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U.S. Citizenship
and Immigration
Services

39

[REDACTED]

FILE: [REDACTED]
EAC 07 051 50527

Office: VERMONT SERVICE CENTER

Date: JUL 18 2008

IN RE: 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:

[REDACTED]

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.


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 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 lawful permanent resident of the United States.

The director denied the petition finding that the petitioner failed to establish that she was battered or subjected to extreme cruelty by her spouse during her marriage.

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 U.S.C. § 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:

(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.

(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.

* * *

(ix) *Good faith marriage.* A spousal self-petition cannot be approved if the self-petitioner entered into the marriage to the abuser for the primary purpose of circumventing the immigration laws. A self-petition will not be denied, however, solely because the spouses are not living together and the marriage is no longer viable.

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.

* * *

(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.

* * *

(vii) *Good faith marriage.* Evidence of good faith at the time of marriage may include, but is not limited to, proof that one spouse has been listed as the other's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. Other types of readily available evidence might include the birth certificates of children born to the abuser and the spouse; police, medical, or court documents providing information about the relationship; and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered.

The record in this case provides the following pertinent facts and procedural history. The petitioner is a native and citizen of Kenya. The petitioner initially entered the United States on March 3, 1994.¹ On December 22, 1995, the petitioner married B-H-² a United States citizen, in Minnesota. On August 29, 1996, B-H- filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf. The petitioner concurrently filed a Form I-485, Application to Adjust Status, on that same date. The Form I-130 petition was denied on December 31, 1997 based upon the determination that the petitioner's marriage to B-H- was fraudulent and had been entered into for the purpose of evading the immigration laws of the United States. The petitioner's Form I-485 application was denied on February 25, 1998.

On February 4, 1999, B-H- filed a second Form I-130 on the petitioner's behalf. The petitioner concurrently filed a second Form I-485. In a decision dated April 18, 2001, the Form I-130 was denied for abandonment and the Form I-485 was denied accordingly. On July 14, 2006, Citizenship and Immigration Services (CIS) issued a Notice to Appear (NTA) to the petitioner charging her as removable under section 212(a)(7)(A)(i)(I) of the Act as an immigrant who, at the time of admission, was not in possession of valid entry documents. The petitioner remains in proceedings and her next hearing is set for August 5, 2008.

The petitioner filed the instant Form I-360 on December 11, 2006, claiming eligibility as an abused spouse of a United States citizen. With the initial filing, the petitioner submitted copies of her and B-H-'s birth certificates, marriage certificate, and judgment for divorce, her employment authorization cards, passport, and portions of her 1995 and 1996 federal income tax returns. In addition, the petitioner submitted copies of statements regarding a joint money market and a savings account with B-H- and an electric bill, but no testimonial or documentary evidence to demonstrate that she was battered or subjected to extreme cruelty by her spouse during their marriage.

On July 9, 2007, the director issued a request for, *inter alia*, further evidence to establish that the petitioner was battered or subjected to extreme cruelty by her spouse during their marriage. The petitioner responded to the director's request on October 2, 2007. As it relates to the claimed abuse, the petitioner submitted a personal statement and letters from friends and family.

In her personal statement, the petitioner claims that although she and B-H- were happy "in the early stages of [their] marriage . . . [B-H-] turned out to be an alcoholic [who] when he got drunk he would be loud, and bossy. . . ." The petitioner further claims that B-H- belittled her, directed profane language at her, and would lose his temper "over small things." Additionally, the petitioner states that B-H- spent time with his friends and did not include her, that he did not pay attention to her and provide her with moral or emotional support, and did not take responsibility for their financial matters. Finally, the petitioner claims that one morning after an argument, B-H- "decided not to appear [for the petitioner's] adjustment of status interview" The petitioner's general claims such as that her spouse used inappropriate language, did not pay attention to her and shirked financial responsibilities is not sufficient to establish a claim of battery or extreme cruelty.

Although the petitioner also submitted several letters from friends and family, the letters do not provide any information regarding the claimed abuse. While we acknowledge that the letter from the petitioner's friend, Cliff [REDACTED] mentions "unpleasant times" that he witnessed "as a result of [B-H-'s] alcohol and

¹ The petitioner subsequently departed the United States on an unknown date and was paroled back into the United States on January 25, 1998.

