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U.S. Department of Homeland Security
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U.S. Citizenship
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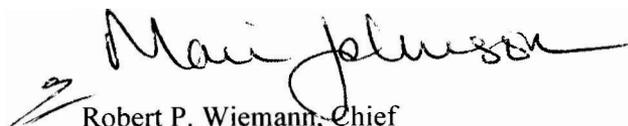
Petitioner:

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.


Robert P. Wiemann, 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 appeal will be dismissed.

The petitioner seeks immigrant classification under section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii) (2007), as an alien battered or subjected to extreme cruelty by a United States citizen.

The director denied the petition pursuant to section 204(g) of the Act because the petitioner had married her husband while she was in removal proceedings and did not establish by clear and convincing evidence that their marriage was entered into in good faith.

On appeal, counsel submits a letter and additional evidence.

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 Belarus who entered the United States on June 19, 2003 as an exchange visitor (J-1). On April 23, 2004, the petitioner filed a Form I-589, Application for Asylum. The New York Asylum Office Director determined that the petitioner's asylum claim was not credible and referred her case to the New York Immigration Court. On June 1, 2004, the petitioner was served with a Notice to Appear for removal proceedings charging her under section 237(a)(1)(B) of the Act for remaining in the United States beyond her period of authorized stay. The petitioner remains in proceedings before the Philadelphia Immigration Court and her next hearing is scheduled for December 11, 2007.

The NTA was filed with the New York Immigration Court on June 1, 2004. On January 18, 2005, the petitioner married D-L-*, a U.S. citizen, in Philadelphia. Accordingly, the petitioner was married while in removal proceedings. See 8 C.F.R. §§ 204.2(a)(1)(iii), 245.1(c)(8)(i)(D). D-L- subsequently filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf, which was withdrawn on November 4, 2005. The petitioner filed the instant Form I-360 on September 20, 2005. On May 23, 2006, the director issued a Notice of Intent to Deny (NOID) the petition pursuant to, *inter alia*, section 204(g) of the Act. The petitioner, through counsel, timely responded to the NOID with further evidence. The director determined that the petitioner had demonstrated 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, by a preponderance of the evidence, the burden of proof generally applicable in visa petition proceedings. However, the director found that the petitioner had failed to establish that her marriage was entered into in good faith by clear and convincing evidence, the higher burden of proof imposed on marriages entered into while the alien spouse is in removal proceedings. Accordingly, the director denied the petition pursuant to section 204(g) of the Act on November 14, 2006.

* Name withheld to protect individual's identity.

We concur with the director's determinations. The evidence submitted on appeal fails to overcome the ground for denial. Beyond the director's decision, the petitioner has also failed to establish her eligibility for immediate relative classification as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act.

Relevant Statutory and Regulatory Provisions

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) (2007).

Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J) (2007), 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 for classification under section 204(a)(1)(A)(iii) of the Act are further explicated by the regulation at 8 C.F.R. § 204.2(c)(2)(1)(iv), which states, in pertinent part: "*Eligibility for immigrant classification.* A self-petitioner is required to comply with the provisions of section . . . 204(g) of the Act[.]"

Section 204(g) of the Act, 8 U.S.C. §1154(g) (2007), states:

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 or preference status by reason of a marriage which was entered into during the period described in section 245(e)(2) [pendency of administrative or judicial proceedings regarding the alien's right to be 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 in this case indicates that the petitioner has not resided outside of the United States for at least two years after her marriage.

Section 245(e) of the Act, 8 U.S.C. §1255(e) (2007), states, in pertinent part:

Restriction on Adjustment of Status Based on Marriages Entered While in Exclusion or Deportation Proceedings

- (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 In accordance with regulations, there shall be only one level of administrative appellate review for each alien under the previous sentence.

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 or a lawful permanent resident spouse shall not be approved if the marriage creating the relationship occurred on or after November 10, 1986, and while the alien was in exclusion, deportation, or removal proceedings, or judicial proceedings relating thereto. Determination of commencement and termination of proceedings and exemptions shall be in accordance with § 245.1(c)([8]) of this chapter, except that the burden in visa petition proceedings to establish eligibility for the [bona fide marriage] exemption in § 245.1(c)([8])(iii)(F) of this chapter shall rest with the petitioner.^[1]

^[1] This regulation was promulgated before the self-petitioning provisions of section 204(a) of the Act were enacted. However, the regulation implementing the self-petitioning provisions requires all self-petitioners to comply with the provisions of section 204(g) of the Act. 8 C.F.R. § 204.2(c)(2)(1)(iv).

* * *

(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.

