

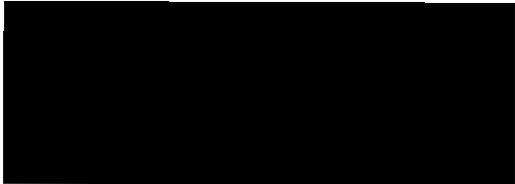
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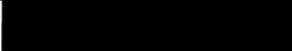
**U.S. Citizenship
and Immigration
Services**

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FILE:



Office: VERMONT SERVICE CENTER

Date: **MAR 04 2008**

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IN RE:

Petitioner:



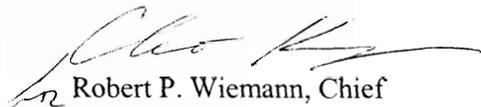
PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON BEHALF OF PETITIONER:



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 citizen of the United States.

The director denied the petition finding that the petitioner failed to respond to the director’s Notice of Intent to Deny (NOID) and therefore did not establish that she was battered or subjected to extreme cruelty by her spouse, that she resided with her spouse and that she entered into her marriage in good faith.

The petitioner submits a timely appeal with additional evidence.

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 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 Cambodia who entered the United States on August 14, 2001 as a nonimmigrant visitor (B-2), with authorization to remain until February 13, 2002. On December 26, 2002, the petitioner married Y-P¹, a United States citizen in Massachusetts. On February 14, 2003, the petitioner's spouse 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 Forms I-130 and I-485 were denied on April 9, 2004. On January 13, 2005, the Service issued a Notice to Appear (NTA) to the petitioner charging her as removable under section 237(a)(1)(B) of the Act for having remained in the United States beyond her period of authorized stay. She remains in proceedings and her next hearing is scheduled for August 12, 2008.

The petitioner filed the instant Form I-360 on August 1, 2005. The director issued a Request for Evidence (RFE) on May 30, 2006 of the requisite abuse, residence, and good faith marriage. The petitioner, through counsel, timely responded to the RFE with additional evidence. On August 29, 2006, the director issued a NOID that notified the petitioner of the deficiencies in the record and afforded the petitioner the opportunity to submit further evidence to establish her claim of abuse, residence with her spouse, and her good faith marriage. The petitioner failed to respond to the director's NOID and the director denied the petition on January 5, 2007. The petitioner, through counsel, submits a timely appeal with additional evidence. The petitioner provides no explanation regarding why she failed to submit the evidence in response to the director's NOID. As will be discussed, upon review of the record as it was constituted before the director, we concur with the findings that the petitioner failed to establish that she was battered or subjected to extreme cruelty by her spouse, that she resided with her spouse and that she entered into her marriage in good faith.

Residence

On the Form I-360, the petitioner indicated that she resided with her spouse from December 2002 until

¹ Name withheld to protect individual's identity.

January 2003 and that she last resided with her spouse at [REDACTED] in Lowell, Massachusetts. The petitioner submitted no testimonial or documentary evidence of her residence with her spouse at the time of filing. In response to the director's RFE, the petitioner submitted an affidavit from [REDACTED] a friend of the petitioner, who indicates that the petitioner and her spouse shared a room in her apartment at [REDACTED] from December 31, 2002 until October 2003. In his NOID, the director noted discrepancies between the petitioner's claims on the Form I-360 and the statements contained in [REDACTED]'s affidavit regarding the dates the petitioner lived with [REDACTED] and requested that the petitioner provide an explanation for the noted discrepancies. As previously indicated, the petitioner did not respond to the NOID.

On appeal, the petitioner submits a personal statement in which she generally claims that she resided with her spouse "for a few weeks" and explains that she continued to reside with [REDACTED] after her husband left her. However, where as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Obaighbena*, 19 I&N Dec. 533, 537 (BIA 1988). The petitioner has provided no explanation of why her testimonial evidence was not available for submission below. Accordingly, the AAO need not and will not consider the evidence submitted for the first time on appeal. If the petitioner wishes the evidence to be considered, she may submit it with a new self-petition. *See Matter of Obaighbena*, 19 I&N Dec. at 537.

