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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services



B9

FILE:

EAC 06 266 50252

Office: VERMONT SERVICE CENTER

Date: APR 02 2009

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision. Because the petition is not approvable, however, it will be remanded for further action.

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 the spouse of a U.S. citizen who has been battered or subjected to extreme cruelty by her U.S. citizen spouse. The director denied the petition because the petitioner did not establish that she had a qualifying relationship with a U.S. citizen and that she was eligible for immigrant classification based on a qualifying relationship. The director specifically noted that the petitioner had established all of the other eligibility requirements.

The petitioner, through counsel, submits a timely appeal.

We concur with the director's determination that the petitioner has not established that she had a qualifying relationship with a U.S. citizen or that she was eligible for immigrant classification based on a qualifying relationship. Counsel's claims and additional evidence on appeal do not overcome the grounds for denial of the petition. However, we do not concur with the director's determination that she has established that she was battered or subjected to extreme cruelty by her U.S. citizen spouse or that she resided with her spouse or entered into her marriage in good faith. Nonetheless, the case must be remanded because the director denied the petition without first issuing a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

Eligibility for Immigrant Classification Under Section 204(a)(1)(A)(iii) of the Act

Section 204(a)(1)(A)(iii) of the Act provides that the spouse of a U.S. citizen may self-petition for immigrant classification if the petitioner demonstrates that he or she entered into the marriage with the U.S. citizen spouse in good faith and that during the marriage, the petitioner or a child of the petitioner was battered or subjected to extreme cruelty perpetrated by the petitioner's spouse. In addition, the petitioner 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 C.F.R. § 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 regulations provide further guidance at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

(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 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.

(ii) *Relationship.* A self-petition file by a spouse must 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.

Procedural History and Pertinent Facts

The record in this case documents the following pertinent facts and procedural history. The petitioner is a native and citizen of Zimbabwe who entered the United States on March 14, 1999 on a B-2 visitor visa. She met W-K-¹ a U.S. citizen, in the fall of 2000 and married him on April 7, 2002. The petitioner claims that they resided together after they got married for approximately eight months, during which time W-K- became increasingly abusive towards her; and the relationship ended in December 2002 when W-K- moved away, and the petitioner has not seen him since that time. The petitioner filed the pending Form I-360 Petition on September 29, 2006, indicating that she has been married two times. On April 16, 2007, the director issued a Request for Evidence (RFE), specifically requesting a copy of the marriage certificate for the petitioner's first marriage and proof of legal termination of that marriage, as well as additional evidence that she married W-K in good faith. The petitioner responded to the RFE on June 12, 2007, providing, through counsel, a description of her traditional marriage in Zimbabwe to A-C- and an explanation of why neither a marriage certificate nor proof of termination of that marriage exists. The petitioner also provided her own statement and six additional statements from friends as evidence that she had entered into her marriage with W-K- in good faith.

¹ Name withheld to protect individual's identity.

On July 20, 2007 the director issued a decision to deny the I-360 Petition.² The director concluded that, in order for the prior marriage and termination of such marriage to be considered valid for immigration purposes, both the marriage and the divorce must have been registered with a civil authority from Zimbabwe, adding that, according to the Department of State Foreign Affairs Manual (FAM), marriage certificates and divorce decrees are available in Zimbabwe. The director also found that the petitioner's representative had submitted the descriptive statement regarding the traditional marriage and lack of documentary proof of marriage and divorce, and that the statement, therefore, holds no evidentiary weight for immigration purposes. Based on the petitioner's failure to submit documentation of her prior marriage and divorce in Zimbabwe, the director found that that the petitioner had failed to establish that she had a qualifying relationship as the spouse of a United States citizen and had failed to establish her eligibility for immigrant classification based upon that relationship. The director found that all other eligibility requirements had been met.

