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FILE:



Office: VERMONT SERVICE CENTER

Date:

JUL 15 2008

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IN RE:

Petitioner:



PETITION: Petition for 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)

ON BEHALF OF PETITIONER:



DESENER, AD 55020

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

2 Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, 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 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 because the petitioner did not establish that she had a qualifying relationship as the spouse of a United States citizen, that she was eligible for immigrant classification based upon that relationship, and that she was battered or subjected to extreme cruelty by her United States citizen spouse.

The petitioner, through counsel, submits a timely appeal.

Section 204(a)(1)(A)(iii) 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, 8 C.F.R. § 1154(a)(1)(J) 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 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

. . . 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) of the Act are further explicated in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

Evidence for a spousal self-petition –

(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.

(ii) *Relationship.* A self-petition file by a spouse must be accompanied by evidence of . . . the relationship. Primary evidence of a marital relationship is a marriage certificate issued by civil authorities, and proof of the termination of all prior marriages, if any, of . . . the self-petitioner

* * *

(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.

The record in this case provides the following pertinent facts and procedural history. The petitioner is a native and citizen of Colombia who entered the United States on February 7, 2002 as the fiancée of M-A,¹ a United States citizen. The petitioner and M-A- resided together in Alabama for four months, from February 2002 until their separation in June 2002. The petitioner filed this Form I-360 on February 1, 2005. The petitioner married R-G-² on July 14, 2006. On November 6, 2006, the director issued a Request for Evidence (RFE) of, *inter alia*, the requisite qualifying relationship and battery or extreme cruelty. The petitioner responded to the RFE on December 20, 2006. On February 16, 2007, the director issued a Notice of Intent to Deny (NOID) the petition for lack of evidence of, *inter alia*, the requisite qualifying relationship, eligibility for immigrant classification based on the qualifying relationship, and battery or extreme cruelty. The petitioner responded to the NOID on April 12, 2007.

¹ Name withheld to protect individual's identity.

² Name withheld to protect individual's identity.

The director denied the petition on June 4, 2007, finding that the petitioner failed to establish that she had a qualifying relationship as the spouse of a United States citizen, her eligibility for immigrant classification based upon that relationship, and that she was battered or subjected to extreme cruelty by her citizen spouse.

On appeal, counsel for the petitioner argues that the petitioner is eligible for approval and resubmits copies of documents already contained in the record. As will be discussed below, we concur with the ultimate determination of the determination of the director that the petitioner has failed to establish her eligibility for immigrant classification.

Qualifying Relationship and Eligibility for Immediate Relative Classification

The record contains no marriage certificate indicating that a legal marriage ceremony was performed between the petitioner and M-A- and subsequently registered with the proper state authority. Instead, the director accepted the petitioner's contention that she and M-A- had a common law marriage but found that their marriage was terminated more than two years prior to the filing of the petition.³ In addition, the director found that the petitioner's subsequent marriage to R-G- precluded approval of the instant petition as there is no statutory provision which allows the qualifying relationship "to continue after the self-petitioner remarries." As will be discussed, we find the director's factual determinations and reasoning to be flawed. However, while we do not agree with the director's rationale, we concur with his ultimate determination that the petitioner failed to establish that she had a qualifying relationship as the spouse of a United States citizen and that she was eligible for classification based upon that relationship.

We note at that outset that our disagreement with the director's decision does not hinge on the recognition of common law marriages in Alabama; it is clear that Alabama recognizes marriages contracted without a ceremony or solemnization of the marriage. *Wall v. Williams*, 11 Ala. 826 (1847); *Beggs v. State*, 55 Ala. 108 (1876); *Ashley v. State*, 109 Ala. 48 (1895); *Moore v. Heineke*, 119 Ala. 627 (1898); *Tartt v. Negus*, 127 Ala. 301 (1900); *Hawkins v. Hawkins*, 142 Ala. 571 (1905); *White v. Hill*, 176 Ala. 480 (1912); *Herd v. Herd*, 194 Ala. 613 (1915); *Woodward Iron Co. v. Dean*, 217 Ala. 530 (1928); *Walker v. Walker*, 218 Ala. 16 (1928); *Rogers v. McLeskey*, 225 Ala. 148 (1932); *Cavin v. Cavin*, 237 Ala. 185 (1939). Rather, we are not persuaded that the petitioner established the elements necessary to demonstrate that she had a valid, common law marriage with M-A- under the laws of Alabama. The necessary elements are: capacity to enter into a marriage, present agreement or consent to be husband and wife (rather than an intent to marry in the future), public recognition of the existence of the marriage and consummation. *Waller v. Waller*, 567 So.2d 869 (Ala. Civ. App. 1990).

