

(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: [REDACTED]

IN RE: Petitioner: [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)

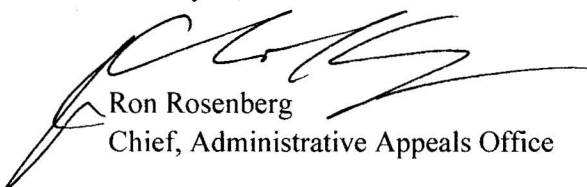
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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 Vermont Service Center, (“the director”), denied the immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the 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 a U.S. citizen.

The director denied the petition for failure to establish that the petitioner entered into marriage with her husband in good faith and that she met the requirement for the bona fide marriage exemption from the bar to approval at section 204(g) of the Act because she married while she was in removal proceedings. On appeal, the AAO determined that the petitioner established by a preponderance of the evidence that she married her husband in good faith, but did not meet the higher burden of proof required for the bona fide marriage exemption from section 204(g) of the Act. Additionally, the AAO determined that the petitioner failed to demonstrate her eligibility for immediate relative classification.

On motion, counsel submits a 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:

(iv) *Eligibility for immigrant classification.* A self-petitioner is required to comply with the provisions of . . . section 204(g) of the Act . . .

(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.

The record in this case indicates that the petitioner was in removal proceedings at the time of her marriage. In such a situation, section 204(g) of the Act prescribes:

Restriction on petitions based on marriages entered while in exclusion or deportation proceedings. – Notwithstanding subsection (a), except as provided in section 245(e)(3), a petition may not be approved to grant an alien immediate relative status by reason of a marriage which was entered into during the period [in which administrative or judicial proceedings are pending regarding the alien's right to remain in the United States], until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.

The record does not indicate that the petitioner resided outside of the United States for two years after her marriage. Accordingly, section 204(g) of the Act bars approval of this petition unless the petitioner can establish eligibility for the bona fide marriage exemption at section 245(e) of the Act, which states in pertinent part:

Restriction on adjustment of status based on marriages entered while in admissibility or deportation proceedings; bona fide marriage exception. –

- (1) Except as provided in paragraph (3), an alien who is seeking to receive an immigrant visa on the basis of a marriage which was entered into during the period described in paragraph (2) may not have the alien's status adjusted under subsection (a).
- (2) The period described in this paragraph is the period during which administrative or judicial proceedings are pending regarding the alien's right to be admitted or remain in the United States.
- (3) Paragraph(1) and section 204(g) shall not apply with respect to a marriage if the alien establishes by *clear and convincing evidence* to the satisfaction of the [Secretary of Homeland Security] that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage

took place and the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition under section 204(a) . . . with respect to the alien spouse or alien son or daughter. In accordance with the regulations, there shall be only one level of administrative appellate review for each alien under the previous sentence.

8 U.S.C. § 1255(e) (emphasis added).

The corresponding regulation at 8 C.F.R. § 204.2(a)(1)(iii) states, in pertinent part:

Marriage during proceedings – general prohibition against approval of visa petition. A visa petition filed on behalf of an alien by a United States citizen . . . shall not be approved if the marriage creating the relationship occurred on or after November 10, 1986, and while the alien was in . . . removal proceedings, or judicial proceedings relating thereto. . . . [T]he burden in visa petition proceedings to establish eligibility for the exemption . . . shall rest with the petitioner.

(A) *Request for exemption.* . . . The request must be made in writing The request must state the reason for seeking the exemption and must be supported by documentary evidence establishing eligibility for the exemption.

(B) *Evidence to establish eligibility for the bona fide marriage exemption.* The petitioner should submit documents which establish that the marriage was entered into in good faith and not entered into for the purpose of procuring the alien's entry as an immigrant. The types of documents the petitioner may submit include, but are not limited to:

- (1) Documentation showing joint ownership of property;
- (2) Lease showing joint tenancy of a common residence;
- (3) Documentation showing commingling of financial resources;
- (4) Birth certificate(s) of child(ren) born to the petitioner and beneficiary;
- (5) Affidavits of third parties having knowledge of the bona fides of the marital relationship (Such persons may be required to testify before an immigration officer as to the information contained in the affidavit. Affidavits must be sworn to or affirmed by people who have personal knowledge of the marital relationship. Each affidavit must contain the full name and address, date and place of birth of the person making the affidavit and his or her relationship to the spouses, if any. The affidavit must contain complete information and details explaining how the person acquired his or her knowledge of the marriage. Affidavits should be supported, if possible, by one or more types of documentary evidence listed in this paragraph); or
- (6) Any other documentation which is relevant to establish that the marriage was not entered into in order to evade the immigration laws of the United States.