On appeal, the petitioner submits her own statement describing her traditional marriage to A-C- under customary laws of Zimbabwe and an explanation of why no written documentation or registration of the marriage or its termination exists. The petitioner, through counsel, also submits a statement from A-C- explaining the practices of his unregistered marriage to the petitioner, confirming the petitioner's account. Also submitted on appeal are the following documents relevant to the petitioner's claim that she was married and divorced previously under customary law in Zimbabwe and that such customary unions are not registered:

- Email communication from the Embassy of Zimbabwe in the United States, dated August 10, 2007, confirming that customary marriages and divorces in Zimbabwe are not registered.
- An affidavit from [REDACTED], dated August 28, 2007, declaring that she is a legal practitioner in Zimbabwe and stating that there are both registered and unregistered customary marriages in Zimbabwe, citing to the Customary Marriages Act, Chapter 5:07, dealing with registered customary marriages and noting that unregistered customary marriages are governed by customary law and not Common Law; and the marriage is a private affair between the parties and their families with no need to approach the court and no need for written documentation.
- Two articles, *Women's Reproductive Rights in Zimbabwe* (Center for Reproductive Law & Policy, December 1997) and *Proposals for Law Reform on the Recognition of Customary Marriages* (Legal Assistance Center, Namibia, 1999), citing to the laws and customs in Zimbabwe and referring specifically to unregistered customary marriages and lack of legal action available for the dissolution of such marriages.
- Three Zimbabwean Case Decisions, all involving the policies of unregistered customary

² Although required under former 8 C.F.R. § 204.2(c)(3)(ii)(2006), no Notice of Intent to Deny (NOID) was issued in this case. While it is no longer a regulatory requirement for petitions filed on or after June 18, 2007, a NOID is required in this case, as it was filed on September 25, 2006.

marriages in Zimbabwe.

As will be discussed below, we find that the petitioner has provided sufficient evidence of the existence of unregistered customary marriages in Zimbabwe, and that it is unreasonable to expect that certain legal documents for such unions should be available in light of the requirements for such marriages. Despite such evidence, however, the petitioner has failed to establish that she was married to A-C- pursuant to Zimbabwean customary law and her marriage was dissolved according to customary law. The petitioner has, therefore, failed to provide evidence that her prior marriage had been terminated and that she was eligible to legally marry W-K-. We also find that she failed to establish that she was battered or subjected to extreme cruelty by her U.S. citizen spouse or that she entered into her marriage in good faith.

Qualifying Relationship and Eligibility for Immediate Relative Classification

Primary evidence of a qualifying relationship with a U.S. citizen spouse is a marriage certificate issued by civil authorities, and proof of the legal termination of all the self-petitioner's prior marriages. 8 C.F.R. § 204.2(c)(2)(ii). The petitioner submitted a copy of her marriage certificate as evidence of her marriage to W-K-, a U.S. citizen, on April 7, 2002. However, on her I-360 Petition she claimed to have been married twice, the first time by a customary marriage in Zimbabwe to A-C- in October 1989. She claimed that both the customary marriage and the subsequent divorce, on November 2, 1992, were accomplished according to traditional custom, stating that at no point is written documentation made of the marriage or divorce. In support of her statements, she submitted an affidavit from A-C- confirming the procedures for their marriage and divorce. She also submitted documents, including court decisions, that refer to the existence of the type of unregistered customary unions described by the petitioner.

Although the director noted that the FAM states that marriage certificates and divorce decrees are available in Zimbabwe, such availability does not mean that all customary marriages and divorces are registered in Zimbabwe or that all such unions are documented by official marriage certificates or divorce decrees. To the contrary, the petitioner has provided credible reports, based on extensive research into the laws and customs of Zimbabwe, of the existence of both registered and unregistered customary unions as well as civil unions in Zimbabwe. See *Proposals for Law Reform on the Recognition of Customary Marriages, supra*, at 61.

