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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

NOV 09 2010

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner seeks immigrant 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.

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).

The director denied the petition on November 7, 2009, determining that the petitioner: (1) had not established that she had a qualifying relationship as the spouse, intended spouse, or former spouse of a lawful permanent resident or citizen of the United States; and (2) had not established that she is eligible for immigrant classification under section 201(b)(2)(A)(i) of the Act. The director found that the petitioner was not married to B-H-,[1] the claimed abusive United States citizen. The director accepted the petitioner's late filed appeal as a motion and on April 20, 2010, determined that the motion did not overcome the grounds of denial and denied the petition.

Counsel for the petitioner submits a timely appeal and brief.

Section 204(a)(1)(J) of the Act, 8 C.F.R. § 1154(a)(1)(J) states, in pertinent part:

> In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) . . ., or in making determinations under subparagraphs (C) and (D), the [Secretary of Homeland Security] shall consider any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the [Secretary of Homeland Security].

The evidentiary guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are further explained in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

Evidence for a spousal self-petition –

[1] Name withheld to protect the individual's identity.

> (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 . . . .

The record in this matter provides the following pertinent facts and procedural history. The petitioner is a native and citizen of Mexico who indicated that she entered the United States in September 1999. The petitioner claimed that she entered into a common law marital relationship with B-H- sometime in April 2001. The petitioner stated on the Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant, that she resided with B-H- from April 2001 to May 2002. The petitioner filed this Form I-360 on February 5, 2008. On April 13, 2009 and again on July 28, 2009, the director issued Requests for Evidence (RFE), requesting evidence regarding the petitioner and B-H's relationship, among other issues. The director denied the petition on December 7, 2009 and affirmed his decision on April 20, 2010, finding that the petitioner failed to establish that she had a qualifying relationship as the spouse of a United States citizen and failed to establish her eligibility for immigrant classification based upon that relationship.

On appeal, counsel for the petitioner asserts that the petition is eligible for approval. Counsel observes that the State of Colorado recognizes common law marriages and that the petitioner and B-H- cohabited in the State of Colorado and together had a child born on January 28, 2002. Counsel asserts that under Colorado law the petitioner and B-H- were married and the record includes sufficient evidence to support the inference that the couple was married. We disagree.

Qualifying Relationship and Eligibility for Immediate Relative Classification

We note that the director properly examined Colorado law and found that the State of Colorado recognizes common law marriage. The director also correctly noted that Colorado requires cohabitation, mutual agreement to be married, and that the couple openly hold themselves out to be married in order to establish a common law marriage. In addition, Colorado courts look at a number of non-exclusive factors to determine whether a common law marriage exists. Such factors include: (1) whether the couple refer to themselves as married before third parties; (2) filing joint federal or state tax returns; (3) listing the other party as a spouse on insurance forms or retirement plans; (4) joint finances, such as bank accounts, or owning property; and (5) the woman taking the man's surname. *People v. Lucero* 747 P.2d 660 (Colo 1987). Colorado law requires more than an inference to establish that a couple entered into a common law marriage

In this instance, the facts do not demonstrate that the petitioner and B-H- had a mutual agreement to be husband and wife and that there was public recognition of the existence of their marriage. In a July 2,

2009 letter submitted in response to the director's RFE, the petitioner stated that she wanted to become a legal resident of the United States and that she lost custody of one of her daughters (N-H-) when she divorced her ex-husband. The petitioner briefly described the abuse she experienced perpetrated by B-H- and listed her goals if allowed to live in the United States. The record also included a June 30, 2009 letter written by a licensed clinical social worker who indicated that the petitioner had married a man in 2001, that domestic abuse began a few short months after the marriage, that the petitioner was hospitalized due to severe depression after an episode of abuse by her husband, and at present the petitioner's daughter was in the care of the petitioner's ex-in-laws. The petitioner's mother and brother also submitted affidavits, dated June 4, 2009 and June 15, 2009 respectively, in which they reference B-H- and his abuse of the petitioner. The record further included a Shelter Order, dated May 20, 2002, wherein N-H-, the couples' daughter, was remanded to the custody of B-H-.

