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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B9

[redacted]

DATE: MAY 25 2011 OFFICE: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: [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:

SELF-REPRESENTED

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, with a fee of $630. 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 service center director 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 United States citizen.

The director denied the petition on the basis of his determination that: (1) the petitioner had failed to establish a qualifying relationship with a citizen of the United States; (2) that her former husband subjected her to battery or extreme cruelty during their marriage; and (3) that she married her former husband in good faith. On appeal, the petitioner submits a letter and additional evidence.

Applicable Law

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 individual who is no longer married to a citizen of the United States remains eligible to self-petition under these provisions if he or she is an alien: "who was a bona fide spouse of a United States citizen within the past 2 years and . . . who 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) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa).

Section 204(a)(1)(J) of the Act, states, in pertinent part, the following:

> 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 explained further at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part, the following:

> (i) *Basic eligibility requirements.* A spouse may file a self-petition under section 204(a)(1)(A)(iii) . . . of the Act for his or her classification as an immediate relative . . . if he or she:

* * *

(B) Is eligible for immigrant classification under section 201(b)(2)(A)(i) . . . of the Act based on that relationship [to the U.S. citizen spouse].

* * *

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

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.

Remarriage prior to the adjudication of a self-petition filed under section 204(a)(1)(A)(iii) of the Act is discussed at 8 C.F.R. § 204.2(c)(1)(ii):

> *Legal status of the marriage* . . . After the self-petition has been properly filed, the legal termination of the marriage will have no effect on the decision made on the self-petition. The self-petitioner's remarriage, however, will be a basis for the denial of a pending self-petition.

Pertinent Facts and Procedural History

The petitioner, a citizen of the People's Republic of China, entered the United States on September 8, 2005 as the fiancée of A-T-,[1] a U.S. citizen, who she married [redacted]. They divorced

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

[redacted].[2] The petitioner remarried another man [redacted] She filed the instant Form I-360 on June 22, 2009. The director issued a subsequent request for additional evidence, as well as a notice of intent to deny (NOID) the petition, to which the petitioner, through prior counsel, filed timely responses. After considering the evidence of record, including prior counsel's responses to the request for additional evidence and NOID, the director denied the petition on June 8, 2010.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, the AAO finds that the petitioner has failed to overcome the director's grounds for denying this petition. Beyond the decision of the director, the petitioner has also failed to demonstrate that she resided with A-T-.

Qualifying Relationship and Corresponding Eligibility for Immediate Relative Classification

The petitioner has failed to demonstrate the existence of a qualifying relationship and her corresponding eligibility for immediate relative classification on the basis of such a relationship for two reasons, as discussed below.

A. The petitioner's remarriage prior to approval of the petition mandates its denial

As noted, the petitioner and A-T- divorced, and the petitioner married another man, before she filed this petition. The regulation at 8 C.F.R. § 204.2(c)(1)(ii) specifically states that remarriage prior to adjudication of a self-petition is a basis for denial.

On appeal, the petitioner argues that her remarriage does not mandate denial of the petition because the termination of her second marriage left her in need of "VAWA relief." The petitioner cites no legal authority for her claim and the regulation precludes approval when the self-petitioner has divorced the abusive spouse and remarried another individual before the petition is adjudicated. 8 C.F.R. § 204.2(c)(1)(ii). *See also Delmas v. Gonzalez*, 422 F.Supp. 2d 1299 (S.D. Fla. 2005), (alien's remarriage prior to filing her self-petition was disqualifying).

Accordingly, the petitioner is ineligible for immigrant classification based upon her relationship with A-T- because she divorced him and remarried another man prior to filing this petition.

B. The petitioner's failure to file the petition within two years of her divorce from A-T- also precludes approval of the petition

As noted, the petitioner's divorce from A-T- took legal effect [redacted], and she did not file the instant petition until June 22, 2009, more than two years later. The petitioner is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) (II)(aa)(CC) of the Act based on her relationship with A-T- because she was not his bona fide spouse within two

[2] The record contains a copy of a divorce decree issued by the Superior Court of [redacted]

years of the date she filed this petition.[3] On appeal, the petitioner does not dispute that the petition was filed more than two years after she and A-T- divorced. Instead, she argues that "there is no indication that a failure to file the application within that time period is fatal to the claim." Section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act directly refutes the petitioner's claim.