The sole evidence of the petitioner's residence with her spouse consists of a general statement from [REDACTED] that the petitioner and her spouse resided with [REDACTED]. The statement contains no probative details regarding the petitioner's and her spouse's residence, such as a description of the apartment, the petitioner's and her spouse's belongings, or an account of their daily schedules. Accordingly, we concur that the record, as it was constituted before the director, was not sufficient to establish that the petitioner resided with her spouse.

Beyond the decision of the director, we find additional, unresolved discrepancies that preclude a finding that the petitioner resided with her spouse as claimed. First, although the director's NOID only noted a discrepancy between the petitioner's claim that she resided with her spouse until January 2003 and [REDACTED]'s statement that the petitioner and her spouse resided with [REDACTED] until October 2003,² we note an additional discrepancy regarding the claimed apartment number. Specifically, in her affidavit, [REDACTED] claimed to have resided with the petitioner and her spouse in [REDACTED] while the petitioner claimed to have resided in a [REDACTED]. In fact, although [REDACTED] initially indicated apartment 2 in her statement, she later corrected and initialed her statement to indicate [REDACTED]. Second, on the Form G-325, Biographic Information, signed by the petitioner on January 3, 2003 and submitted in conjunction with her Forms I-130 and I-485 application, the

² While the petitioner provided an explanation regarding the contradiction between her claim and [REDACTED]'s claim about the length of time the petitioner and her spouse resided together, we have not evaluated the petitioner's explanation on appeal.

petitioner indicated that she resided at [REDACTED] Lowell, Massachusetts from January 2002 to January 2003. This information contradicts both [REDACTED] statement and the claim on the petitioner's Form I-360 that the petitioner resided with her spouse at [REDACTED] from December 2002 until January 2003.

As discussed above, we concur with the determination of the director and, on review, find additional discrepancies in the record that were not noted by the director. Accordingly, 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.

Battery or Extreme Cruelty

With the initial filing the petitioner submitted a "preliminary forensic psychiatric examination" from [REDACTED] whose report stated:

[The petitioner] stated that when they were first married, the relationship was "nice and normal and there was no abuse." Unfortunately, this period of normalcy lasted only a short period of time. [The petitioner] described how an old girlfriend of her husband came to there [sic] door over 2-3 days demanding to see [the petitioner's spouse]. This ex-girlfriend told [the petitioner's spouse] that she had just found out that she was approximately 4 weeks pregnant. Upon learning about this, [the petitioner's spouse] left the home he shared with [the petitioner] for approximately one week and then returned for approximately 2 weeks. During this two-week period, [the petitioner] explained that [her spouse] fully expected her to fulfill her marital obligations of cooking and having sexual relations with him.

During the winter of 2003, [the petitioner's spouse] left again after taking his wife to visit his parents' home. On that particular day, [the petitioner and her spouse] arrived at his parents' home and around 6 p.m. that evening, [the petitioner's spouse] left without explanation. [The petitioner] subsequently found out that [the petitioner's spouse's] sister had taken him to visit his pregnant ex-girlfriend. [The petitioner's spouse] subsequently changed his telephone number so that [the petitioner] was not able to telephone him.

[The petitioner's spouse] returned to the home he shared with his wife for a very brief period of 2-3 days during the month of June 2003. During this time, he warned his wife that she must not pursue him or interfere in any way with his relationship with his ex-girlfriend or that he would "cause her trouble."

During [the petitioner's spouse's] initial one-week abandonment, [the petitioner] was distraught, unable to work, extremely tearful and experienced symptoms of

severe anxiety including heart palpitations and shortness of breath with episodes of dyspnea. After [her spouse's return] (after his initial one week abandonment), [the petitioner] was full of hope that her husband had resolved the issue with his ex-girlfriend [and that] their marriage would return to the "nice and normal state." Her hopes were subsequently dashed at his next abandonment after visiting his parents' home.

