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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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

B9.

DATE: **AUG 18 2011**

Office: VERMONT SERVICE CENTER

File: [REDACTED]

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:

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 \$630. 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,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, initially approved the immigrant visa petition; however, upon review of the record, the director issued a Notice of Intent to Revoke (NOIR) approval and ultimately revoked approval of the petition. The Administrative Appeals Office (AAO) dismissed a subsequently filed appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion to reconsider will be granted. The AAO's previous decision will be affirmed and approval of the petition will remain revoked.

The petitioner seeks immigrant classification 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 an alien battered or subjected to extreme cruelty by a United States citizen.

Applicable Law and Regulations

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 based on his or her relationship to the abusive spouse, 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 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 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 set forth 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.

(ii) *Relationship.* A self-petition filed by a spouse must be accompanied by evidence of citizenship of the United States citizen or proof of the immigration status of the lawful permanent resident abuser. It must also be accompanied by evidence of the relationship. Primary evidence of a marital relationship is a marriage certificate issued by civil authorities, and proof of the termination of all prior marriages, if any, of . . . the self-petitioner

(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 regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "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."

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

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.

Facts and Procedural History

The petitioner is a national and citizen of Argentina who entered the United States on the visa waiver program on September 16, 2001. He married C-S-¹, the claimed abusive United States citizen, on September 15, 2005. He filed the Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant, on September 22, 2006. The director approved the petition on February 4, 2008. Upon review of the record, the director issued a Notice of Intent to Revoke (NOIR) approval of the petition. The director informed the petitioner of inconsistencies and deficiencies in the record and provided the petitioner with the opportunity to submit evidence to establish that he had jointly resided with C-S-, that he had been subjected to battery or extreme cruelty perpetrated by C-S-, and that he had entered into the marriage in good faith. The director also specifically requested the status of the petitioner's marriage to C-S-. On August 16, 2010, upon review of the evidence submitted in response to the NOIR, the director determined that the petitioner had not addressed the issues outlined in the NOIR, had not overcome the grounds of revocation and, thus, revoked approval of the petition. Counsel for the petitioner submitted a timely appeal and brief in support of the appeal. Upon review of counsel's argument and the totality of the record, the AAO found that the petitioner had not established: he had jointly resided with C-S-; he had been subjected to battery

¹ Name withheld to protect the individual's identity.

or extreme cruelty perpetrated by C-S-; or, he had entered into the marriage in good faith. The AAO also found, beyond the decision of the director, that the petitioner had not established a qualifying relationship with C-S- as the petitioner had not provided evidence that the petitioner's marriage to C-S- was still valid when the petition had been filed.

Counsel for the petitioner submits a Form I-290B, Notice of Appeal or Motion, checking the box indicating that she is filing a motion to reopen and a motion to reconsider this matter and submits a brief and evidence previously submitted. Counsel asserts that the revocation of the petition in this matter violates United States Citizenship and Immigration Services (USCIS) policy which requires that a review of an approved Form I-360 must be based on new evidence not available at the time the Form I-360 was approved. Counsel submits a December 15, 2010 policy memorandum in support of her assertion. Counsel also contends that the inconsistencies and deficiencies in the record as noted by the AAO are easily explained. Counsel does not submit any new facts that are supported by affidavits or other documentary evidence and, thus, the motion to reopen will be dismissed. As counsel contends that the AAO's decision was based on an incorrect application of law or Service policy, the motion to reconsider will be granted.

USCIS Policy

Counsel's interpretation of the December 15, 2010 USCIS Policy Memorandum and update to the Adjudicator's Field Manual, is not persuasive. See PM-602-0022 Revocation of VAWA-Based Self-Petitions (Forms I-360); AFM Update AD10-49. This policy memorandum confirmed that the Vermont Service Center (VSC) was designated as the USCIS office with the sole authority to revoke an approved Violence Against Women Act (VAWA) self-petition and reminded district offices of the protocol to follow when a district office believed that a VAWA self-petition should be reviewed for possible revocation. In the matter at hand, the VSC, based upon its review of the record, determined that insufficient and inconsistent evidence had been submitted in support of the petition, and that approval of the Form I-360 may have been in error. As noted in the NOIR, this was the VSC's determination not the determination of a field or district office. The VSC properly notified the petitioner of the intent to revoke approval of the petition pursuant to the revocation procedures at 8 C.F.R. § 205, and provided the petitioner with the opportunity to submit evidence prior to rendering a final decision. The petitioner, however, failed to submit testimony or evidence sufficient to overcome the grounds set out in the NOIR. The director's decision revoking approval of the petition was properly upheld by the AAO. Accordingly, there was no procedural or policy violation in the director's decision to seek a revocation of the petition's approval pursuant to section 205 of the Act, 8 U.S.C. § 1155.

