

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B9.



FILE:

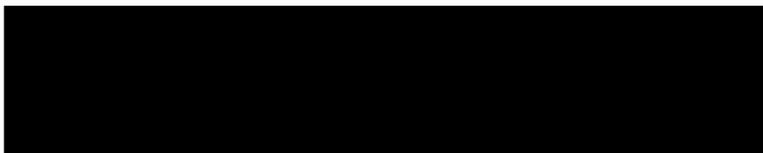
[Redacted]
EAC 05 004 52669

Office: VERMONT SERVICE CENTER

Date: FEB 12 2009

IN RE:

Petitioner:



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.

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 Director, Vermont Service Center, denied the immigrant visa petition. On appeal, the Administrative Appeals Office (AAO) remanded the matter for further action. The matter is now before the AAO upon certification of the director's subsequent, adverse decision. The decision of the director will be affirmed, as modified below, and the petition will be denied.

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].

In this case, the director initially denied the petition on January 11, 2006 because the petitioner did not establish that her U.S. citizen spouse had subjected her or any of her children to battery or extreme cruelty. In its November 22, 2006 decision on appeal, the AAO concurred with the director's determination, but remanded the petition for issuance of a Notice of Intent to Deny (NOID) in compliance with the former regulation at 8 C.F.R. § 204.2(c)(3)(ii) (2006).

Upon remand, the director issued a NOID on April 17, 2007, which informed the petitioner that she had not submitted sufficient evidence to establish the requisite battery or extreme cruelty. The petitioner, through counsel, responded to the NOID with additional evidence, which the director found insufficient to establish her eligibility. Accordingly, the director denied the petition on September 7, 2007 on the ground cited in the NOID and certified the decision to the AAO for review. The director's Notice of Certification informed the petitioner that she had 30 days to submit a brief to the AAO. To date, the AAO has received nothing further from the petitioner or counsel.

In our prior decision, incorporated here by reference, we fully discussed the pertinent facts and relevant evidence submitted below. Accordingly, we will only address the evidence submitted after that decision was issued. In response to the NOID, the petitioner submitted her personal statement dated June 14, 2007, an evaluation of the petitioner written by [REDACTED], a licensed clinical social

worker, and printouts summarizing the Harris County, Texas criminal record of the petitioner's husband, D-B-¹

In her June 14, 2007 statement, the petitioner reiterates her claims that her husband called her derogatory names, spent her money, insulted her cooking and threatened her. The petitioner states that her husband threatened her "by saying that he does not like whoever gives him trouble and he 'will deal' with such a person." The petitioner explains that her husband "was a drug user, used guns, engaged in gang fights and said he would not hesitate to deal with whoever made trouble for him." The petitioner further explains, again, that she contacted an unspecified women's shelter and that a member of the shelter's staff told her that she did not have a case and the shelter could not help her because she lacked physical evidence of her husband's abuse. The petitioner again admits that she made false accusations against her husband to the police so that she could obtain a restraining order against him. As noted in the director's decisions and our prior decision, the record shows that the petitioner was convicted of three counts of falsely reporting a crime, namely, felony spousal battery. The petitioner's admission and conviction greatly detract from the credibility of her claim that her husband subjected her or her children to extreme cruelty.

While the petitioner reiterates that she made the false accusations, in part, upon reliance of the women's shelter's statement that she could not obtain a protection order without a police report of her husband's physical abuse, the petitioner does not specify the name of the shelter or provide any evidence from the shelter regarding its contact with her. 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. §§ 103.2(b)(2)(iii), 204.1(f)(1), 204.2(c)(2)(i).

██████████ states that his evaluation of the petitioner was based on a single interview and was completed at counsel's request after the NOID was issued, nearly five years after the petitioner states that she separated from her husband. As noted by the director, ██████████ conclusion that the petitioner suffered extreme cruelty inflicted by her husband is based on the petitioner's statements, which are of little probative value and credibility given her admission of and conviction for falsely accusing her husband of spousal abuse. ██████████ does not indicate that he conducted any tests or used other diagnostic mechanisms to assess the petitioner's mental health and he does not diagnose the petitioner with any mental health condition caused or exacerbated by her husband's alleged extreme cruelty. While we do not question ██████████'s clinical expertise, his evaluation in this case is of little probative value.