In response to the director's RFE,³ the petitioner submitted a letter from [redacted] who claimed that the petitioner and her spouse resided with [redacted] during their marriage. However, [redacted] provided no testimonial evidence regarding the petitioner's claim of abuse.

No further evidence was submitted in response to the director's NOID. On appeal, the petitioner submits a personal statement and a statement from counsel noting several unsuccessful attempts to get in touch with the petitioner's spouse in order to obtain an affidavit from him. Due to his inability to contact the petitioner's spouse, counsel concludes that he was "hiding from me and my investigator – and his wife." As noted above, because the petitioner was notified of the deficiencies in the record regarding her claim of abuse and failed to provide any further evidence in support of her claim, we will not accept her new testimonial evidence on appeal. *See Soriano*, 19 I&N Dec. at 766; *see also Obaighena*, 19 I&N Dec. at 537.

Upon review of the record as it was constituted before the director, we concur with his finding that the petitioner failed to establish that she was battered or subjected to extreme cruelty by her spouse. The sole evidence to support her claim of abuse consists of the report submitted by [redacted]. While we do not dispute the report's conclusion that the petitioner was depressed and showed symptoms of "distress" and "anxiety," the fact that the petitioner suffers from these symptoms due to circumstances in her marriage, does not establish that what the petitioner claims to have suffered during her marriage can be considered battery or extreme cruelty. While the petitioner's symptoms may be a direct result of her spouse's actions, not any claimed action will establish the requisite abuse. Rather, the petitioner must establish that such actions are considered to be battery or extreme cruelty. In this instance, the report's conclusions are based upon the petitioner's claim that her spouse may have fathered a child with another woman, that he expected the petitioner to cook for him and have sexual relations, and that he ultimately left the petitioner. We do not find these claims 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.

While the report also generally indicated that the petitioner's spouse told the petitioner that he would

³ Although the director's RFE referred to the petitioner's "personal statement," the record contains no personal statement from the petitioner at the time of filing, in response to the RFE, or in response to the NOID. The only statement contained in the record from the petitioner was submitted on appeal.

“cause her trouble” if she interfered with his relationship with the other woman, the report does not elaborate on any specific threat, indicate that the petitioner was fearful of her spouse, or that she believed that he would somehow follow through on his statement.⁴

Accordingly, we concur with the finding of the director that 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

At the time of filing, the petitioner submitted the evaluation from [REDACTED] who stated that the petitioner met her spouse through a mutual friend in November 2002 and that they were married in December 2002. Other than as it relates to the claimed abuse, the evaluation contains no further probative details regarding the petitioner’s relationship with her spouse. In response to the director’s RFE, the petitioner submitted the affidavit from [REDACTED] who generally states that the petitioner and her spouse resided together as husband and wife. [REDACTED] provides no probative details describing the petitioner’s feelings for her spouse, interactions that she witnessed between the petitioner and her spouse, or any other information to demonstrate the petitioner’s claim of a good faith marriage. The petitioner offered no personal testimony regarding her good faith marriage or testimony from friends or family that described her courtship with her spouse, shared events, or other evidence to establish a claim of a good faith marriage in response to the director’s NOID. No documentary evidence was submitted. On appeal, the petitioner submits a brief personal statement with no explanation for her failure to submit this testimony below. As previously noted, however, because the petitioner had been afforded ample opportunity to submit evidence regarding her good faith marriage prior to the director’s decision, we will not accept this new evidence on appeal. *See Soriano*, 19 I&N Dec. at 766; *see also Obaigbena*, 19 I&N Dec. at 537.

Based upon the record that was before the director at the time of his decision, we concur with the director’s determination that the petitioner failed to establish that she entered into her marriage in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

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.

⁴ Although not a factor in this determination, we note that if the petitioner’s appellate statement were considered, it is not consistent with the claim contained in the report. Specifically, in her appellate statement, the petitioner contradictorily states that it was her spouse’s girlfriend who told her that she would “cause [her] in a trouble [sic],” rather than her spouse.