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FILE:

EAC 07 160 51099

Office: VERMONT SERVICE CENTER

Date: **AUG 15 2008**

IN RE:

Petitioner:



PETITION: Petition for Special 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 The decision of the director will be withdrawn and the petition will be remanded for further action.

The petitioner seeks classification pursuant to section 204(a)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien battered or subjected to extreme cruelty by a United States citizen spouse.

The director denied the petition because the record did not establish that the petitioner entered into marriage with her husband in good faith.

The petitioner, through counsel, timely appealed.

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).

An alien who has divorced a United States citizen may still self-petition under this provision of the Act if the alien demonstrates "a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse." Section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc).

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 clause (ii) or (iii) of subparagraph (B), 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.

(vii) *Good moral character.* A self-petitioner will be found to lack good moral character if he or she is a person described in section 101(f) of the Act. Extenuating circumstances may be taken into account if the person has not been convicted of an offense or offenses but admits to the commission of an act or acts that could show a lack of good moral character under section 101(f) of the Act. A person who was subjected to abuse in the form of forced prostitution or who can establish that he or she was forced to engage in other behavior that could render the person excludable under section 212(a) of the Act would not be precluded from being found to be a person of good moral character, provided the person has not been convicted for the commission of the offense or offenses in a court of law. A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she willfully failed or refused to support dependents; or committed unlawful acts that adversely reflect upon his or her moral character, or was convicted or imprisoned for such acts, although the acts do not require an automatic finding of lack of good moral character. A self-petitioner's claim of good moral character will be evaluated on a case-by-case basis, taking into account the provisions of section 101(f) of the Act and the standards of the average citizen in the community. If the results of record checks conducted prior to the issuance of an immigrant visa or approval of an application for adjustment of status disclose that the self-petitioner is no longer a person of good moral character or that he or she has not been a person of good moral character in the past, a pending self-petition will be denied or the approval of a self-petition will be revoked.

* * *

(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.

* * *

(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

(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.

(v) *Good moral character*. Primary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit. The affidavit should be accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. Self-petitioners who lived outside the United States during this time should submit a police clearance, criminal background check, or similar report issued by the appropriate authority in each foreign country in which he or she resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. If police clearances, criminal background checks, or similar reports are not available for some or all locations, the self-petitioner may include an explanation and submit other evidence with his or her affidavit. The Service will consider other credible evidence of good moral character, such as

affidavits from responsible persons who can knowledgeably attest to the self-petitioner's good moral character.

* * *

(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 petitioner in this case is a native and citizen of China who entered the United States on February 17, 2003 as the K-1 nonimmigrant fiancée of Z-Y-,¹ a United States citizen. The petitioner married Z-Y- on April 4, 2003 in East Lansdowne, Pennsylvania. On April 22, 2003, Z-Y- filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf. The petitioner filed a Form I-485, Application to Adjust Status, on that same date. The Forms I-130 and I-485 were denied on November 29, 2006. On December 20, 2004, the petitioner filed a Form I-360 claiming eligibility as the abused spouse of Z-Y-. The Form I-360 was denied on October 19, 2005.

The petitioner filed this Form I-360 on May 7, 2007. On May 14, 2007, Citizenship and Immigration Services (CIS) issued a Notice to Appear (NTA) to the petitioner charging her as an alien subject to removal pursuant to 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 September 25, 2008. The director denied the petition on January 16, 2008, finding that the petitioner failed to establish that she entered into her marriage in good faith. The petitioner, through counsel, submits a timely appeal and argues that the petitioner has established her eligibility for classification. As will be discussed, although we concur with the director's determination, the petition will be remanded because the director denied the case without the issuance of a Request for Evidence (RFE) or Notice of Intent to Deny (NOID).

Good Faith Entry into Marriage

In her February 12, 2007 statement, the petitioner describes meeting Z-Y- through his grandmother, for whom the petitioner caring for at the time. The petitioner generally claims that she and Z-Y- "fell in love at first sight," had a traditional engagement ceremony and that Z-Y- petitioned for her and she came to the United States, where they were married. The petitioner states that she and Z-Y- "were very happy together," that she loved Z-Y- and wanted to have a child with him. The petitioner provides no further probative details regarding meeting Z-Y-, their courtship and relationship together prior to their

¹ Name withheld to protect individual's identity.

marriage, or any other information in support of her claim of a good faith marriage.

As documentary evidence, the petitioner provided photographs, statements from a joint bank account, and a copy of the petitioner's life insurance policy which named Z-Y- as the beneficiary. In addition, the record also contains a copy of the petitioner's 2003 Internal Revenue Service (IRS) Form 1040, U.S. Individual Income Tax Return, in which she indicated her filing status as "Married filing separately." The petitioner's photographs, while evidence that the petitioner and her spouse were together at a particular place and time, contain little probative value in establishing her good faith intent. The petitioner fails to describe the photographs, the date, time and importance of the event depicted, or to provide any other information about the photographs to establish their relevance to her claim of a good faith marriage. Similarly, while the petitioner's evidence establishes that she and Z-Y- opened a bank account together, the petitioner does not submit evidence such as cancelled checks to show that both she and Z-Y- actually accessed and used the account. Further, the petitioner's insurance policy is dated November 19, 2003, the same time that the petitioner claims to have separated from Z-Y-. It is unclear why the petitioner would obtain an insurance policy and name her spouse as the beneficiary when, according to her own testimony, she and Z-Y- were no longer together. Finally, as it relates to the petitioner's tax returns, the petitioner has not submitted evidence that these returns were actually filed with the IRS.