Joint Residence

The petitioner noted on the Form I-360 that he had jointly resided with C-S- from the date of their marriage, September 15, 2005, until December 2005, when C-S- disappeared. The petitioner provided the affidavits of two friends, [REDACTED] as well as documentary evidence in support of his claim of joint residence. The AAO previously discussed the deficiencies in the documentary evidence submitted and will not set out the deficiencies again. Counsel asserts that the inconsistency noted by the AAO in the petitioner's friends'

testimony and the petitioner's testimony is a matter of perspective and accordingly is not an inconsistency regarding when the couple resided together. Although the affidavits submitted by the petitioner's friends and the petitioner's testimony may reflect a different perspective on the date the couple started to live together as claimed by counsel, a review of the totality of the evidence finds that the record does not include probative, credible testimony or other evidence establishing that the petitioner and C-S- established a joint residence. The petitioner fails to provide any probative testimonial evidence regarding his joint residence with C-S-. He does not describe the number of rooms in the apartment, the landlord, their home furnishings, their neighbors, any of the jointly-owned belongings, or any of their daily routines within the residence. Similarly, the affiants who submitted statements on his behalf provided minimal information regarding the claimed joint residence. The record does not include sufficient consistent and probative testimony to establish that the petitioner jointly resided with C-S- during the marriage.

Battery or Extreme Cruelty

The director and AAO previously discussed the petitioner's statements, the statements of his friends, and the psychological evaluation provided by Dr. [REDACTED]. The director and the AAO both noted inconsistencies in the petitioner's statements to USCIS and to Dr. [REDACTED]. Counsel does not address the inconsistencies in the record, but rather contends that the differences in testimony from the petitioner, his friends, and Dr. [REDACTED] demonstrate that these individuals did not conspire to assist the petitioner with his immigration petition. Counsel's contention is not persuasive. The petitioner does not provide a statement addressing the inconsistencies in the record regarding his claim that he was subjected to battery or extreme cruelty. More importantly, in addition to the inconsistencies already noted, a review of the petitioner's statements reveals that he failed to provide probative testimony regarding specific instances of battery or extreme cruelty. His statement provides an overview of the claimed abuse. Without detailed probative testimony of particular events and the surrounding circumstances of the events, the petitioner's testimony is insufficient to establish that he was subjected to battery or extreme cruelty.

The record does not include probative evidence that the petitioner was subjected to behavior perpetrated by C-S- that constitutes battery and/or extreme cruelty as set out in the statute and regulation.

Good Faith Entry into Marriage

In the NOIR, the director specifically referenced the petitioner's inconsistent statements regarding C-S-'s immigration status. For example, Dr. [REDACTED] indicated that the petitioner reported that C-S- was born in Cuba, that she escaped from Cuba when she was ten, and her family all remained in Cuba. Dr. [REDACTED] noted that the petitioner appreciated the hardships C-S- suffered because he was also away from his family. The director pointed out that although the petitioner discussed that C-S- was born and lived in Cuba in detail with Dr. [REDACTED] the petitioner also provided C-S-'s birth certificate to USCIS, a birth certificate identifying C-S- as born in Florida. Thus, the petitioner's statements to Dr. [REDACTED] did not provide a truthful description of his interactions with C-S- or their claimed common interests. Moreover, as the AAO previously

determined, a review of the petitioner's statements to USCIS reveals a general overview of his introduction to C-S-, their courtship, and subsequent marriage. He does not provide a detailed account of the couple's courtship and marriage which would assist the AAO in evaluating his intentions upon entering the marriage. He fails to describe, in any meaningful detail, the couple's first introductions; his first impressions of C-S-; their decision to date; their first date; their courtship; their decision to marry; their engagement; their wedding; or any of their shared experiences. The key factor in determining whether a petitioner entered into a marriage in good faith is whether he or she intended to establish a life together with the spouse at the time of the marriage. *See Bark v. INS*, 511 F.2d 1200 (9th Cir.1975). The petitioner's statements and those of the individuals submitting statements on his behalf lack probative detail providing insight into the petitioner's intentions upon entering into the marriage. While the lack of documentary evidence is not necessarily disqualifying, the petitioner's testimonial evidence in this matter is not credible or probative and fails to support a finding that he entered into the marriage in good faith. Considered in the aggregate, the relevant evidence fails to demonstrate that the petitioner entered into marriage with C-S- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Qualifying Relationship and Immigration Classification

As the AAO previously determined, the petitioner refers to C-S- as his ex-wife and despite the director's specific request for information regarding the status of the petitioner's marriage to C-S-, the petitioner failed to provide this required information. Thus, the record does not establish that the petitioner had a qualifying relationship with C-S- when the petition was filed or that he is eligible for immediate relative classification based on a qualifying relationship with his former wife. The record does not establish that the petitioner is statutorily eligible for this immigrant classification. As previously noted, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Conclusion

Upon review of counsel's assertions on appeal and the totality of the record, the petition was erroneously approved. The petitioner is not eligible for this immigrant classification as he has not established: a qualifying relationship with C-S-; his eligibility for immigrant classification based on a qualifying relationship; his joint residence with C-S-; that he was subjected to battery or extreme cruelty perpetrated by C-S-; or that he entered into the marriage in good faith. The record on motion to reconsider is insufficient to establish that the prior decisions of the director and the AAO were based on an incorrect application of law or Service policy.

As always, the burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here that burden has not been met.

ORDER: The director's August 16, 2010 decision and the AAO's February 2, 2011 decision are affirmed and approval of the petition remains revoked.