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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC 07-024-50917

Office: VERMONT SERVICE CENTER

Date:

12 2009
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IN RE: Petitioner: [REDACTED]

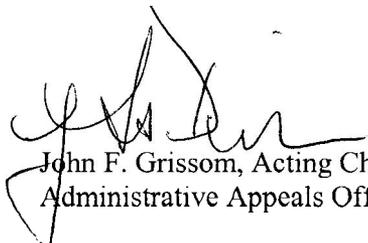
PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(A)(iii) of the
Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON BEHALF OF PETITIONER:
[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 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 and the matter remanded for further action. The AAO notes, however, that the petition is not approvable.

The petitioner seeks classification as a special immigrant pursuant to section 204(a)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(A)(iii), as having been battered or subjected to extreme cruelty by her U.S. citizen spouse. The director denied the petition finding that the petitioner failed to establish that she had been battered or subjected to extreme cruelty by her spouse during their marriage, was a person of good moral character and that she entered into her marriage in good faith.

The petitioner, through counsel, submits a timely appeal with a brief and a Certificate of No Penal Record for "[REDACTED]"

We concur with the director's determination that the petitioner has not established the requisite battery or extreme cruelty, has not established that she is a person of good moral character and that she entered into her marriage in good faith. Counsel's claims and additional evidence on appeal do not overcome the grounds for denial of the petition. 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 in effect at 8 C.F.R. § 204.2(c)(3)(ii).

Eligibility for Immigrant Classification Under Section 204(a)(1)(A)(iii) of the Act

Section 204(a)(1)(A)(iii) of the Act provides that the spouse of a U.S. citizen may self-petition for immigrant classification if the petitioner demonstrates that he or she entered into the marriage with the U.S. citizen spouse in good faith and that, during the marriage, the petitioner or a child of the petitioner was battered or subjected to extreme cruelty perpetrated by the petitioner's spouse. In addition, the petitioner 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 regulation at 8 C.F.R. § 204.2(c)(1) provides the following guidance regarding relevant eligibility requirements:

(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.

* * * *

(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 person who was subjected to abuse in the form of forced prostitution or who can establish that he or she was forced to engage in other behavior that could render the person excludable under section 212(a) of the Act would not be precluded from being found to be a person of good moral character, provided the person has not been convicted for the commission of the offense or offenses in a court of law. A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she willfully failed or refused to support dependents; or 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. If the results of record checks conducted prior to the issuance of an immigrant visa or approval of an application for adjustment of status disclose that the self-petitioner is no longer a person of good moral character or that he or she has not been a person of good moral character in the past, a pending self-petition will be denied or the approval of a self-petition will be revoked.

* * * *

(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.

* * * *

(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.

(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. Self-petitioners who lived outside the United States during this time should submit a police clearance, criminal background check, or similar report issued by the appropriate authority in each foreign country in which he or she 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.

Procedural History and Pertinent Facts

The record in this case provides the following pertinent facts and procedural history. The petitioner is a native and citizen of the Dominican Republic who attempted to enter the United States (Puerto Rico) on February 2, 1997. She was apprehended by the U.S. Coast Guard at that time and released on her own recognizance by the legacy Immigration and Naturalization Service (INS) on February 11, 1997. On September 10, 1997 the petitioner married A-C-¹ a U.S. citizen, in Rios Piedras, Puerto Rico. On September 25, 1997 A-C- filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf. The petitioner filed a Form I-485, Application to Adjust Status, on November 23, 1998, which was denied by the Service on December 27, 2001.

Pursuant to an enforcement action by U.S. Immigration and Customs Enforcement at her place of employment, the petitioner was detained on June 29, 2006, charged with inadmissibility as an immigrant not in possession of valid documents, and placed in removal proceedings. Immigration Court proceedings remain pending to date.

The petitioner, through counsel, filed the instant I-360 Petition on October 31, 2006. As evidence that she had been abused by her spouse, the petitioner initially submitted two statements, both dated in October 2006, from [REDACTED] and [REDACTED] respectively. The former indicated that the petitioner had been under his care for depression and "Anguish of Separation an emotional instability," and the latter indicated that he had treated the petitioner since November 23, 2003 and that she was diagnosed in December 2003 with high blood pressure and chronic anemia and in October 2005 with anxiety depressive disorder. The petitioner also submitted copies of two bank statements showing that the petitioner and her husband had a joint account in 2000 and 2006.