While the present record establishes that customary unregistered marriages and divorces exist in Zimbabwe, it does not establish the validity of the petitioner's claimed marriage or divorce from her first husband. The law of a foreign country is a question of fact which must be proved by the petitioner if relied upon to establish eligibility for an immigration benefit. See *Matter of Khatoon*, I&N Dec. 153 (BIA 1984); *Matter of Fakalata*, 18 I&N Dec. 213 (BIA 1982); *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). This includes common, customary, religious, and tribal law. See *Matter of Kumah*, 19 I&N Dec. 290 (BIA 1985). It is the burden of the petitioner to prove that the common, customary, religious or tribal law requirements for divorce were met in accordance with

the requirements of the jurisdiction in which the customary marriage was recognized. *Id.* To prove the validity of a customary divorce, the petitioner must present evidence that establishes (1) the petitioner's tribe, (2) the current customary divorce law of that tribe, and (3) the fact that the pertinent ceremonial procedures were followed. *Matter of Kodwo*, 24 I&N Dec. 479, 482 (BIA 2008) (citing *Matter of DaBaase*, 16 I&N Dec. 39 (BIA 1976)). The petitioner must also prove that the divorce was properly perfected:

Affidavits should be specific and include the full names and birth dates of the parties; the date of the customary marriage; the date of, and grounds for, the dissolution of the marriage; the names, birth dates of, and custody agreement for any children born of the marriage; and a description of the tribal formalities that were observed, including the names of the tribal leaders, the name of the tribe, the place, the type of divorce, and any other relevant information.

Id. at 483-84.

In this case, the petitioner has submitted only two statements attesting to her prior marriage and divorce, her own and one from her former husband, A-C-. The one from A-C- indicates it was sent by electronic mail and contains an electronic signature; it is not notarized. There is no way to confirm its origin. Moreover, neither affidavit provides all of the information required by *Kodwo* to prove that the divorce was properly perfected. While the petitioner has credibly explained and provided corroborating evidence of why no marriage certificate or divorce decree would be available for the union she describes, there is insufficient evidence in the record establishing that all procedures for a customary marriage and divorce in Zimbabwe were followed in her case. She has, therefore, failed to establish that her prior marriage had been terminated and that she was eligible to legally marry W-K-.

The petitioner has thus failed to establish that she has a qualifying relationship with W-K-, her U.S. citizen spouse, pursuant to section 204(a)(1)(A)(iii)(II)(aa) of the Act; or that she is eligible for immediate relative classification based on her relationship with W-K-, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act.

Battery or Extreme Cruelty

Along with her I-360 Petition, as evidence of abuse the petitioner submitted her own statement, undated, and affidavits by [REDACTED], dated July 11, 2005, and [REDACTED], dated July 29, 2005. She also submitted a copy of a card from the Emergency Housing Services Coordinator of the Martin Luther King Housing Development Association in Tacoma, Washington, and a letter from the Salvation Army in Tacoma, signed by a staff member and dated October 29, 2002, stating that the petitioner was a resident there from September 9-11, 2002. In response to the RFE, the petitioner submitted six statements from friends, all of which are dated either June 6 or 7, 2007, including additional statements from [REDACTED] and [REDACTED]. Although these statements were

submitted as evidence of a good faith marriage, three of them also referred to abuse.

In her statements the petitioner claims that she met W-K- in fall 2000, and their relationship was good; after several months he moved in with her; and 18 months after they began dating she accepted his marriage proposal. She states that he began lying, lost his job and began getting angry with her; he would leave home with his friends without letting her know when he would be back, sometimes staying out all night; and once when she confronted him, they argued and he hit her. She claims that she forgave him, but that hitting her and degrading her out of anger became a habit for him, even in front of her friends; and that her friends encouraged her to call the police but she thought she was to blame or did not want to get her husband in trouble. She claims that her friends stopped visiting because of her husband's erratic behavior; she began to spend nights at shelters whenever he would get upset and be violent; and, after eight months of marriage, she asked W-K- to leave and he agreed.

