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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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[Redacted]

FILE: [Redacted] Office: VERMONT SERVICE CENTER Date:

SEP 10 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. A subsequent motion to reopen and reconsider was granted by the AAO, who affirmed its previous decision. The matter is now before the AAO on a second motion to reconsider. The motion will be granted. The previous decisions of the AAO will be affirmed, and the petition will be denied.

The petitioner seeks immigrant classification under section 204(a)(1)(A)(iii) of 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.

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.

* * *

(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 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.

* * *

(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.

As the facts and procedural history have been adequately documented in the previous decision of the AAO, dated March 26, 2009, we will repeat only certain facts as necessary here. In this case, the petitioner is a native and citizen of Zambia who was admitted into the United States on October 13, 2002, as a B-2 nonimmigrant visitor. On April 3, 2003, the petitioner married A-W¹, a U.S. citizen, in Indiana. The director initially denied the petition on July 6, 2007, finding that the petitioner failed to 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, the AAO determined 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 AAO, however, agreed with the director's determination that the evidence of record was insufficient to establish that the petitioner entered into the marriage in good faith and that she resided with him.

On first motion, counsel submitted a brief and copies of documents previously submitted. Counsel stated that, as the AAO determined that the petitioner provided sufficient testimony, including statements from herself and from Mr. [REDACTED], regarding her husband's abuse, "[i]t is therefore unclear as to why the same evidence would not be probative as to the bona fides of the marriage." Counsel asserted: "While the regulations might have multiple prongs, it is clearly erroneous that the same affidavit would be found to be credible and consistent on one part and incredible and inconsistent in another." The AAO affirmed its previous decision, reasoning that the petitioner had not demonstrated that she resided with her husband and that she entered into their marriage in good faith.

¹ Name withheld to protect individual's identity.

On second motion, counsel states, in part, as follows:

Petitioner argues that the Service has taken each factor and is improperly assigning a weight so as to favor their decision. Petitioner's evidence is considered credible when determining whether she has been subject to cruelty and battery, but is considered lacking when determining whether or not the marriage was entered into in good faith. Petitioner is not arguing that whether the marriage is bonafide is irrelevant, but rather that there is illogic in how the evidence is examined for each element.

Counsel conflates the evidentiary standard prescribed by section 204(a)(1)(J) of the Act with the petitioner's burden of proof. The statute mandates that U.S. Citizenship and Immigration Services (USCIS) "shall 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 provision prescribes an evidentiary standard. See 8 C.F.R. §§ 103.2(b)(2)(iii); 204.2(c)(2)(1). This evidentiary standard is not equivalent to the petitioner's burden of proof in this case, which, as in all visa petition proceedings, is the preponderance of the evidence. *In re Cabrera*, 21 I&N Dec. 589 (BIA 1996); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). When determining whether or not the petitioner has met his or her burden of proof, USCIS shall consider any relevant, credible evidence. However, "the determination of what evidence is credible and the weight to be given that evidence shall be within the [agency's] sole discretion." Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J); 8 C.F.R. §§ 103.2(b)(2)(iii); 204.2(c)(2)(1). In our previous decisions dated March 26, 2009 and April 19, 2010, we addressed the relevant evidence and explained the insufficiency of that evidence to establish the petitioner's eligibility. We find no error in the assessment of the relevant evidence in our previous decisions. In this matter, the petitioner has not demonstrated that she resided with her husband and that she entered into their marriage in good faith. She is consequently ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act and her petition must be denied.

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 previous decisions of the AAO, dated March 26, 2009 and April 19, 2010, will be affirmed and the petition will be denied.

ORDER: The decisions of the AAO, dated March 26, 2009 and April 19, 2010, are affirmed. The petition is denied.