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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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**U.S. Citizenship
and Immigration
Services**

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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: **APR 06 2009**
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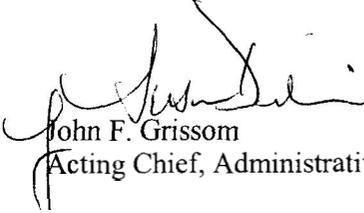
PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(B)(ii) of the
Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(B)(ii)

ON BEHALF OF PETITIONER:



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.


John F. Grissom
Acting 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 The director's decision will be withdrawn and the matter remanded for further action.

The petitioner seeks immigrant classification under section 204(a)(1)(B)(ii) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii), as an alien battered or subjected to extreme cruelty by a lawful permanent resident of the United States.

The director denied the petition on the basis of his determination that the petitioner had failed to establish: (1) that she shared a joint residence with her husband; and (2) that she married her husband in good faith.

Counsel submitted a timely appeal on December 31, 2007

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 the alien demonstrates that he or she entered into the marriage with the United States lawful permanent resident 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)(B)(ii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(II).

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

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

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

- (ii) *Legal status of the marriage.* The self-petitioning spouse must be legally married to the abuser when the petition is properly filed with the Service. A spousal self-petition must be denied if the marriage to the abuser legally ended through annulment, death, or divorce before that time. . . .

- (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.

* * *

- (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 filed under section 204(a)(1)(B)(ii) 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.
- (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. . . .
- (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.

* * *

- (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, a citizen of Mexico, married F-M,¹ a lawful permanent resident of the United States, on February 16, 1998, in Jacana, Mexico. She entered the United States in or around February 1999. F-M- filed Form I-130, Petition for Alien Relative, on behalf of the petitioner in April 1998, and it was approved on March 17, 2004.²

The petitioner filed the instant Form I-360 on January 9, 2007. The director issued a request for additional evidence on January 18, 2007, and requested additional evidence to establish that the petitioner was subjected to battery or extreme cruelty by F-M-; that she is a person of good moral character; and that she married F-M- in good faith. The petitioner responded on April 8, 2007, and submitted additional evidence. The director issued a second request for additional evidence on July 24, 2007, and requested additional evidence to establish that the petitioner has a qualifying marriage with F-M-; that the petitioner shared a joint residence with F-M-; and that she married F-M- in good faith. The petitioner responded on October 1, 2007, and submitted additional evidence. After considering the evidence of record, the director denied the petition on November 30, 2007.

Upon review of the entire record of proceeding, the AAO agrees with the director's decision to deny the petition.

Joint Residence

The first issue on appeal is whether the petitioner has established that she shared a joint residence with F-M-. Upon review, the AAO agrees with the director's determination that the petitioner has not established that she and F-M- shared a joint residence.

The petitioner states on the Form I-360 that she and F-M- shared a joint residence from February 1998 until January 2004. In his November 30, 2007 denial, the director stated that the photographs of the couple; the police report; the medical reports from 2001; and the affidavits from friends and family members discussing the abuse suffered by the petitioner had failed to establish that the petitioner shared a joint residence with the F-M-.

The petitioner submits no additional evidence to overcome the decision of the director on appeal. On the Form I-290B, counsel states that F-M- and the petitioner lived with F-M-'s mother after their marriage. Counsel states that F-M- and the petitioner lived with F-M-'s mother at two addresses: (1) [REDACTED] in San Antonio, Texas; and (2) [REDACTED] in San Antonio, Texas. Counsel states that the police report, the statement from the battered women's shelter, and "various correspondences" prove that the petitioner and F-M- resided together at the same address.

¹ Name withheld to protect individual's identity.

² See SRC 98 155 50462.

The AAO disagrees with counsel's analysis. The AAO questions why, if the petitioner and F-M- shared a joint residence for over five years as attested by the petitioner on the Form I-360, she is unable to submit a single document that names both she and F-M- as living at the same address. While there are several documents in the record that list the petitioner as having lived at both the [REDACTED] and [REDACTED] addresses, the record lacks a single document identifying F-M- as living at either of these residences.

Although the Form I-130 approval notice identifies F-M-'s mailing address as the [REDACTED] residence, the AAO notes that it is dated March 17, 2004, after the period during which the petitioner states that she and F-M- lived together. This document, therefore, is not evidence that she and F-M- shared a joint residence between February 1998 and January 2004. Nor does the June 17, 2001 police report state that the petitioner and F-M- were living together. Although the petitioner's pay statement indicates that she lived at the [REDACTED] address in May 2005, this document does not support her assertion that she and F-M- shared a joint residence between February 1998 and January 2004. In fact, it contradicts her testimony in the Form I-360.

The petitioner's claim of joint residence during the time indicated on the Form I-360, therefore, consists of several documents indicating that she lived at the [REDACTED] and [REDACTED] addresses. There is no evidence indicating that F-M- lived at either address during this time. The AAO acknowledges that, since the petitioner indicates that they lived with F-M-'s mother, copies of mortgage or lease documents, or even evidence of shared utility accounts, may not be available. However, if the petitioner and F-M- shared a joint residence for over five years as attested by the petitioner on the Form I-360, it is unclear to the AAO why documents such as bank statements, tax returns, credit card statements—any evidence that names both the petitioner and F-M- as sharing the same address—would be unavailable. It is unclear to the AAO why the petitioner would not be able to obtain a single document indicating that she and F-M- shared a residence during the period of claimed joint residence. The petitioner has failed to establish that she shared a joint residence with F-M-, as required by section 204(a)(1)(B)(ii)(II)(dd) of the Act.

Good Faith Entry into Marriage

The second issue on appeal is whether the petitioner has established that she entered into marriage with F-M- in good faith. Upon review, the AAO agrees with the director's determination that the petitioner has failed to establish that she entered into marriage with F-M- in good faith.