³ In instances where an alien is no longer in a marital relationship at the time of filing, to remain eligible for immigrant classification, the petitioner must have been "a bona fide spouse of a United States citizen within the past two years" Section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act; 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC).

In this instance, the facts do not demonstrate that the petitioner and M-A- had a present agreement to be husband and wife and that there was public recognition of the existence of their marriage. Although the petitioner claims that she engaged in certain domestic chores, including cooking and cleaning, slept in the same bed as M-A-, and had sexual relations with him, there is no other demonstrable showing of their present intent to be husband and wife, such as the petitioner's use of M-A-'s name, the sharing of accounts, or the purchase of assets together. The petitioner herself indicated in her statement to the Pell City police department that she and M-A- had been living together and "were planning to be married...." Regardless, even if we were persuaded that the petitioner's actions were sufficient to show that *she* intended to enter into a common law marriage, such a fact is not sufficient to demonstrate a common law marriage in Alabama. Instead, there must be a mutual understanding and agreement between the two parties to enter into such a relationship. *Id.* The record does not show that M-A- assented to such an arrangement. Although M-A- may have intended to marry the petitioner at some point after her entry into the United States, as required by the terms of her admission as a K-1 nonimmigrant,⁴ the intent to marry in the future is not sufficient to establish a present intent to be man and wife. *Piel v. Brown* at 94; *Turner v. Turner*, 251 Ala. 295, 297 (1948)(an expression of an intention to marry in the future, followed by cohabitation, does not create the common law marital status). In her April 6, 2005 statement, the petitioner acknowledges M-A-'s statement that they "would eventually marry." Moreover, in her April 10, 2007 statement, the petitioner refers to the uncertainty M-A- felt about getting married. Specifically, the petitioner states that as late as June 18, 2002, M-A- indicated that "he was not sure about getting married" Finally, although the petitioner claims that she and M-A- "held [themselves] out to the local community as husband and wife" by going to grocery stores, restaurants, theaters, and "other public venues," and on one occasion attending church together, the record does not support a finding that there was a public recognition of their relationship as husband and wife. The affidavits submitted on the petitioner's behalf, while acknowledging the petitioner's engagement to M-A- and the fact that they resided together, do not discuss their knowledge of the petitioner's purported marital status. Neither the petitioner's statements nor any of the statements submitted on her behalf by family and friends provide any probative details which demonstrate that the petitioner and M-A- held themselves out as a married couple, such as introducing each other as husband or wife. As presented above, the facts do not establish the petitioner's and M-A-'s present agreement to be husband and wife and the public recognition of the existence of their marriage, and therefore, that their relationship is considered a common law marriage in accordance with the laws of Alabama.

Even if the record of proceeding supported the director's finding that the petitioner and M-A- had a common law marriage, which it does not, the director's conclusion that the common law marriage was terminated in June 2002, when the petitioner and M-A- ceased residing together, is erroneous. A common law marriage is not considered to be terminated simply by the mutual agreement of the parties

⁴ Section 101(a)(15)(K) of the Act defines a K-1 nonimmigrant, in pertinent part, as an alien who "is the fiancée . . . of a citizen of the United States . . . and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission."

or because the parties choose to separate and no longer reside together. Rather, if recognized as a common law marriage, the marriage can only be terminated through a court action for divorce. *See Piel v. Brown* at 94 (once intent to create common law marriage is demonstrated, a marriage can only be ended by death or divorce). Therefore, if the petitioner had established that she shared a common law marriage with M-A-, then contrary to the director's finding, the petitioner would still have been married to M-A- at the time the petition was filed, despite the fact that they were separated. Following this analysis, the director's subsequent conclusion that the petitioner's marriage to R-G- precluded approval of the petition would also have been erroneous because the marriage to R-G- would not be considered a viable marriage.⁵

As discussed above, although we disagree with the director's factual determinations and analysis, we concur with his ultimate determination that the petitioner failed to establish that she had a qualifying relationship as the spouse of a United States citizen and that she is eligible for classification based upon that relationship, as required by sections 204(a)(1)(A)(iii)(II)(aa) and (cc) of the Act; 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa),(cc).

