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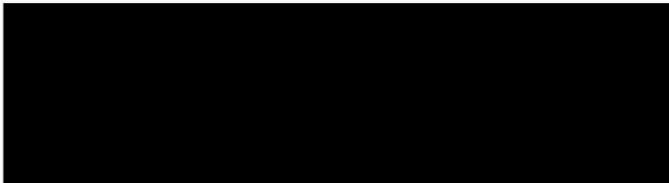
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090



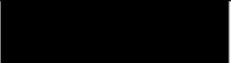
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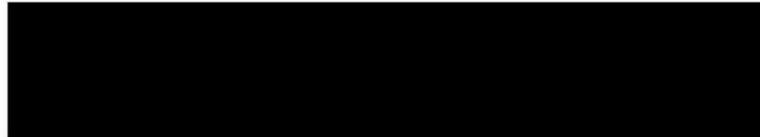
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EAC 03 204 51438

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 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 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 because the petitioner did not establish that she entered into marriage with her U.S. citizen husband in good faith, that she resided with him and that he battered or subjected her to extreme cruelty during their marriage.

On appeal, counsel submits a brief and additional evidence.

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 further explicated in the regulation at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part:

(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.

(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 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.

(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.

The record in this case provides the following pertinent facts and procedural history. The petitioner is a native and citizen of Zambia who entered the United States on October 13, 2002 as a nonimmigrant visitor (B-2). On April 3, 2003, the petitioner married A-W¹, a U.S. citizen, in Indiana. A-W subsequently filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf, action upon which was terminated on January 25, 2006 due to A-W's failure to respond to a Request for Evidence (RFE).

The petitioner filed this Form I-360 on June 30, 2003, through prior counsel, [REDACTED]. On June 15, 2004, the director issued a RFE for further evidence of the petitioner's entry into marriage with her husband in good faith, her residence with him, her good moral character and her husband's battery or extreme cruelty. Prior counsel twice requested and was twice granted additional time to respond to the RFE. On May 17, 2005, over five months after the second extension was granted on January 7, 2005, the director denied the petition on the grounds cited in the RFE. On June 22, 2005, the petitioner, through her second counsel, [REDACTED], submitted additional evidence in response to the RFE. On December 26, 2006, the petitioner filed a motion to reopen through present counsel, [REDACTED], in which she claimed that her first [REDACTED] had provided ineffective assistance. On March 21, 2007, the director granted the motion, reopened the proceedings and issued a Notice of Intent to Deny (NOID) the petition for lack of the requisite good-faith entry into the marriage, joint residence and battery or extreme cruelty. The petitioner timely responded to the NOID with additional evidence, which the director found insufficient to establish her eligibility. On July 6, 2007, the director denied the petition on the grounds cited in the NOID and the petitioner timely appealed.

On appeal, counsel submits a brief, copies of documents previously filed below and new documentation of the Supreme Court of Wisconsin, Office of Lawyer Regulation investigation of the petitioner's grievance against her first counsel. The evidence submitted on appeal confirms that the performance of the petitioner's first counsel was deficient. Present counsel's claims and the evidence submitted on appeal do not, however, establish the petitioner's eligibility. Upon de novo review, we find that the petitioner has established that her husband subjected her to battery and extreme cruelty, but has not demonstrated that she entered their marriage in good faith and resided with her husband.

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 Maka v. INS*,

¹ Name withheld to protect individual's identity.

904 F.2d 1351, 1356 (9th Cir. 1990); *Mester Manufacturing Co. v. INS*, 900 F.2d 201, 203-04 (9th Cir. 1990).

Battery or Extreme Cruelty

The record contains the following evidence relevant to the petitioner's claim that her husband subjected her to battery and extreme cruelty during their marriage:

- The petitioner's June 28, 2003 affidavit initially submitted with the Form I-360 and her April 17, 2007 affidavit submitted in response to the NOID;
- Affidavit of the petitioner's friend, [REDACTED];
- A copy of the dissolution decree of the prior marriage of the petitioner's husband;² and
- A psychological evaluation of the petitioner by [REDACTED]

In her first affidavit, the petitioner stated that shortly after their marriage, she realized that her husband abused drugs and alcohol. She reported that her husband forced her to have sex against her will and she did not realize that in the United States, a woman has the right to refuse her husband. After the petitioner confided in the former couple's friends, [REDACTED] and [REDACTED], she stated that her husband became enraged, screamed and beat her. The petitioner explained that her husband had hit her before, but never in that manner and she thought he had gone mad. The petitioner stated that she ran to the home and stayed there for a couple of days. Although her friends begged her not to return to her husband, the petitioner explained that she returned because she felt her husband needed her help and she was obligated to help him as his wife. The petitioner stated that she last saw her husband in mid-May and she left their apartment and stayed with the [REDACTED] because she could not locate her husband and she had no money to pay the rent. The petitioner reported that [REDACTED] **found out that the** petitioner's husband was arrested and ordered to complete a drug rehabilitation program.

