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



U.S. Citizenship and Immigration Services

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FILE: [Redacted]
EAC 06 219 52050

Office: VERMONT SERVICE CENTER

Date: FEB 03 2010

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)

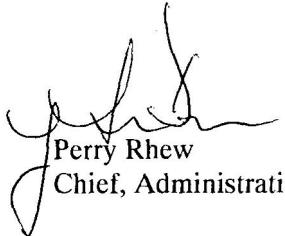
ON BEHALF OF PETITIONER:



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).


Perry Rhew
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 June 13, 2007, on the basis of his determination that the petitioner had failed to establish: (1) that he shared a joint residence with his wife; (2) that he was subjected to battery or extreme cruelty by his wife; and (3) that he married his wife in good faith. The petitioner filed a timely appeal, which the AAO dismissed on June 4, 2009. In its decision, the AAO affirmed each of the director's findings.

Counsel filed the instant matter on July 1, 2009, and marked the box at Part 2 of the Form I-290B to indicate that he was filing both a motion to reopen and a motion to reconsider. Upon review, the AAO finds that counsel's submission meets the requirements of neither a motion to reopen, nor a motion to reconsider.

The regulation at 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 upon 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 Although counsel submits a compact disk, which he asserts contains a recording of the petitioner's wife verbally abusing him, he does not explain why this recording could not have been discovered or presented in the previous proceeding. Counsel's submission contains no evidence that could be considered *new* under 8 C.F.R. 103.5(a)(2).

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 petitioner has not met that burden. Accordingly, counsel's submission does not qualify as a motion to reopen.

Nor does counsel's submission qualify as a motion to reconsider. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part the following:

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 College Dictionary* 736 (Houghton Mifflin 2001)(emphasis in original).

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 does not qualify as a motion to reconsider. Again, in order for a submission to qualify as a motion to reconsider, that submission must, at the time it is filed, establish that the decision it seeks to have reconsidered was incorrect at the time it was issued. 8 C.F.R. § 103.5(a)(2). As noted previously, counsel asserts that the compact disk he submits contains a recording of the petitioner's wife abusing him verbally. The AAO notes that the recording relates to the petitioner's claim to having been abused; counsel submits no evidence or arguments regarding the other two grounds of the denial of the petition: (1) the petitioner's failure to establish that he shared a joint residence with his wife; and (2) his failure to establish that he married his wife in good faith. As such, counsel's submission does not establish that the AAO's decision was incorrect. Nor does it establish that the AAO's decision was incorrect based upon the record before it at the time it issued its decision, either. Accordingly, counsel's submission does not qualify as a motion to reconsider.

In accordance with this discussion, the AAO finds that counsel's submission satisfies the requirement of neither a motion to reopen nor a motion to reconsider. The regulation at 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, counsel's submission will be dismissed, the proceedings will not be reopened or reconsidered, and the decisions of the director and the AAO will not be disturbed.

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 previous decisions of the director and the AAO are affirmed.