The petitioner notes that section 204(a)(1)(A)(iii)(II)(aa)(BB) of the Act, which pertains to situations involving the abuser's bigamy, contains no such filing deadline, and that to allow unlimited filings only in bigamous situations has no rational basis and constitutes a denial of her due process rights. Like the Board of Immigration Appeals, the AAO lacks jurisdiction to rule on the constitutionality of the Act and the regulations we administer. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905, 912 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992). Even if we were to identify a constitutional infirmity in the statute, we lack the authority to remedy it. *Matter of Fuentes-Campos*, 21 I&N Dec. at 912.

The petitioner also argues on appeal that the two-year post-divorce filing deadline is a statute of limitations subject to equitable tolling. The petitioner again cites no legal authority for her claim. Although courts have found certain filing deadlines to be statutes of limitations subject to equitable tolling in the context of removal or deportation, the petitioner cites no case finding visa petition filing deadlines subject to equitable tolling. *Compare Albillo-DeLeon v. Gonzalez*, 410 F.3d 1090, 1098 (9th Cir. 2005) (time limit for filing motions to reopen under NACARA is a statute of limitations subject to equitable tolling) *with Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1048-50 (9th Cir. 2008) (deadline for filing a visa petition to qualify under section 245(i) of the Act is a statute of repose not subject to equitable tolling).

The two-year, post-divorce filing period of section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act is a statute of repose not subject to equitable tolling, and we lack the authority to waive the statutory deadline.[4]

As set forth above, the petitioner has failed to demonstrate the existence of a qualifying relationship with a citizen of the United States for two reasons. First, her remarriage prior to the adjudication of the petition mandates its denial. 8 C.F.R. § 204.2(c)(1)(ii). Second, she failed to file the petition within two years of the legal termination of her marriage to A-T-, as required by section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act. The petitioner, therefore, has not demonstrated a qualifying relationship requisite for immigrant classification under section 204(a)(1)(A)(iii) of the Act. Beyond the decision of the director, the petitioner has also not

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[3] Even if the petitioner had filed this petition within two years of her divorce within two years of her divorce from A-T- and had not remarried, the petitioner would still be denied because, pursuant to section 204(a)(1)(A)(iii) (II)(aa)(CC)(ccc) of the Act, she has failed to demonstrate a connection between termination of the marriage and any abuse to which she was subjected by A-T- during their marriage.

[4] Even if the deadline were found to be a statute of limitations, the petitioner would still have to show that she exercised due diligence in pursuit of her claim. *See Albillo-DeLeon v. Gonzalez*, 410 F.3d at 1100.

established her corresponding eligibility for immediate relative classification on the basis of such a relationship, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act.

Battery or Extreme Cruelty

In her June 3, 2009 letter, the petitioner stated that A-T- blackmailed her; demanded that she pay household expenses, including his monthly car loan payment; and told her that he would not appear at an interview scheduled in conjunction with her immigration processing unless she first paid him $60,000. She also stated that A-T- was aggressive and physically threatening in an unspecified manner, and that his behavior caused her psychological hardship and depression that bordered on psychosis.

In her undated letter sent to the director in response to his December 28, 2009 NOID, the petitioner stated that A-T- was verbally abusive both to her and to her son; often refused to allow her and her son to sleep; did not allow her son to attend school; spent her savings; and constantly threatened to divorce her.

In their January 15, 2010 letters, [redacted] and [redacted] stated that the petitioner was devastated by A-T-'s behavior.

The record also contains an August 6, 2009 letter from [redacted], a psychologist who interviewed the petitioner on July 11, 2009. [redacted] stated in her letter that the petitioner told her that A-T- demanded money and expected her to pay their shared expenses; made her buy him a car; verbally abused her; threatened to divorce her; threatened her immigration status; demanded cash in exchange for his attendance at an interview scheduled in conjunction with her permanent residency application; failed to attend the interview; and filed for divorce. [redacted] stated that the petitioner suffers from symptoms of Dysthymic Disorder, which is a form of chronic moderate depression, and Generalized Anxiety Disorder.

Considered in the aggregate, the relevant evidence fails to establish that A-T- subjected the petitioner to battery or extreme cruelty during their marriage. The petitioner does not allege, and the record does not establish, that A-T- subjected the petitioner to battery during their marriage.

Nor does the relevant evidence establish that A-T- subjected the petitioner to extreme cruelty during their marriage. To qualify for immigrant classification under section 204(a)(1)(A)(iii) of the Act, the statute and regulation require that the non-physical cruelty be extreme. *See Hernandez v. Ashcroft*, 345 F.3d 824, 840 (9th Cir. 2003) (interpreting the definition of extreme cruelty at 8 C.F.R. § 204.2(c)(1)(vi)). The petitioner's claims that A-T- demanded money from her lack sufficient probative detail to show that such actions constituted psychological abuse or exploitation or were part of an overall pattern of violence. In similar fashion, her brief assertion that A-T- was physically threatening lacks probative detail necessary for a demonstration that such behavior constituted a threatened act of violence. The remaining other actions of A-T- described by the

petitioner are not comparable to the types of behaviors listed at 8 C.F.R. § 204.2(c)(1)(vi) as examples of extreme cruelty.

