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U.S. Citizenship and Immigration Services
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U.S. Citizenship
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Services

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FILE: [REDACTED]
EAC 06 182 52366

Office: VERMONT SERVICE CENTER

Date: SEP 14 2009

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:

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 Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion. The previous decisions of the director and the AAO will be affirmed.

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 on March 8, 2007, 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. The petitioner filed a timely appeal, which the AAO dismissed on April 21, 2009. In its decision, the AAO withdrew the director's findings with regard to the issue of the couple's shared joint residence, but affirmed the director's finding with regard to the issue of whether the petitioner had entered into marriage with her ex-husband in good faith. The AAO also found that the petitioner had failed to establish that she had been the victim of ineffective assistance of counsel.

Counsel filed the instant matter on May 21, 2009, and marked the box at Part 2 of the Form I-290B to indicate that she was filing both a motion to reopen and a motion to reconsider. Upon review, the AAO finds that counsel's submission does not satisfy the requirements of a motion to reopen.

8 C.F.R. 103.5(a)(2) states, in pertinent part, the following:

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

Based on the plain meaning of the word "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹

On motion, counsel submits another brief, and another self-affidavit from the petitioner. The additional information provided by the petitioner in her May 20, 2009 self-affidavit was previously available and could have been discovered or presented in the previous proceeding. Accordingly, the 2009 affidavit does not meet the requirements for a motion to reopen.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With this motion, the self-petitioner has not met that burden. Counsel's submission does not qualify as a motion to reopen.

¹ The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence>" WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

The regulation at 8 CFR 103.5(a)(2) states, in pertinent part the following:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Counsel's submission satisfies the requirements of a motion to reconsider, and the AAO will therefore adjudicate this matter as a motion to reconsider.

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)(A)(ii)(II)(aa) of the Act states, in pertinent part, that an individual who is no longer married to a citizen of the United States is eligible to self-petition under these provisions if he or she is an alien:

- (CC) who was a bona fide spouse of a United States citizen within the past 2 years and –
 - (aaa) whose spouse lost status within the past 2 years due to an incident of domestic violence
 - (bbb) whose spouse lost or renounced citizenship status within the past 2 years related to an incident of domestic violence; or
 - (ccc) who demonstrates a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse. . . .

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:

- (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.

* * *

- (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 pertinent facts and procedural history of this case were set forth in the AAO's April 21, 2009 decision, incorporated here by reference. As such, the AAO will only repeat such facts as necessary here. The petitioner, a citizen of Nigeria, married P-F,² a citizen of the United States, on March 29, 2004. The petitioner filed for divorce the following month, in April 2004. They divorced on December 14, 2004. The petitioner filed the instant Form I-360 on May 22, 2006, and the director denied the petition on March 8, 2007. The AAO dismissed the petitioner's appeal on April 21, 2009. On motion, counsel states that the AAO erred in its analysis. Specifically, counsel asserts that the AAO erred in its determination that the petitioner had failed to establish that she married P-F- in good faith or that she had been the victim of the ineffective assistance of prior counsel.

² Name withheld to protect individual's identity.

Good Faith Entry into Marriage

The AAO affirms its April 21, 2009 determination that the petitioner has failed to establish that she entered into marriage with P-F- in good faith. In making that determination, the AAO found the petitioner's testimony and supporting evidence insufficient to establish that she had entered into marriage with P-F- in good faith.

As was noted by the AAO in its April 21, 2009 decision, 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 he thought to be bad influences. P-F- 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.

As was also noted by the AAO, the petitioner stated in her January 4, 2007 affidavit that she learned she was pregnant in May 2004. The baby was born on January 29, 2005, and [REDACTED] not P-F-, was named as the child's father on the birth certificate. Although the petitioner asserted that P-F- was in fact the father of the child, the AAO noted that the petitioner had specifically notified the State of Minnesota that [REDACTED] and not P-F-, was the father of the child and, as such, declined to accept the birth certificate of this child as evidence of the petitioner's good faith entry into the marriage.