In her second affidavit, the petitioner stated that before their marriage, her husband once came home drunk, demanded food from the petitioner, ate a few bites, dumped the food in the trash and swore at the petitioner for not cooking well. The petitioner stated that her husband apologized the next day and promised not to repeat his behavior. After this incident, the petitioner reported that she confided her fear of her husband's behavior when drunk to the [REDACTED] and that for a while, he stopped drinking. The petitioner stated that on their wedding night, she asked her husband to purchase her a calling card so she could tell her friend in Zambia about their marriage. The petitioner reported that her husband grabbed her hand and threatened to kill the petitioner or have her deported if she told anyone about their marriage. Later that night, the petitioner stated that her husband again forced her to have sex against her will and told her that African women had no right to deny their men. The next day, the petitioner related that she confided in the [REDACTED] and a week later, the petitioner stated that her husband demanded that the petitioner tell him what she had said to the [REDACTED]. As she was trying to

² Marion, Indiana Superior Court, Civil Division, Cause Number [REDACTED] (Mar. 23, 1999).

explain, the petitioner reported that her husband tried to slap her, grabbed her as she dodged and threatened that if she ever called the police, he would have her deported. The petitioner states that her husband stopped her from going to the [REDACTED] and because there was no telephone in their apartment, she could not communicate with anyone.

When the petitioner asked her husband about a syringe she had found in the apartment, she stated that her husband became enraged, held her by the neck, cursed her and threatened to throw her out if she did not stop bossing him around. The petitioner reported that her husband threatened that nothing would happen to him because the petitioner would not dare report him because the authorities would deport her. The petitioner stated that she again went to the [REDACTED] and they again urged her not to return to her husband, but she went back to their apartment because she felt obligated to her husband. The petitioner recounted that her husband returned to their apartment, but then left without a word. The petitioner explained that she then moved in with the [REDACTED] and at the end of May 2003, her husband met with [REDACTED] who told the petitioner that her husband had been ordered to be monitored for drugs and advised her not to go see him. The petitioner explained that [REDACTED] moved all the former couple's belongings into storage and in the course of the move found the divorce decree of her husband and gave it to her. The petitioner stated that her husband never told her he had previously been married.

In his affidavit, [REDACTED] stated that the petitioner suffered "psychological torture" during and after her marriage. He explained that the petitioner separated from her husband when he turned out to be "different from the character she had believed he was and would continue to be." Mr. [REDACTED] did not further describe the petitioner's psychological torture or the cause of the former couple's separation. While [REDACTED] does not further discuss the abuse, the brevity of his statements is understandable given that he was a friend of the petitioner's husband and continued to support him after the former couple's separation.

In his evaluation, [REDACTED] stated that he began treating the petitioner in September 2003 and diagnosed her with depression and post-traumatic stress disorder. Dr. [REDACTED] description of the abuse is consistent with the petitioner's testimony. Dr. [REDACTED] further noted that through the course of counseling, the petitioner continually recounted incidents of abuse in greater detail. Dr. [REDACTED] also discussed in detail how the petitioner's symptoms are consistent with known patterns of victims of spousal abuse.

In his decision, the director stated, "although the behavior described by you would constitute battery and/or extreme cruelty, the information is based purely on your testimony and is unsupported by any corroborative evidence." Corroborative evidence is not required to establish battery or extreme cruelty and testimony alone, if credible, detailed and probative, may suffice to establish the petitioner's claim. As the regulation explains: "The self-petitioner may, but is not required to, demonstrate that preferred primary or secondary evidence is unavailable." 8 C.F.R. § 103.2(b)(2)(iii). While the regulation at 8 C.F.R. § 204.2(c)(2)(i) encourages the submission of primary evidence, when possible, it explicates the statute's prescription that U.S. Citizenship and Immigration Services (USCIS) must consider any

relevant and credible evidence. Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J). In this case, the director cited no inconsistencies in the petitioner's testimony, [REDACTED] affidavit or Dr. [REDACTED]'s evaluation. The director also noted no other reason to discount the relevance or credibility of this evidence. Accordingly, the director's assertion that corroborative evidence was necessary in this case was inappropriate.

