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



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

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Date: **MAR 15 2012** 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 Director, Vermont Service Center, (“the director”) denied the immigrant visa petition. The AAO dismissed a subsequent appeal. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen and reconsider. The motion will be granted and the previous decision of the AAO will be affirmed.

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.

On July 6, 2010, the director denied the petition on the basis of his determination that the petitioner had failed to establish: (1) that he and his wife shared a joint residence; (2) that his wife subjected him to battery or extreme cruelty during their marriage; and (3) that he married his wife in good faith. On January 10, 2011, the AAO dismissed the petitioner’s appeal.

On motion, counsel submits a brief and a declaration from the petitioner.

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:

- (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.

Pertinent Facts and Procedural History

The petitioner, a citizen of Turkey, married A-S-¹ a citizen of the United States, on February 22, 2003. He filed the instant Form I-360 on June 3, 2009, which is now before the AAO on a motion to reopen and reconsider its prior decision dismissing the appeal. The motion is granted.

The AAO reviews these proceedings *de novo*. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). A full review of the record fails to establish the petitioner's eligibility. The decision to dismiss the appeal will be affirmed for the following reasons.

Good Faith Entry into Marriage

In its January 10, 2011 decision, the AAO reviewed the evidence of record and determined that the petitioner did not establish that he married his wife in good faith. In reaching this determination, the AAO found that the statements submitted by the petitioner and his affiants lacked probative detail providing insight into the petitioner's intentions upon entering into the marriage, and provided very little information regarding the former couple's shared experiences, apart from the alleged abuse.

¹ Name withheld to protect individual's identity.

The AAO further found that the documentary evidence submitted by the petitioner failed to establish that he married A-S- in good faith.

On motion, counsel cites to Board of Immigration Appeals (BIA) and federal court decisions involving determinations of marriage fraud. Counsel states that under *Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988), in order to make a finding that a marriage is a sham, any derogatory evidence must be documented in the record and must be substantial and probative of fraud. Counsel asserts that “there is significant independent verification of a good faith marriage and an absence of substantial and probative evidence which would support a finding of marriage fraud.” Counsel appears to have misinterpreted both the regulation pertaining to good faith entry into the marriage at 8 C.F.R. § 204.2(c)(2)(vii) and our previous decision. There was no finding of marriage fraud in our previous decision. Rather, we found that the petitioner had failed to establish that he entered into the marriage in good faith. Failure to establish good-faith entry into the marriage is not equivalent to a finding of marriage fraud. The regulations do not place the burden on United States Citizenship and Immigration Services (USCIS) to establish that the marriage was entered into in bad faith as argued by counsel, but rather on the petitioner to establish that he entered the marriage in good faith.

De novo review of the record does not establish that the petitioner entered into marriage with his spouse in good faith. The relevant evidence submitted below and on appeal was discussed in our prior decision, incorporated here by reference. Counsel has not addressed our finding that the petitioner failed to provide probative evidence of his intentions upon entering into the marriage. Accordingly, the petitioner has failed to establish that he entered into marriage with A-S- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Battery or Extreme Cruelty

In its January 10, 2011 decision, the AAO reviewed the evidence of record and determined that the petitioner failed to establish that he was subjected to battery or extreme cruelty. The AAO found that the record contained inconsistent evidence with regard to whether the petitioner was subjected to physical abuse by A-S-. The AAO further found that the record did not demonstrate that A-S-'s non-physical behavior involved threatened violence, psychological or sexual abuse, or otherwise constituted extreme cruelty, as that term is defined at 8 C.F.R. § 204.2(c)(1)(vi).

On motion, counsel asserts that the psychological evaluation submitted by the petitioner was not fully and fairly considered. Counsel contends that the AAO's decision “does not provide any objective basis for rejecting the expert report regarding the abuse suffered by the applicant.” Counsel cites to Rule 702 of the Federal Rules of Evidence, which pertains to testimony by experts. Counsel states that the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) amended the rule and “set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony.” However, in administrative proceedings, the federal rules of evidence are not controlling. See *Matter of Grijalva*, 19 I&N Dec. 713, 721-22 (BIA 1988). 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)(i). Accordingly, the mere submission of evidence that is relevant may not always suffice to establish the petitioner's credibility or meet the petitioner's burden of proof.

In the psychiatric evaluation dated December 11, 2008, [REDACTED] stated that he met with the petitioner on two occasions: on December 1, 2004, and four years later on December 4, 2008. [REDACTED] diagnosed the petitioner with having a previous episode of brief reactive psychosis with paranoid features, now in remission and mixed personality disorder with shy and dependent personality features. According to [REDACTED], the petitioner had a mental breakdown in 2004 during a period of unspecified abuse and harassment by A-S-, was hospitalized "on two or three occasions," and he was diagnosed with schizophrenia. [REDACTED] stated that petitioner told him that although A-S- never hit him, she was mentally abusive; demanded and spent significant amounts of money; and became pregnant by another man. [REDACTED] description of the alleged mental abuse is brief and fails to provide probative details to establish that the petitioner suffered extreme cruelty as that term is defined in the regulations. In addition, [REDACTED] evaluation does not establish a connection between the alleged abuse and the petitioner's mental health conditions.

