

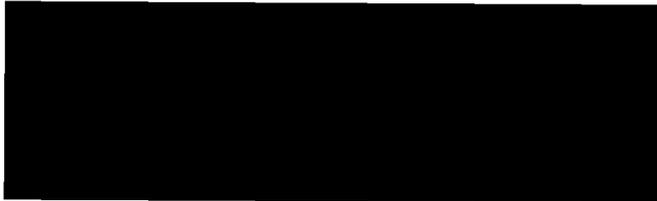
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B9

DATE: **SEP 12 2011**

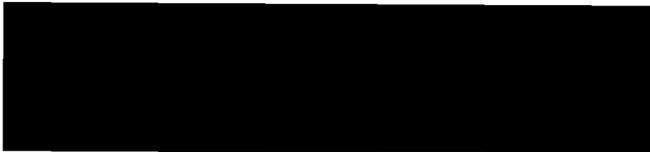
Office: VERMONT SERVICE CENTER

File: 

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:

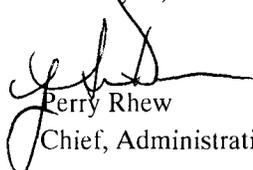


INSTRUCTIONS:

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 Director, Vermont Service Center, denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequently filed appeal. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motion will be granted. The AAO's previous decision will be affirmed and the petition will remain 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.

The director determined that the petitioner had not established that she had jointly resided with a United States citizen, or that she had been subjected to battery or extreme cruelty perpetrated by a United States citizen. The AAO affirmed the director's decision.

Applicable Law and Regulations

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 based on his or her relationship to the abusive spouse, 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 explained 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.

The evidentiary guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are set forth 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.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on

an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Facts and Procedural History

The petitioner is a native and citizen of China. She entered the United States on May 2, 2003 on a K-3 visa. She claims she married ██████¹ the claimed abusive United States citizen, on September 13, 2001 in China. On or about November 5, 2004, she filed a Form I-485, Application to Register Permanent Residence or Adjust Status. On November 3, 2008, the petitioner filed the instant Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant. On January 12, 2010, the director issued a request for evidence (RFE). Upon review of the record, including the petitioner's response to the RFE, the director determined that the petitioner had not established that she had jointly resided with ██████ and that she had been subjected to battery or extreme cruelty perpetrated by ██████. Counsel for the petitioner submitted a Form I-290B, Notice of Appeal or Motion. Upon review of the evidence submitted on appeal, the AAO dismissed the appeal. Counsel for the petitioner now submits a Form I-290B, Notice of Appeal or Motion, checking the box indicating that he is filing a motion to reopen and a motion to reconsider this matter and submits a brief and a medical record dated June 15, 2010. The AAO will reopen the matter to consider the medical record, and as counsel appears to contend that the AAO's decision was based on an incorrect application of law or Service policy, the motion to reconsider will also be granted.

Joint Residence

The AAO previously found that the petitioner had not provided consistent, probative evidence of her claimed joint residence with ██████. The AAO specifically observed that the petitioner's testimony did not provide any detail regarding her alleged residence with ██████ in China or of the couple's alleged joint residences in the United States. The inconsistencies and deficiencies in the record as set out by the AAO regarding the petitioner's claimed joint residence will not be repeated here. Counsel on motion asserts that the AAO relied on one discrepant document and failed to consider the petitioner's explanation regarding the document. Counsel also contends that the AAO failed to give substantial weight to the documentary evidence showing the couple's joint address at the Wine Court address and Fremont address and failed to consider the overall instability in the petitioner's marriage leading to her frequent moves.

Counsel's assertion that the AAO found that the petitioner had not established joint residence based on a single discrepant document is unfounded. The AAO found the backdated lease unreliable as evidence and did not find the petitioner's explanation that her husband bought several lease forms and used them for two separate addresses either credible or reasonable. The AAO reviewed the record for evidence of the joint residences and found that the petitioner had received mail at a couple of the addresses she claimed were joint residences with her husband. However, as previously noted, receiving mail at a particular address is insufficient to establish that the individual resided at the address. The record does not include testimony or other consistent probative

¹ Name withheld to protect the individual's identity.

evidence, establishing when, where, and for how long the petitioner allegedly resided with her husband at specific addresses. The petitioner has failed to provide probative, consistent testimony regarding the claimed joint residences, such as a description in detail of the residential buildings, their apartments, their home furnishings, their neighbors, or any of their daily routines within the various residences. She testified that she lived intermittently with her husband but failed to provide consistent chronological detail of when, where, and for how long she lived at particular addresses and whether her living arrangements included her husband. Upon review of the totality of the evidence in the record, neither the record nor the petitioner provides a consistent account of the couple's alleged joint residences. The petitioner has not provided credible testimony to establish that she jointly resided with her husband during the marriage.