In addition, the director overlooked the dissolution decree of the petitioner's husband's prior marriage. The decree granted the petitioner's husband limited and supervised visitation with his children and permitted reconsideration of the visitation terms only upon proof of his completion of alcohol and drug treatment and evidence that he was no longer drinking or using drugs. The court also found that the petitioner's husband was bound by a restraining order issued for the protection of his former wife. While the court order does not document qualifying abuse, the dissolution decree supports the petitioner's testimony of her husband's alcohol and drug addictions and his cycle of abuse and violence. *See Self-Petitioning for Certain Battered or Abused Spouses and Children*, 61 F.R. 13061, 13066 (Mar. 26, 1996) (noting that "documentation of nonqualifying abuse may be used to establish a pattern of abuse and violence and to bolster claims that qualifying abuse also occurred").

The petitioner provided detailed and consistent testimony regarding her husband's abuse. She described her husband physically assaulting her on two occasions, his sexual abuse, and his threats and other nonviolent behavior that was part of an overall pattern of violence. Her testimony is consistent with [REDACTED]'s statements and [REDACTED] psychological evaluation. Her husband's prior divorce decree also supports the petitioner's testimony regarding the cycle of her husband's abuse. The preponderance of the relevant evidence demonstrates that the petitioner's husband subjected her to battery or extreme cruelty during their marriage pursuant to section 204(a)(1)(A)(iii)(I)(bb) of the Act. The director's determination to the contrary is hereby withdrawn.

Entry into the Marriage in Good Faith

The petitioner has not, however, met her burden of proof to demonstrate that she married her husband in good faith. The record contains the following evidence relevant to this issue:

- The petitioner's June 28, 2003 affidavit initially submitted with the Form I-360 and her April 17, 2007 affidavit submitted in response to the NOID;
- Affidavit of the petitioner's friend, [REDACTED]; and
- Two photographs of the petitioner and her husband.

In her affidavits, the petitioner described how she met her husband, their courtship and wedding. In her second affidavit, the petitioner also explained that she did not have any documentation to prove her statements because she was trapped in her marriage, did not work and did not have any money to spend. She further noted that her husband had leased their apartment prior to their marriage. However, the petitioner repeatedly mentioned her friend, [REDACTED], with whom she came

to the United States and who the petitioner stated was present when she met her husband and encouraged her to visit him in Indiana. The petitioner did not submit testimony from [REDACTED]

Although she is not required to do so, the petitioner does not explain why such evidence is unobtainable. *See* 8 C.F.R. §§ 103.2(b)(2)(iii), 204.1(f)(1), 204.2(c)(2)(i).

The petitioner also repeatedly referred to the [REDACTED], whom she indicated were her only close friends in Indiana. The petitioner stated that she and her husband spent a lot of time at the [REDACTED] home and that they assisted her throughout her troubled marriage and after her separation from her husband. However, in his affidavit, [REDACTED] merely asserted that the petitioner married her husband in good faith. He did not describe any visits that the former couple made to the [REDACTED] home or the petitioner's relationship with her husband in any probative detail. The petitioner submitted no statement from [REDACTED]. Again, although she is not required to do so, the petitioner does not explain why such evidence is unobtainable. *Id.*

The abusive behavior of the petitioner's husband and the short duration of their marriage may explain the petitioner's lack of documentation of shared financial assets and other joint marital responsibilities. The photographs picture the petitioner and her husband together on one occasion, but the petitioner provides no context for or other explanation of the photographs to support her statements.

The petitioner's testimony is also inconsistent regarding her intentions in marrying her husband. In her first affidavit, the petitioner described her instant attraction to her husband whom she found very charming. She reported that her husband first proposed in November 2002, but she was not ready to marry him. After he persistently asked her again and again, the petitioner stated that she agreed to marry in March 2003. She also stated that her husband told her they had to get married so that he could "file papers" so that she "could work and help him pay money he owed to people he had bought drugs from on credit." However, in her second affidavit, the petitioner stated that her husband first proposed marriage after she expressed her wish to return to Zambia. The petitioner explained that she told her husband she would stay with him only if he could find her a job. Within a week of their marriage, the petitioner stated that her husband told her he had to "file" for her so that she could be authorized to work. The petitioner explained, "I didn't understand what he said by filing work papers, so I reminded him how he told me I would be all set to work if I married him." While the petitioner's desire to find employment is understandable, it is unclear from her testimony whether or not the ability to work in the United States was her primary motivation in marrying her husband.