The record also contains a psychiatric admission evaluation by [REDACTED] pertaining to the petitioner's admission on November 18, 2004 to the [REDACTED]. [REDACTED] diagnosed the petitioner with schizophrenia, paranoid type in acute exacerbation. [REDACTED] stated that the petitioner had been experiencing auditory hallucinations for the previous seven years, which precedes his marriage to A-S-. The evaluation did not state that the petitioner was in a marital relationship, but instead stated that the petitioner had been residing with his uncle since he was 12 years old. Therefore, we find that the AAO accorded proper weight to the psychological evaluation submitted by the petitioner.

De novo review of the record does not establish that the petitioner was subjected to battery or extreme cruelty by his spouse. The relevant evidence submitted below and on appeal was discussed in our prior decision, incorporated here by reference. Counsel has not addressed our finding that the petitioner failed to provide consistent, detailed and probative evidence of the alleged abuse. On motion, the petitioner asserts in a declaration, dated February 7, 2011, that he was initially too ashamed to tell anyone that his wife hit him, including [REDACTED] but the petitioner fails to provide any additional probative information to support his claim of abuse. Accordingly, the petitioner has not established that his wife subjected him to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Joint Residence

In its January 10, 2011 decision, the AAO reviewed the evidence of record and determined that the petitioner failed to establish that he jointly resided with his spouse. The AAO found that the petitioner's statement in his March 17, 2010 self-affidavit that he and A-S- were living together at

[REDACTED] at the time he proposed marriage on March 16, 2002, and that they lived there until August 2003, conflicts with his Form I-360 where he stated that he and A-S- lived together from February 2003 until February 28, 2008. The AAO further found that the petitioner's Form G-325A, Biographic Information, signed on June 18, 2003, provided that he had been living at [REDACTED] since November 2001, and the record contained a copy of a check written by the petitioner to U.S. Citizenship and Immigration Services (USCIS) on May 12, 2004 which provided the couple's address as [REDACTED]. On motion, the petitioner asserts in his declaration that he first resided with his wife at [REDACTED] and he did not notice the error his attorney made when he reviewed his affidavit. However, the petitioner failed to address the inconsistency between his Form I-360 and affidavit regarding the date he first resided with A-S-.

The AAO found that the petitioner also stated in his March 17, 2010 self-affidavit that he and A-S- moved with his aunt and uncle from the [REDACTED] address to [REDACTED] in August 2003, and submitted a lease for the [REDACTED] property (which was not signed by the petitioner or by A-S-) covering the period from August 1, 2003 through February 29, 2004. However, the record contained a statement from a property management company regarding the couple's residence at [REDACTED] stating that on August 30, 2004, the couple gave notice that they were moving away from that residence on October 1, 2004, and that they made their final rent payment on September 1, 2004, which indicates they were still living at [REDACTED] as of August 30, 2004. On motion, the petitioner asserts that this error may have occurred because the same property management company owns both the [REDACTED] and [REDACTED] properties. The petitioner, however, did not explain the reason he failed to notice a discrepancy of this significance at the time he received the notice from the property management company.

The AAO found that the petitioner also stated in his March 17, 2010 self-affidavit that he and A-S- signed a lease in late February 2005 to rent a condominium located at [REDACTED] and submitted a copy of the lease, the term of which began on March 1, 2005. He also submitted a copy of a receipt for a \$1,500 rental deposit the couple made for this property on February 27, 2005. However, the record contained a banking statement covering the period from December 3, 2004 through December 16, 2004, which indicated the petitioner and A-S- were already living at the [REDACTED] address during that time period. Medical billing information in the record also indicated that the petitioner was already living at the [REDACTED] address in November 2004. On motion, the petitioner asserts that he moved into the property at [REDACTED] in September 2004 after leaving [REDACTED] because his friend owned the property. He states that his mother purchased the property in March 2005 from his friend. The petitioner, however, did not submit a letter from his friend who owned the property, documentation reflecting that his mother purchased the property in March 2005, or any other evidence to support his claim.

The AAO found that the petitioner submitted two banking statements regarding the couple's joint account covering the period from May 14, 2005 through July 14, 2005 which indicated that the couple was living at [REDACTED] but the petitioner's testimony and the other evidence of record indicate that the couple was living at the [REDACTED] address during that time. On motion, the petitioner asserts that he never resided at [REDACTED] and does not see

where that address appears on the documentation he submitted. The petitioner's statement is not persuasive, as a review of the record shows that he has submitted three bank statements for the couple's joint account during the period of March 17, 2005 through July 14, 2005 addressed to the couple at [REDACTED]

De novo review of the record does not establish that the petitioner jointly resided with his spouse. The explanations offered by the petitioner on motion do not reasonably resolve the numerous inconsistencies in the relevant evidence. As previously stated, the inconsistencies catalogued above diminish the probative value of the petitioner's testimony that he and A-S- shared a joint residence. Accordingly, the relevant evidence fails to demonstrate that the petitioner resided with A-S-, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

Conclusion

On motion, the petitioner has not established that he jointly resided with A-S-, that she subjected him to battery or extreme cruelty, and that he married her in good faith. He is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act and the appeal remains dismissed.

In these proceedings, the petitioner bears the burden of proof to establish his 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). Here, that burden has not been met.

ORDER: The motion is granted. The AAO's decision, dated January 10, 2011, is affirmed.