The AAO concluded its April 21, 2009 analysis of this matter by noting that in cases such as this, where there is little evidence of the petitioner's intentions upon entering the marriage, the petitioner's testimony is crucial. However, the AAO found that in this particular case, the petitioner's testimony with regard to her intentions upon entering the marriage was insufficiently vague, and that the testimony contained in the affidavits from the petitioner's friends and family members was also insufficiently vague. The AAO notified the petitioner that the simple assertion of good faith entry into marriage is insufficient; details must be provided, and that the record of proceeding lacked basic information about the relationship between the petitioner and P-F-. Absent such information, there could be no inquiry into the petitioner's intentions at the time of the marriage. The AAO notified the petitioner that the record lacked information, for example, 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, etcetera. Such detailed testimony would have allowed the AAO, in the absence of any documentary evidence speaking to the petitioner's intentions upon entering into the marriage, to have examined her intentions. However, as the petitioner's testimony lacked basic information regarding the couple's relationship, and there was little to no documentary evidence regarding her intentions upon entering into the marriage, the AAO notified the petitioner that it was unable to examine her intentions at the time of

the marriage. Accordingly, the petitioner had failed to demonstrate that she had entered into the marriage in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

In her May 20, 2009 motion, counsel argues: (1) that the AAO did “not properly apply the ‘any credible evidence’ standard”; (2) that the AAO’s April 21, 2009 decision was internally inconsistent; and (3) that the AAO based its decisions on requirements of testimony that are not supported in law, and that the petitioner was never given the opportunity to address; and (4) that the petitioner’s ineffective assistance of counsel claim should be held in abeyance.

Counsel’s first assertion on motion is that the AAO did not properly apply the “any credible evidence” standard. Counsel states that USCIS has “long abided” by this standard, and that it “has adopted policies to make this clear to its adjudicators.” Counsel states the following:

The AAO and the Service must consider ALL credible evidence. If it decides not to consider some of the evidence, it must explain why that evidence is not credible. [REDACTED] evidence, consisting [sic] of testimonial evidence from herself and five individuals. The denial states that [REDACTED] does not meet her burden because the AAO cannot ascertain her intent without knowing the details of her courtship such as [sic] her first impression of her husband and their shared activities . . . In applying the any credible evidence [standard], looking at all the evidence, it is clear that [REDACTED] married in good faith and because she loved [P-F].

Counsel has misunderstood the “any credible evidence” standard to which she cites, and is confusing the evidentiary standard set forth by the “any credible evidence” standard with the petitioner’s burden of proof. Both the director and the AAO have considered the evidence submitted by the petitioner; counsel’s implicit assertion that the AAO did not consider the evidence of record is incorrect. The AAO, in its April 21, 2009 decision, considered all evidence submitted by the petitioner. However, while that evidence was credible, it was insufficient to establish the petitioner’s claim. Section 204(a)(1)(J) of the Act requires USCIS to “consider any credible evidence relevant to the petition.” Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J). 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, 8 U.S.C. § 1154(a)(1)(J); 8 C.F.R. § 204.2(c)(2)(i). The evidentiary guidelines for establishing the petitioner’s claim list examples of the types of documents that may be submitted and states, “All forms of relevant credible evidence will be considered.” 8 C.F.R. § 204.2(c)(2)(iv). In this case, as in all visa petition proceedings, the petitioner bears the burden of proof to establish his or 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 sufficient to meet the petitioner’s burden of proof. Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J); 8 C.F.R. § 204.2(c)(2)(i). To require otherwise would render the

adjudicatory process meaningless. While the evidence of record may be credible, the AAO does not find it sufficient to satisfy the petitioner's burden of proof in establishing that she entered into marriage with her ex-husband in good faith.

The AAO considered all of the evidence submitted by the petitioner, including her testimonial evidence, before issuing its April 21, 2009 decision, and it did not deem any of that evidence not credible. The issue was not whether the petitioner's evidence was credible, which it was. The issue was whether that evidence satisfied the petitioner's burden of proof, which it did not.