² Name withheld to protect individual's identity.

neglect,” [REDACTED] does not provide any probative information which demonstrates that the petitioner was battered or subjected to extreme cruelty by B-H-

On appeal, counsel states that CIS should give a “more expansive definition of a battered spouse as a matter of public policy.” Counsel then cites to a 1997 Florida State University Law Review article and argues that adjudicators should consider whether a petitioner was neglected or deprived of economic resources or medical care in the determination of whether a petitioner has been abused. Even if we accepted counsel’s argument, he does not provide examples of how the petitioner in this case was neglected or deprived of economic resources or medical care. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). In fact, the evidence in the record demonstrates that the petitioner was employed, had access to and use of her own finances, and was covered by her own medical insurance. We note specifically that the petitioner’s divorce decree indicates that the petitioner’s automobile was held in her own name, that she had a 401-K account in her own name, and that she had medical and dental insurance coverage for herself through her employment. Such facts are not indicative of the neglect or deprivation of the petitioner.

Counsel’s submission of the *amici curiae* brief from the Ninth Circuit is equally unpersuasive. Although counsel only submits the *amici curiae* brief, it should be noted that this case was decided on October 7, 2003 and is cited as *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003). It is further noted that as the instant case arose outside the jurisdiction of the Ninth Circuit, the *Hernandez* decision is not a binding precedent. Moreover, *Hernandez* addressed an alien’s eligibility for suspension of deportation under former section 244(a)(3) of the Act, 8 U.S.C § 1245(a)(3) (1996), a different statutory provision than that involved in this case, namely section 204(a)(1)(A)(iii) of the Act. While we acknowledge that the *Hernandez* court gave deference to the regulation at 8 C.F.R. § 204.2(c)(1)(vi) in its interpretation of the term “extreme cruelty” as used in former section 244(a)(3) of the Act, the court applied the term to facts that are clearly distinguishable from those in this case. *Id.* at 839.

In *Hernandez*, the alien's husband severely beat her repeatedly in Mexico and once attacked her with a knife, cutting the alien's hand to the bone. *Hernandez*, 345 F.3d at 829-30. Her husband's battery resulted in extensive physical injuries that left visible scars on the alien's head and hand that were observed by the Immigration Judge. *Id.* at 830-31. After one severe beating, the alien fled to her sister's home in the United States. *Id.* at 830. Her husband called her repeatedly and then came to the United States to see her, apologized and promised to see a marriage counselor if the alien returned to Mexico with him. *Id.* Yet when the alien returned to Mexico, her husband became violent again and eventually attacked the petitioner with a knife. *Id.*

The pertinent issue in *Hernandez* was whether the alien was "subjected to extreme cruelty in the United States [emphasis added]" by her husband, as required by the former section 244(a)(3) of the Act, although her husband never physically assaulted her in this country. The *Hernandez* court held that the alien's husband subjected her to extreme cruelty in the United States because although not overtly violent, his actions were part of a contrite phase in his cycle of domestic violence and hence fit the regulatory description of extreme cruelty as acts that, in and of themselves, “may not initially appear violent but that are part of an overall pattern of violence.” *Id.* at 840-41 (quoting 8 C.F.R. § 204.2(c)(1)(vi)).

In this case, B-H-'s behavior, as described by the petitioner, does not rise to the level of domestic harm described in *Hernandez*. Further, B-H-'s non-physical actions do not demonstrate that his behavior was accompanied by any coercive actions or threats of harm or that his actions were aimed at insuring dominance or control over the petitioner. As noted by *Hernandez* the court, because Congress "required a showing of extreme cruelty in order to ensure that [a petitioner is] protected against the extreme concept of domestic violence, rather than mere unkindness," not "every insult or unhealthy interaction in a relationship [rises] to the level of domestic violence" Although the petitioner refers to a single incident when, after an argument, B-H- failed to attend her adjustment of status interview, the petitioner does not indicate that B-H-'s failure to attend the interview was part of pattern of abuse against the petitioner rather than merely being indicative of the deterioration of their marriage. We also note that contrary to the petitioner's claim that B-H- determined on the morning of the interview that he was not going to attend the interview because of an argument the night before, the letter from the petitioner's attorney of record at the time of the interview, dated May 17, 1999, two days prior to the scheduled interview, states:

It is our understanding from our clients that *the marriage is not going forward*. [The petitioner and B-H-] will not be appearing at their scheduled interview.

[emphasis added].