Pertinent Facts and Procedural History

The petitioner is a citizen of Fiji who entered the United States as a B-2 visitor on July 27, 1996. In 1997, the petitioner was placed in removal proceedings and ordered removed on September 9, 2005,

but the petitioner did not depart the United States and her proceedings remain pending. The petitioner married D-J-¹, a U.S. citizen, in California on October 29, 2005, thus subjecting herself to the bar on approval of immigrant petitions based on marriages entered into while the alien is in removal proceedings at section 204(g) of the Act.² She filed the instant Form I-360 on July 30, 2010. After considering the petitioner's response to a Request for Evidence (RFE), the director denied the petition for failure to establish that the petitioner entered into marriage with D-J- in good faith and that she met the requirements for the bona fide marriage exemption from the bar to approval at section 204(g) of the Act. The AAO determined that the petitioner established her good faith in marrying D-J- by a preponderance of the evidence, but that she did not demonstrate the bona fides of her marriage under the heightened standard of proof required by section 245(e)(3) of the Act. Additionally, the AAO determined that the petitioner was ineligible for immediate relative classification based on her marriage to D-J-. For these reasons, the AAO dismissed the petitioner's appeal. The AAO's prior decision is incorporated here. The petitioner, through counsel, timely filed a motion to reopen and reconsider.

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

Section 204(g) of the Act Bars Approval

In its March 13, 2013 decision, the AAO determined that the petitioner established her good faith in marrying D-J- by a preponderance of the evidence but failed to demonstrate the bona fides of her marriage by clear and convincing evidence, as required by section 245(e)(3) of the Act. While identical or similar evidence may be submitted to establish a good faith marriage pursuant to section 204(a)(1)(A)(iii)(I)(aa) of the Act and the bona fide marriage exception at section 245(e)(3) of the Act, the latter provision imposes a heightened burden of proof. *Matter of Arthur*, 20 I&N Dec. 475, 478 (BIA 1992). See also *Pritchett v. I.N.S.*, 993 F.2d 80, 85 (5th Cir. 1993) (acknowledging "clear and convincing evidence" as an "exacting standard.") To demonstrate eligibility under section 204(a)(1)(A)(iii)(I)(aa) of the Act, the petitioner must establish her good-faith entry into the qualifying relationship by a preponderance of the evidence and any credible evidence shall be considered. Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J); *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). However, to be eligible for the bona fide marriage exemption under section 245(e)(3) of the Act, the petitioner must establish her good-faith entry into the marriage by clear and convincing evidence. Section 245(e)(3) of the Act, 8 U.S.C. § 1255(e)(3); 8 C.F.R. § 245.1(c)(9)(v). "Clear and convincing evidence" is a more stringent standard. *Arthur*, 20 I&N Dec. at 478.

¹ Name withheld to protect the individual's identity.

² See 8 C.F.R. § 245.1(c)(8)(ii)(A) (Section 204(g) of the Act applies and proceedings remain pending until the removal order is executed and the alien departs the United States, is found not to be removable or the proceedings are otherwise terminated.).

In this case, the record contains the petitioner's affidavits, joint bank statements, a joint credit union statement, copies of 2005, 2006 and 2007 federal income tax returns showing the petitioner's filing status as married filing jointly with D-J-, copies of electronic mail messages, copies of greeting cards, photographs of the petitioner with D-J- at their wedding and on various other occasions, and affidavits from her mother, uncle and cousin. In its prior decision, the AAO explained that the financial documents were dated shortly before the petitioner and D-J- separated, the electronic mail messages are unidentified and incomplete and the photographs showed only that the petitioner and D-J- were pictured together on several unidentified occasions. Additionally, the copies of the joint tax returns were not accompanied by any evidence that they were actually filed with the Internal Revenue Service (IRS). On motion, counsel submits a brief and an additional statement from the petitioner.

