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**U.S. Citizenship
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FILE:



Office: VERMONT SERVICE CENTER

Date: NOV 29 2005

EAC 02 183 51741

IN RE:

Petitioner:



PETITION: Petition for Special Immigrant Battered 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a native and citizen of Mexico who is seeking classification as a special immigrant 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 the battered spouse of a U.S. citizen.

The director denied the petition, noting that the petitioner's marriage occurred while the petitioner was in deportation proceedings and finding that the petitioner failed to provide clear and convincing evidence that the marriage was entered into in good faith and not entered into for the purpose of procuring entry as an immigrant.

The petitioner, through counsel, files a timely appeal.

Section 204(a)(1)(A)(iii) of the Act provides that an alien who is the spouse of a United States citizen, who is a person of good moral character, who is eligible to be classified as an immediate relative, and who has resided with his or her spouse, may self-petition for immigrant classification if the alien demonstrates to the Secretary of Homeland Security that—

(aa) the marriage or the intent to marry the United States citizen was entered into in good faith by the alien; and

(bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse.

The regulation at 8 C.F.R. § 204.2(c)(1) states, in pertinent part, that:

(i) A spouse may file a self-petition under section 204(a)(1)(A)(iii) or 204(a)(1)(B)(ii) of the Act for his or her classification as an immigrant relative or as a preference immigrant if he or she:

(A) Is the spouse of a citizen or lawful permanent resident of the United States;

(B) Is eligible for immigrant classification under section 201(b)(2)(A)(i) or 203(a)(2)(A) of the Act based on that relationship;

(C) Is residing in the United States;

(D) Has resided in the United States with the citizen or lawful permanent resident spouse;

(E) Has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage; or is the parent

of a child who has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage;

(F) Is a person of good moral character;

(G) Is a person whose deportation (removal) would result in extreme hardship to himself, herself, or his or her child; and

(H) Entered into the marriage to the citizen or lawful permanent resident in good faith.

According to the evidence in the record, the petitioner entered the United States, without inspection on August 1, 1992. The petitioner was included as accompanying her father on the application for asylum he filed in 1993. The petitioner was issued an Order to Show Cause on June 21, 1994. The petitioner's case was denied on April 13, 1998, and she was granted voluntary departure until August 11, 1998. On September 28, 2000, the Board of Immigration Appeals (BIA) denied a subsequent appeal and indicated that the petitioner had 30 days, until on or about November 1, 2000 to voluntarily depart the United States.¹ The record contains no evidence that the petitioner has left the United States since the BIA's decision.

On October 14, 2000, during the period between the issuance of the BIA's decision and the petitioner's voluntary departure date, the petitioner and her spouse were married and the petitioner's spouse filed a Form I-130 on the petitioner's behalf.² The petitioner filed the instant Form I-360 on March 4, 2002, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, her United States citizen spouse. The Form I-360 petition was denied on April 9, 2003 based upon the director's determination that the petitioner failed to establish that she entered into the marriage in good faith. Thus, the sole issue to be determined on appeal is whether the petitioner has established, by clear and convincing evidence, that she entered into the marriage in good faith.

Section 204(g) of the Act states:

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], until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.

Section 245(e) of the Act states:

¹ A memo in the file from Miami's Assistant District Counsel, Margaret Nocero, indicates that the 9th Circuit dismissed a subsequent petitioner's appeal on March 7, 2001; however, there is evidence in the record to confirm this fact.

² The Form I-130 petition was filed on October 30, 2000 and subsequently withdrawn by the petitioner's spouse with written notification of the withdrawal issued by the District Director, San Francisco, on October 29, 2003.

- (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.

The regulation at 8 C.F.R. § 245.1(c)(9)(v) states, in pertinent part:

Evidence to establish eligibility for the bona fide marriage exemption. Section 204(g) of the Act provides that certain visa petitions based upon marriages entered into during deportation, exclusion or related judicial proceedings may be approved only if the petitioner provides clear and convincing evidence that the marriage is bona fide

On appeal, counsel states that the petitioner "produced a clear and convincing amount of evidence showing that her marriage was bona fide, and entered into in good faith." We are not persuaded by counsel's statement. The statute and regulation do not require a "clear and convincing" *amount* of evidence, but rather that *the evidence itself* be clear and convincing.

Counsel also argues that the "immigration proceedings were effectively ended by the [BIA] on September 28, 2000." Counsel's argument is without merit. In accordance with 8 C.F.R. §§ 204.2(a)(1)(iii) and 245.1(c)(9), and as correctly indicated by the director, termination of proceedings occurs when either:

- (1) the alien departs from the United States while an order of removal is outstanding or before the expiration of the departure period; or
- (2) the alien is found not to be inadmissible or deportable; or
- (3) when the Form I-122, I-221, I-860, I-862 is canceled; or
- (4) when proceedings are terminated by the immigration judge or the BIA; or

- (5) when a petition for review or an action for habeas corpus is granted by a Federal court on judicial review.

