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**U.S. Citizenship
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JAN 19 2007

FILE: [REDACTED]
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Office: VERMONT SERVICE CENTER

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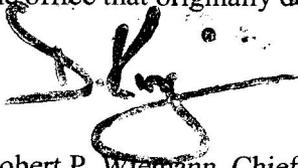
IN RE: Petitioner: [REDACTED]

PETITION: Petition for Immigrant Battered 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 appeal will be dismissed.

The petitioner seeks classification as an immigrant pursuant to section 204(a)(1)(A)(iii) of 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 because the petitioner did not establish that she entered into marriage with her husband in good faith.

On appeal, counsel submits a brief and additional evidence.

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).

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

(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 self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she . . . 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.

* * *

(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.

* * *

(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. . . . 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 Venezuela who was paroled into the United States on February 8, 1996. The petitioner married F-G-¹, a U.S. citizen, on June 29, 1994 in New York. On August 4, 1995, the legacy Immigration and Naturalization Service (INS) approved the Form I-130, immigrant petition for alien relative, filed by F-G- on the petitioner's behalf. The petitioner filed this Form I-360 on September 15, 2005. The director subsequently issued a Request for Evidence (RFE) of the petitioner's good moral character and good faith marriage to her husband. The petitioner, through counsel, timely responded with further documentation. On March 22, 2006, the director issued a Notice of Intent to Deny (NOID) the petition for lack of the requisite good moral character and good faith marriage. The petitioner, through counsel, timely responded to the NOID with additional evidence. On June 29, 2006, the director denied the petition for lack of evidence that the petitioner entered into marriage with her husband in good faith.

On appeal, counsel claims that under the principle of *res judicata*, the prior approval of the Form I-130 filed by the petitioner's husband on her behalf director precluded the director from revisiting the question of the petitioner's good-faith marriage. We concur with the director's determination that the petitioner failed to establish the requisite good faith marriage. Beyond the director's decision, the record also fails to demonstrate that the petitioner is a person of good moral character.

Good Faith Entry into Marriage

The petitioner submitted the following evidence relevant to her alleged good faith entry into marriage with her husband:

- Affidavits of the petitioner's friend [REDACTED] dated January 9 and May 17, 2006;
- Affidavits of the petitioner's friend, [REDACTED] dated January 24 and April 9, 2006;
- Affidavit of the petitioner's daughter dated July 25, 2006 and submitted on appeal;
- A copy of the former couple's 1996 joint federal income tax return;
- One bank statement dated April 8, 1997 that is individually addressed to the petitioner at the former couple's marital residence;
- One electricity and gas bill dated November 2, 1995 that is individually addressed to the petitioner at the former couple's marital residence;
- One gas bill dated August 28, 1997 addressed to the petitioner individually at another residence;
- Eight telephone bills dated between September 1995 and March 1997 that are individually addressed to the petitioner's husband at the former couple's marital residence; and
- Copies of ten photographs of the petitioner and her husband that are unidentified as to date and location.

The petitioner's friend, Ms. [REDACTED] states that she socialized with and visited the former couple frequently. Ms. [REDACTED] notes that in 1996, she called the petitioner's home and the petitioner's husband answered her call. Ms. [REDACTED] also states that the petitioner bought clothing for her husband when she

¹ Name withheld to protect individual's identity.

and Ms. [REDACTED] went shopping together. Ms. [REDACTED] provides no further, probative details regarding the petitioner's marital relationship. Ms. [REDACTED] states that she knew the petitioner and her husband during the former couple's marriage and that most of the times when she called the petitioner, the petitioner's husband answered the telephone. Ms. [REDACTED] provides no further, relevant information. The petitioner's daughter states that she was six years old when the petitioner and her husband separated. The petitioner's daughter confirms the former couple's joint residence and states that she and the petitioner's husband went out together and he bought her ice cream. The petitioner's daughter provides no further, probative information.

The bank statement and utilities bills are addressed to the petitioner or her husband individually and do not indicate that the former couple shared financial assets or liabilities. Moreover, the 1997 gas bill individually addressed to the petitioner indicates that she maintained another residence apart from the former couple's marital home at that time. The copied photographs show the petitioner, her husband and the petitioner's daughter together on four, unidentified occasions. The pictures alone do not establish the petitioner's good faith entry into marriage with her husband.

