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U.S. Department of Justice
Immigration and Naturalization Service

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invasion of personal privacy**

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

[Redacted]

FILE: [Redacted]
EAC 00 108 54005

Office: Vermont Service Center

Date: OCT 30 2002

IN RE: Petitioner:
Beneficiary:

[Redacted]

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:

[Redacted]

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 Russia 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 application 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); (2) is a person of good moral character pursuant to 8 C.F.R. 204.2(c)(1)(i)(F); and (3) 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). The director further determined that the petitioner had not established that her spouse is a U.S. citizen, pursuant to 8 C.F.R. 204.2(c)(1)(i)(A). He reserved the right to dismiss this conclusion if at any time additional evidence disproves the assumption that her spouse is a U.S. citizen. Additionally, the director determined that although documentation reflects that there may be a bona fide marriage, the record shows that the petitioner placed personal ads in a Russian newspaper seeking male companionship, only four months after her marriage, and may not meet the qualification pursuant to 8 C.F.R. 204.2(c)(1)(i)(H).

Upon review of the record of proceeding, the Associate Commissioner determined that the petitioner had overcome the director's findings that she had not established that her spouse is a U.S. citizen pursuant to 8 C.F.R. 204.2(c)(1)(i)(A), and that her removal from the United States would result in extreme hardship pursuant to 8 C.F.R. 204.2(c)(1)(i)(G). The Associate Commissioner, however, determined that based on the conflicting information furnished by the petitioner regarding her claimed abuse, and the fact that the petitioner did not address the director's concerns regarding the contradictory evidence furnished, the Service cannot accept the petitioner's claims that she was the subject of extreme cruelty pursuant to 8 C.F.R. 204.2(c)(1)(i)(E). The Associate Commissioner also noted that imaging services were accorded the petitioner as a result of a motor vehicle accident and not as a result of abuse, as claimed by the petitioner. Further, based on the applicant's convictions for aggravated harassment and harassment with physical contact, and the petitioner's violation of a protection order

granted to her former mother-in-law, the petitioner had failed to establish that she is a person of good moral character pursuant to 8 C.F.R. 204.2(c)(1)(i)(F). The petitioner neither addressed nor rebutted the finding of the director regarding the personal ads placed by the petitioner in a Russian newspaper seeking male companionship only four months after her marriage. The Associate Commissioner, therefore, dismissed the appeal on May 30, 2002.

On motion, the petitioner asserts that she has been a victim most of her life and would prefer not to be made a victim again by the Immigration Service. She states that she is annexing and making a part of this motion the affidavits from [REDACTED] and [REDACTED] to further document the fact that she was victimized by her former husband, and to support the fact that she is a person of good moral character.

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.¹

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

¹ 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).

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, the petitioner submits an affidavit from [REDACTED] claiming to be a friend of the applicant, stating that he "witnessed the severe beating inflicted upon the petitioner in the hallway of the apartment building as she was caught while trying to escape when she thought he [sic] husband was trying to kill her." 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). In fact, this affidavit is inconsistent with [REDACTED] previous affidavit, dated June 4, 2001, in which he stated that when the petitioner came down to the lobby to get the mail, he saw the petitioner's badly swollen and discolored face. Furthermore, the affidavits from [REDACTED] and [REDACTED] attesting to the petitioner's good moral character, do not overcome the fact that the petitioner had been convicted of two or more criminal offenses.

Additionally, the petitioner, on motion, neither addressed nor submitted new evidence to overcome the concerns of the director regarding the contradictory evidence furnished by the petitioner. The petitioner has not shown that she was the subject of extreme cruelty pursuant to 8 C.F.R. 204.2(c)(1)(i)(E). In view of the personal ads placed by the petitioner in a Russian newspaper seeking male companionship only four months after her marriage, the petitioner has not shown that she entered into her marriage in good faith as required by 8 C.F.R. 204.2(c)(1)(i)(H). 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.

Accordingly, the motion will be dismissed.

ORDER: The motion is dismissed.