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U.S. Department of Justice  
Immigration and Naturalization Service

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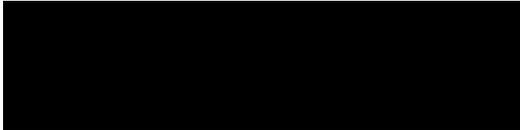
OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536

FILE: [Redacted]  
EAC 99 148 52586

Office: Vermont Service Center

Date: AUG 12 2002

IN RE: Petitioner:  
Beneficiary:



APPLICATION: Petition for Special Immigrant Battered Spouse Pursuant to Section 204(a)(1)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1154(a)(1)(A)(iii)

IN BEHALF OF PETITIONER:



Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be dismissed.

The petitioner is a native and citizen of the Dominican Republic who is seeking classification as a special immigrant 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 the battered spouse of a United States citizen.

The director denied the petition after determining that the petitioner failed to establish that she: (1) has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage; or is the parent of a child who has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage pursuant to 8 C.F.R. 204.2(c)(1)(i)(E); and (2) is a person whose deportation (removal) would result in extreme hardship to herself, or to her child pursuant to 8 C.F.R. 204.2(c)(1)(i)(G).

Upon review of the record of proceeding, the Associate Commissioner concurred with the director's conclusions and dismissed the appeal on March 22, 2000.

On August 13, 2001, counsel submits a motion to reopen the Associate Commissioner's decision. He asserts that the petitioner requests that the motion to reopen proceedings out-of-time be granted as the petitioner asserts she received false and misleading advice from the person who helped prepare her I-360 petition. He further asserts that the petitioner has no command of the English language and she could not understand the written decision of the Vermont Service Center. Counsel submits additional evidence.

Pursuant to 8 C.F.R. 103.5(a)(2), a motion to reopen must state the new facts to be proved at the reopened proceedings and be supported by affidavits or other documentary evidence. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. 103.5(a)(4).

Based on the plain meaning of "new," a new fact is held to be evidence that was not available and could not have been discovered or presented in the previous proceeding.<sup>1</sup>

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<sup>1</sup> The word "new" is defined as "1. having existed or been made for only a short time.... 3. Just discovered, found, or learned <new evidence> ...." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984) (emphasis in original).

When used in the context of a motion to reopen in analogous legal disciplines, the terminology "new facts" or "new evidence" has been determined to be evidence that was previously unavailable during the prior proceedings. In removal hearings and other proceedings before the Board of Immigration Appeals, "[a] motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing...." 8 C.F.R. 3.2 (1999). In examining the authority of the Attorney General to deny a motion to reopen in deportation proceedings, the Supreme Court has found that the appropriate analogy in criminal procedure would be a motion for a new trial on the basis of newly discovered evidence. INS v. Doherty, 502 U.S. 314, 323 (1992); INS v. Abudu, 485 U.S. 94, 100 (1988). In federal criminal proceedings, a motion for a new trial based on newly discovered evidence "may not be granted unless...the facts discovered are of such nature that they will probably change the result if a new trial is granted,...they have been discovered since the trial and could not by the exercise of due diligence have been discovered earlier, and...they are not merely cumulative or impeaching." Matter of Coelho, 20 I&N Dec. 464, 472 n.4 (BIA 1992) (quoting Taylor v. Illinois, 484 U.S. 400, 414 n.18 (1988)).

On motion, counsel submits an affidavit from the petitioner and from two friends of the petitioner stating that the petitioner has encountered a lot of problems with her spouse, she was abused by her spouse, and that she used to have bruises all over her body. A review of this evidence submitted on motion reveals no fact that could be considered "new" under 8 C.F.R. 103.5(a)(2). The evidence submitted was previously available and could have been discovered or presented in the previous proceeding. Also, this evidence, without supporting documentary evidence, is insufficient to establish that the petitioner has been battered by or was the subject of "extreme cruelty" as contemplated by Congress. For these reasons, the motion may not be granted.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. INS v. Doherty, supra, at 323 (citing INS v. Abudu, 485 U.S. at 107-108). A party seeking to reopen a proceeding bears a "heavy burden." INS v. Abudu, supra, at 110.

Furthermore, the record reflects that on March 22, 2000, the Administrative Appeals Office's decision was mailed to the petitioner at her last known address. The decision instructed the petitioner that any motion to reopen or reconsider must be filed within 30 days of the decision that the motion seeks to reconsider. See 8 C.F.R. 103.5(a)(1)(i). This motion was received by the Service on August 13, 2001. The petitioner, on motion, has not



demonstrated that the delay, approximately 17 months later, was reasonable and was beyond her control. Pursuant to 8 C.F.R. 103.5(a)(4), a motion that does not meet applicable requirements shall be dismissed.

Accordingly, the motion will be dismissed.

**ORDER:** The motion is dismissed.