The letters signed by [redacted] and [redacted] are identical, which calls into question their actual authorship, and diminishes their probative value. While we do not question the professional expertise of [redacted] and her diagnosis of the petitioner's mental health condition, her letter alone does not establish that the behavior of A-T- as described by the petitioner constituted battery or extreme cruelty.

The relevant evidence fails to demonstrate that, during their marriage, A-T-subjected the petitioner to battery or extreme cruelty, as that term is defined in the regulation at 8 C.F.R. § 204.2(c)(1)(vi) and as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Good Faith Entry into Marriage

The relevant testimonial evidence does not establish that the petitioner entered into the marriage in good faith, as she failed to provide detailed, probative information about her relationship with A-T- beyond the generalized assertions that she met A-T- through a mutual friend, that they fell in love at first sight, and that they corresponded for two years. For example, the record lacks probative details regarding the circumstances surrounding their initial introductions; their courtship; their engagement; their wedding; and their shared residence or any other marital experiences, apart from the alleged abuse. Although [redacted] and [redacted] stated their belief that that the petitioner married A-T- in good faith, they offered no details about the couple's relationship. Moreover, as noted previously, their letters are identical to one another, calling into question their authorship and reducing their probative value.

Nor does the documentary evidence of record establish that the petitioner married A-T- in good faith. The pictures of the couple together are only evidence that they were together on a few occasions. The evidence that the couple shared a joint bank account is not evidence of shared financial obligations as there is no evidence that both individuals had access to, and used, the account. The evidence of a good faith marriage for two reasons. First, there is no evidence that the 2005 joint tax return was ever filed with the Internal Revenue Service and the petitioner submitted only a partial copy of the return. Nor is the installment sale contract for A-T-'s car evidence of shared financial obligations, as the petitioner was not named in the document.

The petitioner has failed to establish that she entered into marriage with A-T- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Joint Residence

Beyond the decision of the director, the petitioner has failed to establish that she resided with A-T-. The petitioner provided conflicting information about the alleged joint residence on the Form I-360: she first stated that she and A-T- resided together from September 2005 until April 2007, but later

stated that they ceased living together in September 2006. The petitioner's statement that she and A-T- resided together until April 2007 also conflicts with the couple's divorce decree, which provided separate addresses for the couple as of January 23, 2007.

The record contains additional conflicting information regarding the petitioner's alleged joint residence with A-T-. On the Form I-360, she stated that the last address she shared with A-T- was located [redacted], and that they lived there together until September 4, 2006. On the Form G-325A, Biographic Information, that she signed on December 5, 2005, the petitioner stated that the [redacted] address in [redacted] had been her only residence in the United States, and that she had lived there since September 2005. However she also submitted an identification card issued by the State of [redacted] on September 26, 2005, which listed her address as an apartment on [redacted] in [redacted]. The [redacted] address was also listed as the couple's address on the cover letter[5] to the 2005 income tax return submitted by the petitioner.

Both [redacted] and [redacted] stated that they had visited the couple at their residence, which was located on [redacted] The divorce decree names the [redacted] residence in [redacted] as the petitioner's current address as of January 23, 2007 and, given that the petitioner stated on the Form I-360 that the [redacted] address in [redacted] was the last address at which she and A-T- resided together, it is unclear when they would have lived together at the [redacted] home in [redacted]

Given the unresolved inconsistencies in the petitioner's statements on the Form I-360 and the documentary evidence of record, the petitioner has failed to establish that she resided with A-T-, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act. For this additional reason, the petition may not be approved.

Conclusion

The petitioner has failed to overcome the director's decision on appeal. She has not established: a qualifying relationship with a citizen of the United States; that her former husband subjected her to battery or extreme cruelty during their marriage; or that she married her former husband in good faith. Beyond the decision of the director, the petitioner has also failed to establish that she resided with her former husband and was eligible for immediate relative classification based on their former relationship.[6] Accordingly, the petitioner is ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act and this petition must remain denied.

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[5] The first page of the tax return was not submitted, so it is not clear whether the tax return was filed from this address.

[6] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 and the appeal will be dismissed.

ORDER: The appeal is dismissed.

(9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).