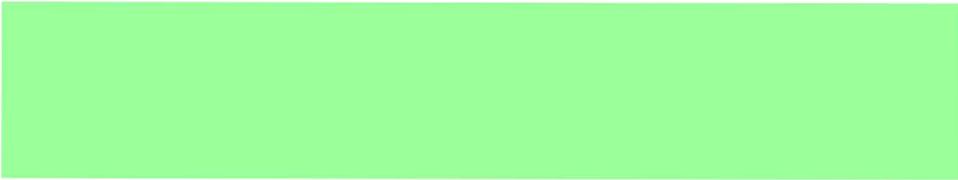


(b)(6)

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

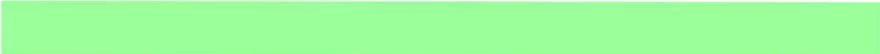


U.S. Citizenship
and Immigration
Services



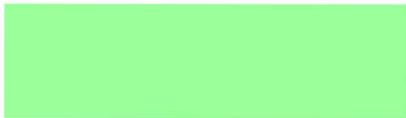
Date: **NOV 27 2013**

Office: VERMONT SERVICE CENTER File: 

IN RE: Petitioner: 

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:

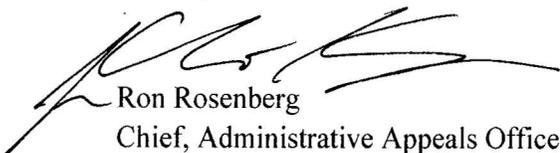


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, (“the director”) denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on a motion to reopen and reconsider. The motion will be granted. The appeal will remain dismissed and the petition will remain denied.

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 her U.S. citizen spouse.

The director denied the petition for failure to establish that the petitioner jointly resided with her husband and entered into marriage with him in good faith. The director also denied the petition for failure to establish the requisite battery or extreme cruelty. On December 8, 2012, the AAO dismissed the appeal, and further determined that the petitioner did not establish her good moral character.

On motion, counsel submits a supplemental brief and additional evidence.

Relevant 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, 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 further 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.

(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.

* * *

(vii) *Good moral character.* A self-petitioner will be found to lack good moral character if he or she is a person described in section 101(f) of the Act. Extenuating circumstances may be taken into account if the person has not been convicted of an offense or offenses but admits to the commission of an act or acts that could show a lack of good moral character under section 101(f) of the Act. . . . A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she . . . committed unlawful acts that adversely reflect upon his or her moral character, or was convicted or imprisoned for such acts, although the acts do not require an automatic finding of lack of good moral character. A self-petitioner's claim of good moral character will be evaluated on a case-by-case basis, taking into account the provisions of section 101(f) of the Act and the standards of the average citizen in the community.

* * *

(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 further explicated in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

(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.

(v) *Good moral character.* Primary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit. The affidavit should be accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. . . . If police clearances, criminal background checks, or similar reports are not available for some or all locations, the self-petitioner may include an explanation and submit other evidence with his or her affidavit. The Service will consider other credible evidence of good moral character, such as affidavits from responsible persons who can knowledgeably attest to the self-petitioner's good moral character.

* * *

(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 is a citizen of The People's Republic of China (China) who entered the United States on July 13, 2009, as a K-3 visitor. The petitioner married G-R-¹, a U.S. citizen, on January 25, 2008 in Foshan City, China. The petitioner's husband filed an alien relative immigrant petition (Form I-130) on the petitioner's behalf, which was approved on September 29, 2008. The petitioner filed and later withdrew her application for adjustment of status. The petitioner filed the instant Form I-360 on September 14, 2010. The director denied the petition for failure to establish the petitioner's joint residency with G-R-, the requisite battery or extreme cruelty, and good-faith entry into the marriage. The petitioner, through counsel, timely appeal and the AAO dismissed the appeal on December 8, 2012 further finding that the petitioner failed to establish her good moral character. The AAO's prior decision is incorporated here. The petitioner timely submitted a motion to reopen and reconsider.

Counsel's brief and the additional evidence meet the requirements for a motion to reopen and reconsider. The AAO reviews these proceedings *de novo*. See *Soltane v. DOJ*, 381 F.3d 143, 145

¹ Name withheld to protect the individual's identity.

(3d Cir. 2004). Upon reopening and reconsideration, full review of the record fails to establish the petitioner's eligibility. Counsel's claims and the new evidence submitted on motion fail to overcome the grounds for denial. The appeal will remain dismissed for the following reasons.

