we failed to assign proper weight to a psychological evaluation and affidavits submitted in his case; however, we clearly addressed and analyzed the evidentiary weight of the psychological evaluation submitted by [REDACTED], as well as the affidavits submitted by the petitioner. See page six of our decision, dated July 18, 2014. In making a decision on the self-petition, U.S. Citizenship and Immigration Services (USCIS) has sole discretion to determine what evidence is relevant and credible and the weight to be given that evidence. See 8 C.F.R. § 204.2(c)(2)(i). Upon thorough review, we determined that the evidence submitted was insufficient to meet the petitioner's burden of proof.

The petitioner also cites to U.S. Ninth Circuit Court of Appeals cases, *Hernandez v. Ashcroft*, 345 F.3d 824, 840 (9th Cir. 2003) and *Lopez-Birrueta v. Holder*, 633 F.3d 1211, 1216 (9th Cir. 2011) for the proposition that Violence Against Women Act 2004 (VAWA) legislation encourages adjudicators to view evidence in the most favorable light to the petitioner. The petitioner indicates that we failed to evaluate his evidence in the manner most favorable to his case by according insufficient evidentiary weight to his evidence. The petitioner has failed to establish that we incorrectly applied pertinent law or Service policy to his case.

The U.S. Ninth Circuit Court of Appeals states generally in *Lopez-Birrueta v. Holder*, 633 F. 3d 1215-16, that:

Congress's goal in enacting VAWA was to eliminate barriers to women leaving abusive relationships. The statute was a generous enactment, intended to ameliorate the impact of harsh provisions of immigration law on abused women. Accordingly, when interpreting this statute, we have adhere[d] to the general rule of construction that when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion.

(Citing to *Hernandez v. Ashcroft*, 345 F. 3d 841. Citations and internal quotation marks omitted).

In *Hernandez v. Ashcroft*, 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 F. 3d at 833-35. As this case arose outside of the Ninth Circuit, neither *Hernandez* nor *Lopez-Birrueta* are 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 673 (7th Cir. 2009); *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).

Even if we were to defer to *Hernandez* as persuasive authority in this case, the facts constituting extreme cruelty in *Hernandez* are not analogous to the actions of the petitioner's wife as described in the record. The plaintiff in *Hernandez* was subjected 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, and periods of contrition and emotional manipulation to convince the plaintiff 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 former spouse's behavior was similarly part of an overall pattern of violence or otherwise constituted extreme cruelty under the regulation.

Furthermore, the U.S. Second Circuit Court of Appeals clarifies in *Rosario v. Holder*, 627 F.3d 58, 63 (2d Cir. 2010) that, "whether an alien has been 'battered or subjected to extreme cruelty' under the statute generally entails a factual judgment, not a legal prescription."¹ The Act and the regulation also clearly reflect that "[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). Although USCIS must consider all credible evidence relevant to a petitioner's claim of abuse, the agency is not obligated to determine that all such evidence is sufficient to meet the petitioner's burden. Section 204(a)(1)(J) of the Act; 8 C.F.R. § 204.2(c)(2)(i).

Our decision, dated July 18, 2014, discussed and analyzed the content and evidentiary value of all relevant evidence contained in the record, including affidavits from the petitioner and his cousins, divorce related information, and psychological evaluation evidence. Upon review, we determined that the record, viewed in its totality, failed to establish by a preponderance of the evidence that the petitioner's former spouse subjected him to battery or extreme cruelty, as defined in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). On motion, the petitioner has failed to establish that our prior decision incorrectly applied pertinent law or agency policy, or that we failed to consider credible relevant evidence in violation of the statute or regulations.

Conclusion

The instant motion does not meet the applicable filing requirements for a motion to reconsider and shall therefore be dismissed.

ORDER: The motion is dismissed. The AAO decision, dated July 18, 2014, is affirmed. The underlying petition remains denied.

¹ The petitioner's case arises within the jurisdiction of the U.S. Second Circuit Court of Appeals.