This inconsistency in the petitioner's testimony and the lack of probative details in [REDACTED] affidavit detract from the credibility of the petitioner's claim. In sum, the relevant evidence fails to demonstrate that the petitioner entered into marriage with her husband in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Joint Residence

The evidence listed in the preceding section is also relevant to the petitioner's claim that she resided

with her husband. On the Form I-360, the petitioner stated that she lived with her husband from October 2002 to May 2003 and that their last shared residence was an apartment on Whitcomb in Indianapolis. In her affidavits, the petitioner stated that after she met him in New York, she returned to her husband's home in Indianapolis. The petitioner did not state the address of the apartment or describe their shared residence in any probative detail. Her testimony is consequently insufficient to demonstrate that she resided with her husband.

The remaining, relevant evidence also fails to establish the petitioner's claim. Mr. [REDACTED] also did not discuss the petitioner's residence with her husband, although the petitioner stated that the former couple frequently visited with the [REDACTED] that their homes were within walking distance of each other and that [REDACTED] moved her and her husband's belongings from their apartment after their separation. The photographs also do not picture the petitioner and her husband in any residential setting.

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

Deficient Performance of Prior Counsel

On appeal, present counsel does not discuss the petitioner's claims of entering into marriage with her husband in good faith and residing with him. However, counsel claims that the ineffective assistance of the petitioner's first [REDACTED] adversely affected her ability to document her case. Counsel claims that "[e]ach lapse in communication by [REDACTED] further widened the time gap between the marriage and the present. As the gap continued to grow, the reasonable ability of [the petitioner] to obtain the requested documentation grew even smaller." As previously noted, the petitioner stated in her second affidavit that she had no further evidence due to the circumstances of her marriage. However, the petitioner did not explain why further testimony regarding her good-faith marriage was unavailable from [REDACTED] and [REDACTED] and her own affidavits did not include any probative details regarding her residence with her husband. On appeal, the petitioner submits no statement explaining how the passage of time has affected her ability to document her case.

The Board of Immigration Appeals has recently held that there is no constitutional or other statutory or regulatory right to effective assistance of counsel in immigration proceedings. *Matter of Compean, Bangaly and J-E-C-, et al.*, 24 I&N Dec. 710, 726-27 (A.G. 2009). However, aliens may merit certain relief if they demonstrate that their prior counsel's performance was deficient. *Id.* at 727-30. To prevail on a deficient performance of counsel claim, an alien must show: 1) that counsel's failings were egregious; 2) in cases where the alien moves to reopen beyond the 30-day limit, the alien must show 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). *Id.* at 732-34. To establish prejudice, the alien must show 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. *Id.* at 734.

In this case, the petitioner satisfies the first two requirements, but not the third.³ The record shows that [REDACTED]'s failings were egregious and that the petitioner exercised due diligence in discovering and seeking to correct his errors. However, the petitioner has not demonstrated how she was prejudiced by [REDACTED] errors. The director granted present counsel's motion to reopen and, upon reopening, issued a NOID granting the petitioner the opportunity to submit further evidence. In addition, the evidence untimely filed by the petitioner's second attorney after the first denial of the petition was considered both below and on appeal. On appeal, the petitioner submits no statement detailing what evidence she was unable to obtain due to [REDACTED]'s actions or inaction and she provides no further testimony of her own. Apart from her brief assertion regarding the passage of time since the breakdown of the petitioner's marriage, counsel presents no reasons why [REDACTED] failures are relevant to this appeal. Accordingly, the petitioner has failed to demonstrate that but for deficient performance, she would have been entitled to the approval of this petition.

Conclusion

While the petitioner has established that her husband subjected her to battery and extreme cruelty, she has not demonstrated that she entered into their marriage in good faith and resided with him. 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. The petitioner has demonstrated that her first counsel made serious errors in these proceedings, but she has not established that she was prejudiced by those errors.

The petition will be denied 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

³ As the petitioner's case was pending prior to the publication of *Matter of Compean*, she is not required to comply with the new documentary filing requirements set forth in that decision. *Matter of Compean*, 24 I&N Dec. at 741-42. However, the three substantive standards cited above do apply to the petitioner's case. *Id.* at 741.