On the Form I-360, the petitioner states that she and her husband resided together from June 1994 until August 1999. However, the petitioner submitted no documentation of their marital relationship after 1997. The 1996 joint income tax return and the August 4, 1995 approval of the Form I-130 petition filed by the petitioner's husband on her behalf date from the beginning of the former couple's relationship and do not outweigh the majority of the documentation, which, as discussed above, fails to provide detailed, probative evidence of the petitioner's good-faith marriage.

The petitioner submitted no other documentary or testimonial evidence of her allegedly good faith entry into marriage with her husband of the types listed in the regulation at 8 C.F.R. § 204.2(c)(2)(vii) and described in the director's RFE and NOID. Although she is not required to do so, the petitioner does not explain why such evidence does not exist or is unobtainable. *See* 8 C.F.R. §§ 204.1(f)(1), 204.2(c)(2)(i). The petitioner also did not submit her own statement describing the former couple's courtship, wedding, joint residence and shared experiences.

Accordingly, the record does not demonstrate that the petitioner entered into marriage with her husband in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

The Issue of the Petitioner's Good-Faith Entry into Marriage is Not Res Judicata

On appeal, counsel claims that we are prohibited from revisiting the question of the petitioner's good faith marriage because the INS previously approved the Form I-130 petition filed by the petitioner's husband on her behalf. Counsel's reliance on the principle of *res judicata* is misguided for two reasons. First, it is not clear that the doctrine applies in visa petition proceedings before CIS. The application of *res judicata* prevents relitigation of the same issue between the same parties when there has been a final and valid judgment on the issue. *Federated Dept. Sotres, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). *Res judicata* may apply to administrative proceedings when an agency acts in a judicial

capacity and resolves disputed issues of fact, which the parties have had an adequate opportunity to litigate. *United States v. Utah Constr. & Min. Co.*, 384 U.S. 394, 422 (1966). Although some federal circuit courts of appeals have found that *res judicata* applies to immigration proceedings, the majority of these cases – including that cited by counsel – address the applicability of the doctrine in removal proceedings. *See, e.g., Hamdan v. Gonzales*, 425 F.3d 1051, 1059 (7th Cir. 2005) (citing cases applying *res judicata* to adjudication of petitions for relief from removal in immigration courts); *Medina v. INS*, 993 F.2d 499, 503 (5th Cir. 1993) (applying *res judicata* in deportation proceedings and cited by counsel on appeal). Removal proceedings before the Executive Office for Immigration Review (EOIR) within the Department of Justice are quasi-judicial and differ significantly from the adjudication of visa petitions by Citizenship and Immigration Services (CIS) at issue in this case. In removal proceedings, both parties present their claims before an immigration judge or the Board of Immigration Appeals (BIA). Both parties may present evidence and witnesses on their behalf and cross-examine the witnesses of the opposing party. In visa petition proceedings before CIS, the petitioner requests relief directly from the agency itself and is not provided with a hearing before an impartial body absent an appeal.

Moreover, while multiple issues and applications for relief may be adjudicated in removal proceedings before EOIR, each petition for an immigration benefit filed before CIS is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The record of proceeding for the Form I-130 petition filed by the petitioner's husband is not before us and counsel does not show that the same supporting documents were filed in both cases to establish a good-faith marriage. Indeed, if the Form I-130 petition was approved based on the same evidence regarding the allegedly good-faith marriage submitted in this case, the approval would have been erroneous. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988).

