

PUBLIC COPY

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

B9

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: JUL 30 2008
EAC 07 067 50140

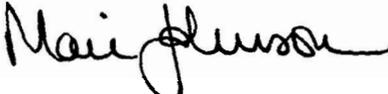
IN RE: Petitioner: [REDACTED]

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:

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 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 finding that the petitioner failed to establish that she resided with her spouse, that she was battered or subjected to extreme cruelty by her spouse during their marriage and that she entered into her marriage in good faith.

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 China who married J-Z-,¹ a U.S. citizen, in China on March 21, 2002. J-Z- filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf on May 3, 2002. The Form I-130 was approved on September 12, 2002 and the petitioner entered the United States as a K-3 nonimmigrant on July 13, 2003. The petitioner filed a Form I-485, Application to Adjust Status, on July 23, 2003. J-Z- withdrew the Form I-130 on June 6, 2005 and Citizenship and Immigration Services (CIS) issued a Notice to Appear (NTA) to the petitioner charging her as removable under section 237(a)(1)(G)(ii) of the Act as an alien who failed or refused to fulfill her marital agreement which in the opinion of the Secretary of Homeland Security was made for the purpose of procuring her admission as an immigrant.

The petitioner filed this Form I-360 on January 5, 2007. On August 22, 2007, the director issued a Request for Evidence (RFE) of, *inter alia*, the requisite residence, battery or extreme cruelty, and good-faith entry into the marriage. The petitioner responded to the RFE on November 19, 2007. The director denied the petition on December 19, 2007. The petitioner, through counsel, submitted a timely appeal.

On appeal, counsel argues that the director "set up an extremely high standard and an unreasonable burden of proof" and failed to give the petitioner "the procedure of due process of a hearing." Counsel's arguments are not persuasive. As it relates to his due process argument, counsel provides no case law or argument to support his claim that the petitioner is entitled to a hearing on her petition. More importantly, counsel has not shown that the petitioner suffered "substantial prejudice" as a result of the director's action. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). Counsel's "burden of proof" argument is equally unpersuasive. As cited above, section 204(a)(1)(J) of the Act requires CIS to "consider any credible evidence relevant to the petition." Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J). This mandate is reiterated in the regulation at 8 C.F.R. § 204.2(c)(2)(i). This mandate, however, establishes an *evidentiary standard*, not a burden of proof. In this case, as in all visa petition proceedings, the petitioner bears the burden of proof to establish her eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). We further note that the mere submission of relevant evidence of the types listed in the regulation at 8 C.F.R. § 204.2(c)(2) will not necessarily meet the petitioner's burden of proof. While CIS must consider all credible and relevant evidence,

¹ Name withheld to protect individual's identity.

the agency is not obligated to determine that all such evidence is credible or sufficient to meet the petitioner's burden of proof. 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). To require otherwise would render the adjudicatory process meaningless. As will be discussed, the petitioner has failed to meet her burden of proof and to establish her eligibility for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act.

Residence

On the Form I-360, the petitioner indicated that she resided with her spouse from July 2003 until November 2003 and that she last resided with her spouse at [REDACTED] in San Francisco, California. At the time of filing, the petitioner submitted no testimonial or documentary evidence to establish her and J-Z-'s residence at the listed address. The petitioner did, however, submit copies of her 2003 and 2004 state and federal income tax returns, which listed her and J-Z-'s address at [REDACTED] in San Francisco, California. The [REDACTED] address was the address listed on the Form I-130 submitted by J-Z- on the petitioner's behalf, by the petitioner on her Form I-485, and by the petitioner and J-Z- on their Forms G-325A, Biographic Information.

In response to the director's RFE, although the petitioner failed to submit any documentary evidence in support of her claim of residence with J-Z-, she did submit a personal statement. As it relates to the inconsistent evidence regarding the petitioner's claimed address, the petitioner stated:

We lived together at [REDACTED] in the Chinatown area of San Francisco. This was not his family home. He actually moved out to live with me on Stone Street. To my belief, he was originally living with his parents on [REDACTED] in San Francisco. He said he wants to keep the address consistent so when he helped me file my adjustment application, he used the same address. He told me to tell the Immigration that I live on the [REDACTED] address so that I can be consistent with my application.

The petitioner then states that she and J-Z- rented "a room" on Stone Street "from an elderly Chinese gentleman," where she and J-Z- lived for three months before he left her. The petitioner provides no further discussion of her residence with J-Z-, such as a description of the apartment or their shared belongings, other than to state that it had two bedrooms. The petitioner claims that she attempted to contact the man who rented her the apartment and other tenants, but was unsuccessful. While the petitioner indicated that she and J-Z- rented the apartment, she does not provide a copy of the lease or rental agreement. Although she is not required to do so, the petitioner does not explain why such evidence does not exist or is unobtainable. *See* 8 C.F.R. §§ 204.1(f)(1), 204.2(c)(2)(i).