Given the inadequacy of the petitioner's testimonial evidence regarding her courtship and relationship with Z-Y- prior to their marriage, which relates to her intent to establish a life with Z-Y- and the lack of probative documentary evidence, we concur with the director's finding that the petitioner failed to demonstrate that she entered into her marriage in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Despite our concurrence with the director's determination, the case will be remanded because the director denied the petition without first issuing a NOID. The regulation at 8 C.F.R. § 204.2(c)(3)(ii)(2006) directed that CIS provide a petitioner with a NOID and an opportunity to present additional information and arguments before a final adverse decision is made. Although CIS promulgated a rule on April 17, 2007 which gave CIS discretion to deny a petition without the issuance of an RFE or NOID, the preamble to the rule provided the following guidance regarding the application of the rule:

USCIS' ability to issue shorter RFE and NOID response times will apply to any RFE or NOID issued on or after the effective date of this rule even if the application or petition was filed before the effective date of this regulation. USCIS' discretion to deny cases for lack of required initial evidence without first issuing an RFE, however, will only extend to petitions and applications that are filed on or after the effective date of this regulation.

[Emphasis added]. 72 Fed. Reg. 19100, 19104 (Apr. 17, 2007).

As the instant petition was filed on May 7, 2007, prior to the effective date of the rule, the petitioner should have been provided an RFE or NOID as indicated in the preamble of the rule.

On remand, we find additional issues that need further consideration.

Qualifying Relationship and Eligibility for Classification

On the Form I-360, the petitioner indicated her marital status as divorced but provided no documentation regarding the termination of her marriage to Z-Y-. As previously cited, section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act requires that a self-petitioner who has divorced her spouse must demonstrate that the divorce occurred within two years of the petition filing date and that there was a connection between the divorce and the former spouse's battery or extreme cruelty. As the petitioner has failed to submit documentation to establish that date that her marriage was terminated, we cannot determine whether the divorce took place during the two-year period prior to the filing of the petitioner. Moreover, even if the petitioner establishes that the divorce took place during the requisite two-year period, as will be discussed below, she has failed to establish that she was battered or subjected to extreme cruelty by Z-Y- during their marriage. Accordingly, the petitioner has failed to establish that she has a qualifying relationship with her former spouse and was eligible for immediate relative classification based on such a relationship, as required by sections 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) and (II)(cc) of the Act.

Residence

On the Form I-360, the petitioner indicated that she resided with Z-Y- from February 2003 until November 2003 and that they last resided together at [REDACTED], in Philadelphia, Pennsylvania. While the petitioner submitted several documents which list her address at the claimed residence, the sole documentary evidence of Z-Y-'s residence at the claimed address consists of six bank statements from Asian Bank, three of which are dated *after* the petitioner claims to have stopped residing with Z-Y-. In her personal statement, dated February 12, 2007, the petitioner provided no testimony regarding her residence with Z-Y-, such as a description of their home, the exact dates of their joint residence, whether it was an apartment or a home, whether it was leased and the terms of that arrangement, whether they lived with any friends or family, or any other probative information to establish that she resided with Z-Y- as claimed. Although the record also contains two letters from the petitioner's landlord that were submitted in support of her previous Form I-360, the letters provide only general information regarding the petitioner's residence with Z-Y-. The letters do not provide any specific dates of residence, information regarding their rental agreement such as the rent amount, the length of the lease term, or the form of payment received by the petitioner or Z-Y-. Based upon the lack of testimonial evidence from the petitioner, the general information contained in the petitioner's landlord's statements, and the lack of evidence which demonstrates Z-Y-'s residence at the claimed address, the petitioner has failed to establish that she resided with Z-Y-, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

Battery or Extreme Cruelty

In her February 12, 2007 statement, the petitioner claims that after several months of marriage, Z-Y- became “different” to her, would “give [her] a hard time” in front of other people and yelled at her. Further, the petitioner states that Z-Y- began to stay out at night and that she discovered that he was having an affair. Finally, the petitioner states that Z-Y- asked her to return the money that he spent on their marriage and continued to reiterate this request after they separated. The petitioner claims that after she indicated that she could not repay the money, Z-Y- threatened to have her deported on two unspecified occasions. The petitioner submits no further testimonial or documentary evidence in support of her claim of abuse. We find the petitioner’s statement insufficient to establish that she was battered or subjected to extreme cruelty by Z-Y- during their marriage. The petitioner has offered no testimony regarding being threatened with or actually psychologically abused by Z-Y-. The petitioner’s general claims that she was called names and yelled at, that Z-Y- had an affair and allegedly threatened to have her deported on two unidentified occasions do not establish that Y-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.

While the record contains evidence submitted in support of the petitioner’s previous Form I-360, that documentation is also insufficient to establish the petitioner’s claim of abuse. The psychological report and treatment summary completed by [REDACTED] indicates that Y-Z- separated from the petitioner, “complaining that she was not educated enough for him and that she was not what he had expected for a wife.” [REDACTED] further states that Y-Z- “had become quite verbally abusive,” and reiterates the petitioner’s claims that Y-Z- asked the petitioner to repay money to him and threatened to have her deported. [REDACTED] does not, however, provide specific details of the claimed verbal abuse or further details regarding Y-Z-’s alleged threats. Similarly, the letter from the petitioner’s landlord generally describes hearing the “sound of arguing” and indicates that Y-Z- “seemed to often curse” the petitioner, but does not provide any further probative information which demonstrates a claim of abuse. Accordingly, the petitioner has failed to establish that she was battered or subjected to extreme cruelty 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). This matter will be remanded in accordance with the above discussion. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for further action in accordance with the foregoing of the entry of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.