The criminal records of the petitioner's husband show that he was convicted of five offenses in Texas between 1999 and 2004. The records do not, however, indicate that the petitioner or either of her children were the victim of any of her husband's offenses or that they were otherwise adversely affected by her husband's criminal behavior. As noted in our prior decision, the 1999 theft conviction of the petitioner's husband occurred two years before the petitioner states that the former couple met in 2001.

¹ Name withheld to protect individual's identity.

In her September 25, 2004 statement submitted below, the petitioner reported that in the Spring of 2002 her husband's cousin called her to ask for money to get her husband out of jail on bail. The petitioner stated that she did not have the money and she did not indicate that her husband or his cousin threatened her or that his 2002 criminal activity otherwise adversely affected her or her children.

The preponderance of the evidence does not demonstrate that the petitioner's husband subjected the petitioner or any of her children to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act. Accordingly, the September 7, 2007 decision of the director denying the petition is affirmed.

Joint Residence

Beyond the director's September 7, 2007 decision, the petitioner has also failed to demonstrate that she resided with her husband. The criminal records of the petitioner's husband submitted in response to the NOID discount the petitioner's claim that she resided with her husband in June 2002.

Section 204(a)(1)(A)(iii)(II)(dd) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(dd), requires the self-petitioner to demonstrate that he or she has "resided with the alien's spouse or intended spouse." Section 101(a)(33) of the Act, 8 U.S.C. § 1101(a)(33), defines the term "residence" as "the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." The requirement of joint residence for a spousal self-petition is further explicated in the regulation at 8 C.F.R. § 204.2(c)(1)(v), which states, in pertinent part, "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." 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.

* * *

(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.

On the Form I-360, the petitioner stated that she resided with her husband in June 2002 and that their last shared residence was an apartment at _____ in San Jose, California. In her statement

submitted below, the petitioner asserted that after their marriage on May 3, 2001, she resided with friends at [REDACTED] in Houston, Texas while she and her husband looked for their own apartment. The petitioner does not indicate that she and her husband resided together during this time. The petitioner states that in late May 2001 she returned to San Jose, California, where her husband joined her on June 9, 2002. The petitioner's roommate, [REDACTED], confirms that the petitioner's husband arrived at their apartment on June 9, 2002, but neither the petitioner nor [REDACTED] specifies the date he left.

The criminal records of the petitioner's husband show that he was charged with two offenses on June 14, 2002 in Harris County, Texas, just five days after he purportedly joined the petitioner in San Jose, California. In her June 14, 2007 statement, the petitioner does not explain this discrepancy. While section 204(a)(1)(A)(iii)(II)(dd) of the Act does not state a requisite minimum time of joint residence, section 101(a)(33) of the Act prescribes that residence is a person's "principal, actual dwelling place in fact, without regard to intent." The record indicates that the petitioner's husband stayed with the petitioner for at most four days before he returned to Texas. The petitioner and her roommate state that the petitioner's husband did not return to California after his single visit and the record contains no other evidence that the petitioner's husband's principal and actual dwelling place was the petitioner's home in San Jose. While the petitioner indicated that she and her husband intended to live together in California after she obtained a new apartment, qualifying joint residence is measured by the former couple's "principal, actual dwelling place in fact, without regard to intent." Section 101(a)(33) of the Act, 8 U.S.C. § 1101(a)(33).

The record also does not demonstrate that the petitioner and her husband ever resided together in Texas. To the contrary, the petitioner states that she resided with friends at [REDACTED] in Houston, Texas after her marriage in early May and that she returned to California by herself at the end of that month. The record also contains conflicting statements by the petitioner regarding her residence in Texas. On the Form G-325A, Biographic Information, signed by the petitioner on May 3, 2001 and submitted with her prior Form I-485, Application to Adjust Status (submitted with her husband's Form I-130, Petition for Alien Relative, filed on her behalf), the petitioner stated that she lived at [REDACTED] in Houston, Texas from April 2001 until May 3, 2001. Yet on her Form G-325A submitted with her Form I-485 application submitted with her Form I-360, the petitioner states that she lived at [REDACTED] from April 2001 until May 2001.

The preponderance of the evidence does not demonstrate that the petitioner resided with her husband during their marriage, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

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). 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).

The petitioner has not demonstrated that her husband subjected her or any of her children to battery or extreme cruelty during their marriage and that she resided with her husband during their marriage. The petitioner is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act and her petition must be denied.

The denial of the petition will be affirmed 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. The petitioner has not sustained that burden.

ORDER: The director’s decision of September 7, 2007 is affirmed. The petition is denied.