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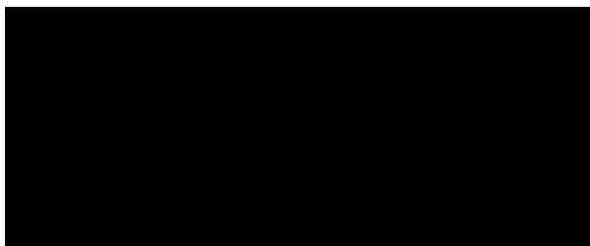


U.S. Department of Homeland Security
U.S. Citizenship & Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

**U.S. Citizenship
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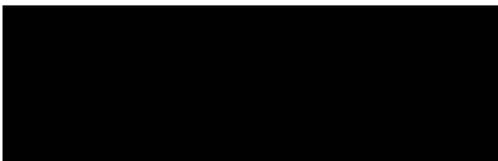


FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date:
EAC 07 121 50772

IN RE: Petitioner: [REDACTED]

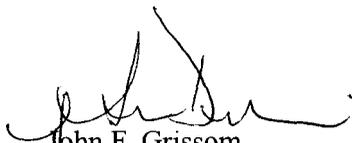
PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(A)(iii) of the
Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON BEHALF OF PETITIONER:



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 Director, Vermont Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision; however, because the petition is not approvable, it will be remanded for further action and consideration.

The petitioner seeks immigrant classification under 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 denied the petition for failure to establish entry into the qualifying relationship in good faith.

On appeal, prior counsel submitted a brief.

We concur with the director's determination that the petitioner has not established entry into the qualifying relationship in good faith. Beyond the director's decision, we find that the petitioner has not established that she was subjected to the requisite battery or extreme cruelty by her spouse. Nonetheless, the case must be remanded because the director denied the petition without first issuing a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

The record in this case provides the following relevant facts and procedural history. The petitioner is a native and citizen of Kenya who entered the United States as a nonimmigrant visitor (B-2) on March 6, 2001. On October 4, 2004, the petitioner married L-M¹, a U.S. citizen, in Oakland, California. L-M- subsequently filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf. The director denied the Form I-130 because the petitioner and L-M- failed to appear for a scheduled interview on July 6, 2006.

On March 26, 2007, the petitioner filed this Form I-360. On November 5, 2007 the director issued a Request for Evidence (RFE). The petitioner timely responded with further evidence. On March 10, 2008, the director denied the petition for failure to establish entry into the qualifying relationship in good faith and the petitioner, through prior counsel, timely appealed.

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).

¹ Name withheld to protect individual's identity.

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 explicated in the regulation at 8 C.F.R. § 204.2(c)(1), which 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 citizen . . . 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 are 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.

* * *

(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.

Entry into the Marriage in Good Faith

The record contains the following evidence relevant to the petitioner's claim that she entered into marriage with her husband in good faith:

- A copy of the petitioner's marriage certificate indicating that she married L-M- in Oakland, California on October 4, 2004;
- The petitioner's statement;
- A letter from [REDACTED] dated November 23, 2007 stating that the petitioner and L-M- leased an apartment at [REDACTED] and lived together in the apartment;
- A copy of a lease for a period beginning on February 1, 2005 and ending on August 1, 2005 listing the petitioner, L-M-, and [REDACTED] as tenants;
- Bank statements; and
- Affidavits from [REDACTED] and [REDACTED]

The petitioner submitted a statement in which she states that she met L-M- in the "summer of 2004" in a class at the Laney Community College. The petitioner states that she and L-M- "started talking," became friends and "started dating." The petitioner states that the relationship progressed and L-M- introduced her to his parents and sisters. The petitioner also states that, on October 4, 2004, L-M- surprised her by taking her to the courthouse for a surprise wedding ceremony. The petitioner states that L-M- had made all of the arrangements and had the rings and birth certificates and he had also contacted a friend of hers to witness the ceremony. The petitioner states that afterwards, L-M- "moved in with [her] in Hayward." The AAO notes that the record of proceeding contains no statements from any of the wedding guests. Although the petitioner's statement mentions meeting L-M-, the affidavit does not contain any discussion regarding how the petitioner met her spouse, their courtship, her

feelings for her spouse or reasons for marrying him and offers no details of their life together after their marriage except as it relates to the claimed abuse. Although the petitioner also submitted two affidavits, the affidavits do not provide details of the petitioner's and L-M-'s courtship or relationship. The affidavits from [REDACTED] and [REDACTED] contain only a general statement regarding the petitioner's relationship with her former spouse, such as stating that each has knowledge that the petitioner and L-M- were married. The AAO notes that [REDACTED] resides in Kenya and does not appear to have firsthand knowledge of the petitioner's relationship with L-M-. In addition, the affidavits provide no probative details regarding the petitioner's relationship with her spouse and interactions with each other.