Finding that the evidence was insufficient to establish the petitioner's eligibility, on December 12, 2006 U.S. Citizenship and Immigration Services (USCIS) issued a Request for Evidence (RFE) of battery or extreme cruelty, good faith marriage and good moral character. In response, the petitioner submitted her personal affidavit describing problems in her relationship with A-C- that began in 2003, affidavits from two acquaintances describing problems in the couple's relationship, and a medical evaluation of the petitioner by [REDACTED], dated February 5, 2007. The medical evaluation included a diagnosis of the petitioner with "Depressive Episode with Anxiety, Anguished Personality with lack of self esteem and Cardiac Condition with Arterial Hypertension and Chronic anemia." [REDACTED] added that the petitioner's emotional condition "is a direct cause of the difficulties with her spouse and her feeling of considerable loss. The final impressions in this case is [sic] that she has not been able to adjust with her spouse ending in violence and mistreatment, as informed by the patient."

The director found that the petitioner had failed to establish her eligibility, noting that the statements of the petitioner, her two acquaintances and the two doctors described marital discord but did not describe any acts committed by A-C- that constitute battery or extreme cruelty. The

¹ Name withheld to protect individual's identity.

director also found no evidence establishing that the petitioner is a person of good moral character, noting the lack of police clearances or explanation of why such clearances are unavailable; and a lack of documents supporting the petitioner's assertion of a good faith marriage, despite the petitioner's claim of a relationship spanning almost ten years. The director denied the petition accordingly.

The petitioner, through counsel, submits a timely appeal with a brief and a Certificate of No Penal Record for [REDACTED]. In her brief, counsel asserts that the director erred by "misapplying the applicable legal authorities . . . failed to use an heed [sic] the applicable standard of proof . . . and grossly misstated the evidence . . . [and] failed when averring that the beneficiary did not have good moral character." We find counsel's assertions to be mistaken for the reasons noted below.

Battery or Extreme Cruelty

On appeal the petitioner, through counsel, asserts that she was subjected to extreme cruelty by her husband and that affidavits from third parties and a mental health professional's opinion attest to abuse by the petitioner's husband. Counsel argues that Congress made it clear that a wide variety of types of evidence should be accepted to support a battery claim and that such evidence was provided by the petitioner but was dismissed as insufficient and found to lack credibility. Counsel also argued that the director erred in failing to use the applicable standard of proof.

As noted by counsel, section 204(a)(1)(J) of the Act requires USCIS to "consider any credible evidence relevant to the petition." This mandate is reiterated in the regulation at 8 C.F.R. § 204.2(c)(2)(i). However, this mandate establishes an evidentiary standard, not a burden of proof. Accordingly, "[t]he determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of" USCIS. Section 204(a)(1)(J) of the Act. The evidentiary guidelines for demonstrating the requisite battery or extreme cruelty lists examples of the types of documents that may be submitted and states, "All credible relevant evidence will be considered." 8 C.F.R. § 204.2(c)(2)(iv).

As in all visa petition proceedings, the petitioner bears the burden of proof to establish her eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The mere submission of relevant evidence of the types listed in the regulation at 8 C.F.R. § 204.2(c)(2) will not necessarily meet the petitioner's burden of proof. While USCIS must consider all credible evidence relevant to a petitioner's claim of abuse, the agency is not obligated to determine that all such evidence is credible or sufficient to meet the petitioner's burden of proof. Section 204(a)(1)(J) of the Act; 8 C.F.R. § 204.2(c)(2)(i).

In this case, while we find the petitioner's evidence generally to be credible, we do not find it sufficient to meet the petitioner's burden of proof. First, the petitioner has failed to allege any threat of or actual physical act of abuse perpetrated against her by A-C-. Neither the statement by

nor the two statements by described above, indicate any personal knowledge of A-C-'s behavior or describe any actions taken by A-C-; the affidavits of two acquaintances note that A-C- was rude and violent and argumentative and insulting, but do not refer to any threat of or actual physical act of abuse. The petitioner also complained that beginning in 2003 A-C- would argue with her, act as if she were non-existent, hang up on her and refuse to go with her to the doctor or talk to her about their problems; and he would insult her and call her names and stay out late until finally he did not come home and said he would stay at his mother's house. The petitioner also claimed that when A-C- came in late she had to wake up and prepare him something to eat or drink and that they stopped having sexual relations. Again, the petitioner does not refer to any threat of or actual physical act of abuse. The petitioner's allegation of extreme cruelty is based upon these same claims. While we acknowledge that, as described, A-C-'s actions, may be unkind and inconsiderate, they do not rise to the level of the acts described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi), which include forceful detention, psychological or sexual abuse or exploitation, rape, molestation, incest, or forced prostitution. The claims made by the petitioner and the general statements submitted on her behalf fail to establish that the petitioner was the victim of any act or threatened act of physical violence or extreme cruelty, that A-C-'s non-physical behavior was accompanied by any coercive actions or threats of harm, or that his actions were aimed at insuring dominance or control over the petitioner.