Counsel argues that the previously submitted bank statements and tax returns show that the petitioner and D-J- co-mingled their assets after their marriage and show that the petitioner entered the marriage in good faith upon marrying him. The joint bank statements show minimal activity and do not indicate that the petitioner and her husband used it for shared financial interests. As previously determined by the AAO, the tax returns carry little evidentiary weight because they were not accompanied by any proof that they were actually filed with the Internal Revenue Service (IRS). On motion, counsel states that the petitioner requested copies of her returns from the IRS and would forward them to the AAO. To date, over seven months later, the AAO has received no evidence that the joint tax returns were actually filed.

Counsel further asserts that the petitioner's previously submitted affidavits and the statements from her family provided clear and convincing evidence of her good-faith marriage. As explained in the AAO's prior decision, the petitioner recounted how she met D-J- through a matchmaking site on the internet and how the two began communicating through electronic mail messages, but failed to provide sufficiently detailed and probative information regarding the petitioner's courtship, wedding, shared residence and experiences with her husband, apart from the abuse. Additionally, the petitioner's family members attested that the petitioner was happy with D-J- and that they attended her wedding, but did not provide complete and detailed information explaining how they acquired their knowledge of the petitioner's marriage.³ On motion, the petitioner submits a statement briefly listing the locations and dates of previously submitted photographs. She does not provide any further, probative information regarding, for example, her early relationship with D-J-, her decision to marry him, their wedding, shared residence and other experiences. The petitioner's brief statement submitted on motion is insufficient to establish her good-faith entry into the marriage by clear and convincing evidence.

Further, counsel argues that the AAO failed to consider the approved Form I-130 Petition for Alien Relative filed by the petitioner's husband on her behalf as evidence of her good-faith entry into the marriage pursuant to 8 C.F.R. § 245.1(c)(8)(v). However, that regulation prescribes that when a visa petition based on the same marriage is approved, it will generally be considered primary evidence of eligibility for the bona fide marriage exemption unless USCIS determines additional evidence is

³ On motion, counsel incorrectly asserts that the AAO improperly dismissed the affidavits submitted by the petitioner's family because they were dated shortly before the petitioner and D-J- separated. Counsel misunderstands the AAO's decision. The portions of the AAO's decision quoted in counsel's brief referred to the bank statements and other documents submitted and not to the affidavits from her family members.

needed. 8 C.F.R. § 245.1(c)(8)(v). The fact that a visa petition based on the marriage in question was previously approved does not automatically entitle the beneficiary 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 . . . that the marriage was bona fide and not entered into to evade immigration laws.”).

Moreover, although similar, the parties, statutory provisions and benefits procured through sections 204(a)(1)(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(f), 204.2(a)(2). In contrast, in this case, the petitioner bears the burden of proof to establish not only the validity of their marriage, but also that she entered the marriage in good faith by clear and convincing evidence, a heightened standard of proof. Section 204(a)(1)(A)(iii)(I) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(I); 8 C.F.R. § 204.2(c)(1)(iv). Throughout these proceedings, the petitioner has been notified three times that additional evidence beyond the approved Form I-130 was required and she has had three opportunities to submit additional affidavits or documentation. As previously discussed, the evidence submitted below and the petitioner’s brief statement on motion do not provide clear and convincing evidence of her entry into the marriage in good faith. Accordingly, she has not established her eligibility for the bona fide marriage exemption at section 245(e)(3) of the Act and section 204(g) of the Act consequently bars approval of this petition.

Eligibility for Immediate Relative Classification

Because the petitioner is not exempt from section 204(g) of the Act, she has also failed to demonstrate her eligibility for immediate relative classification, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act and as explicated in the regulation at 8 C.F.R. § 204.2(c)(1)(iv).

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). On motion, the petitioner has not overcome the grounds for dismissal of her appeal. She has not demonstrated that she is exempt from the bar to approval of her petition under section 204(g) of the Act, and that she is eligible for immediate relative classification based on her marriage. Accordingly, the petitioner is ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act on these two grounds and the appeal will remain dismissed.

ORDER: The motion is granted. The March 13, 2013 decision of the Administrative Appeals Office is affirmed. The petition remains denied.