



U.S. Citizenship
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APR 21 2009

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date:
EAC 06 182 52366

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:
[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


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 appeal will be dismissed.

The petitioner seeks immigrant classification under 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 on the basis of his determination that the petitioner had failed to establish: (1) that she shared a joint residence with her ex-husband; and (2) that she entered into marriage with her ex-husband in good faith.

Counsel filed a timely appeal on June 27, 2007.

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, 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:

- (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)(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.

* * *

- (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 is a citizen of Nigeria who entered the United States in B-2 visitor status on May 30, 2003. She married P-F-¹ a United States citizen, on March 29, 2004. The petitioner and P-F- divorced on December 14, 2004.²

The petitioner filed the instant Form I-360 on May 22, 2006. On November 6, 2006, the director issued a notice of intent to deny (NOID) the petition, which notified the petitioner of deficiencies in the

¹ Name withheld to protect individual's identity.

² The AAO notes that, in her appellate brief, counsel states that the petitioner filed for divorce from P-F- in April 2004.

record and afforded her the opportunity to submit additional evidence to establish that she had shared a joint residence with P-F-; that P-F- subjected her to battery or extreme cruelty; and that she married P-F- in good faith. The petitioner responded on January 5, 2007. After considering the evidence of record, the director denied the petition on March 8, 2007. In his decision, the director found that the petitioner had failed to establish that she had shared a joint residence with P-F-; that P-F- had subjected her to battery or extreme cruelty; and that she had married P-F- in good faith.

Counsel filed a Form I-290B on April 12, 2007. In his May 30, 2007 decision, the director rejected counsel's appeal on the basis of its late filing. The director also found that since counsel submitted no evidence in support of the Form I-290B, the filing did not qualify for treatment as a motion, either. However, the director notified counsel and the petitioner that he was re-opening the matter on service motion, as his March 8, 2007 decision contained an error. According to the director, the March 8, 2007 decision should have only contained two grounds for denial: (1) that the petitioner had failed to establish that she had shared a joint residence with P-F-; and (2) that the petitioner had failed to establish that she married P-F- in good faith. According to the director, the petitioner's response to his NOID was sufficient to establish that the petitioner was subjected to battery or extreme cruelty by P-F-. The director also informed counsel and the petitioner that a new, corrected, denial would accompany the decision.

As noted in his May 30, 2007 communication, the director issued a second letter of denial on May 30, 2007. In this denial, the director found two grounds for denial, as indicated previously: (1) that the petitioner had failed to establish that she had shared a joint residence with P-F-; and (2) that the petitioner had failed to establish that she married P-F- in good faith. Counsel's second Form I-290B was filed timely; it was received at the service center on June 27, 2007.

Joint Residence

The first issue on appeal is whether the petitioner has established that she shared a joint residence with P-F-. The petitioner stated on the Form I-360 that she and P-F- shared a joint residence from December 2003 until August 2005 (they were divorced on December 14, 2004). At the time the petition was filed, the petitioner submitted two items in support of her contention that she and P-F- shared a joint residence: (1) her own affidavit; and (2) and affidavit from [REDACTED]

In her May 19, 2006 affidavit, the petitioner stated that she met P-F- at a gas station in Pflugerville, Texas. They exchanged phone numbers, and began dating. The petitioner realized that P-F- was addicted to drugs, and P-F- suggested that the couple move from Texas to Minnesota so that he would not be around his friends, whom he felt to be bad influences. They agreed that the petitioner would move to Minnesota first, and P-F- would join her later. The petitioner moved to Minnesota, and P-F- joined her there on December 22, 2003. The petitioner stated that, due to P-F-'s criminal record, the couple "could not readily find an apartment." However, the petitioner met [REDACTED], and [REDACTED] sublet his apartment to the couple. After enduring abuse from P-F-, the petitioner contacted her lawyer on July 2, 2004, and asked him to prepare and file a petition for dissolution of marriage. It

appears that P-F- moved out of the home after she filed for divorce, as the petitioner states that P-F- called her on the phone to curse at her.

In his May 15, 2006 affidavit, ██████████ stated that he subleased his apartment to P-F- and the petitioner, as they were having trouble renting an apartment because P-F- had a criminal record, and had not held a job for some time.

