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



U.S. Citizenship
and Immigration
Services

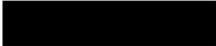
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Date: Office: VERMONT SERVICE CENTER File: 

MAY 11 2012

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 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630, or a request for a fee waiver. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 and a motion to reopen and reconsider. The matter is again 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 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 pursuant to section 204(c) of the Act because the record showed that the petitioner had previously sought immediate relative status as the spouse of a U.S. citizen by reason of a marriage entered into for the purpose of evading the immigration laws. The director further determined that the petitioner had not established the requisite good-faith entry into her marriage, residence with her husband and his battery or extreme cruelty. On November 20, 2007, the AAO affirmed the director’s decision and dismissed the appeal. On April 12, 2010, counsel filed a motion to reopen and reconsider with the AAO, more than two years after the decision was issued. The AAO determined that counsel had not established that the delay in filing the motion was reasonable and was beyond the control of the petitioner, and dismissed the motion as untimely filed on October 8, 2010.

A motion to reopen or reconsider must be filed within 30 days of the adverse decision. 8 C.F.R. § 103.5(a)(1)(i). Whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, 3 days shall be added to the prescribed period. 8 C.F.R. § 103.8(b). Service by mail is complete upon mailing. *Id.* The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i). A motion that does not meet the applicable requirements shall be dismissed. *Id.* at § 103.5(a)(4).

The filing deadline may be excused for motions to reopen in the discretion of U.S. Citizenship and Immigration Services (USCIS) only “where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.” 8 C.F.R. § 103.5(a)(1)(i).

On the present motion, counsel reasserts that he did not file the motion within the applicable time period because neither he nor the petitioner was aware of the AAO’s decision. According to counsel, he mailed a letter, dated November 2, 2006, to the Vermont Service Center to inform USCIS of his office’s new address. Counsel states that he sent the letter to the Vermont Service Center because that office had not yet transferred the file to the AAO. Counsel states further that in a July 2008 response to the petitioner’s Freedom of Information Act (FOIA) request, a copy of the AAO’s November 20, 2007 appeal dismissal was not included. Counsel maintains that he only became aware of the appeal dismissal because it was attached as an exhibit to the Department of Homeland Security’s opposition to the petitioner’s motion for a continuance of her removal proceedings before the San Francisco Immigration Court. Counsel asserts that he filed the first motion shortly after reviewing the exhibit.

The AAO denied the prior motion because the petitioner’s record did not contain a copy of the change of address letter counsel claims was filed with the Vermont Service Center and USCIS systems did not show an updated address for counsel. On the present motion, counsel provides a declaration from an

employee of his law firm, [REDACTED] stating that she mailed a copy of a change of address letter to the Vermont Service Center on November 2, 2006. Counsel submits copies of a notice from the Vermont Service Center, which acknowledges his change of address, and an envelope from the Vermont Service Center, date-stamped February 6, 2007, sent to his new address. Counsel also submits a January 30, 2007 letter from USCIS regarding the receipt of his FOIA request, which was sent to his new address. Counsel asserts that these documents reflect that USCIS systems had his new address at the time of the decision on the appeal. The documentation provided with the instant motion demonstrates that the delay in filing the prior motion was reasonable and was beyond the control of the petitioner. Therefore, the petitioner's motion to reopen is granted.

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 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.

(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.

* * *

(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 record in this case provides the following facts and procedural history. The petitioner is a native and citizen of China. On July 1, 1998, the petitioner married R-L-¹ a U.S. citizen, in China. The petitioner was admitted to the United States on August 17, 1999 as a conditional resident pursuant to the approved Form I-130, Petition for Alien Relative, filed by R-L- on her behalf. On June 7, 2001, the petitioner and her husband jointly filed a Form I-751, Petition to Remove the Conditions on Residence. The San Francisco District Office conducted two interviews with the former couple in regards to the Form I-751 petition. During the second interview, on May 17, 2005, the petitioner's husband withdrew his support of the Form I-751 petition and the petitioner and her husband both signed affidavits stating that the petitioner had paid her husband \$30,000 for the marriage and that they had never lived together. On that same date, the District Director denied the Form I-751 petition and terminated the petitioner's conditional residency. On May 18, 2005, the petitioner was served with a Notice to Appear for removal proceedings charging her under section 237(a)(1)(D)(i) of the Act as an alien whose conditional residency has been terminated.²

