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

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FILE: [REDACTED]
EAC 07 069 50487

Office: VERMONT SERVICE CENTER

Date: JUN 09 2009

IN RE: [REDACTED]

PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(A)(iii) of the
Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting 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 The director's decision will be withdrawn and the matter remanded for further action.

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.

The director denied the petition on the basis of his determination that the petitioner had failed to establish that she entered into marriage with her husband in good faith.

Counsel submitted a timely appeal on September 8, 2008.

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:

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.

* * *

- (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 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.

* * *

- (vii) *Good faith marriage.* Evidence of good faith at the time of marriage may include, but is not limited to, proof that one spouse has been listed as the other's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. Other types of readily available evidence might include the birth certificates of children born to the abuser and the spouse; police, medical, or court documents providing information about the relationship; and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered.

The petitioner is a citizen of Vietnam who entered the United States as a K-1 fiancé on September 3, 2005. She married H-D-¹ a citizen of the United States, on September 8, 2005.

The petitioner filed the instant Form I-360 on January 8, 2007. The director issued a request for additional evidence on February 26, 2008, and requested additional evidence to establish that the petitioner married H-D- in good faith, and that the petitioner is a person of good moral character. The petitioner responded on May 23, 2008. After considering the evidence of record, the director denied the petition on August 14, 2008.

Good Faith Entry into Marriage

The sole issue on appeal is whether the petitioner has established that she married H-D- in good faith. In the undated self-affidavit she submitted at the time she filed the petition, the petitioner stated that she met H-D- when she was twenty-three years old. Although he lived in the United States, H-D- returned to Vietnam "once or twice a year" for visits of "three to four months each time." Her family had rented a house from him since 1999; she and H-D- began dating in April 2003. The petitioner stated that because the couple "really started to fall in love with each other in

¹ Name withheld to protect individual's identity.

June 2003," H-D- rented a separate room for the two of them to stay in while he visited Vietnam. They would stay together while H-D- was in Vietnam, and after H-D- returned to the United States she would resume living with her mother and brothers. She stated that H-D- proposed marriage in June 2004. Both families were happy about the engagement. She entered the United States with a fiancé visa on September 3, 2005, and married five days later. According to the petitioner, the abuse began one month later.

The petitioner also submitted several affidavits from fiends and family members at the time the petition was filed in support of her assertion that she married H-D- in good faith. The petitioner also submitted bank statements, a copy of their 2005 income tax return; a copy of their lease; and a title to a truck that they owned together.

The director found the petitioner's evidence insufficient and, on February 26, 2008, requested additional evidence. In his request for additional evidence, the director stated that the affidavits were vague and provided insufficient detail to determine her intentions upon entering into the marriage. The director stated that only tax returns from 2005 were submitted, and that they were not signed. As such, according to the director, it was unclear whether the returns had actually been submitted to the Internal Revenue Service (IRS). Finally, with regard to the bank statements, the director noted that the petitioner had only submitted bank statements from June and July 2006, which was immediately prior to the time of the claimed separation. The director noted that, further, there was little transaction history in the bank statements. As such, it was unclear how often, and for what purpose, the account was used. For all of these reasons, the director requested additional documentation from the petitioner to demonstrate that she married H-D- in good faith.

In her May 23, 2008 response to the director's request, the petitioner submitted, among other items, another self-affidavit, additional bank statements, and an IRS printout detailing the petitioner's 2005 tax return, which indicated that a joint return had been filed. In her March 26, 2008 self-affidavit, the petitioner stated, with regard to her intentions upon entering into the marriage, that she met H-D- in September 1999. She stated that H-D- traveled back and forth to the United States and, over time, the two of them fell in love. In 2004, H-D- proposed marriage.