In support of her assertion that she married F-M- in good faith, the petitioner submitted photographs and medical records indicating that she was seen for a "threatened miscarriage" in 2001. In his July 24, 2007 request for additional evidence, the director stated that this evidence was not sufficient to demonstrate her good faith entry into the marriage. The director stated that the medical records were not sufficient to show that F-M- was the father of the baby, and that the photographs, alone, were not sufficient to demonstrate her intentions upon entering into the marriage. The director specifically

requested a statement from the petitioner describing, in her own words, her relationship with F-M-, beginning with the first time she met F-M-.

However, the petitioner elected not to submit such a statement in support of her assertion that she married F-M- in good faith. Rather, she opted to re-submit information already contained in the record of proceeding, which the director had just informed her was insufficient. The director noted this in his denial, stating in part that she “had already been informed that this evidence was not sufficient” and that “[i]t is unclear why you would resubmit the same evidence.”

On appeal, the petitioner elects, again, not to submit a statement describing her relationship with F-M-, and again offers no explanation for her failure to comply with the director’s specific request. With regard to the director’s statement that the medical records do not state that F-M- was the father of the child, counsel states that, under Texas law, a woman’s spouse is presumed to be the father of her child. Counsel also points to the marriage certificate and I-130 approval notice as evidence that the petitioner married F-M- in good faith. No additional evidence, beyond the assertions of counsel on the Form I-290B, is submitted in support of the petitioner’s contention that she married F-M- in good faith.

Upon review, the AAO agrees with the director’s determination that the petitioner has failed to establish that she married F-M- in good faith. While the marriage certificate establishes that the petitioner legally married F-M-, it does not establish that she married him in good faith, despite counsel’s assertions to the contrary. Nor are the photographs of record evidence of her intentions upon entering into the marriage: the photographs merely establish that F-M- and the petitioner were together on certain occasions.

Nor is approval of the Form I-130 evidence of a good faith marriage, as asserted by counsel. Approval of a Form I-130 is not prima facie evidence of the beneficiary’s good-faith entry into marriage with her husband under section 204(a)(1)(A)(iii) of the Act. In self-petitions under section 204(a)(1)(B)(ii) of the Act, the alien bears the burden of proof to establish that she or he entered into the marriage in good faith, and the regulation specifically defines the term “good faith marriage” and what types of evidence will suffice to meet that eligibility criterion. 8 C.F.R. §§ 204.2(c)(1)(ix), (c)(2)(vii). Hence, the fact that a self-petitioner was the beneficiary of an approved Form I-130 filed by his or her spouse will not establish that the petitioner actually entered into the marriage in good faith. Further, the AAO notes that the burden of proof in the Form I-130 filing was on D-T-, and not on the petitioner. While evidence submitted with a Form I-130 petition filed on the petitioner’s behalf may be relevant to a determination of her good faith entry into the marriage, reliance on such evidence alone is unwarranted. Had Congress not intended for USCIS to inquire into the bona fides of the marriage, and rely solely upon approval of the Form I-130, it would not have enacted section 204(a)(1)(A)(iii) of the Act to require that petitioner make such a demonstration. For all of these reasons, the AAO rejects counsel’s assertion that approval of the Form I-130 establishes that the petitioner entered into the marriage in good faith.

The AAO highlights the petitioner’s repeated failure, despite explicit instructions from the director, to submit a personal statement describing her relationship with F-M-, beginning with their first meeting.

As it currently stands, the record lacks critical information that would aid the AAO in making a determination on the petitioner's intentions upon entering into the marriage. For example, the record lacks information regarding how the petitioner and F-M- met; the petitioner's first impressions of F-M-; why she decided to date F-M-; their first date; details about their courtship; the length of their courtship; activities they enjoyed together; when they became engaged; the length of their engagement; details about their wedding; etc. Again, the director specifically afforded the petitioner the opportunity to submit an affidavit, but she declined the opportunity. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The evidence of record fails to demonstrate that the petitioner entered into marriage with F-M- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Conclusion

The AAO agrees with the director's determination that the petitioner has failed to establish that she shared a joint residence with F-M- or that she married F-M- in good faith. However, the record indicates that the director did not issue a notice of intent to deny the petition (NOID) before he issued his decision. Although the record establishes that the petitioner is ineligible for the benefit sought, the petition must be remanded, solely on procedural grounds, so that the petitioner has the opportunity to respond to a NOID. The petition must be remanded to the director for issuance of a NOID in compliance with the regulation in effect at 8 C.F.R. § 204.2(c)(3)(ii)³ on the date this petition was filed, and the director must afford the petitioner the opportunity to submit a response within the 60-day period. On remand, the director must address the issues before the AAO on appeal; i.e., whether the petitioner has established that she shared a joint residence with F-M-, and whether she married F-M- in good faith. The director should also explore the issue of whether the petitioner had a qualifying relationship with F-M-, and her subsequent qualification for immigrant classification as an immediate relative, as the AAO notes that the record contains a copy of a May 2005 paystub for the beneficiary. The paystub lists the petitioner's marital status as "single." If the marriage between F-M- and the petitioner was terminated more than two years before the Form I-360 was filed on January 9, 2007, the petitioner is not eligible for immigrant classification under section 204(a)(1)(B)(ii) of the Act as an alien battered or subjected to extreme cruelty by a lawful permanent resident of the United States.

As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

³ USCIS promulgated a rule on April 17, 2007 related to the issuance of requests for evidence and NOIDs. 72 Fed. Reg. 19100 (Apr. 17, 2007). The rule became effective on June 18, 2007, *after* the filing of this petition on January 9, 2007.

ORDER: The director's November 30, 2007 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.