This Form I-360 petition was filed on December 2, 2005. On May 23, 2006, the director issued a Notice of Intent to Deny (NOID) the petition for lack of the requisite joint residence, good-faith entry into the marriage, battery or extreme cruelty and pursuant to section 204(c) of the Act. The petitioner, through counsel, timely responded to the NOID with additional evidence. On September 21, 2006, the director denied the petition based on the grounds cited in the NOID. On November 20, 2007, the AAO affirmed the director's decision and dismissed a subsequent appeal.

On November 24, 2010, the petitioner filed a second Form I-751 petition as an alien who entered into her marriage in good faith, but the marriage was terminated through divorce or annulment. The petitioner appeared for an interview in connection with her second Form I-751 petition at the San Francisco Field Office on July 22, 2011. During the interview, the petitioner testified that she was granted a judgment of dissolution of marriage from R-L- on June 9, 2009. The petitioner testified further that on December 27, 2010, she wed her second husband, J-H-. On July 27, 2011, the Field Office Director determined that the petitioner failed to demonstrate that her marriage with R-L- was bona fide at its inception, and denied the Form I-751 accordingly.

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.

Section 204(c) of the Act

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

[N]o petition shall be approved if –

¹ Name withheld to protect the individual's identity.

² The petitioner remains in proceedings before the San Francisco Immigration Court and her next hearing is scheduled for June 21, 2012.

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

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

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

A decision that section 204(c) of the Act applies must be made in the course of adjudicating a subsequent visa petition. *Matter of Rahmati*, 16 I&N Dec. 538, 539 (BIA 1978). USCIS may rely on any relevant evidence in the record, including evidence from prior USCIS proceedings involving the beneficiary. *Id.* However, the adjudicator must come to his or her own, independent conclusion and should not ordinarily give conclusive effect to determinations made in prior collateral proceedings. *Id.*; *Matter of Tawfik*, 20 I&N Dec. 166, 168 (BIA 1990).

Evidence that a marriage was not entered into for the primary purpose of evading the immigration laws may include, but is not limited to, proof that the beneficiary has been listed as the petitioner'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 together. *Matter of Phillis*, 15 I&N Dec. 385, 386-87 (BIA 1975).

In its November 20, 2007 decision, the AAO determined that a *de novo* review of the record indicates that the petitioner's marriage to R-L- was entered into for the purpose of evading the immigration laws. The AAO found that the statements of the petitioner, her husband and her mother-in-law submitted below and counsel's claims on appeal were not supported by the relevant documentary evidence and lacked sufficient weight to overcome the former couple's May 17, 2005 attestations. The AAO noted that during the petitioner's May 17, 2005 Form I-751 interview, the petitioner signed a sworn affidavit stating, "My aunt intr[o]duce us to let me to the United States [sic]. I want to live in the United States. I paid \$30,000 to [R-L-]. I want to live in the United States. I never live with him." On that same date, the petitioner's husband signed a sworn affidavit stating:

I married [the petitioner] . . . because my friend asked me to get married with his n[ie]ce and he would support me with money. . . . He offered me \$30,000 for the marriage. He paid me \$5,000 before I went to China. He paid me \$5,000 USA money in China. I spent it really fast. He paid me the rest of the money the first year. I lived with my parents then and I still do. [The petitioner] never lived with me. I never had sex with her.

