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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

By

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 27 2008

EAC 04 125 54442

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:

[redacted]

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.

for 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 matter for further action. The matter is now before the AAO upon certification of the director's subsequent, adverse decision. The decision of the director will be affirmed and the petition will be 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 United States citizen.

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 states, in pertinent part:

> In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) or clause (ii) or (iii) of subparagraph (B), 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].

In this case, the director initially denied the petition on April 27, 2005, finding that the petitioner failed to establish, by a preponderance of the evidence, that she entered into her marriage in good faith. The director additionally found that the petitioner ineligible based on section 204(g) of the Act for failure to establish, by clear and convincing evidence, that the petitioner entered into her marriage in good faith. In our March 22, 2006 decision on appeal, we concurred with the director's determination and further found that the petitioner had not established the requisite battery or extreme cruelty. However, we remanded the petition for issuance of a Notice of Intent to Deny (NOID) in compliance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii). Upon remand, the director issued a NOID on May 25, 2006, which informed the petitioner, through counsel, that she had failed to establish the requisite good faith marriage and abuse. The petitioner, through counsel, timely responded to the NOID with additional evidence. The director denied the petition on March 16, 2007 finding that the petitioner failed to establish her good faith marriage and the claimed battery or extreme cruelty and certified his decision to the AAO for review. No further evidence has been submitted on certification. As such, we consider the record to be complete as it now stands.

Our review focuses on the documentation submitted subsequent to the AAO's remand decision, incorporated here by reference. The evidence consists of a statement from the petitioner and a new Ex Parte Restraining Order issued against her former spouse on January 12, 2007. In her statement, as it relates to her claim of a good faith marriage, the petitioner describes meeting her spouse at a dance club. She claims that her former spouse pursued a relationship with her and that after dating for six months, her spouse proposed to her. The petitioner provides no other details surrounding their six-month courtship, their interactions, or her feelings for

her spouse other than to indicate that she would only agree to marry him if he accepted her "conditions in becoming a member" of her religion. The petitioner offers no further testimonial or documentary evidence which establishes that she entered into her marriage in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Despite the determination by the director in his April 27, 2005 decision regarding the applicability of section 204(g) of Act and the AAO's concurrence with that finding, the director failed to address section 204(g) in either his NOID or certification decision. We note that 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 eligibility for the bona fide marriage exemption from section 204(g) of the Act 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 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 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), (a)(1)(J); *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 exception 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); 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").

As previously discussed, the petitioner has failed to establish that she entered into her marriage in good faith by a preponderance of the evidence, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act. Therefore, beyond the decision of the director, we find that she has also failed to demonstrate that she qualifies for the bona fide marriage exemption under the heightened standard of proof required by section 245(e)(3) of the Act. Accordingly, section 204(g) of the Act requires the denial of this petition.

As it relates to the claim of abuse, the petitioner reiterates the claims made below but does not offer any further probative details to establish her claim of battery or extreme cruelty. Moreover, the petitioner fails to address or provide an explanation for the discrepancies noted in our prior decision. We note that although the petitioner provides details about incidents that have occurred more recently, as well as a new Ex Parte Restraining Order against her spouse, according to the petitioner's own statement, these incidents occurred both *after* the filing of the petition and *after* the marriage was annulled. As the petitioner must establish eligibility at the time of filing, a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Further, the Act and the regulation explicitly require that the abuse take place during the marriage. Section 204(a)(1)(A)(iii)(I)(bb), 8 U.S.C. § 1154(a)(1)(A)(iii)(I)(bb); 8 C.F.R. § 204.2(c)(1)(vi). Accordingly, this evidence cannot be considered in support of this petition.

Based upon the above discussion, we concur with the director's determination that the petitioner failed to demonstrate the requisite battery or extreme cruelty and her entry into the marriage in good faith. Sec. 204(g) of the Act further bars approval of this petition.

Beyond the director's decision, we also find that the petitioner's acknowledgement, in her August 11, 2006 affidavit, of the annulment of her marriage raises further questions regarding her eligibility. The validity of a marriage is generally governed by the law of the place where it was contracted. *Matter of P,* 4 I&N Dec. 610 (BIA 1952). A marriage will be recognized as valid for immigration purposes if the marriage is voidable, but not if the marriage is void *ab initio. Matter of Agoudemos*, 10 I&N Dec. 444, 446-47 (BIA 1964); *Matter of G*, 9 I&N Dec. 89, 91 (BIA 1960). In this case, we take administrative notice of the fact that under Connecticut law, "[a]n annulment shall be granted if the marriage is void or voidable . . . ." Conn. Gen. Stat. Ann. § 46b-40(b) (West 2008). The petitioner has not provided any documentation regarding her annulment and the basis upon which it was granted. Without any further evidence, we find the possibility exists that the petitioner's marriage was found void *ab initio.* Accordingly, the petitioner has failed to establish that she had a qualifying relationship as the spouse of a United States citizen and that she was eligible for immigrant classification based upon that relationship, as required by section 204(a)(1)(A)(iii)(II)(aa), (cc) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa),(cc). We, therefore, withdraw the director's findings on those two issues.

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) ("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 petitioner has not established that she had a qualifying relationship with her former spouse, was eligible for immigrant classification based on such a relationship, that she entered into her marriage in good faith and that her former spouse subjected her to battery or extreme cruelty during their marriage. Consequently, the petitioner is ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act. Section 204(g) of the Act further bars approval of this petition.

The petition will be denied for the five reasons stated above, 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.

ORDER: The director's decision of March 16, 2007 is affirmed. The petition is denied.