Counsel's second assertion on motion is that the AAO's April 21, 2009 decision was internally inconsistent. As was noted previously, the AAO in that decision withdrew the director's finding that the petitioner had failed to establish that she had shared a joint residence with her ex-husband. Rather, the AAO found the evidence of record sufficient to demonstrate that the petitioner and P-F had shared a joint residence. Counsel asserts the following:

It is interesting to contrast the Service and the AAO's treatment of the issue of battery or extreme cruelty and shared residence. The Service found that [REDACTED] testimony regarding the battery she suffered was sufficient. The AAO posed that if [REDACTED] testimony was sufficient to establish that she was battered by her US citizen spouse, her testimony should be sufficient to establish that she shared a residence with her husband. "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." AAO Decision at 6. Yet the AAO fails to extend this same logic as to the issue of entry into a good faith marriage. As argued above, this internal inconsistency mandates that the case be reconsidered.

The AAO disagrees with counsel's assertion that its April 21, 2009 decision was inconsistent. Although counsel's citation to the AAO's decision is correct, she cites the language out of context. In full, that passage from the AAO's decision, at page 5, stated the following:

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 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 residence.

The AAO's determination that the petitioner had established that she had shared a joint residence with her ex-husband was based upon its finding that the petitioner's account of the abuse to which she was subjected was premised on the fact that the two of them were living together at the time the abuse occurred. The AAO affirms its determination that the petitioner has established that she was subjected to abuse and that, since that abuse took place within the couple's shared joint residence, that she has also established that they in fact shared a joint residence.

However, the link that binds the petitioner's testimony regarding the abuse and her testimony regarding the joint residence does not extend to her testimony regarding her intentions upon entering into the marriage. That the petitioner and her ex-husband lived together, or that he abused her, does not necessarily indicate that the petitioner entered into the marriage in good faith. Again, the petitioner's account of the abuse made clear that such abuse occurred within the home. It did not, however, make clear that she entered into the marriage in good faith. The burden was on the petitioner to establish that she entered into the marriage in good faith, and she failed to sustain that burden. As was indicated above, this was not based on a finding that the petitioner's testimony was not credible, as counsel seems to imply; the AAO does not question the credibility of her testimony. Rather, as has now been stated several times, the AAO found that testimony insufficient to sustain her burden of proof.

Counsel's third assertion on motion is that the AAO based its decisions on requirements of testimony that are not supported in law, and that the petitioner was never given the opportunity to address. Counsel states the following:

Where, in all of this, is there evidence that _____ primary purpose in marrying her abuser was to circumvent the immigration laws? Where is there evidence that this was even one purpose of her marriage? The denial cites none. There is no such evidence.

It is not for the AAO to prove that the petitioner married her ex-husband in order to circumvent the immigration laws. Counsel cannot shift the burden of proof from the petitioner to USCIS. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Rather, it is for the petitioner to demonstrate that she entered into the marriage in good faith. The AAO is not required to demonstrate that the petitioner did *not* enter into the marriage in good faith, as counsel seems to imply. The AAO notes further that although marriage fraud is one bar to establishing good faith entry into the marriage, a finding that the petitioner has failed to establish his or her good faith entry into the marriage is not equivalent to a finding of marriage fraud.

Counsel also states that, in its finding that without detailed evidence regarding the petitioner's intentions upon entering into the marriage the AAO cannot make such a determination, the AAO "has misconstrued the any credible evidence and gone beyond the statute, regulations, and case law." First, the AAO incorporates here its previous discussion with regard to counsel's misunderstanding of the "any credible evidence" standard to which she cites. Again, that mandate establishes an evidentiary standard, not a burden of proof. Again, the AAO did not find the petitioner's testimony to be not credible. To the contrary, it found her testimony credible, considered it, and analyzed it. However, while that evidence was credible, it did not satisfy her burden of proof.