On motion, counsel asserts that the record reflects that the petitioner and R-L- “intended to have a life together.” Counsel asserts that the Ninth Circuit Court of Appeals in *United States v. Orellana-Blanco*, 294 F.3d 1143, 1151 (9th Cir. 2002), stated that “[a]n intent to obtain something other than or in addition to love and companionship from that life does not make a marriage a sham. Rather, the sham arises from the intent not ‘to establish a life together.’” Counsel contends that “all the declarations of Petitioner, [R-L-], and [R-L-’s] mother all state anyway that the \$30,000 was a dowry, so that [R-L-] could buy a car and jewelry for the Petitioner.”

Counsel submits a declaration from the petitioner, dated April 9, 2010, in which she briefly recounts that she had “memorable experiences” with R-L-, including their birthday celebrations, Chinese New Year, and visiting sites around San Francisco. She states that she resided with R-L- between 1999 and 2003, and they were separated for two years prior to the May 17, 2005 interview. The petitioner states that her mother gave R-L- a dowry of \$30,000, which he received in four installments during his travels to Hong Kong. She recalls that she and R-L- conducted their financial transactions in cash and therefore had minimal use of their checking account.

On motion, the petitioner submits letters from her friends, [REDACTED], who briefly discuss their knowledge of the petitioner’s marriage, but provide no probative information regarding the petitioner’s good faith in entering the relationship. The petitioner’s friends do not describe any particular visit or social occasion in detail or otherwise provide detailed information establishing their personal knowledge of the relationship. The petitioner also resubmits several photographs of herself and R-L-, which she claims were taken on various occasions during their marriage.

Counsel’s claims and the additional evidence submitted on motion fail to demonstrate any error in the AAO’s prior determination that the director properly denied the instant petition pursuant to section 204(c) of the Act. As previously stated, counsel’s characterization of R-L-’s receipt of \$30,000 as a dowry payment is unpersuasive. The petitioner’s husband explicitly attested in a sworn affidavit, “I married [the petitioner] because my friend asked me to get married with his n[ie]ce and he would support *me* with money” (emphasis added). The petitioner’s husband stated that he was paid \$30,000 to marry the petitioner in installments in the United States and China. The petitioner also issued a sworn affidavit stating, “My aunt intr[o]duce us to let me to the United States [sic]. I want to live in the United States. I paid \$30,000 to [R-L-]. I want to live in the United States.” The additional statements submitted on motion from the petitioner and her friends are brief and lack probative details to establish that the petitioner and R-L- intended “to establish a life together.” These statements lack sufficient weight to overcome the former couple’s May 17, 2005 attestations. The fraudulent marriage prohibition of section 204(c) of the Act consequently bars approval of this petition.

Good Faith Marriage

In its November 20, 2007 decision, the AAO determined that the relevant evidence fails to establish that the petitioner entered into her marriage with her husband in good faith. The AAO noted that the

testimony and evidence submitted below and on appeal fail to overcome the May 17, 2005 sworn attestations of the petitioner and her former husband, which state that the petitioner paid her husband \$30,000 for the marriage and that they never lived together. On the motion, counsel reasserts that “the proper test in determining sham marriages for immigration purposes is whether the parties intended to have a life together.” As previously discussed, the petitioner has not provided sufficient evidence to establish that she and R-L- had a bona fide marriage. Accordingly, the petitioner has failed to demonstrate that she entered into marriage with her former husband in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Joint Residence

In its November 20, 2007 decision, the AAO determined the petitioner has not established that she resided with her husband. The AAO specifically noted that in the May 17, 2005 sworn statements, the petitioner and her former husband stated that they never lived together. The AAO stated that although the petitioner’s husband and her mother-in-law submitted statements attesting to the former couple’s joint residence, their testimony, as well as that of the petitioner, is not supported by relevant, documentary evidence.

On motion, counsel asserts that the statements from the petitioner, R-L- and R-L-’s mother attest to the petitioner’s joint residence with R-L- from 1999 to 2003. Counsel states that in the petitioner’s declaration she “claims that because of language difficulties, what she had meant was that she and [R-L-] were not living together in 2005, not that they never lived together.”

