

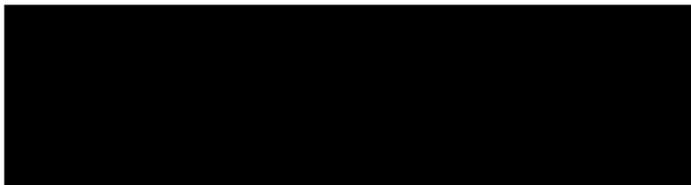
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



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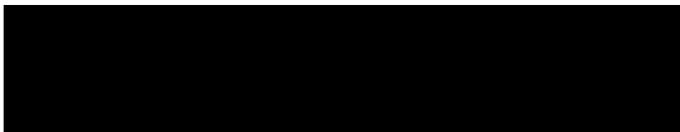
DATE: JUN 01 2011 OFFICE: VERMONT SERVICE CENTER

FILE:

IN RE:

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,

Perry Rhew,  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director 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 on the basis of his determination that the petitioner had failed to establish: (1) that she shared a joint residence with her former husband; (2) that her former husband subjected her to battery or extreme cruelty during their marriage; and (3) that she married her former husband in good faith. On appeal, counsel submits a brief.

*Applicable Law*

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, the following:

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:

- (iv) *Eligibility for immigrant classification.* A self-petitioner is required to comply with the provisions of section 204(c) of the Act . . . .
- (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 standard and 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.

\* \* \*

- (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.

Section 204(c) of the Act, 8 U.S.C. § 1154(c), states, in pertinent part, the following:

[N]o petition shall be approved if –

- (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative . . . status as the spouse of a citizen of the United States . . . by reason of a marriage determined by the [Secretary of Homeland Security] to have been entered into for the purpose of evading the immigration laws, or
- (2) the [Secretary of Homeland Security] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

The regulation corresponding to section 204(c) of the Act, located at 8 C.F.R. § 204.2(a)(1)(ii), states the following:

*Fraudulent marriage prohibition.* Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

*Pertinent Facts and Procedural History*

The petitioner, a citizen of the Dominican Republic, married M-B-<sup>1</sup> a citizen of the United States, on July 28, 2004. She filed the instant Form I-360 on February 5, 2008. The director issued two subsequent requests for additional evidence to which the petitioner, through counsel, filed timely responses. After considering the evidence of record, including the petitioner's responses to the requests for additional evidence, the director denied the petition on August 11, 2010.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, we find that the petitioner has failed to overcome the director's grounds for denying this petition. Beyond the decision of the director, we also find that section 204(c) of the Act further bars approval of the petition and that, because the petitioner has not complied with section 204(c) of the Act, she is consequently ineligible for immediate relative classification based upon her marriage to M-B-.

*Evidentiary Standard and Burden of Proof*

Counsel argues on appeal that the director incorrectly applied the "any credible evidence" standard. However, counsel appears to have conflated the evidentiary standard set forth by section 204(a)(1)(J) of the Act with the petitioner's burden of proof. Section 204(a)(1)(J) of the Act requires U.S. Citizenship and Immigration Services (USCIS) to "consider any credible evidence relevant to the petition." *Id.* 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 [agency's] sole discretion." 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 reiterates, "All forms of relevant credible evidence will be considered." 8 C.F.R. § 204.2(c)(2)(iv). However, in this case, as in all visa petition proceedings, the petitioner bears the burden of proof to establish her eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). 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.

*Joint Residence*

In her January 25, 2008 self-affidavit, the petitioner stated that she lived with M-B- until February 2005, and [REDACTED] who is M-B-'s mother, stated in her March 11, 2008 affidavit that M-B- and the petitioner lived together at her residence, which is located at [REDACTED] Christiansted, St. Croix, in the U.S. Virgin Islands.

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<sup>1</sup> Name withheld to protect individual's identity.

However, although the petitioner stated that she and M-B- ceased living together in February 2005, in a notarized letter dated October 18, 2005 to U.S. Citizenship and Immigration Services (USCIS), she stated that she was still living at the [REDACTED] address in Christiansted. She also appeared before USCIS for interviews in connection with the petitioner's application for permanent residency on January 24, 2007 and October 22, 2007, and represented herself as sharing a marital residence with M-B-. Although the director raised this inconsistency in his August 11, 2010 decision, counsel does not address the matter on appeal, and these inconsistencies undermine the probative value of the petitioner's testimony regarding the alleged joint residence.

On appeal, counsel cites [REDACTED] affidavit as evidence that the petitioner resided with M-B-. However, [REDACTED] provided no probative information about the alleged joint residence: for example, she did not describe the couple's room, any of their furnishings, other jointly-held possessions, or any other aspect of the allegedly joint residence in any meaningful way. Her statements, therefore, do not establish that M-B- and the petitioner resided together. Nor did any of the petitioner's other affiants provide any probative information regarding the allegedly joint residence.

Nor does the documentary evidence of record establish that M-B- and the couple resided together. Although the record contains evidence that the couple held a joint account at FirstBank Virgin Islands, the account was opened on March 17, 2006. As the petitioner stated in her January 25, 2008 self-affidavit that the joint residence ended in February 2005, a joint account opened in March 2006 is not evidence that she resided with M-B-. Nor is the 2005 jointly-filed tax return evidence that the couple resided together, as it was signed by M-B- and the petitioner on March 9, 2006, more than one year after the petitioner stated that the alleged joint residence ended.