As discussed above, the record contains no documentary evidence of the claimed residence such as correspondence addressed to the petitioner and her spouse, financial or tax documents, utility bills, or a lease. The testimonial evidence provided by the petitioner contains scant probative information about her purported residence with her J-Z- and the petitioner submits no statements from friends or relatives

to establish her claim. Accordingly, we concur with the finding of the director that the petitioner has failed to establish that she resided with her spouse, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

Finally, while not a determinative factor in our decision, we note that beyond the finding made by the director, the record contains an additional inconsistency related to the petitioner's claim of residence with her spouse. In her declaration, the petitioner claims that J-Z- told her to use the [REDACTED] address for consistency at the time that they were filing their paperwork with immigration, yet the record contains evidence that the petitioner continued to use the [REDACTED] address, where she claims that she never resided, well after she and J-Z- separated. Specifically, the record contains a copy of the petitioner's California Identification Card, issued on December 2, 2003, one month after she stopped residing with J-Z-, in which she listed her address as [REDACTED]. 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).

Battery or Extreme Cruelty

The sole evidence submitted to support the petitioner's claim of abuse consists of her declaration, dated October 1, 2007. In this declaration, the petitioner states that she suspected that J-Z- had a girlfriend during their marriage, that J-Z- was "quite callous" and angry because the petitioner "did not provide him with sex." The petitioner then states that J-Z- began staying away from their home for "two or three days at a time," that he was cold and "unattached," and eventually stopped coming home altogether. Finally, the petitioner claims that J-Z- intentionally lied to immigration officials to hurt her and get her deported.

The petitioner's October 1, 2007 declaration is not sufficient to establish a claim of battery or extreme cruelty. The petitioner has made no claim of being threatened with or actually subjected to physical abuse by J-Z- during their marriage. Further, the petitioner's assertion of extreme cruelty is based upon general claims such as that J-Z- may have had a girlfriend, frequently stayed away from his home, was cold and angry, and caused the petitioner to be placed in removal proceedings. These claims do not establish that J-Z-'s actions 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. Further, the petitioner's description of J-Z-'s non-physical behavior does not demonstrate that his actions were accompanied by coercive acts or threats of harm, or that his actions were aimed at insuring dominance or control over the petitioner. Accordingly, the petitioner has 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.

Good Faith Entry into Marriage

To support her claim of a good faith marriage, the petitioner submitted her personal declaration, copies of her and J-Z-'s 2003 and 2004 state and federal tax forms, a receipt and certification from the Minyun Hotel affirming the fact that the petitioner and J-Z- had a marriage banquet, photographs of the petitioner's and J-Z-'s wedding ceremony and several other undated photographs. Additionally, the petitioner submitted a single copy of a Western Union receipt form and two "Reporting Form For Receipts From Abroad (Individuals)" as evidence that J-Z- transferred money to the petitioner in China and translations of letters sent from J-Z- to the petitioner while she remained in China.

In her October 1, 2007 declaration, the petitioner describes meeting J-Z- through a friend while the petitioner was in China and J-Z- was in the United States. The petitioner states that they began their courtship through phone calls and letters until they were able to meet two months later when J-Z- came to China to meet her. The petitioner claims that after J-Z- returned to the United States, they continued to converse over the telephone and through letters until J-Z- came back to China in March 2002 to marry her. Although the petitioner then describes their wedding ceremony and banquet, she provides no further probative details regarding her feelings for J-Z-, her intent in marrying him, or any other details to establish that she intended to share a life with him. We note that although the petitioner's declaration references a joint bank account that she had with J-Z-, she indicates that she "never [had] any access to that account"

The remaining evidence is similarly lacking. For instance, while the petitioner's marriage photographs and receipts document the fact that a legal marriage and wedding ceremony took place, these facts do not establish the petitioner's intent in marrying J-Z-. The petitioner fails to describe the additional photographs she submitted into the record, to provide the date and time the photographs were taken, to explain the importance of the event depicted, or provide any other information about the photographs to establish their relevance to her claim of a good faith marriage. The tax documents are unsigned by the petitioner and J-Z- and the petitioner submits no evidence to establish that any of the returns were actually filed with the state of California and the Internal Revenue Service. Finally, the documents which demonstrate that J-Z- sent money and letters to the petitioner while she remained in China, while maybe indicative of the good faith intent of J-Z-, do not establish the petitioner's feelings for J-Z- or that she intended to share a life with him when she married him. Accordingly, we concur with the finding of the director that the petitioner has failed to establish that she entered into marriage with J-Z- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Finally, while not a determinative factor in our decision, we do note, beyond the finding made by the director, that the record contains an additional inconsistency related to the petitioner's claim of a good faith marriage. Specifically, although the petitioner claimed in her personal declaration and in a June 6, 2005 interview before CIS that she met J-Z- "through the introduction of [her] friend," during the petitioner's March 22, 2004 interview before CIS, she claimed that she met J-Z- through a personal ad in a Chinese newspaper. 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* at 582, 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 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.