With regard to counsel's contention that the AAO went beyond the statute, regulations, and case law, the AAO disagrees. Both the statute and the regulation require the petitioner to establish that

she married her ex-husband in good faith. In order to establish that she married her ex-husband in good faith, the AAO must ascertain the petitioner's intentions at the time she entered into the marriage. As the record contained little documentary evidence that spoke to her intentions upon entering into the marriage, the petitioner's claim to have entered into the marriage in good faith was based upon her testimony. However, her testimony was, as discussed in the AAO's April 21, 2009 decision, insufficiently vague, and lacking in probative detail, with regard to those intentions. Counsel takes issue with the AAO's provision in its decision of examples of details that could provide insight into the petitioner's intentions prior to the marriage, such as information regarding the couple's courtship; their first introductions; their first impressions; their decision to marry; descriptions of the types of activities they enjoyed together; or how cultural differences, or any other types of differences, were bridged. Counsel is correct that a description of the couple's courtship is not the only way to demonstrate a good faith marriage. However, the petitioner offered no other details regarding her intentions upon entering into the marriage. The regulation specifically requires the petitioner to establish that she entered into the marriage in good faith, and the AAO emphasizes the vague, nonspecific nature of the petitioner's testimony with regard to her intentions upon entering the marriage, which offered no insight into her intentions at that time. That the petitioner failed to describe the couple's courtship did not preclude approval of this petition; the petitioner could have provided other relevant, credible, and detailed testimony that would have allowed the AAO to ascertain her intentions upon entering into the marriage.

Counsel also states the following:

In many cultures, the families of the bride and groom arrange for the marriage. In these cases, courtship is avoided all together [sic] thus a rule where the particulars of a courtship are important in determining where a person's intentions were at the time of the marriage does not provide any illumination. Consider what an affidavit of a woman from India, who agrees to an arranged marriage to a US citizen might say. . . .

First, as was noted previously, the AAO did not deny the petition because the petitioner had failed to provide "the particulars" of the couple's courtship. It denied the petition because she had failed to establish that she had entered into the marriage in good faith. The provision of information regarding the courtship is merely one way of making such a demonstration. Second, the petitioner testified on the Form I-360 that she and P-F- began living together in December 2003, several months before their March 29, 2004 wedding. This was not an arranged marriage, and the couple did have a courtship. Counsel's references to arranged marriages and affidavits of women from India have no relevance to this case.

Ineffective Assistance of Counsel

Counsel's fourth assertion on appeal is that the petitioner's "ineffective assistance of counsel claim should be held in abeyance for finality in *Compean*." In its April 21, 2009 decision, the AAO found that counsel had not complied with *Matter of Compean, Banglay and J-E-C-, et al*, 14 I&N Dec. 710 (A.G. 2009), which governed cases involving claims of ineffective assistance of counsel at the

time the AAO issued its decision. However, counsel's argument is moot, as the Attorney General vacated the *Compean* decision on June 3, 2009. See *Matter of Compean, Banglay and J-E-C-, et al*, 25 I&N Dec. 1 (A.G. 2009). The AAO, therefore, will analyze the petitioner's claim of ineffective assistance of counsel under the pre-*Compean* standard.

Under that standard, any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The record does not indicate that the petitioner has not complied with these requirements. She has therefore not demonstrated that she was the victim of the ineffective assistance of her previous counsel.

For all of these reasons, the AAO affirms its previous determination that the petitioner has failed to establish, by a preponderance of the evidence, that she entered into marriage with P-F- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Conclusion

Counsel's submission failed to qualify as a motion to reopen. Although counsel's submission did qualify as a motion to reconsider, that submission fails to sustain the petitioner's burden. A motion to reconsider must establish that the decision was based on an incorrect application of law or United States Citizenship and Immigration Services policy based on the evidence of record at the time the decision was rendered. 8 C.F.R. § 103.5(a)(3). Counsel has demonstrated no misapplication of law or policy in the AAO's April 21, 2009 decision and her motion to reconsider that decision will consequently be dismissed. *Id.* at § 103.5(a)(4) (A motion that fails to meet the applicable requirements shall be dismissed.).

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 motion is dismissed. The AAO affirms its April 21, 2009 decision.