The director found this evidence insufficient to establish that the petitioner and P-F- had shared a joint residence and, in his November 6, 2006 NOID, requested additional evidence from the petitioner in support of her assertion that she and P-F- shared a joint residence. In response, the petitioner submitted more affidavits. In her January 4, 2007 affidavit, the petitioner stated that she cannot submit a lease or utility bills because, due to P-F-'s criminal history and her own lack of credit and employment history, they could not lease an apartment in their own names.

In her June 25, 2007 affidavit, which was submitted on appeal, the petitioner stated that she and P-F- did not have a written lease for their apartment, which they subleased from ██████████. The petitioner stated that all utilities were in ██████████'s name.

In his June 26, 2007 affidavit, ██████████ who states that he is from the same tribe as the petitioner and knew her in Nigeria, stated that he visited P-F- and the petitioner in their apartment several times. ██████████ testified that, in addition to the fact that P-F- was physically present when he visited the couple's apartment, he knows that P-F- was living there because he remembers men's shoes near the door, men's shaving cream in the bathroom, and a brand of beer that he knows the petitioner did not drink.

Upon review, the AAO finds that the petitioner has established that she shared a joint residence with P-F-. Although there is little documentary evidence of record to establish that P-F- and the petitioner shared a joint residence, the petitioner's explanation as to why such evidence is unavailable is reasonable. The director has accepted the petitioner's testimony with regard to battery or extreme cruelty, a determination with which the AAO agrees. However, the battery and extreme cruelty as described by the petitioner took place in the couple's home. It is unclear to the AAO how, if the petitioner's testimony with regard to the battery or extreme cruelty is sufficient, that her testimony with regard to a shared joint residence is not sufficient, given that such battery or extreme cruelty took place within their shared joint residence. The petitioner has established by a preponderance of the evidence that she shared a joint residence with P-F-, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act. The AAO, therefore, withdraws that portion of the director's decision finding otherwise.

Good Faith Entry into Marriage

The director also found that the petitioner had failed to establish that she married P-F- in good faith. The AAO agrees. Although the AAO has found the petitioner's testimony sufficient to establish that she shared a joint residence with P-F-, neither her testimony, nor the other evidence of record, is sufficient to establish that she married P-F- in good faith.

As noted previously, the petitioner stated in her May 15, 2006 affidavit that she met P-F- at a gas station in Pflugerville, Texas. The petitioner stated that she liked him from the moment she met him, and felt that he also liked her. They exchanged phone numbers, and began dating. Five weeks later, she realized that P-F- was addicted to drugs. The petitioner stated that she spoke to him about his need to seek treatment, and his need to attend church services with her, on a regular basis. Several months later, P-F- suggested that the couple move from Texas to Minnesota so that he would be away from certain friends whom he thought to be bad influences. The petitioner states that she moved to Minnesota first, and P-F- joined her there on December 22, 2003. He proposed marriage on March 23, 2004, and the couple was married in Houston, Texas on March 29, 2004. According to counsel's appellate brief, the petitioner filed for divorce in April 2004, the month after she and P-F- were married. The divorce became final on December 14, 2004.

According to the petitioner's January 4, 2007 affidavit, she learned she was pregnant in May 2004. The baby was born on January 29, 2005, and [REDACTED], not P-F-, is named as the child's father on the birth certificate. Although the petitioner now states that P-F- is in fact the father of the child, she told the Registrar of the State of Minnesota's that [REDACTED] is the father of the child, the petitioner acknowledges that she and [REDACTED] had sexual relations, and the child bears [REDACTED] surname. Accordingly, the AAO will not accept the birth of this child as evidence of the petitioner's good faith entry into marriage with P-F-. Although counsel states on appeal that Minnesota law presumes P-F- to be the father of the child because he was born within a certain timeframe immediately following the divorce, the AAO notes nonetheless that the petitioner specifically notified the State of Minnesota that [REDACTED] is the father of her child. Regardless of whether the State of Minnesota presumes P-F- to be the father of the her child, the AAO will not accept the birth certificate of the petitioner's child as evidence of her good faith entry into marriage with P-F- for immigration purposes, as she represented to the State of Minnesota that he is not the father of the child.

