

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

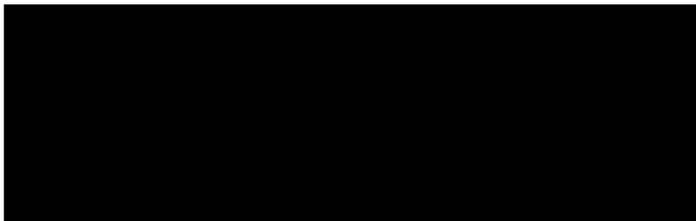
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



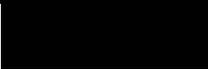
U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B9



FILE:



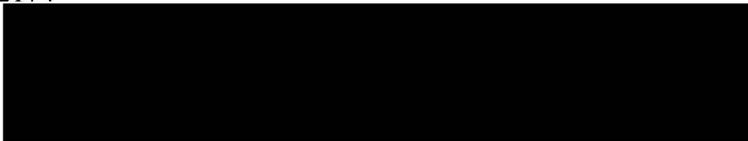
Office: VERMONT SERVICE CENTER

Date: MAR 26 2008

EAC 03 061 52174

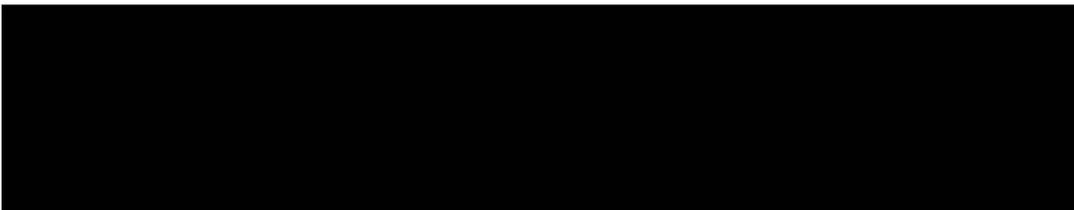
IN RE:

Petitioner:



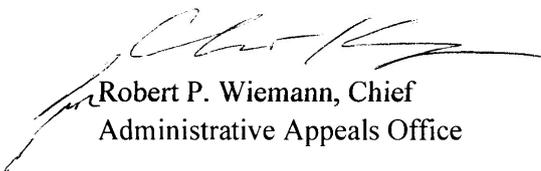
PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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. On appeal, the Administrative Appeals Office (AAO) remanded the petition for further action by the director. The matter is now before the AAO upon certification of the director's subsequent, adverse decision. The February 16, 2007 decision of the director will be affirmed and the petition will be denied.

Section 204(a)(1)(A)(iii) of the Immigration and Nationality Act (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].

As the facts and procedural history have been adequately documented in the previous decision of the AAO, we will only repeat certain facts as necessary here. The director initially denied the petition on September 27, 2004, finding that the petitioner failed to establish that he was battered or subjected to extreme cruelty by his citizen spouse during their marriage. On appeal, the AAO concurred with the findings of the director but remanded the case on March 30, 2006 because the director denied the petition without first issuing a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii). In addition, because the record indicated that the petitioner's Form I-485, Application to Adjust Status, based upon his marriage to his first spouse, B-D-¹, was denied for failure to establish a good faith marriage and that his marriage to his second spouse, J-O-², was entered into while the petitioner was in proceedings, the AAO requested the director to consider on remand whether the approval of the petition was precluded by sections 204(c) and (g) of the Act.

Upon remand, the director issued a NOID on June 1, 2006, which notified the petitioner of the deficiencies in the record regarding his claim of battery or extreme cruelty and the lack of clear and convincing evidence of his good faith marriage to J-O-. The director did not request any evidence regarding the petitioner's marriage to B-D-. The petitioner timely responded to the director's NOID with additional evidence. On October 3, 2006, the director issued a second NOID, identifying the same deficiencies as noted in the previous NOID. Again, however, the director requested no evidence regarding the petitioner's prior marriage to B-D-. The director denied the petition on February 16, 2007, finding that the petitioner failed to establish that he was battered by or subjected to extreme cruelty by J-O- during their marriage and that he entered into his marriage in good faith. Accordingly, the director also found that the petitioner failed to meet the higher burden of clear

¹ Name withheld to protect individual's identity.

² Name withheld to protect individual's identity.

and convincing evidence of his good faith marriage, as required by the exception to section 204(g) of the Act at section 245(e)(3) of the Act. The director certified his decision to the AAO for review and notified the petitioner, through counsel, that he could submit a brief to the AAO within 30 days of service of the director's decision. Although the record contains two letters from counsel dated December 4, 2007 and December 17, 2007, regarding the petitioner's updated contact information, neither the petitioner nor counsel has provided any further submission on certification. Accordingly, we consider the record to be complete as it now stands.

Battery or Extreme Cruelty

The evidence relative to the petitioner's claim of abuse submitted below was fully addressed in the AAO's prior decision, incorporated here by reference. Accordingly, we will only address the material submitted since that decision was issued. That material consists of:

- The petitioner's July 22, 2006 statement and December 4, 2007 affidavit;
- A statement and December 1, 2006 affidavit from [REDACTED] a coworker of the petitioner and J-O-;
- A statement and December 1, 2006 affidavit from J-O-;
- A statement and undated affidavit from [REDACTED] the petitioner's girlfriend;
- A statement from [REDACTED] the petitioner's former mother-in-law.