The petitioner also submitted a letter from [REDACTED] a resident manager at [REDACTED]. The letter is dated November 23, 2007 and states that the petitioner moved into the complex in December 2003 and her spouse "joined in afterwards." [REDACTED] also states that the petitioner and L-M- "came to the office and signed the lease agreement and [were] issued [a] house key and [a] common area key." [REDACTED] does not state when the petitioner and her spouse moved into the apartment, when L-M- moved out, or when the petitioner moved out of the apartment. In addition, [REDACTED] does not state the source of the information provided. As documentary evidence, the petitioner submitted a copy of a lease for the apartment with the term of the lease beginning on February 1, 2005 and ending 6 months later on August 1, 2005. The record of proceeding only contains the lease mentioned above and the lease makes no provision for a month-to-month tenancy. In her statement, the petitioner states that L-M- moved into her apartment in Hayward, California after they were married on October 4, 2004. However, the lease in the record or proceeding indicates the beginning of the term as February 1, 2005, almost four months after the petitioner and L-M- were married. The record of proceeding contains no explanation for this inconsistency. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Finally, the AAO notes that the petitioner does not include a statement from the roommate listed in the lease verifying that the petitioner and L-M- lived with her in the apartment.

The bank statements in the record of proceeding indicate that the petitioner and L-M- had a joint bank account. However, the AAO is not able to determine that both the petitioner and L-M- deposited and withdrew funds from the account. Therefore, the bank statements can only be afforded minimal probative value. Although the lack of documentary evidence of a good faith marriage is not automatically disqualifying, as discussed above, the testimonial evidence submitted by the petitioner does not establish that she entered into the marriage in good faith. Accordingly, the petitioner failed to demonstrate that she entered into marriage with her spouse in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

The record does not demonstrate that the petitioner entered into marriage with her husband in good

faith. 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.

Battery or Extreme Cruelty

Beyond the director's decision, we further find that the petitioner has failed to demonstrate the requisite battery or extreme cruelty. In her statement, the petitioner states that L-M- would abuse her, treat her harshly and never bought her anything for Christmas even though he demanded a gift from her. The petitioner does not describe any of incidents of abuse or harsh treatment in probative detail. The affidavits in the record of proceeding provide insufficient information to establish her claim. None of the affidavits provide details of abuse or extreme cruelty. [REDACTED] only states that the petitioner has "gone through so much emotionally for being left by the husband she loved." Neither affiant describes any incident of alleged abuse in detail or provides further, probative information.

The only mention of battery in the record of proceeding is in the psychological report prepared by [REDACTED]. [REDACTED] states that "on one occasion, [L-M-] twisted [the petitioner's] right arm back with such force" that the petitioner "is still receiving physical therapy for the injury and pain inflicted." [REDACTED] also states that when the petitioner told L-M- that she had no money to give him, L-M- "hit [the petitioner] in [sic] her back and told her she would be sorry if she did not give him money." Finally, [REDACTED] states that L-M- threatened to kill the petitioner.

Although [REDACTED] report describes abuse on the part of L-M- towards the petitioner, the petitioner never mentions any of these things in her own statement. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, [REDACTED] does not have firsthand knowledge of these events.

In sum, the relevant evidence fails to demonstrate that the behavior of the petitioner's spouse rose to the level of the acts described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). Accordingly, we disagree with the director's determination and find that the petitioner has failed to demonstrate that L-M- subjected her to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

We note that the AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). See also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See e.g., *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Despite the petitioner's ineligibility based on the present record, this case must be remanded to the director for issuance of a NOID in compliance with the regulation the in effect at 8 C.F.R. § 204.2(c)(3)(ii).

As always 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.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.