Joint Residence

In its decision dated October 12, 2012, the AAO determined that the petitioner had not established that she resided with G-R-. In her affidavit dated August 12, 2010, the petitioner stated that she first met G-R- through an online dating site in September of 2007. She then stated he came to visit her in China once in mid-January of 2008 and that she did not reside with him in the United States. In her affidavit submitted on motion, the petitioner states that during her time together with G-R- after their marriage, G-R- purchased clothes for her and paid for all of their expenses including hotel, food, and taxi fees. She states that during the month that they lived together in China, they shared a bed and established a daily routine. She further states G-R- could not leave his home in Colorado because he was an avid skier and also wanted to stay near his children but that he promised that the two of them would live together in the United States.

On motion, counsel asserts that the petitioner provides a detailed account of their daily life together in China and already submitted other credible evidence below, including credit card receipts, photographs and electronic mail messages that demonstrate her joint residence with G-R- in China. Counsel's arguments and the petitioner's description of the time spent with G-R- in China fail to establish her shared marital residence. Section 101(a)(33) of the Act defines the term "residence" as a person's "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33). In her affidavit on motion, the petitioner states that after G-R- arrived in Hong Kong, China, she traveled from her home in Foshan, China to meet him and the two "resided together in [a] hotel" for three days. She states that she married G-R- on January 25, 2008 in Foshan. She states that the two stayed at her home in Foshan, China for a few days and then traveled to Nanning, China for nine days where they stayed at a hotel. She further states that they then returned to Foshan for seven days before traveling to Hong Kong on February 10, 2008, two days prior to G-R-'s departure. The record shows that G-R-'s stay in China totaled 24 days, 18 of which were spent sight-seeing with the petitioner after the two were married. The relevant evidence indicates that the petitioner spent the majority of G-R-'s time in China after their marriage staying at hotels and not residing at her own or G-R-'s "principal, actual dwelling place in fact." Accordingly, the record does not establish that the petitioner resided with her husband, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

Entry into the Marriage in Good Faith

In its prior decision, the AAO determined that the petitioner had not established that she entered into marriage with G-R- in good faith because she failed to provide probative details regarding their courtship, engagement, wedding, joint residence or any of their shared experiences, apart from the alleged abuse. On motion, the petitioner submits a self-affidavit.

In her affidavit, the petitioner repeats her earlier statements describing how she met G-R- online and adds that after six months of daily communication, they were deeply in love. She states that when G-R-

arrived in China and they met in person, she fell more in love with him and the two were married on January 25, 2008, six days after his arrival. She states that G-R- bought her a diamond wedding ring and paid for all of their expenses during their trips. She briefly describes their daily routines but does not add any probative information to the affidavits she submitted previously.

On motion, counsel incorrectly argues that the AAO abused its discretion by acting outside of its powers in determining that the petitioner did not marry G-R- in good faith because a Form I-130 Petition for Alien Relative and Form I-129F petition for foreign citizen spouse filed by the petitioner's husband were previously approved. Counsel adds that the United States Department of State's (DOS) approval of the petitioner's K-3 nonimmigrant visa is further evidence that the petitioner's relationship with G-R- was "thoroughly vetted" and found to be in good faith. Although similar, the parties, statutory provisions and benefits procured through sections 201(b)(2)(A)(i) (Form I-130) and 204(a)(1)(A)(iii) (Form I-360) of the Act are not identical. The petitioner's husband was the petitioner and bore the burden of proof in the prior Form I-130 adjudication, in which he was required to establish his citizenship and the validity of their marriage. Section 201(b)(2)(A)(i) of the Act, 8 U.S.C. § 1151(b)(2)(A)(i); 8 C.F.R. §§ 204.1(g), 204.2(a)(2). Additionally, by extension, DOS's approval of the K-3 is based on the pending or approved Form I-130 where the burden was on the petitioner's husband. 8 C.F.R. § 214(k)(7). In contrast, in this case, the petitioner bears the burden of proof to establish not only the validity of their marriage, but also her own good-faith entry into their union. Section 204(a)(1)(A)(iii)(I)(aa) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(I)(aa). The regulations for self-petitions under section 204(a)(1)(A)(iii) of the Act further explicate the statutory requirement of the self-petitioner's good-faith entry into the marriage or qualifying relationship. 8 C.F.R. §§ 204.2(c)(1)(ix), 204.2(c)(2)(vii).