Accordingly, the petitioner has failed to establish that she was battered or subjected to extreme cruelty during her marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act. We, therefore, concur with the director's finding that the petitioner failed to satisfy this requirement.

Good Moral Character

The regulation at 8 C.F.R. § 204.2(c)(2)(v) states that primary evidence of a petitioner's good moral character is an affidavit from the petitioner, accompanied by local police clearances or state-issued criminal background checks from each place the petitioner has lived for at least six months during the three-year period immediately preceding the filing of the self-petition. The petitioner submitted no affidavit regarding her good moral character and no police clearance or state-issued criminal background check at the time of filing or in response to the director's RFE. The one document submitted on appeal, the Certificate of No Penal Record, was submitted to address the lack of evidence of good moral character in the record. It is deficient, however, in that it does not provide the correct name of the petitioner, and it cannot be considered credible evidence that a valid record check has been conducted.

Accordingly, the petitioner has failed to establish that she is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act. We, therefore, concur with the director's finding that the petitioner failed to satisfy this requirement.

Good Faith Entry into Marriage

The record contains the following evidence relevant to the petitioner's claim that she entered into

her marriage with her U.S. citizen spouse in good faith: Two affidavits by acquaintances, the petitioner's affidavit, and two bank statements from Banco Popular for the petitioner and A-C-.

In her affidavit, the petitioner claims that her relationship with A-C- began when she met him at his aunt's house, who had been the petitioner's friend for a long time; that she and A-C- would call each other frequently and used to go to the beach and have dinner, among other activities; and that A-C- used to tell her that he missed her and wanted to get married. She claimed that they started living together in Bayamon after their wedding and that their marriage went well during the first years, they were very much in love and shared a lot together with their family and friends. In the affidavits from her friends, dated January 24, 2007, one claims to have known the petitioner and A-C- for approximately ten years, would visit the couple at home and knew that they lived together as husband and wife and believed that they were a bona fide couple; the other friend claims to have known the petitioner and A-C- for four years because they rented an apartment from her.

Other than the three affidavits described above, the record lacks any description or reference to the couple's relationship, either before or during their marriage, as evidence that the petitioner entered into her marriage in good faith. While the petitioner and others describe the problems in the couple's relationship, neither she nor others provide any credible details regarding her feelings for her husband or her plans for a future with her husband, her courtship or wedding. There is no evidence submitted by individuals who claim to have known the petitioner or her husband before they were married, and the record is devoid of information about how or why the couple married or details of their courtship or relationship. The two bank statements noted above cover the one month period beginning March 14, 2000 and June 13, 2006 respectively; they are addressed to the couple at addresses in Bayamon, [REDACTED] on the 2000 statement, and [REDACTED] on the 2006 statement. The bank statements, while an indication that the couple resided together as claimed, show little activity and do not establish that the account was used by both or that the petitioner entered into her marriage in good faith. Other documentary evidence of a good faith marriage is lacking, such as proof that one spouse has been listed as the other's spouse on insurance policies, property leases or income tax forms.

Accordingly, the petitioner has 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. We, therefore, concur with the director's findings that the petitioner failed to satisfy this requirement.

Conclusion

For the reasons noted above, the AAO concurs with the director's decision that the petitioner has failed to establish that she was battered or subjected to extreme cruelty by her U.S. citizen spouse, that she is a person of good moral character and that she entered into her marriage in good faith. Consequently, she is ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act. The petition is not approvable for the above stated reasons, with each considered as an independent and alternative bar to approval.

Nonetheless, the case will be remanded because the director denied the petition without first issuing a NOID as required under former 8 C.F.R. § 204.2(c)(3)(ii)(2006). While it is no longer a regulatory requirement for petitions filed on or after June 18, 2007, a NOID is required in this case, as it was filed on October 31, 2006.

As always, the burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act.

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