In addition to the arguments proffered by counsel on appeal, the petitioner submits a personal statement, additional statements from friends, and reports from medical professionals. In her personal statement on appeal, the petitioner reiterates her previous claim that her spouse had a problem with alcohol and that he insulted her. Again, however, the petitioner provides only general statements regarding B-H-'s behavior and does provide any probative details or specific information regarding any particular incident. The petitioner also presents new claims on appeal that her spouse used marijuana and subjected her to physical abuse and social isolation, but does not elaborate on any of these claims or explain why she failed to make these allegations in her previous statement. Finally, the petitioner discusses the fact that she and B-H- were late in filing their 1995 and 1996 tax returns because B-H- was "avoiding contact with the IRS because he owed child support payments." The petitioner states that the IRS garnished her wages which affected her credit and states that based upon these actions by B-H-, she was subjected to "economical abuse" during her marriage. As discussed above, however, the evidence contained in the record fails to establish that the petitioner was financially abused by B-H-. While his actions may have affected her credit, she does not explain why she could not file her taxes separately or otherwise indicate that she was threatened or coerced into not filing the taxes in a timely manner.

The assessment from [REDACTED] indicates that the petitioner sought "therapeutic support" because of her "citizenship predicament, and added disillusionment, as she watched her dream crumbling. . . ." [REDACTED] describes the health conditions reported by the petitioner (grinding her teeth) and indicates that such a condition is indicative of individuals "who suppress their anxiety." [REDACTED] cites the petitioner's claim that B-H- was "emotionally volatile," had "frequent tirades, and drinking anomalies" The petitioner also submits a letter from [REDACTED] who indicates that she has been treating the petitioner since June 2005. [REDACTED] confirms that the petitioner has been treated for irritable bowel syndrome, sleep walking and jaw pain and states that the petitioner's "relationship to [B-H-] certainly contributed" to her medical condition. While we do not dispute the petitioner's diagnoses, the fact that the petitioner suffers from these ailments due to circumstances in her marriage and its dissolution, does not

establish that what the petitioner claims to have been subjected to during her marriage can be considered battery or extreme cruelty. Not every claimed action will suffice to establish the petitioner's claim of abuse. Rather, the petitioner must establish that such actions are considered to be battery or extreme cruelty. In this instance, [REDACTED] generally reports the petitioner's claim that B-H-'s was volatile, had tirades, and drank while [REDACTED] simply refers to the petitioner's relationship with B-H- as contributing to her condition. Neither doctor provides any probative details which demonstrate that the petitioner's medical and psychological condition were related to actions of B-H-'s that are considered to be battery or extreme cruelty.

Finally, the petitioner submits an additional statement from [REDACTED]. However, like his previous statement, [REDACTED] statement on appeal fails to provide probative details which establish the petitioner's claim of abuse. For instance, [REDACTED] again refers to the "problems" in the petitioner's marriage and generally refers to B-H-'s drug and alcohol use. While [REDACTED] describes one instance when he saw B-H- "openly shun[]" the petitioner and another instance when B-H- was "loud and verbally abusive" toward the petitioner, he does not provide any further description of either incident.

As discussed above, the general claims made by the petitioner and the evidence submitted on her behalf are not sufficient to establish that the petitioner was battered or that B-H-'s behavior rose 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. As such, 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.

Beyond the decision of the director, we find that the petitioner has failed to establish that she resided with her spouse and that she entered into her marriage in good faith. On the Form I-360, the petitioner claims to have resided with B-H- from December 22, 1995 until January 25, 1999 and that she last resided with B-H- at [REDACTED]. In support of the Form I-360, the petitioner submitted no testimonial evidence, such as information regarding how she met B-H-, how long they dated prior to their marriage, a description of her feelings for B-H- and intent in marrying him, or any other details relevant to her claim of a good faith marriage. The petitioner also failed to provide any details regarding her claim of residence with B-H-, such as a list of addresses and dates of their residences together. In her February 5, 2007 affidavit, the petitioner only generally states that she married B-H- in good faith and does not provide any information regarding her residence with B-H-. In her September 28, 2007 letter, the petitioner generally indicates that she met B-H- through a friend in early 1995, dated for a few months and got married and again fails to provide any information regarding her claimed residence with B-H-.

While the petitioner also submitted numerous letters from friends and family who attest to the petitioner's good moral character, few of the letters address the petitioner's residence with B-H- and her good faith marriage. The letters from the petitioner's sister, [REDACTED] acknowledge the fact that she attended the petitioner's wedding ceremony and state only that she "know[s] for a fact that a bone fide [sic] marriage existed" and that she witnessed "how much they cared for each other at the early stages of that relationship." [REDACTED] does not, however, provide a description of what interactions or behaviors she witnessed to conclude that the petitioner and B-H- shared a good faith relationship and offers no testimony regarding the petitioner's residence with B-H-. Similarly, [REDACTED] statements indicate that he witnessed the petitioner's and B-H-'s courtship and attended their wedding but provides no probative details to establish that the petitioner entered into her marriage in good faith and that she resided with B-H-.