In a case such as this, where there is little physical evidence of the petitioner's intentions upon entering the marriage, the petitioner's testimony is crucial. However, the petitioner's testimony, with regard to her intentions upon entering the marriage, is vague. Although the record contains affidavits from the petitioner's friends and family members, their testimony is insufficiently vague. Simply asserting that the petitioner married P-F- in good faith is not sufficient; details must be provided. The record, as it presently stands, lacks basic information about the relationship between the petitioner and P-F-. Although the petitioner states that she and P-F- met at a gas station, she offers few other details. The record lacks information about the couple's first introductions; first impressions; their decision to date; their courtship; the types of activities they enjoyed together; the length of their courtship; their decision to marry; or how any cultural differences, or any other types of differences, were resolved, etc. Without such information, the AAO cannot examine the petitioner's intentions, as there is little physical evidence that speaks to her intentions upon entering the marriage. The evidence of record fails to demonstrate that the petitioner entered into marriage with P-F- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Ineffective Assistance of Counsel

On appeal, counsel asserts that the petitioner has been the victim of the ineffective assistance of her previous counsel. However, counsel has not complied with *Matter of Compean, Banglay and J-E-C-, et al*, 14 I&N Dec. 710 (A.G. 2009), which governs cases involving claims of ineffective assistance of counsel. In *Compean*, the Attorney General held that the Constitution affords no right to counsel or effective assistance of counsel to aliens in immigration proceedings under the Sixth Amendment or the Due Process Clause of the Fifth Amendment. *Id.* at 711-727. Although the Act and the regulations do not afford aliens a right to effective assistance of counsel, either, USCIS may, in its discretion, reopen proceedings based on the deficient performance of an alien's prior attorney. *Id.* at 727. *Compean* establishes three elements of proof and six documentary requirements that an alien must meet to prevail on a claim of deficient performance of counsel. *Id.* Although *Compean* addresses deficient performance of counsel claims in the context of motions to reopen removal proceedings, the decision also applies to claims of deficient performance raised on direct review. *Id.* at 728 n.6.

To prevail on a deficient performance of counsel claim, the alien must demonstrate the following:

1. That counsel's failings were egregious;
2. In cases where the alien moves to reopen beyond the 30-day limit, the alien must demonstrate that he or she exercised due diligence in discovering and seeking to cure the lawyer's deficient performance; and
3. That the alien was prejudiced by the attorney's error(s). To establish prejudice, the alien must demonstrate that but for the deficient performance, it is more likely than not that the alien would have been entitled to the relief he or she was seeking.³ *Id.* at 732-34.

In order to establish these three requirements, the alien must submit six documents:

1. The alien's detailed affidavit setting forth the relevant facts and specifically stating what the attorney did, or did not do, and why the alien was consequently harmed;
2. A copy of the agreement, if any, between the attorney and the alien. If no written agreement exists, the alien must specify what the lawyer agreed to in his or her affidavit;

³ Where the alien sought discretionary relief, the alien must not only show that he or she was eligible for such relief, but also would have merited a favorable exercise of discretion. *Matter of Compean*, 24 I&N Dec. at 734-35.

3. A copy of the alien's letter to the attorney setting forth the attorney's deficient performance and a copy of the attorney's response, if any;
4. A completed and signed complaint addressed to the appropriate State bar or disciplinary authorities;
5. Any document(s) the alien claims the attorney failed to submit; and
6. When the alien is subsequently represented, a signed statement from the new attorney attesting to the deficient performance of the prior attorney.

Id. at 735-38. If any of the latter five documents are unavailable or missing, the alien must explain why the documents are unavailable or summarize the contents of any missing documents. *Id.* at 735.

The three substantive requirements must be met for all deficient performance claims filed before and after *Compean* was issued on January 7, 2009. *Id.* at 741. For claims pending prior to January 7, 2009, the alien is not required to meet the six new documentary requirements, but must still comply with the requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). *Lozada* required an alien to submit the following: (1) an affidavit attesting to the relevant facts, detailing the agreement that was entered into, what actions were supposed to be taken, and what the attorney did or did not do; (2) evidence that the attorney was informed of the allegations, given an opportunity to respond, and the attorney's response, if any; and (3) evidence that a complaint has been filed with the appropriate disciplinary authorities regarding such representation or an explanation of why such a complaint was not filed. *Id.* at 638-39.

Here, the petitioner has satisfied neither *Compean* nor *Lozada*. Accordingly, the petitioner has failed to establish that she was the victim of ineffective assistance of counsel or any other manner of deficient performance by her previous counsel.

Conclusion

The AAO disagrees with the director's determination that the petitioner has failed to establish that she shared a joint residence with her ex-husband and, accordingly, withdraws that portion of the director's decision. However, the AAO nonetheless agrees with the director's determination that the petitioner has failed to establish that she entered into marriage with her ex-husband in good faith. The petitioner, therefore, is ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), and the petition must be denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.