Battery or Extreme Cruelty

With her initial submission, the petitioner submitted a police report, dated June 19, 2002, from the Pell City police department which documents an incident described as "harassment." The report indicates that M-A- threatened to send the petitioner and her daughter back to Colombia because the petitioner wrote him a letter telling him she was "unsure" about their marriage. The report further indicated that M-A- has shown "violant [sic] actions towards [the petitioner] and her daughter" on three specific dates, March 16, 2002, May 18, 2002, and May 26, 2002. Although the report documents one occasion in which M-A- rubbed the petitioner's and her daughter's faces with a washcloth that had soap on it, the petitioner does not provide the date in which the washcloth incident occurred and does not describe the other three alleged incidents.

In her affidavit, dated April 6, 2005, the petitioner claimed that she left her marital home because M-A- "hit her and [her] minor . . . daughter." The petitioner does not provide any details regarding this alleged incident of physical abuse and does not indicate the date in which the incident occurred.

In her undated statement submitted in response to the director's RFE, the petitioner stated that M-A- hit her daughter on two unspecified occasions so that her daughter "would go back to bed." The petitioner does not refer to being "hit" by M-A- as indicated in her April 6, 2005 statement. However, the petitioner does reaffirm her previous claim regarding the incident with the washcloth, stating that M-A-

⁵ While the petitioner's marriage to R-G- may have no effect on this petition, if we were to accept the petitioner's claim that she had a valid common law marriage to M-A-, the marriage to R-G- might be considered a bigamous marriage unless the petitioner could also establish that she obtained divorced M-A-. *See* section 13A-13-1(a) of the Code of Alabama 1975, which indicates that the criminal offense of bigamy applies to common law marriages.

became angry and began “scrubbing on [her] daughter’s body” and then threw the towel in the petitioner’s face. The petitioner asserts that this incident, which she “will never forget,” occurred on June 18, 2002, the day before she filed the police report. In addition, the petitioner claims that M-A- humiliated her and her daughter because they could not speak English, would leave them books to learn English, and questioned them at night to see what they had learned. The petitioner claims that M-A- got angry as “his expenses were more” because he had to take care of the petitioner and her daughter and described one occasion where she petitioner asked M-A- to buy a broom and M-A- responded by telling her to buy a broom “if you have money.”

In his RFE and NOID, the director questioned the authenticity of the police report submitted by the petitioner and noted discrepancies between the petitioner’s individual statements and the police report. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In response to the NOID, the petitioner submitted an explanation for the inconsistencies noted in the police report as well as an amended police report. We find the evidence submitted by the petitioner in response to the NOID overcomes the director’s valid concerns regarding the legitimacy of the police report. The petitioner, however, failed to provide an explanation regarding the discrepancies noted in her statements and between her statements and the police report. Rather, she submitted a new affidavit with no discussion or attempt to reconcile the inconsistencies noted by the director. In the affidavit, dated April 10, 2007, the petitioner states that on March 16, 2002 and May 18, 2002, M-A- hit her daughter with a shoe, two of the three dates listed in the police report. However, in this affidavit, the petitioner now alleges that the incident with the washcloth occurred on May 26, 2002, not June 18, 2002, as previously stated. Instead, although the petitioner describes June 18, 2002 as their last day together, she now claims that upon “seeing that [she] could not make him change,” she asked M-A- for money to return to Colombia, and he refused. The petitioner claims that M-A- threatened to call the police and left the apartment and that she went to the police department the next day. This version of events contradicts the claims contained in her April 6, 2005 affidavit.

As it relates to the alleged extreme cruelty, the petitioner states:

I felt humiliated every day. [M-A-] was not the same person as the one I fell in love with. He began to have sharp changes in personality. Everything bothered him. He controlled us all the time. He shouted at me when pointing out things in the apartment. He did not speak to me with affection. He began to behave with bad humor. I did not understand what he wanted. He constantly criticized me. He was disgusted when I prepared Colombian food. When we went to the supermarket, he did not let me pick out the food. He always bought what he wanted and I felt more pain when the girl wanted something at the supermarket and he told her no in a nasty way.