The regulation's non-exclusive list acknowledges that evidence of a bona fide marriage for immigration purposes may take "many forms, including, but not limited to, proof that the beneficiary has been listed as the petitioner's spouse on any insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences." *Matter of Phillis*, 15 I&N Dec. 385, 387 (BIA 1975). *See Malhi v. I.N.S.*, 336 F.3d 989, 994-95 (9th Cir. 2003) (noting that although the regulation at 8 C.F.R. § 204.2(a)(1)(iii)(B) provides a "non-exhaustive list, it is clear that, in order to qualify for the bona fide marriage exemption, an [alien] must offer evidence that is probative of the motivation for marriage[,]” which is “based on an actual and legitimate relationship.”)

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 exemption 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). To demonstrate eligibility for immigrant classification under section 204(a)(1)(A)(iii) of the Act, the self-petitioner must establish his or her good-faith entry into the qualifying relationship by a preponderance of the evidence and any relevant, credible evidence shall be considered. Sections

See Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 13061, 13064 (Mar. 26, 1996).

204(a)(1)(A)(iii)(I)(aa) and 204(a)(1)(J) of the Act, 8 U.S.C. §§ 1154(a)(1)(A)(iii)(I)(aa), 1154(a)(1)(J) (2007); *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774, 782-83 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965). However, to be eligible for the bona fide marriage exemption under section 245(e)(3) of the Act, the petitioner must establish his or 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) (2007); 8 C.F.R. § 245.1(c)(8)(v). “Clear and convincing evidence” is a more stringent standard. *Arthur*, 20 I&N Dec. at 478. *See also Pritchett v. I.N.S.*, 993 F.2d 80, 85 (5th Cir. 1993) (acknowledging “clear and convincing evidence” as an “exacting standard”).

Eligibility for the Bona Fide Marriage Exemption from Section 204(g) of the Act

The record contains the following evidence relevant to the bona fides of the petitioner’s marriage:

- The petitioner’s September 1, 2005 statement, her July 20, 2006 affidavit and her December 13, 2006 affidavit submitted on appeal;
- Statements of the petitioner’s mother, [REDACTED], and the petitioner’s friends and acquaintances, [REDACTED] and [REDACTED];
- Two energy bills dated March 7 and April 6, 2005 that are jointly addressed to the petitioner and her husband;
- Commerce Bank account statements jointly addressed to the petitioner and her husband that are dated in March, April, May and June, 2005 and corresponding checks cancelled during this time;
- Five earnings statements of the petitioner dated between April and June 2005;
- Paypal statements of purchases made by the petitioner in 2004 and 2005;
- Cellular telephone service agreement for the petitioner dated May 25, 2004 and a Victoria’s Secret credit card statement of the petitioner listing a transaction on May 21, 2005;
- The petitioner’s employee data record dated March 8, 2005 on which her husband is listed as her emergency contact and the petitioner’s Form W-4, Employee’s Withholding Allowance Certificate, dated March 8, 2005 and indicating that she is married, both of which were submitted on appeal;
- Printouts of electronic mail messages sent to the petitioner from her husband in June and July 2005 and an unsigned and undated greeting card purportedly written to the petitioner from her husband, all of which were submitted on appeal; and
- Photographs of the petitioner, her husband, his family and other individuals captioned as having been taken during 2004 and 2005.

In her September 1, 2005 statement, the petitioner says that she met her husband at a party in October 2003, that they “liked each other” and soon began dating. The petitioner explains that in December, she felt that the former couple “had a very strong connection” and that she moved in with her husband at his request in March 2004. The petitioner reports that she became acquainted with her husband’s cousins and mother and “was really happy” until her husband became abusive a month later. The petitioner states that she loved her husband and wanted to have a family with him and so

endured the abuse and hoped that her husband would keep his repeated promises not to further abuse her. After their marriage, the petitioner states that the former couple was “very happy” for a couple of months during which she became close to his family. The petitioner reports that she left her husband on June 15, 2005 due to his abuse. The petitioner does not further describe how she met her husband, their courtship, wedding or any of their shared experiences (apart from the abuse) in any probative detail.

The statements of the petitioner’s mother, friends and acquaintances do not fully support her claim of a bona fide marriage. The statements of the petitioner’s mother, [REDACTED] and [REDACTED], primarily address the abuse. The petitioner’s mother provides no probative details concerning the petitioner’s marriage and indicates that she never visited the former couple and knew of their relationship only through telephone conversations with the petitioner and photographs sent to her by the petitioner. [REDACTED] states that she met the petitioner in December 2004 and that the petitioner frequently talked about “how she wanted to get married and start life with” her husband. Yet [REDACTED] observed that the petitioner “tried to convince not only her girl friends but mainly herself that the choice to marry [D-L-] she made was right.” [REDACTED] notes that at the time, she was not very close to the petitioner and did not “ask her personal questions.” [REDACTED] states that she visited the former couple a few times before they were married and that they were “very affectionate to each other.” While she states that she visited the former couple “sometimes” after their marriage, she provides no probative details regarding their marital relationship, apart from the abuse.