The sole documentary evidence of the petitioner's good faith marriage and residence consists of two financial statements from Norwest Investment Services, Inc., addressed to the petitioner and B-H- at a post office box, two utility bills, dated December 1998 and January 1999, addressed to the petitioner and B-H- at [REDACTED] and copies of a portion of the petitioner's and B-H-'s 2005, 2006, and 2007 jointly filed federal income tax returns which list their address at [REDACTED]. The petitioner also submitted four photographs taken during her wedding ceremony but no other photographs or descriptions of shared events to document shared events throughout their more than three-year relationship.

The above discussion relates only to the evidence submitted in support of the Form I-360 petition. In addition to the deficiencies discussed above, a review of the record in its entirety reveals additional deficiencies and significant inconsistencies regarding the petitioner's claim of residence and good faith marriage. 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).

On the first Form I-130 that B-H- filed on the petitioner's behalf, the couple's address was listed as [REDACTED]. In support of the petition, B-H- submitted a Form G-325A, Biographic Information, signed on August 20, 1996, which contained the following information relevant to his residence:

- [REDACTED]
- [REDACTED]
- [REDACTED]

To support his claim of residence, B-H- submitted a single utility bill addressed to the couple at [REDACTED] and no evidence to demonstrate his residence [REDACTED]. In fact, although the petitioner claimed to have moved [REDACTED], the record contains numerous documents, dated after their marriage, which indicate B-H-'s residence at an address different than that of the petitioner. Specifically, the record contains the following inconsistent evidence:

- B-H-'s 1995 Form W-4, Employee's Withholding Allowance Certificate, signed by B-H- on March 18, 1996, where he lists his address as [REDACTED]
- B-H-'s 1996 Form W-2, Wage and Tax Statement, which lists his address as [REDACTED]
- Pay statements from DLS Die Cutting, covering March 1996 through March 1997 which are addressed to B-H- at [REDACTED]
- The petitioner's employment record with DLS Die Cutting which lists his marital status in 1997 as "single;"
- B-H-'s second Form G-325A, signed on January 28, 1999, in which he indicates that he moved to [REDACTED] in July 1995, rather than in May 1995 as indicated on his first Form G-325A;
- B-H-'s consent form for a drug test at Airport Medical Clinic, signed by B-H- on March [REDACTED]

- 8, 1996, in which he lists his address as [REDACTED]
- B-H-'s Form I-9, Employment Eligibility Verification, signed on March 26, 1996, in which he lists his address as [REDACTED] and
- B-H-'s life insurance group enrollment form, signed by the petitioner on April 15, 1996, in which he lists his marital status as "single" and his mother as his sole beneficiary.

The record contains equally inconsistent evidence regarding the petitioner. On her Form G-325A, signed by the petitioner on January 28, 1999, the petitioner provides the following, pertinent information:

- [REDACTED] from April 1996 to August 1996
- [REDACTED], MN from November 1994 until January 1996

However, the evidence in the record demonstrates the following contradictory evidence:

- The petitioner's 1995, Form W-2, Wage and Tax Statement which lists her address as [REDACTED] Minnesota;
- The petitioner's 1996, Form W-2, Wage and Tax Statement which lists her address as [REDACTED] Minnesota;
- The petitioner's BSM Flex-Choice Plan medical election form, signed by the petitioner on August 15, 1996, in which the petitioner indicates her marital status as "single;"
- The petitioner's Delta Dental enrollment form, signed by the petitioner on August 19, 1996, in which she lists her marital status as "single;"
- The petitioner's Life/Disability Enrollment Form, signed by the petitioner on August 15, 1996, in which she lists B-H- as a "friend;"
- The petitioner's Application for Group Medical Coverage, signed by the petitioner on August 15, 1996, indicating her election for self-only coverage and her marital status as "single;"
- The petitioner's enrollment card for The Hartford, signed by the petitioner on August 15, 1996, where she lists B-H- as her "friend;" and
- The petitioner's 1995, Form W-4, Employee's Withholding Allowance Certificate, signed by the petitioner on March 28, 1996, in which she indicates her marital status as "single;"

Based upon the numerous and significant contradictions contained in the record, we find that petitioner has failed to establish her claim of a residence and good faith entry into marriage. The record contains little probative testimonial evidence regarding the petitioner's residence and good faith marriage and contains only scant documentary evidence. That documentary evidence does not outweigh the significant inconsistencies contained in the record. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-92.

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 reasons stated above, 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.