In addition to her own testimony regarding the alleged abuse, the petitioner submitted affidavits from family and friends. However, although many of the affidavits submitted on the petitioner's behalf attest to the petitioner's good moral character, her behavior as a tenant and her attendance at church in Colombia, the statements provide no information relevant to the petitioner's claim of abuse. The remaining affidavits, while generally discussing the alleged abuse, do not provide sufficient probative details to establish that the petitioner was battered or subjected to extreme cruelty by M-A-. For instance, the petitioner's sister, [REDACTED] generally states that M-A-'s behavior changed, that he did not show the petitioner and her daughter respect, did not tolerate or appreciate them, "created traumas," and made them live "with a permanent tension" that affected them emotionally. The affidavit from [REDACTED] vaguely refers to "problems" in the petitioner's relationship with M-A- which stemmed from M-A-'s "mandate" that the petitioner speak English. The petitioner's pastor, [REDACTED] states that the petitioner feared for her welfare and that of her daughter but does not indicate that he knew M-A- or ever witnessed interactions between the petitioner and M-A-. Instead, [REDACTED] indicates that sometime after December 2003, more than a year and a half after the petitioner and M-A- separated, he interviewed the petitioner "to know her better" and explains that the petitioner shared her experience of M-A-'s "physical and emotional abuse," and the allegation that she was "humiliated and physically aggravated" by him. [REDACTED] does not provide specific examples of the alleged physical or emotional abuse or humiliation but states that "many of the problems were due to the differences in culture, the language barrier, and the fact that M-A- was older than the petitioner. Finally, we acknowledge the statement from [REDACTED] which affirms the petitioner's claims, including the incident with the washcloth. However, given the discrepancies noted in the record, the fact that [REDACTED] resides in Colombia and bases his knowledge, not as a first-hand witness, but on the petitioner's own rendition of events, lessens the evidentiary value assigned to [REDACTED] s statement.

In addition to the evidence discussed above, the petitioner submitted a letter from [REDACTED] dated March 17, 2007, nearly five years after the petitioner's separation from M-A-. [REDACTED] states that the petitioner and her daughter were continually intimidated by M-A-, that he threatened to call the police on unspecified occasions, pushed, shoved and threw items at the petitioner, and hit the petitioner's daughter with a shoe. [REDACTED] does not further describe any incident of physical abuse or elaborate on the claim of emotional abuse. [REDACTED] also fails to indicate the date that she evaluated the petitioner and to discuss whether the evaluation is part of the petitioner's ongoing treatment.

The petitioner also submitted her medical records from Decatur General Hospital. The records indicate treatment for neck pain which began in March 2006, and for a headache and surgery in 2007 but do not establish a correlation between the petitioner's medical condition and her claim of abuse against M-A-. Although one report generally refers to "domestic violence in the past," this vague statement is not sufficient to establish the petitioner's claims. Similarly, the petitioner's submission of her daughter's discharge instructions from St. Clair Regional Hospital does not provide any probative information regarding the alleged abuse. Although the petitioner's April 10, 2007 affidavit describes an incident where her daughter got a fishhook embedded in her arm which resulted in a trip to the hospital, the

petitioner does not allege that her daughter's injuries were caused by M-A- as part of the alleged abuse. Rather, the petitioner claims that M-A- made her "feel bad in front of [her] daughter" because he shouted that the hospital was very expensive.

As discussed above, we find the record insufficient to establish the petitioner's claim of abuse. The petitioner's allegation of extreme cruelty is based upon claims such as being criticized and humiliated because of her inability to speak English, spoken to without affection, and descriptions of instances when M-A- told her to buy a broom with her own money and spoke harshly to her daughter at the grocery store. These claims regarding M-A-'s non-physical actions, as described by the petitioner, do not rise to the level of the acts described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi), which include forceful detention, psychological or sexual abuse or exploitation, rape, molestation, incest, or forced prostitution and do not demonstrate that his behavior was accompanied by any coercive actions or threats of harm that were aimed at ensuring dominance or control over the petitioner. Further, the record contains significant, unresolved discrepancies regarding the alleged physical abuse. Accordingly, the weight of the relevant evidence does not satisfy the petitioner's standard of proof. We, therefore, concur with the finding of the director that the petitioner failed to establish that she was battered or subjected to extreme cruelty by her spouse during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.