The remaining testimony provides little probative information to support the petitioner’s claim. The petitioner’s former neighbor, [REDACTED] states that he met the petitioner at a party given by her landlord after she moved in with D-L-. He noticed that the former couple was “very close” and that he would then see them coming home together, at other parties or out walking their dog. Mr. [REDACTED] Weekend General Manager of LA Fitness, states that the petitioner obtained her gym membership through her husband and that the former couple came to the gym together between April 16, 2004 and May 2005.

The relevant documentary evidence does not clearly establish that the former couple commingled their financial assets or shared other significant assets or liabilities. Although the petitioner states that she lived with her husband for nearly 15 months on the Form I-360, she submitted joint energy bills for only two months and joint bank statements for only four months. Although the bank statements and the corresponding cancelled checks show that both the petitioner and her husband used the checking account, the petitioner’s earnings statements show that she deposited only part of her salary to the joint account and the remainder to her individual checking account at Wachovia Bank. Counsel lists the online Paypal statements of purchases made by the petitioner in 2004 and 2005 as evidence of her bona fide marriage, but of the eight purchases, only two were paid through the former couple’s joint bank account. The remaining six purchases were paid through the petitioner’s credit card and individual bank account. The cellular telephone service agreement and the Victoria’s Secret credit card statement, both dated during the petitioner’s residency with and

marriage to her husband, further indicate that she maintained her own, individual accounts during the former couple's relationship.

In her decision, the director noted that the petitioner and other affiants stated that she and her husband purchased a home together in May 2005, but that the petitioner did not submit documentary evidence of the former couple's joint ownership of the home, as requested in the NOID. On appeal, the petitioner states that she and her husband looked for and chose a house together, but that the realtor "made it clear . . . that [she] would not be put on the mortgage, since [she] lacked the necessary credit history." The petitioner does not, however, provide evidence of any other significant purchases that the former couple made together. The only purportedly joint purchases documented in the record are two Paypal statements for a "fog lamp" and "Get Access for 1 month" paid through the former couple's joint bank account, but made by the petitioner individually.

The petitioner's employee data record and her Form W-4 show that she identified herself as married to her husband, but these two documents alone do not establish that the bona fides of the petitioner's marriage. While the petitioner states that she is unable to obtain documentation from the former couple's prior landlord and explains that she did not actually purchase the home with her husband, she does not submit other documentary evidence of shared assets or liabilities such as joint tax returns, insurance policies or other joint accounts, apart from [REDACTED]'s attestation to the former couple's gym memberships.

The electronic mail messages and greeting card may reflect the feelings of the petitioner's husband, but the evidence does not document the petitioner's own good faith entry into their marriage. The photographs are also of little probative value. While they show that the petitioner and her husband were pictured together on various occasions, the photographs alone are insufficient to clearly establish the requisite good faith.

The petitioner only briefly describes how she met her husband, their courtship and marriage. She does not describe her intentions in marrying her husband or any of their shared experiences (apart from the abuse) in probative detail. The statements of her mother, friends and acquaintances also fail to provide probative information sufficient to clearly establish the bona fides of her marriage. The relevant documentary evidence shows only that the petitioner and her husband briefly shared a bank account, a utility account and a gym membership, and were photographed together on various occasions. Consequently, the petitioner has failed to establish by clear and convincing evidence that her marriage was entered into in good faith and not for the purpose of procuring her admission as an immigrant. Section 204(g) of the Act thus bars approval of this petition.

Eligibility for Immediate Relative Classification

Beyond the director's decision, the petitioner also fails to demonstrate that she was eligible for immediate relative classification based on her marriage to D-L-. The regulation at 8 C.F.R. § 204.2(c)(2)(1)(iv) requires self-petitioners to comply with section 204(g) of the Act. As previously

discussed, section 204(g) of the Act bars approval of this petition because the petitioner married while she was in removal proceedings and she has not established her eligibility for the bona fide marriage exemption at 245(e)(3) of the Act. Accordingly, the petitioner has not demonstrated that she was eligible for immediate relative classification under section 201(b)(2)(A)(i) of the Act based on her marriage to D-L-, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act. She is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act for this additional reason.

An application or 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 Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) (2007) (“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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.