Second, even if *res judicata* may be applied in these proceedings, the principle requires identical claims and parties, both of which are lacking in this case. Although similar, the parties, statutory provisions and benefits procured through sections 201(b)(2)(A)(i) and 204(a)(1)(A)(iii) of the Act are not identical. The petitioner's husband was the petitioner and bore the burden of proof in the prior Form I-130 adjudication, in which he was required to establish his citizenship and the validity of their marriage. Section 201(b)(2)(A)(i) of the Act; 8 C.F.R. §§ 204.1(g), 204.2(a)(2). In contrast, in this case, the petitioner bears the burden of proof to establish not only the validity of their marriage, but also her own good-faith entry into their union. Section 204(a)(1)(A)(iii)(I)(aa) of the Act. The regulations for self-petitions under section 204(a)(1)(A)(iii) of the Act further explicate the statutory requirement of the self-petitioner's good-faith entry into the marriage or qualifying relationship. 8 C.F.R. §§ 204.2(c)(1)(ix), 204.2(c)(2)(vii). However, the regulations concerning spousal, immediate relative petitions contain no similar evidentiary requirements to establish the bona fides of the marriage except in cases of marriage fraud (8 C.F.R. § 204.2(a)(1)(ii)); marriages entered into when the alien spouse

was in proceedings (8 C.F.R. § 204.2(a)(1)(iii)); and marriage within five years of the petitioner's obtainment of lawful permanent resident status (8 C.F.R. § 204.2(a)(1)(i)). Accordingly, even if applicable in these proceedings, the principle of *res judicata* does not bar an examination of the petitioner's good-faith entry into her marriage or relieve the petitioner of her burden to establish this statutory requirement in the instant case.

Good Moral Character

Beyond the director's decision, the record also fails to establish that the petitioner is a person of good moral character. The record shows that on March 8, 2001, the petitioner pled guilty to and was convicted of prostitution in violation of section 230.00 of the New York Penal Law, which states:

A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee.

Prostitution is a class B Misdemeanor.

The petitioner's conviction for prostitution bars a finding of her good moral character pursuant to section 101(f) of the Act, which states, in pertinent part:

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was –

* * *

(3) a member of one or more of the classes of persons, whether admissible or not, described in paragraphs (2)(D) . . . of section 212(a) of this Act . . . if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period[.]

Section 212(a)(2)(D) of the Act states, in pertinent part:

Prostitution and commercialized vice. – Any alien who –

(i) . . . has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status

is inadmissible.

The petitioner was convicted of prostitution on March 8, 2001, five years before this petition was filed. Accordingly, the petitioner's conviction for prostitution prevents a finding of her good moral character pursuant to section 101(f)(3) of the Act.

The record also fails to support a discretionary finding of the petitioner's good moral character despite her prostitution offense pursuant to section 204(a)(1)(C) of the Act. That section provides CIS with the discretion to find a petitioner to be a person of good moral character if: 1) the petitioner's conviction or act is waivable for the purposes of determining admissibility or deportability under section 212(a) or section 237(a) of the Act; and 2) the conviction or act was connected to the alien's battery or subjection to extreme cruelty by his or her U.S. citizen or lawful permanent resident spouse or parent. Section 204(a)(1)(C) of the Act, 8 U.S.C. § 1154(a)(1)(C). Although inadmissibility due to prostitution is waivable for self-petitioners under section 212(a)(2)(D) of the Act, the petitioner's conviction was not connected to her battery or subjection to extreme cruelty by her U.S. citizen husband.

In her May 18, 2006 affidavit, the petitioner states that she separated from her husband in 1999 and that in 2001 a woman in her neighborhood brought her to a house and told the petitioner she could make money there. The petitioner states, "I didn't know that the woman was taking me to a brothel. I should have left that place after I realized that was a brothel. But, I needed money desperately in order to support myself and my daughter." The petitioner explains that she pled guilty because her court-appointed attorney advised her that otherwise she would have further hearings and the process would take longer. The petitioner does not demonstrate, however, that her conviction was connected to her husband's battery or extreme cruelty. The petitioner and her husband separated in August 1999, over a year and a half before her conviction for prostitution and the petitioner does not indicate that she was in contact with her husband after their separation. The petitioner's affidavit also fails to demonstrate that her economic situation in 2001 was caused by her husband's battery or extreme cruelty and consequently led to her conviction for prostitution. Accordingly, we cannot find the petitioner to be a person of good moral character as a matter of discretion pursuant to section 204(a)(1)(C) of the Act.

The record fails to establish the petitioner's good-faith entry into marriage with her husband and her good moral character. The petitioner is consequently ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act and her petition must be denied.

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 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.