In an October 5, 2009 response to the director's second RFE in which he requested a copy of the divorce decree referenced by the petitioner in her letter when she stated: "I divorced my ex-husband," the petitioner indicated that she meant to say that she was separated from her husband and that the couple did not live together but that she is still married. In the October 5, 2009 response, the petitioner, when referring to the claimed divorce, stated: "there is no court order yet." The petitioner also submitted a [redacted] form that is signed by the petitioner on September 12, 2001 and date stamped as received on October 17, 2001. It appears the petitioner initially listed B-H- as "conyugal" when describing her relationship with B-H-.[2] This word, however, is scratched through and the word "novio" is written instead. The record further included: (1) a September 29, 2009 affidavit signed by [redacted] who declared that she had known the petitioner for over six years and knew that the petitioner was in a common law relationship with B-H-; (2) a September 28, 2009 affidavit signed by [redacted] who declared that he had known the petitioner for ten years and had witnessed her relationship with B-H- and their living together for ten months; and (3) a September 28, 2009 affidavit signed by [redacted] who declared that she was the petitioner's supervisor when the petitioner met B-H- and that the couple had a relationship and moved in together for approximately ten months after the petitioner was pregnant.

Based on the evidence submitted and upon review of Colorado law as it pertains to common law marriage, the director acknowledged that the petitioner and B-H- had a relationship, that they resided together, and that they had a child together; however, the director determined that the evidence did not reflect that the petitioner had held herself out to be married to B-H- as required by Colorado law.

As the director observed, [redacted] and the petitioner's clinical social worker did not witness the petitioner and B-H-'s relationship so are unable to offer testimony that the petitioner and B-H- had a mutual agreement to be husband and wife and that the public recognized the existence of their marriage. Similarly, neither [redacted] although each testifying that he or she witnessed a relationship between the couple and the couple living together, described the circumstances, events, or interactions that demonstrated that the couple had a mutual agreement to be

[2] According to counsel the word "conyugal" is an adjective referring to married or married life. The word "novio" is translated as boyfriend.

husband and wife and that the public recognized the couple as husband and wife. Although the petitioner's mother and brother reference B-H- as the petitioner's husband in their affidavits, neither affiant describes the circumstances, events, interactions, or arrangement between the couple that would demonstrate that the couple had a mutual agreement to be viewed as husband and wife and that the public recognized the existence of a marriage between the couple. The record lacks probative, detailed information from individuals with contemporaneous knowledge of the claimed common law relationship. Thus, the record does not support a finding that there was a public recognition of the couple's relationship as husband and wife. The affidavits submitted on the petitioner's behalf do not provide the necessary probative details which demonstrate that the petitioner and B-H- held themselves out as a married couple. Providing a general statement without the underlying detail is insufficient to establish this essential element of a Colorado common law marriage.

The petitioner's statements also fail to establish that she and B-H- had a mutual agreement to be husband and wife and that they held themselves out publicly as husband and wife. In the petitioner's first statement, she identifies B-H- as her ex-husband indicating that she divorced him sometime in May 2002. Upon questioning by the director regarding the divorce decree, the petitioner changes her identification of the current relationship, noting that she is only separated and considers herself still married to B-H-.[3] In this matter, although the petitioner initially identified her relationship with B-H- as "conyugal" on a [redacted]orm in 2001, the word is stricken and replaced with "novio" or boyfriend. This document is insufficient, in and of itself, to establish that the couple had entered into a mutual agreement to be husband and wife and it is insufficient to demonstrate that the couple held themselves out publicly as husband and wife. The failure of the petitioner to provide detailed information regarding her relationship with B-H- also precludes a determination that the couple had a common law marriage.

Moreover, the record does not include evidence that B-H- mutually agreed to be married to the petitioner. Even if we were persuaded that the petitioner's actions were sufficient to show that *she* intended to enter into a common law marriage, such a fact is not sufficient to demonstrate a common law marriage in Colorado. Instead, there must be a mutual understanding and agreement between the two parties to enter into such a relationship. *People v. Lucero* 747 P.2d 660 (Colo 1987). The record does not include any of the non-exclusive factors that Colorado courts look to as evidence that a common law marriage existed, except the child that the couple have in common. However, having a child together even while cohabitating is insufficient to establish the mutual assent required under Colorado law to establish a common law marriage.

As presented above, the facts do not establish the petitioner's and B-H-'s mutual agreement to be husband and wife and the public recognition of the existence of their marriage, and therefore, that their relationship is considered a common law marriage in accordance with the laws of Colorado.

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[3] The petitioner had a third child born on [redacted] in the State of Colorado. The father of her third child is identified on the child's birth certificate. The record includes no information regarding the petitioner's relationship with her third child's father.

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

In sum, the information in the record: lacks sufficient indicia that the couple mutually agreed to enter into a common law marriage and held themselves out publicly as husband and wife. Consequently, the petitioner has not established by a preponderance of the evidence that she is eligible for this benefit.

The petition will be denied for the stated reasons. 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.

ORDER: The appeal is dismissed.