The director found the petitioner's additional information insufficient, and denied the petition on August 14, 2008. With regard to the bank statements, the director noted that the statements submitted in response to the request for additional evidence were from June and July of 2006, just before the petitioner's separation from H-D- and more than one year after their marriage. Although additional statements were submitted in response to the request for additional evidence, the director noted that they were from the period immediately following the petitioner's adjustment of status application. Furthermore, the transaction history detailed in the bank statements showed large withdrawals, but very few transactions, which raised questions as to how often, and for what purpose, the account was used. The director also found the affidavits of record insufficiently detailed to establish the petitioner's good faith entry into the marriage. Finally, with regard to the printout from the IRS, the director found that theses printouts, alone, are insufficient to establish the petitioner's good faith entry into the marriage.

Counsel submits no new evidence on appeal. Nor does she offer additional testimony from the petitioner regarding her good faith entry into the marriage. Rather, counsel asserts that the evidence of record is “more than sufficient to prove that she did enter the marriage in good faith” and that the petitioner has submitted “all the documents she can.”

Upon review of the entire record of proceeding, the AAO agrees with the director’s determination. The AAO agrees with the director’s findings regarding the affidavits of record; the AAO agrees that the testimony of record is insufficiently vague and general in nature. Again, counsel has failed to address the director’s concerns regarding the affidavits of record by submitting more detailed testimony into the record, which would have allowed the AAO to examine the petitioner’s intentions upon entering into the marriage. The record, as it currently stands lacks detailed, probative information regarding the couple’s first introductions, their decision to date, their courtship, their decision to share a residence, their decision to marry, how any disagreements were resolved, etc. In a case such as this, where there is little documentary evidence of record, such testimony is necessary in order to examine the petitioner’s intentions upon entering into the marriage. However, despite having been specifically placed on notice by the director that he regarded the testimony of record as insufficient, counsel has elected not to supplement the record with further testimony.

Furthermore, the limited testimony by the petitioner with regard to her intentions upon entering into the marriage is inconsistent, which diminishes the evidentiary value of her testimony. For example, the AAO notes that in her first affidavit, the petitioner first stated that she met H-D- when she was 23 years old. As the petitioner was born on January 17, 1981, this statement indicates that she met H-D- in 2004. However, she later states, in the same paragraph, that she and H-D- began dating in April 2003, when she was 22 years old. If she did not meet H-D- until she was 23 years old, it is unclear how they could have begun dating when she was 22 years old. In her March 26, 2008 affidavit, the petitioner introduced a third inconsistency into the record, by stating that she met H-D- in 1999. As the petitioner would have been 18 years old in 1999, this statement conflicts further with her previous testimony. The unresolved inconsistencies in the petitioner’s testimony undermine the credibility of that testimony.

The AAO agrees with the director’s determination with regard to the bank statements, and notes that counsel has elected not to address the director’s concerns regarding those documents. Finally, the AAO agrees with the director’s statement that the IRS printout, alone, fails to establish the petitioner’s good faith entry into the marriage.

The evidence of record fails to demonstrate that the petitioner entered into marriage with H-D- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Conclusion

The AAO concurs with the director's determination that the petitioner has failed to demonstrate that she entered into marriage with H-D- in good faith. However, the record indicates that the director did not issue a notice of intent to deny the petition (NOID) before he issued his decision. Although the record establishes that the petitioner is ineligible for the benefit sought, the petition must be remanded, solely on procedural grounds, so that the petitioner has the opportunity to respond to a NOID. The petition must be remanded to the director for issuance of a NOID in compliance with the regulation in effect at 8 C.F.R. § 204.2(c)(3)(ii)² on the date this petition was filed, and the director must afford the petitioner the opportunity to submit a response. On remand, the director need only address the issues before the AAO on appeal; i.e., whether the petitioner has demonstrated that she entered into marriage with H-D- in good faith.

As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's August 14, 2008 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

² USCIS promulgated a rule on April 17, 2007 related to the issuance of requests for evidence and NOIDs. 72 Fed. Reg. 19100 (Apr. 17, 2007). The rule became effective on June 18, 2007, *after* the filing of this petition on January 8, 2007.