The fact that a visa petition or application based on the marriage in question was previously approved does not automatically entitle the beneficiary or applicant to subsequent immigrant status. *See INS v. Chadha*, 462 U.S. 919, 937 (1983); *Agyeman v. I.N.S.*, 296 F.3d 871, 879 n.2 (9th Cir. 2002) (In subsequent proceedings, "the approved petition might not standing alone prove by a preponderance of the evidence that the marriage was bona fide and not entered into to evade immigration laws."). Accordingly, approval of the Form I-130 does not bar an examination of the petitioner's good-faith entry into her marriage or relieve the petitioner of her burden to establish this statutory requirement in the instant case. In this case, the petitioner provided only a brief description of her marriage and the remaining, relevant evidence lacks probative information sufficient to meet her burden of proof. When viewed in the totality, the preponderance of the relevant evidence does not demonstrate that the petitioner entered into marriage with her husband in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Battery or Extreme Cruelty

In its prior decision, the AAO determined that the petitioner failed to establish that G-R- subjected her to battery or extreme cruelty during their marriage. On motion, the petitioner submits a self-affidavit in which she repeats much of her statements below. She recounts that just before she was supposed to travel to the United States to reunite with G-R-, he sent her an electronic mail message declaring that their marriage was a mistake and that he did not want her to move to the United States. She states that

despite this message, she came to the United States and immediately traveled to Boston where a family friend resided. This is inconsistent with the petitioner's previous statement that she flew to an airport in Chicago and then traveled to California where her friend resided. The petitioner reiterates that she was humiliated after being abandoned "at the airport in a foreign country" although by her own account, G-R- asked her not to come prior to her departure from China and had not been expecting her arrival. She states that he abandoned her without money, friends and family but also explains that she traveled first to a friend's house before attempting to contact G-R-. On motion, counsel asserts that G-R- rigidly controlled the couple's finances, withheld basic necessities, and forced the petitioner "to dress in a highly sexualized manner." Counsel's assertions are not supported by the petitioner's affidavit on motion nor the evidence below. On motion, the petitioner states in her affidavit that G-R- bought her clothes which consisted mainly of long dresses and sent her \$250 each month after his return to Colorado which covered her living expenses in China. She does not describe G-R- as controlling or describe any other actions of G-R- equivalent to battery or extreme cruelty as that term is defined at 8 C.F.R. § 204.2(c)(1)(vi). Accordingly, the petitioner has not established that her husband subjected her to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Good Moral Character

On motion, the petitioner submits an affidavit in which she asserts that she is a person of good moral character but does not submit a California police clearance report. Counsel argues that in reversing the director's finding of good moral character, the AAO incorrectly applied *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003) because the facts of *Spencer Enterprises, Inc. v. United States* differ from the case at hand. Counsel is in error. A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *Id.* The AAO reviews each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *See Maka v. INS*, 904 F.2d 1351, 1356 (9th Cir. 1990); *Mester Manufacturing Co. v. INS*, 900 F.2d 201, 203 (9th Cir. 1990).²

In its prior decision, the AAO determined, within its authority to review the proceedings *de novo*, that beyond the director's decision, the petitioner failed to submit evidence of her good moral character as per 8 C.F.R. § 204.2(c)(2)(v). The regulation prescribes that "[p]rimary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit." 8 C.F.R. § 204.2(c)(2)(v). The regulation further states that the affidavit "should be accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition." *Id.* If the petitioner is unable to obtain a police clearances or criminal background checks, the self-petitioner may include an explanation and submit other evidence with her affidavit. *Id.*

² The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Counsel erroneously asserts that the USCIS's biometrics and record checks provide ample evidence of the petitioner's good moral character and that the AAO violated the petitioner's due process rights by "reversing the Service Center's specific finding that she had proven good moral character without giving her notice and an opportunity to respond." In its prior decision dated December 8, 2012, the AAO gave notice to the petitioner that she failed to establish her good moral character because she did not submit an affidavit attesting to her good moral character nor did she submit local police clearances or a state criminal background check from California where the record shows that the petitioner has been living since August of 2009. On motion the petitioner has had a second opportunity to respond and while she states that she meets all the good moral character requirements, she again fails to submit the necessary check or clearances or provide an explanation for why such evidence is unavailable. Accordingly, the petitioner has not demonstrated that she is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

Conclusion

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, the appeal will remain dismissed and the petition will remain denied.

ORDER: The motion is granted. The December 8, 2012 decision of the Administrative Appeals Office is affirmed. The appeal remains dismissed and the petition remains denied.