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FILE: [REDACTED]  
EAC 06 048 52649

Office: VERMONT SERVICE CENTER

Date: **AUG 22 2007**

IN RE: Petitioner: [REDACTED]

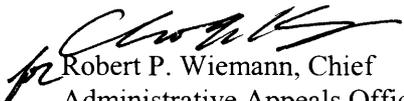
PETITION: Petition for Special Immigrant Battered Spouse Pursuant to Section 204(a)(1)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(B)(ii)

ON BEHALF OF PETITIONER:

[REDACTED]

**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 classification as a special immigrant pursuant to section 204(a)(1)(B)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(B)(ii), as an alien battered or subjected to extreme cruelty by her United States lawful permanent resident spouse.

The director denied the petition, finding that the petitioner failed to establish a qualifying relationship with a U.S. lawful permanent resident, her eligibility for preference immigrant classification based on that relationship, that she was battered or subjected to extreme cruelty by her spouse, and that she entered into the marriage in good faith.

The petitioner, through counsel, submits a timely appeal and brief.

Section 204(a)(1)(B)(ii) of the Act provides that an alien who is the spouse of a lawful permanent resident of the United States may self-petition for immigrant classification if he or she demonstrates that the marriage to the lawful permanent resident spouse was entered into in good faith and that during the marriage, the alien or the alien's child 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 a spouse of an alien lawfully admitted for permanent residence under section 203(a)(2)(A) of the Act, resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(B)(ii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(II).

Section 204(a)(1)(J) of the Act further 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 corresponding regulation at 8 C.F.R. § 204.2(c)(1) states, in pertinent part:

(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 . . . lawful permanent resident 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 under section 204(a)(1)(B)(ii) of the Act are contained in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

(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 both the self-petitioner and the abuser. . . .

\* \* \*

(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.

According to the petitioner, she first met G-M-S-\* in Korea in 1988 where they were co-workers. The petitioner indicates that they were both married to other individuals at that time and maintained a friendship. After moving to the U.S. with his spouse, G-M-S- called the petitioner and rekindled their friendship after realizing that they had both separated from their respective spouses. The petitioner claims that G-M-S- proposed to her and after approximately six months of conversations, decided to accept his proposal.

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\* Name withheld to protect individual's identity.

The petitioner states that she first came to the U.S. in July 2002 as a nonimmigrant visitor and began living with G-M-S-. At this time, both the petitioner and G-M-S- were both still married to other people. The petitioner returned to South Korea in June 2003 and after approximately one month returned to the U.S. where she resumed her residence with G-M-S-. G-M-S- became a lawful permanent resident of the United States in July 2003 and obtained a divorce from his spouse in March 2004.

In January 2005, the petitioner returned to South Korea “to see [her] family and complete the official divorce from [her] first husband . . . .” At the end of January, the petitioner indicates that G-M-S- sent her an electronic message saying that he wanted to separate from her. She states that on April 4, 2005, she called G-M-S- and asked him to “add [her] to his family registration since [she] had divorced legally from [her] first spouse . . . .”<sup>1</sup> The petitioner claims that G-M-S- “refused” to add her to his family registration because he was “going to get back together with his ex-wife” and because he “did not want [the petitioner] anymore.” The petitioner states that G-M-S- came to South Korea on April 6, 2005 in order to ask his ex-father-in-law for help in getting back together with his ex-wife. Although the petitioner claims that she tried to meet G-M-S while he was in South Korea before he made a final decision about getting back with his ex-wife, the petitioner states, “[h]e ignored me and refused to see me,” prior to her returning to the U.S. on April 23, 2005.

When G-M-S- returned to the U.S. on April 26, 2005 he purportedly told the petitioner that the only reason he attempted to get back together with his ex-wife was to “get some money for a new restaurant” and because “his daughter and ex-wife’s brother had also persuaded him to try and work things out as well.” The petitioner then states that G-M-S- reiterated the fact that he wanted to separate from her. A week later, the petitioner claims that she met G-M-S at a restaurant where he again stated his wish to separate, whereupon the petitioner began to cry and said she wanted to die. The petitioner claims that at this time, G-M-S- agreed to try to “work things out” and that they had sexual relations the following morning. The petitioner indicates that approximately one month later, G-M-S- sent the petitioner a message through a third party, indicating that he did not want to live with the petitioner any more. The relationship continued to deteriorate after that point and ultimately ended.