The BIA's grant of voluntary departure is not the same as terminating proceedings.³

As it relates to the petitioner's claim of a good faith marriage, the record contains the petitioner's personal statement, statements from friends and relatives, bank statements, insurance information, tax information and photos. Upon review, we concur with the finding of the director that this evidence is not sufficient to meet the clear and convincing standard required by the Act. Specifically, as the evidence submitted by the petitioner does not demonstrate joint assets and liabilities or joint use and access of accounts, we accord very little evidentiary value to the petitioner's evidence.

The record contains:

- Evidence related to the petitioner's Visa credit card. The account is in the petitioner's name only and does not demonstrate that her spouse also has a card on this account.
- Statements dated April through December 2001 from the AT&T 1997 Long Term Incentive Program, which indicate that the investments in the program are in the petitioner's name only and do not indicate that the petitioner's spouse is the beneficiary of these funds in the event of the petitioner's death.
- A single statement from Bank of America, which indicates that the petitioner opened a checking account in July 2001 and closed it in April 2002. The statement does not indicate that the petitioner's spouse was a joint holder of the account.
- Copies of letters from the petitioner's health insurance carrier, Benefit Concepts. There is no evidence that the petitioner's spouse is covered under the petitioner's health care plan.
- AT&T Broadband bills dated November and December 2001 and a phone bill dated April 19, 2002. The bills are in the petitioner's name only.
- Several statements from AAA in the petitioner's name only with no indication that the petitioner's spouse is covered under this policy.⁴
- MCI Worldcom mobile telephone bills dated October 2000, November and December 2001, and February and March 2002. The bills, however, do not contain any names.
- A Cingular Wireless bill dated December 2001 in the petitioner's name only.

Although the petitioner also submitted copies of bank statements from Commonwealth Central Credit Union, the statements dated October through December 2000 and January through June 2001, are all in the

³ See also *Blackwell v. Thornburgh*, 745 F.Supp. 1529, 1533-37 (C.D. Cal. 1989); *Minatsis v. Brown*, 713 F.Supp. 1056 (S.D. Ohio 1989); *Matter of Enriquez*, 19 I&N Dec. 554 (BIA 1988); and Legal Opinion, General Counsel, CO 204.21-P (Oct. 17, 1990), reprinted in *68 Interpreter Releases* 89 (Jan. 18, 1991) in which CIS determined that a case is also deemed pending even if it is administratively closed.

⁴ We note that although this policy covers a 1999 Mitsubishi automobile, the petitioner submits no evidence of the joint ownership or lease of this automobile.

petitioner's name only. It appears that the petitioner's spouse was not added to the account until July 2001, nearly nine months after they were married. Further, despite the fact that as of July 2001 the petitioner's spouse was added to the account, the record does not establish his actual use of the account. For instance, although the statements show many checks being issued, the petitioner does not submit any evidence to show that both she and her spouse wrote checks on the account.

Although the petitioner submitted a copy of her 2002 taxes showing that she filed jointly with her spouse, the record contains no explanation for the lack information regarding the petitioner's 2000 and 2001 tax returns.

The sole piece of evidence demonstrating that the petitioner shared assets or liabilities with her spouse consists of the registration document for a 1999 Chrysler automobile for the period covering October 2001 through April 2002. The petitioner provides no evidence of registration for this car (or any other vehicle) dating back to the inception of their marriage. As noted previously, the car insurance information submitted by the petitioner does not cover this vehicle. It is noted that although the petitioner claims that her "name is on [her spouse's] car loan, the petitioner provides no evidence to support this statement. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The letters submitted in support of the petition provide only general details about the petitioner's relationship with her spouse prior to their marriage and do not describe any details or facts that would support a claim of a good faith marriage. For instance, the petitioner's sister's letter states that they "dated for 10 moths [sic] every [sic] seem perfect between them." A second letter, submitted by [REDACTED] indicates that [REDACTED] met the petitioner "a little over a year ago." Accordingly, [REDACTED] letter does not provide information regarding the petitioner's intent at the time of the marriage which occurred at least a year prior to the petitioner meeting [REDACTED]

The lack of documentary evidence demonstrating a commingling of assets and liabilities does not lead to a finding of a good faith marriage. Although the marriage certificate submitted by the petitioner is evidence of a legal marriage, the fact that a legal marriage took place does not establish that the marriage was entered into in good faith or that the petitioner resided with her spouse after the marriage ceremony. Similarly, while the petitioner's photographs are evidence that the petitioner and her spouse were together at a particular place and time, they do not establish that they were engaged in a bona fide marriage.

Based upon the above discussion, we find the petitioner has not established that she is eligible for the classification under section 204(a)(1)(A)(iii) of the Act. The evidence submitted by the petitioner does not establish by clear and convincing evidence that her marriage was bona fide. Accordingly, the petitioner is unable to overcome the statutory provision of section 204(g) of the Act regarding the prohibition of approval of a visa petition because the petitioner entered into marriage during proceedings. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.