Battery or Extreme Cruelty

On motion counsel asserts that the information the petitioner provided to her psychiatrist is highly credible and must be given due consideration by the AAO. Counsel contends that the affidavit supplied by an individual who drove the petitioner to Los Angeles after an alleged altercation with her husband should be given "great weight." Counsel avers that the petitioner was subjected to forced financial and sexual servitude and was degraded and forced to live in fear of violence or being deported. Counsel notes that the petitioner continues to suffer from the mental abuse sustained over her long relationship and is on medication. The record on motion includes a record of a telephone initial contact/screening between the petitioner and the Arcadia Mental Health Center dated June 15, 2010. The medical record indicated that the petitioner's presenting problems included depression and anxiety for two years with multiple stressors including marital problems, immigration status, financial stress, passing of her father in China, her son remaining in China, and fear of losing her job. The petitioner was scheduled for an appointment for June 29, 2010 and the disposition of the petitioner's case indicates that she declined counseling services at Arcadia Mental Health Center on that date.

As previously noted, the AAO found that the September 2, 2008 psychological evaluation prepared by [REDACTED], based on two interviews of unspecified length with the petitioner, had diminished probative value. The AAO observed that [REDACTED] two sessions with the petitioner did not reflect the insight commensurate with an established relationship with a mental health professional and that the report was not based on a foundation establishing extreme cruelty or battery as defined in the statute and regulation. The AAO also noted that the petitioner provided information regarding forced sexual intimacy to [REDACTED] but failed to include similar testimony in her declaration to U.S. Citizenship and Immigration Services (USCIS) and thus raised questions regarding the petitioner's credibility. The AAO duly considered the evaluation submitted but found the evaluation insufficient to establish the petitioner's claims. On motion, counsel offers his explanation for the petitioner's failure to provide a consistent account of the alleged abuse, indicating that perhaps the petitioner did not find it comfortable to discuss forced sexual intimacy with her attorneys but was more forthcoming with her psychiatrist.

Upon review, the petitioner has not provided an affidavit on motion explaining her previous failure to provide testimony of forced sexual intimacy to USCIS. Thus, counsel's speculation on

motion has no probative value. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Moreover, upon further review of the record including [REDACTED] evaluation, we observe that the record does not include [REDACTED] credentials and work experience, which also diminishes the probative value of the evaluation. Accordingly, we reiterate that [REDACTED] evaluation has little probative value in establishing the petitioner's claims that she was subjected to battery or extreme cruelty as set out in the statute and regulation.

Upon review of the additional medical record provided on motion, the telephonic interview of the petitioner provides no information regarding her alleged marital problems and provides an overview of possible multiple stressors in the petitioner's life. The medical record fails to provide probative evidence that the petitioner's continued claimed symptoms are specifically connected to her claim that she was subjected to battery or extreme cruelty perpetrated by her husband.

The AAO has considered the totality of the record, noted inconsistencies in the record which have not been addressed by the petitioner, and pointed out deficiencies in the petitioner's testimony and the testimony submitted by others on her behalf. Counsel does not provide new probative evidence on motion that explains the inconsistencies or resolves the deficiencies.

Conclusion

The petitioner is not eligible for this immigrant classification as she has not established she was subjected to battery or extreme cruelty perpetrated by the United States citizen spouse or that she established a joint residence with the United States citizen spouse. The record on motion to reopen does not include new evidence sufficient to overcome the AAO's prior decision and the motion to reconsider is insufficient to establish that the prior decision of the AAO was based on an incorrect application of law or Service policy.

As always, the burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here that burden has not been met.

ORDER: The AAO's March 31, 2011 decision is affirmed and the petition remains denied.