In the declaration the petitioner filed on motion, she states that when she resided with her former husband, they filed federal tax returns between 1999 until 2003. She notes that they deposited their tax refunds from 2000 and 2001 in her bank account and their refunds from 2002 until 2004 in their joint account. The petitioner states that she used her aunt’s address on her Forms 1099 because of her marital troubles with R-L-. She recalls that she and R-L- conducted their financial transactions in cash and therefore had minimal use of their checking account.

Counsel’s claims and the additional evidence submitted on motion fail to demonstrate any error in the AAO’s prior determination that the petitioner did not reside with her former husband. In her declaration, the petitioner does not describe her marital home or shared residential routines in any detail, apart from the alleged abuse. The statements from the petitioner’s friends do not describe in detail any visit to her and her former husband’s residence. Several of the photographs the petitioner resubmits on motion are captioned by her as having been taken at her former marital home. However, these photographs do not overcome the May 17, 2005 sworn affidavits from the petitioner and her former husband in which they state that they never lived together. 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.

Battery or Extreme Cruelty

In its November 20, 2007 decision, the AAO determined that the record failed to establish that the petitioner was subjected to battery or extreme cruelty perpetrated by her spouse. The AAO determined that the relevant evidence did not establish that the petitioner’s husband ever battered her or that his

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 previously submitted psychological consultation report “states that the Petitioner has suicidal ideation because of [R-L-’s] gambling, drinking, and indifference.”

In the declaration the petitioner filed on motion, she states that R-L- would drink excessive alcohol which resulted in “fits of anger, accompanied by harsh words.” She recounts that R-L- repeatedly made derogatory statements and she began eating less, crying, and could not sleep.

Counsel’s claims and the additional evidence submitted on motion fail to demonstrate any error in the AAO’s prior determination that the petitioner’s spouse did not subject her to battery or extreme cruelty. Although the petitioner claims that her former husband used “harsh words” and made derogatory comments, her statements do not demonstrate that her husband ever battered her or that his 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). Accordingly, the petitioner has not established that her former 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.

Qualifying Relationship and Corresponding Eligibility for Immediate Relative Classification

Beyond the decision of the director, the petitioner has failed to demonstrate the existence of a qualifying relationship with R-L, as well as her eligibility for immigrant classification as an immediate relative on the basis of such a relationship. The record contains a judgment from the Superior Court of California, County of San Francisco, which reflects that the petitioner was granted a divorce from R-L- on March 18, 2009. The record reflects that during the petitioner’s Form I-751 interview on July 22, 2011, she testified that she married her second husband, J-H- on December 27, 2010. The petitioner completed and signed a Form G-325A, Biographic Information, with her second husband’s biographic information on the same date as her interview. In the decision denying the petitioner’s second Form I-751 petition, the director noted that the petitioner remarried after the filing of her Form I-360 petition. Remarriage during the pendency of the Form I-360 precludes its approval. 8 C.F.R. § 204.2(c)(1)(ii). The petitioner is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act for lack of a qualifying relationship and corresponding eligibility for immediate relative classification.

Conclusion

On motion, the petitioner has not established that she entered into marriage with her former husband in good faith, that she resided with him and that he subjected her to battery or extreme cruelty during their marriage. Beyond the director’s decision, the petitioner has also not established that she has a qualifying relationship with her former husband and is eligible for immediate relative classification based upon that relationship.³ She is consequently ineligible for immigrant classification under

³ 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. *See Spencer*

section 204(a)(1)(A)(iii) of the Act. Section 204(c) of the Act further bars approval of this petition because the record shows that the petitioner was previously accorded immediate relative status by reason of a marriage determined to have been entered into to evade the immigration laws.

In these proceedings, the petitioner bears the burden of proof to establish her eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Here, that burden has not been met.

ORDER: The AAO's decision, dated November 20, 2007, is affirmed. The appeal remains dismissed. The petition remains denied.