Three individuals who submitted statements in her support refer to incidents of abuse: [REDACTED] stated that she witnessed the petitioner going through hard times and that both verbal and physical abuse occurred on many occasions, on one of which she was present in the petitioner's apartment; she later described this incident as "[W-K-] displayed some violent and inappropriate behavior towards [the petitioner]." She does not provide any time frame for the incident she witnessed or details of W-K-'s acts. [REDACTED] stated that in November 2003 she was doing the petitioner's hair at the petitioner's apartment when W-K- came in cursing and yelling at the petitioner and saying embarrassing words. In a second statement submitted in response to the RFE, she described this same event as happening a little over a year into their marriage and added that W-K- began to throw things out of anger. Another friend, [REDACTED] wrote that she and the petitioner had been friends since January 2002 and that the couple had been dating about a year and a half before she met them; she added that prior to their marriage they appeared to have a normal relationship although W-K- appeared to be a bit controlling; after they married, W-K- began to verbally and physically abuse the petitioner; and there were times the petitioner left her apartment in the middle of the night to stay at a local shelter to escape W-K-'s violent behavior.

The evidence noted above lacks relevant details of the events described or is inconsistent with the petitioner's claims. The statements from friends either provide no dates for their relationship with the petitioner or for the events they describe, or the dates provided do not coincide with the petitioner's claims. The petitioner claims that she and W-K- dated for 18 months prior to their marriage in April 2002, and that he moved out in December of the same year and she did not hear from him after that. Yet, [REDACTED] describes abuse occurring in November 2003. Although she describes events that took place while the couple was dating, [REDACTED] claims to have either met the couple at the time of their marriage, after 18 months of courtship, or in January 2002, three months before they married. She provides no dates or details of the abusive behavior she describes. The record also lacks any details of the times the petitioner claimed to have spent at shelters; neither the business card nor the letter from the Salvation Army regarding a two-day stay in November are evidence that the petitioner had been abused by W-K-, and neither the petitioner nor her friends provide any details of the actions of W-K- that caused the petitioner to seek shelter.

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 Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). 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. While USCIS must consider all credible evidence relevant to a petitioner's claim of abuse, the agency is not obligated to determine that all such evidence is credible or sufficient to meet the petitioner's burden of proof. 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).

In this case, the inconsistencies and lack of detail noted above detract from the credibility of the petitioner's claim, and we do not find the evidence sufficient to meet the petitioner's burden of proof. Other than the petitioner's claims that W-K- hit her on several occasions, there is no credible statement based on personal knowledge of any threat of or actual physical act of abuse perpetrated against her by W-K-. The two statements submitted by her friends who claim to have witnessed physical abuse do not provide relevant details or are not consistent with the petitioner's claims. The claims made by the petitioner and the other statements submitted on her behalf lack relevant details. They fail to establish that the petitioner was the victim of any act or threatened act of physical violence or extreme cruelty, that W-K-'s non-physical behavior was accompanied by any coercive actions or threats of harm, or that his actions were aimed at insuring dominance or control over the petitioner.

Accordingly, the petitioner has failed to establish that she was battered or subjected to extreme cruelty during her marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Joint Residence

The record contains the following evidence relevant to the petitioner's claim that she resided with her husband: A copy of a document from a management company, dated in April and May 2002, showing W-K- as an applicant for a rental residence, and the affidavits mentioned above. The rental document does not provide the address where the petitioner claims to have resided with W-K-, although someone has added a hand-written note at the bottom of the page that refers to the petitioner's apartment number. None of the affidavits provides the address of the petitioner or her husband at any time, though they refer to abusive treatment by H-K- at the couple's apartment.

On the Form I-360, the petitioner claimed to have resided with her husband from April to December 2002. In her statements, she claimed that he moved in with her after they were married, but that the only evidence of this is the rental document described above. She stated that the document was a request to have her husband added to the apartment lease agreement right after they were married and that the request was accepted but he was never officially added to the lease. As no address is included on the form, it cannot be considered a rental agreement or credible evidence of joint residence. She explained that she did not have additional evidence because she destroyed everything that reminded her of him after he left the relationship.