#### *Qualifying Relationship and Eligibility for Immediate Relative Classification*

There appears to be no dispute that the petitioner and G-M-S did not obtain a marriage license and had no marriage ceremony. Therefore, the question that must be determined is whether the petitioner and her spouse entered into a common law marriage as recognized by the state of Texas. The director determined that the petitioner failed to establish a common law marriage with G-M-S- because at the time her divorce was finalized she was not residing with G-M-S-, G-M-S was not “holding himself out” as the petitioner’s spouse, and the petitioner failed to establish that they had an agreement to be married.

On appeal, counsel argues that the director’s decision was based on “several misconceptions about Texas common law marriage.” Counsel first argues that the director’s reliance on the fact that the petitioner was residing in Korea at the time of her divorce is immaterial and has no bearing on the validity of her common law marriage at the time her previous marriage was legally terminated. Counsel then argues that the director’s finding that G-M-S-’s wish to separate from the petitioner voided their common-law marriage was not valid. Finally, counsel states that the petitioner sufficiently documented “instances of [G-M-S-] and [the petitioner’s] behavior as a married couple” as well as “evidence of their reconciliation and G-M-S-’s own recognition of their

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<sup>1</sup> The Family Census Register submitted by the petitioner indicates that her divorce was reported on April 2, 2005.

relationship as a marriage well after April 2, 2005, the date of [the petitioner's] divorce." We note that counsel does not dispute the director's finding that the petitioner could not have entered into a common law marriage with G-M-S prior to April 2005 because she was not free to enter into marriage with G-M-S while she was still married to another person. Counsel cites to three cases to support her argument that the petitioner and G-M-S met the three elements of an informal or common law marriage in Texas: *Eris v. Phares*, 39 S.W.3d 708 (Tex. App. 1<sup>st</sup> Dist. 2001), *Russell v. Russell*, 865 S.W.2d 929 (Tex. 1994), and *Shelton v. Belknap*, 282 S.W.2d 682 (Tex. 1955). Under Texas law, the three elements that must be met are:

- (1) There must have been an agreement to be married.
- (2) After the agreement, the couple must have lived together in Texas as husband and wife, and
- (3) The couple must have represented to others that they were married.

See Tex. Fam. Code Ann. § 2.401(a)(2005).

As will be discussed, we are not persuaded by counsel's arguments and find that the petitioner has failed to establish that she and G-M-S- entered into common law marriage as recognized by the laws of the state of Texas.

*The petitioner failed to establish that there was an agreement to be married*

Although the agreement to be married may be an implied agreement and inferred from evidence which establishes that the parties lived together and represented to others that they were married, the conduct must establish that there is "an agreement to presently become man and wife." *Shelton*, 282 S.W.2d at 684. In finding that the parties in *Shelton* had demonstrated "a present intent to then become and thereafter remain husband and wife," the court looked to the fact that there was an actual statement regarding being husband and wife, followed by the purchase of a wedding ring and a honeymoon. *Id.* at 685. Despite the petitioner's claims regarding their previous plans to marry, at the time the petitioner's divorce was finalized in April 2005, G-M-S- had already indicated his "intent to separate" from the petitioner, told her that "he did not want [her] anymore," and refused to add her to his family register. Upon her return to the United States, G-M-S-'s family ordered the petitioner to leave the home that she shared with G-M-S- and G-M-S- again told the petitioner that he wanted to separate from her. While the petitioner indicates that at some time in May 2005, she "thought G-M-S wanted to reconcile," she does not indicate that G-M-S actually indicated his assent to resume their previous relationship or in any way indicated his agreement to be married to the petitioner. Although the petitioner claims that the "calm" lasted for about one month, the petitioner's testimony indicates that G-M-S refused to talk to her, was cold and silent, pursued a relationship with another woman, and ultimately sent a message through a third party that he did not want to live with the petitioner anymore.

We find the record is legally and factually insufficient to support a finding that the petitioner and G-M-S- agreed to be married. The petitioner's testimonial evidence does not indicate that either she or G-M-S- agreed to be married after her divorce was finalized. In fact, G-M-S- continued to reiterate the fact that he did not want to continue his relationship with the petitioner and refused to discuss their relationship with her. While they did live together for a period of time after her divorce, both G-M-S- and his family made it clear that the petitioner was not G-M-S-'s spouse. Accordingly, we do not find that the petitioner has established that she and G-M-S- "intended to have a present, immediate, and permanent marital relationship and that they did in fact agree to be husband and wife." *Winfield v. Renfro*, 821 S.W.2d 640, 645 (Tex.App.1<sup>st</sup> Dist.1991), writ denied, (Apr. 22, 1992)(citing *Rodriguez v. Avalos*, 567 S.W. 2d 85, 86 (Tex.Civ.App.1978), no writ).