Considered in the aggregate, the relevant evidence fails to establish that the petitioner resided with M-B-, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

#### *Battery or Extreme Cruelty*

The petitioner's claim of abuse by M-B- during their marriage is inconsistent. Counsel made the following statement in his August 6, 2009 letter:

Please be advised that [M-B-] has never physically attacked or assaulted [the petitioner].

Counsel made the following similar statement in his September 17, 2010 brief:

[The petitioner] submits that her husband was not physically violent. . . .

In his June 12, 2008 psychological evaluation of the petitioner, [REDACTED] stated that she told him that there had been no physical abuse. Nor did the petitioner make any reference to

any physical abuse in her January 25, 2008 self-affidavit submitted when she filed the petition. Rather, she stated that she and M-B- separated because he was unfaithful and addicted to drugs.

However, in her July 9, 2009 self-affidavit, the petitioner stated that M-B- was physically abusive and said that he pushed her in their home and into a car; dragged her from a friend's house by her hair; and raped her. She also stated that M-B- abused drugs; cursed at her; stole money from her; once threatened her immigration status; and that she feared he would hurt her.

In her July 8, 2009 affidavit, [REDACTED] stated that she saw M-B- grab the petitioner roughly and demand money from her.

[REDACTED] stated in her July 9, 2009 affidavit that the petitioner told her that M-B- was physically abusive. [REDACTED] stated that on one occasion while the petitioner was visiting her home, M-B- came into the house, grabbed the petitioner by the arm, and forced her into a car.

In his July 9, 2009 affidavit, [REDACTED] stated that his wife told him that she had been speaking with the petitioner by telephone, and that she had heard M-B- in the background yelling.

The petitioner also submitted a letter from M-B-, who stated that his drug addiction caused the marriage to break down. A letter from [REDACTED] M-B-'s mother, makes the same assertion.

In addition to stating that the petitioner told him she had not been physically abused by M-B-, [REDACTED] stated that the petitioner told him that M-B- abused drugs and alcohol; was unfaithful; called her names; asked for money constantly; and slammed doors. [REDACTED] diagnosed the petitioner with an adjustment disorder with mixed anxiety and depressed mood, chronic.

As noted, when she filed the petition, the petitioner submitted a self-affidavit which made no claim of physical abuse and [REDACTED] evaluation stating that the petitioner had told him there was no physical abuse. However, the petitioner later submitted a second self-affidavit and affidavits from acquaintances stating that physical abuse had in fact occurred. This inconsistency between the petitioner's two affidavits as well as between her testimony and that of her affiants diminishes the probative value of the petitioner's testimony regarding the alleged abuse.

Nor does the relevant evidence establish that M-B-'s non-physical behavior constituted extreme cruelty. To qualify for immigrant classification under section 204(a)(1)(A)(iii) of the Act, the statute and regulation require that the non-physical cruelty be extreme. The record indicates that M-B- abused alcohol and drugs, but the relevant evidence does not establish that his resultant behavior included psychological or sexual abuse of the petitioner or that his actions were otherwise part of an overall pattern of violence. See *Hernandez v. Ashcroft*, 345 F.3d 824, 840 (9<sup>th</sup> Cir. 2003) (interpreting the definition of extreme cruelty at 8 C.F.R. § 204.2(c)(1)(vi)).

The petitioner failed to establish that she was subjected to battery or extreme cruelty perpetrated by M-B- during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

*Good Faith Entry into Marriage*

The petitioner's testimony does not establish that she entered into the marriage in good faith, as she failed to provide any probative details regarding her relationship with M-B-. For example, she provided no information regarding their first introductions; their decision to date; their courtship; their engagement; or their wedding. The fact that the petitioner gave birth to a daughter 12 months after her marriage to M-B-, and that M-B- was not the father of that child, further calls into question her good faith entry into the marriage. Although the petitioner stated in her January 25, 2008 self-affidavit that she moved in with the father of the child because M-B- was abusive, she also stated in that she did not move out of the home she had shared with M-B- and his mother until February 2005 which, if accurate, would mean the child was conceived before the petitioner moved out of the home and undermines her explanation. Moreover, the father of the child was interviewed by agents from Immigration and Customs Enforcement (ICE) on November 5, 2007, and he told them that he and the petitioner began dating at least one year prior to her marriage to M-B-, which further discredits the petitioner's explanation. Although the director noted the timing of this pregnancy in both his June 23, 2009 request for additional evidence and in his August 11, 2010 decision denying the petition, neither counsel nor the petitioner further discussed the issue.

Nor does the other testimonial evidence of record establish that the petitioner entered into marriage with M-B- in good faith. Although her affiants attested to the petitioner's good faith entry into the marriage in general terms, their testimony also lacked detailed, probative information regarding the couple's relationship. Nor did any of them discuss her child.

Nor does the documentary evidence of record establish that the petitioner married M-B- in good faith. The pictures of the couple together are only evidence that they were together on one occasion. The evidence that the couple shared a joint bank account is not evidence of shared financial obligations as the account was opened more than one year after the date the petitioner stated she left the relationship. Nor is the 2005 jointly-filed tax return evidence of a good faith marriage, as it was signed by M-B- and the petitioner more than one year after the date the petitioner claims to have left the relationship.

The petitioner has failed to establish that she entered into marriage with M-B- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

*Conclusion*

As set forth above, the petitioner has failed to establish that she resided with M-B-; that M-B- abused her during their marriage; or that she married him in good faith. Accordingly, the petitioner is ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act and this petition must remain denied.

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 and the appeal will be dismissed.

**ORDER:** The appeal is dismissed.