In his statement and affidavit, the petitioner reiterates his previous claims, including the incident in which J-O-'s brother and sisters assaulted him in a restaurant. In his statement and affidavit, the petitioner makes clear that J-O- was not present during the incident and provides no indication that she was involved or provoked the incident. The statement from [REDACTED] also recounts the incident in the restaurant but provides no further evidence which demonstrates that J-O- was involved in the incident. The remaining statements and affidavits provide no further probative evidence to establish that the petitioner was battered by or subjected to extreme cruelty by J-O- during their marriage. Accordingly, we concur with the finding of the director that the petitioner failed to establish that he was battered or subjected to extreme cruelty by J-O- during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Sections 204(c) and (g) of the Act

Although we made no specific finding regarding sections 204(c) and (g) of the Act in our prior decision, we requested that the director consider the relevance of these provisions on remand. Because we did not discuss the evidence in the record related to the petitioner's good faith marriages, our review here covers all relevant evidence of the petitioner's good faith marriages.

I. The petitioner's marriage to B-D-

In our previous decision, based upon the language contained in the denial of the petitioner's Form I-485, we requested the director to consider whether section 204(c) of the Act was applicable to this case. Although the director requested the petitioner to submit further evidence regarding his good faith marriage to J-O-, he did not request any further evidence of the petitioner's good faith marriage to B-D-. The director made no finding, either affirmatively or negatively regarding the petitioner's marriage to B-D-. Upon review, we find

the record does not contain sufficient evidence to support a finding that the petitioner entered into his marriage with B-D- to circumvent the immigration laws. We note that although the petitioner's Form I-485 was denied because the petitioner failed to provide sufficient evidence that he entered into his marriage in good faith, there was no specific finding that the petitioner attempted to evade the immigration laws. Accordingly, we find that section 204(c) of the Act does not preclude approval of this petition as it relates to the petitioner's marriage to B-D-.

II. The petitioner's marriage to J-O-

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). See *Petition to Classify Alien as Immediate Relative*

* * *

(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.")

The petitioner submitted the following evidence to support his claim of a good faith marriage to J-O-:

- A copy of his and J-O-'s marriage certificate;
The petitioner's October 29, 2002 and December 4, 2007 affidavits and two additional undated personal statements;
- A January 29, 2002 letter from _____ the former property manager of the petitioner's and J-O-'s rental home;
- Two letters from _____, the petitioner's girlfriend;
- A joint bill from Indianapolis Power & Light Company, dated December 29, 1997;
Copies of health plan cards for the petitioner and J-O-;

- The petitioner's application and life insurance policy from Transamerica Life Companies, dated January 31, 2000;
- A joint letter from Gallant Insurance Company, dated August 31, 1997;
- The petitioner's and J-O-'s Colonial Life Insurance policies, dated August 20, 1997;
- A copy of the petitioner's and J-O-'s joint automobile insurance policy;
- A copy of the petitioner's and J-O-'s jointly filed 1995 federal tax return;
- A joint lease application, dated June 6, 1997;
- A joint lease agreement covering the period from July 1, 1997 through July 31, 1998;
- A joint purchase agreement for an automobile;
- P-N-D-'s³ birth certificate identifying the petitioner and J-O- as her father and mother
- Undated photographs;
- Blank checks from the petitioner's joint bank account with J-O-;
- A letter and December 1, 2006 affidavit from [REDACTED], a coworker of the petitioner and J-O-;
- A letter from [REDACTED], the petitioner's former mother-in-law; and
- A December 1, 2006 affidavit from J-O-.

Upon review, we find the testimonial evidence submitted by the petitioner and on his behalf contains few probative details regarding the petitioner's good faith marriage to J-O-. The petitioner himself only generally describes his courtship with J-O- and the time leading up to their marriage. He offers little insight into their interaction prior to their marriage and his feelings for her at that time. The remaining statements provided on the petitioner's behalf are similarly lacking. Despite the lack of testimonial evidence, we are persuaded by the petitioner's documentary evidence, including his joint health insurance, car insurance, car purchase agreement, and life insurance policies. In addition, although the petitioner had initially indicated his skepticism regarding the paternity of P-N-D-, the statements made by J-O- and her mother acknowledge the petitioner's paternity and indicate that he has taken responsibility for the child and supports her, although not on a regular basis. Finally, we note the information contained in the petitioner's divorce decree regarding the custody and visitation of P-N-D-, and the reference to and listing of the petitioner's and J-O-'s joint accumulation of personal property and debts, including hospital and utility bills. In his February 16, 2007 decision, the director did not discuss the relevant documentary evidence. Based upon the above discussion, we find that the petitioner has established, by clear and convincing evidence, that he entered into his marriage with J-O- in good faith. Additionally, we find that the petitioner has established his good faith entry into marriage by a preponderance of the evidence under section 204(a)(1)(A)(iii)(I)(aa) of the Act. As such, we hereby withdraw the director's findings in this regard.

Although we have withdrawn the director's aforementioned findings regarding the petitioner's good faith marriage, we concur with the finding that the petitioner failed to establish that he was battered or subjected to extreme cruelty by J-O- during their marriage. Consequently, the petitioner is ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act and his petition must be denied.

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.

³ Name withheld to protect identity.

Accordingly, the February 16, 2007 decision of the director is affirmed and the petition is denied.

ORDER: The petition is denied. The February 16, 2007 decision of the director is affirmed.