*The petitioner failed to establish that she and G-M-S- lived together as husband and wife*

As noted by the director, although we acknowledge that the petitioner did reside with G-M-S- prior her divorce from her first spouse, they could not have been considered to have been living together “as husband and wife” because the petitioner was not free to enter into marriage at that time. In the brief submitted on appeal, counsel quotes *Shelton* and argues that “[A] relationship begun in illegality may, in the absence of impediments and by the consent and agreement of both parties, put on the cloak of legality.” *Shelton*, 282 S.W.2d at 685. Although we agree with the proposition of law cited by counsel, the facts do not establish that after the petitioner’s divorce was finalized and the “cloak of legality” placed upon their relationship, that the petitioner and her spouse resided as husband and wife. The petitioner’s own testimony indicates that even before her divorce was finalized, G-M-S- indicated that he wanted to end the relationship. The petitioner further indicates that after they both returned from Korea after she received her divorce, she and G-M-S- slept separately, that he continued to pursue another woman, and that his own family did not recognize their relationship as husband and wife. While the petitioner describes a single instance in which she awoke “in the living room on the first floor [with G-M-S-] sleeping right next to [her],” this instance is not sufficient to establish that they were living together as husband and wife. We note that the record contains no testimonial or documentary evidence of what was shared by the petitioner and G-M-S- in the home and other evidence such as shared accounts, taxes, or utilities that would be indicative of the shared responsibilities of a married couple. Accordingly, we find the record to be insufficient to support a finding that the petitioner and G-M-S- lived together as husband and wife.

*The petitioner failed to establish that she and G-M-S- represented to others that they were married*

The record contains two statements from [REDACTED] and [REDACTED] which indicate that G-M-S presented the petitioner as his wife. The remaining affiants, while indicating that they visited the petitioner and her spouse and saw them together, do not provide any specific details or describe any particular instances in which G-M-S- indicated that he was married to the petitioner, or introduced her or referred to her as his spouse. The petitioner herself indicates that G-M-S-’s own family did not recognize him to be married to the petitioner. Despite the submission of these affidavits, however, we note that the majority of the affidavits refer to the period of time prior to the petitioner’s divorce from her first spouse and prior to G-M-S-’s expressed desire to end the relationship. Regardless, as the court found in *Winfield*, “occasional introductions as husband and wife do not establish the element of holding out . . . .” 821 S.W.2d at 651. Further, in *Ex Parte Threet*, 333 S.W.2d 361 (Tex. 1960), the Supreme Court of Texas held that evidence that a couple was introduced as husband and wife to a few friends was no evidence that they held themselves out to be married. As previously noted, the record is absent documentary evidence such as taxes, joint bank accounts, or a deed to their home which would show them as holding out to the public that they were married. Accordingly, we find the evidence is not sufficient to support a finding that the petitioner and G-M-S- represented themselves to others as being married. Even if we found that the testimonial evidence sufficiently established that the petitioner and G-M-S- held themselves out as married *prior to the petitioner’s divorce*, the record contains no evidence that when the petitioner was actually free to enter into marriage with G-M-S- that they continued to hold themselves out as married.

As the petitioner has failed to establish that she and G-M-S- were legally married under the laws of the state of Texas, either through a marriage ceremony or through common law marriage, the petitioner has failed to establish that she has a qualifying relationship as the spouse of a lawful permanent resident of the United States and that she was eligible for classification based upon that relationship.

*Battery or Extreme Cruelty*

To be eligible for classification, the statute requires that the abuse be perpetrated against the petitioner by his or her spouse *during the marriage*. As discussed above, as the petitioner has failed to establish that she had a qualifying marriage to G-M-S, she cannot establish that she was subjected to abuse by her lawful permanent resident spouse.

Notwithstanding this finding, we note that even if the petitioner was able to establish a qualifying marriage to G-M-S-, the petitioner's claims regarding the alleged abuse are not sufficient to establish that she was battered or that she was subjected to extreme cruelty by G-M-S-. First, the petitioner's claims regarding threats from G-M-S-'s daughter and husband are not sufficient to establish claim of abuse as the abuse must be perpetrated *by the petitioner's spouse*, not a third party. The petitioner also does not indicate that her husband instigated, encouraged or was otherwise involved in the threatening behavior of his daughter. The petitioner's claims regarding her spouse's financial abuse and descriptions of her spouse as being "cold and mean," "disrespectful" and that he "lied to her" are not sufficient to establish a claim of extreme cruelty. The petitioner does not indicate that her spouse did not provide for her, that she was prevented from accessing her own money, or from obtaining employment. The fact that G-M-S- asked the petitioner to contribute to the household is not indicative of extreme cruelty especially in light of the petitioner's acknowledgment that G-M-S- did not make very much money while working at his brother's restaurant. The petitioner's description of her spouse's actions does not provide examples of actions that rise to the level of those 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.