As noted above, various documents may be submitted as evidence of joint residency, including 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. 8 C.F.R. § 204.2(c)(2)(iii). In this case, although the petitioner claimed to have resided with H-K- for at least eight months, not one credible document has been submitted, and the affidavits do not provide relevant details regarding where or when the petitioner may have resided together.

While the petitioner is not required to have lived with her husband for any specific amount of time, and it is understandable that the petitioner destroyed certain documents as she claimed, the lack of relevant information provided in her own statements and in supporting affidavits, and the failure to provide any documentary evidence detract from the credibility of her claim.

Consequently, the petitioner has not established by a preponderance of the evidence that she resided with her husband, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

Good Faith Entry into Marriage

In support of her claim that she entered into her marriage in good faith, in addition to the evidence listed in the preceding section the petitioner submitted several wedding photographs and one additional photograph of the petitioner and W-K- together. The statements submitted by friends, as noted above, described social events they shared with the petitioner and W-K- before they were married or the abuse that occurred later; they described the couple before their marriage as loving, happy, caring or normal; one added that W-K- “would discuss his future with [the petitioner] [and] his desire to visit her home country of Zimbabwe and meet her relatives.” Regarding the period before she married W-K-, the petitioner initially stated only that after they met their relationship was good; they dated for a while; she was in love with him; they finally married about 18 months after they began dating; and they had a small wedding, after which he moved in with her. In response to the RFE, the petitioner submitted another statement, adding that during their 18-month courtship they were very happy and had a truly loving relationship and shared mutual friends with whom they spent fun times. She explained that she did not have additional evidence of their shared experiences after they married because she destroyed everything that reminded her of him; and that she did not have evidence of shared expenses because he was financially irresponsible and all financial records were in her name.

As noted above, 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. 8 C.F.R. § 204.2(c)(2)(vii). Other potential evidence includes police, medical, or court documents providing information about the relationship; and affidavits of persons with personal knowledge of the relationship. *Id.*

In this case, other than photographs of the wedding ceremony and the statements from friends, the record lacks all such evidence. The AAO recognizes that in this case the marriage lasted only eight months before the petitioner asked her husband to leave, and certain documents would understandably be lacking in light of the petitioner's description of W-K-'s lifestyle and her eagerness to be rid of negative memories. However, the petitioner claims to have dated her husband for 18 months before getting married. Despite a relationship of over two years, neither she nor any acquaintance with personal knowledge of the relationship has provided details about the feelings or plans or activities of the couple during their courtship, engagement or marriage or any relevant information about the couple's relationship other than the brief assessments noted above.

The petitioner is not required to submit preferred primary or secondary evidence. *See* 8 C.F.R. §§ 103.2(b)(2)(iii), 204.1(f)(1), 204.2(c)(2)(i). However, the lack of probative detail and substantive information in the petitioner's testimony regarding the couple's engagement and shared experiences, as well as the lack of documentary evidence, significantly detracts from the credibility of her claim.

Accordingly, the petitioner has failed to establish by a preponderance of the evidence that she entered into marriage with her spouse in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Conclusion

For the reasons noted above, the petitioner has failed to establish by a preponderance of the evidence that she had a qualifying relationship with a U.S. citizen or that she was eligible for immigrant classification based on a qualifying relationship. We also find that she has failed to establish by a preponderance of the evidence that she was battered or subjected to extreme cruelty by her U.S. citizen spouse or that she resided with her husband or entered into her marriage in good faith. Consequently, she is ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

The petition is not approvable for the above stated reasons. Nonetheless, the case will be remanded because the director denied the petition without first issuing a NOID as required under former 8 C.F.R. § 204.2(c)(3)(ii)(2006). While it is no longer a regulatory requirement for petitions filed on or after June 18, 2007, a NOID is required in this case, as it was filed on September 25, 2006.

The AAO maintains plenary power to review 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 also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). 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).

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

ORDER: The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above. Because the petition is not approvable, the petition is remanded to the director for issuance of a NOID and a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.