As it relates to the petitioner's claim of physical abuse, the petitioner describes a single incident which occurred on July 9, 2005 in which she and G-M-S- got into an altercation. The petitioner offers the following description of the incident:

I was angry, hurt and crying and so grabbed his shirt, but he shook off my hands and shouted "Hit me! Hit me!" Then [G-M-S-] grabbed me by my arm with his hand and began to pull me. He had his cell phone in his the [sic] other hand and continued to scream "Hit me! I will call 911!" I was crying and scared. He kept screaming at me and grabbed me and pulled me. I was struggling to get away from him. I just couldn't suffer like this anymore. I finally broke free from [G-M-S-] and ran out of the house.

In finding that the petitioner failed to establish her claim of battery, the director noted the fact that it was the petitioner, not G-M-S who elevated the "verbal argument to a physical altercation" and found G-M-S-'s threats to contact police and to press charges to be justified given the injuries inflicted upon him by the petitioner.

On appeal, counsel states that the director erroneously excused G-M-S-'s "role in the altercation as self-defense" and argues that the "[g]rabbing a shirt in no way justifies an assault that results in injury." Counsel then notes that despite being investigated by the police, no charges were brought against the petitioner as a result of the incident. We are not persuaded by counsel's argument. Counsel attempts to characterize G-M-S-'s actions against the petitioner as a "beating," while minimizing the fact that it was the petitioner who initiated the physical contact with her spouse by grabbing his shirt. Contrary to counsel's characterization, however, according to the petitioner's own testimony, G-M-S- did nothing more than grab her arm and pull her *after* the petitioner grabbed his shirt. Therefore, counsel's assertion that the director's reference to G-M-S-'s actions as

being self-defense was erroneous is not persuasive. While counsel focuses on the injuries sustained by the petitioner, counsel fails to acknowledge the injuries that were inflicted upon G-M-S-. Counsel's final argument that the petitioner was not charged with any crime can be equally applied to G-M-S-. We note that while the petitioner submitted evidence of a temporary restraining order, the order is a "joint and mutual temporary restraining order."<sup>2</sup>

Accordingly, as discussed above, we concur with the determination of the director that the petitioner has failed to establish that she was battered by or subjected to extreme cruelty during her marriage, as required by section 204(a)(1)(B)(ii)(I)(bb) of the Act. The petitioner has failed to overcome this finding on appeal.

*Good Faith Entry into Marriage*

As with our previous discussion, although our determination that the petitioner has failed to establish that she was married to G-M-S necessarily precludes a finding of a good faith marriage, we will also discuss the evidence of the petitioner pertaining to this issue.

Despite a claimed relationship of nearly three years, the petitioner has not submitted any documentary evidence showing shared financial accounts, taxes or other commingling of assets. While the lack of documentary evidence is not automatically disqualifying, the petitioner fails to provide any testimonial evidence regarding what they shared, or, in the alternative, an explanation for why they had no joint accounts or other documentation. The affidavits submitted on the petitioner's behalf contain only general statements such as that they "presented themselves as man and wife" and that they "lived together as a couple," but provide no specific details to demonstrate that the petitioner intended to establish a life with G-M-S. As previously stated in the discussion related to the issue of the common law marriage requirements, the majority of the testimonial evidence in the record relates to the beginning of the petitioner's relationship with G-M-S-, rather than the period of time in which she was actually free to enter into marriage with G-M-S-. As such, the testimony has little probative value in determining that the petitioner intended to establish a life with G-M-S. While the petitioner did submit copies of photographs documenting trips taken with G-M-S-, the photographs offer little probative value in establishing that the petitioner entered into her marriage in good faith. Accordingly, even if we found the petitioner to have had a valid, common law marriage with G-M-S-, the petitioner has failed to establish that she entered into marriage with G-M-S- in good faith, as required by section 204(a)(1)(B)(ii)(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.

**ORDER:** The appeal is dismissed.

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<sup>2</sup> No. 05-1929-FC2, County Court at Law, Number Two, Williamson County, Texas, September 29, 2005.