

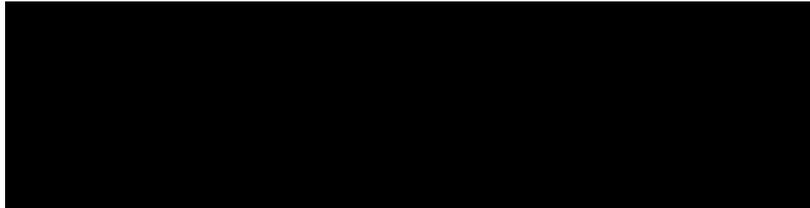
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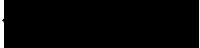


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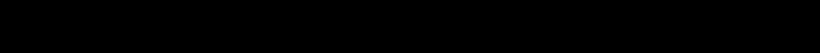
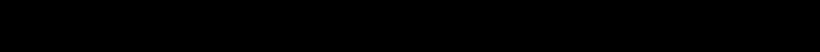


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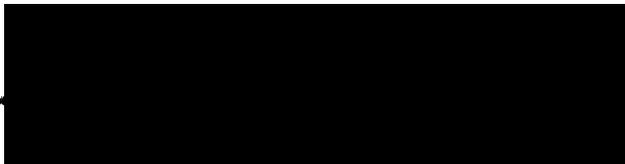
Office: VERMONT SERVICE CENTER

Date: APR 26 2005

IN RE: Petitioner: 
Beneficiary: 

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.

Mai Johnson

SR Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a native and citizen of Canada 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 United States citizen.

The acting director denied the petition, finding that the petitioner failed to establish that she had been a bona fide spouse of a United States citizen within two years of the filing of the instant petition. The acting director declined to revisit two additional issues raised in a request for additional evidence, i.e., whether the petitioner established that she is a person of good moral character and that she married her citizen spouse in good faith.

On appeal, counsel for the petitioner submits a brief and asserts that a prior petition was timely filed and that it should be equitably considered.

Section 204(a)(1)(A)(iii) of the Act provides, in pertinent part, 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 Attorney General 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)(i) states, in pertinent part, that:

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;

* * *

(D) Has resided . . . 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; [and]

* * *

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

The acting director denied the petition, in part, finding that the petitioner failed to establish that she is eligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act, because according to the evidence on the record, the petitioner's marriage to her citizen spouse was annulled more than two years prior to the filing of the petition. The acting director denied the petition, in part, finding that the petitioner failed to establish that she is a person of good moral character and entered into the marriage in good faith.

According to the evidence on the record, the petitioner married her United States resident spouse on April 28, 1998. The petitioner's citizen spouse filed a complaint for annulment to invalidate the marriage with the Chancery Court, Forrest County, Mississippi on October 19, 1999. On March 17, 2000, the Chancery Court determined that the petitioner's marriage was void for want of a valid marriage license.

The petitioner has filed three Form I-360 self-petitions. She filed her first Form I-360 petition on November 19, 1999, which was denied on October 25, 2000 (EAC 0004251878). She filed another Form I-360 petition on June 9, 2001, which was denied on January 11, 2002 (EAC 0118856248). The petitioner filed the instant Form I-360 petition on September 13, 2003, more than three years after the marriage was adjudged void.

On appeal, counsel for the petitioner asserts that no decisions were made on the 1999 and 2001 petitions, so the filings should be combined and Citizenship and Immigration Services (CIS) should use the earlier date as the priority date of record. Counsel asserts that the petitioner suffered ineffective assistance of her former counsel because former counsel advised the petitioner to file a third self-petition in 2003, even though she was clearly ineligible since more than two years had lapsed since her marriage had been annulled.

Counsel's assertions are not persuasive. The 1999 petition was denied on October 25, 2000, and the 2001 petition was denied on January 11, 2002. The petitioner failed to file an appeal of the decision on the 1999 petition or the 2001 petition within 33 days of the decision. There is no legal basis for CIS to bootstrap the instant petition to a previously filed and adjudicated decisions.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Here, the petitioner's affidavit does not set

forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the petitioner in this regard. Counsel was not given an opportunity to respond to the petitioner's allegations. However, the petitioner filed a complaint about her former counsel's conduct with the appropriate disciplinary authorities.

The petitioner complains that her former counsel suggested that the petitioner's son file his own Form I-360 more than a year after he "aged-out."¹ This complaint is not relevant to the instant petition; rather, it is relevant to the petitioner's son's self-petition.

The petitioner complains that her former counsel erred in advising the petitioner to file the instant self-petition, and instead, should have awaited a determination on the previously filed self-petitions. The petitioner's assumption that her 1999 and 2001 petitions are still pending is erroneous.

Finally, even if the AAO were to grant the motion based upon this claim of ineffective counsel, the instant petition could not be approved because the petitioner failed to establish that she entered into the marriage with the U.S. citizen in good faith and that her marriage was valid at its inception. An annulment of a marriage voids the marriage *ab initio*, and in the eyes of the law it is as if the marriage never existed. *See 4 Am.Jur.2d Annulment of Marriage § 81.*

The petitioner failed to establish that she was the spouse of a citizen either at the time of or within two years prior to the filing of the petition.

Section 204(a)(1)(A)(iii)(II) of the Act requires that the self-petitioner establish that he or she is married to a United States citizen or permanent resident at the time of the filing of the Form I-360 petition with certain exceptions. The petitioner does not fall within one of the statutory exceptions to this requirement. Her marriage to the citizen spouse was adjudged void more than two years prior to the filing of the instant petition. More significantly, the judgment annulling the petitioner's marriage is a judicial declaration that no marriage ever existed. *Supra.*

In a notice of intent to deny the petition (NOID), the acting director noted that the petitioner failed to establish that she was a person of good moral character. In her decision denying the instant petition, the acting director failed to consider the evidence submitted in response to the NOID. The AAO finds that, beyond the director's decision, the petition may not be approved based on the two additional grounds cited in the NOID.

Good Moral Character

The regulation at 8 C.F.R. § 204.2(c)(1)(i)(F) requires that the petitioner establish that she is a person of good moral character. In a notice of intent to deny the petition (NOID), the director specifically requested that the petitioner submit police clearances or records from each place she had resided for at least six months during the 3-year period before filing the Form I-360 petition. She had previously submitted one police clearance dated 1999. In the NOID, the acting director informed the petitioner that the 1999 clearance was insufficient. The instructions stated that if the police clearance is researched by name only, she must supply the law enforcement agency with all aliases she has used, including maiden and/or married names(s), if applicable.

¹ The petitioner did not show how this has bearing on the instant Form I-360 petition. The petitioner wrote in an affidavit that her former attorney should have advised her son to file his own self-petition immediately after he turned 21.

On appeal, the petitioner submits three current police clearances. The clearances were researched by the petitioner's maiden name, [REDACTED] only. The clearances should have been researched by all names used by the petitioner including her maiden name, and former married names, [REDACTED] and [REDACTED]. The petitioner has not overcome this objection to approving the petition. For this additional reason, the petition may not be approved.

Bona Fide Marriage

The regulation at 8 C.F.R. § 204.2(c)(1)(i) requires the petitioner to show that she entered into the marriage to the citizen in good faith. Because the petitioner furnished insufficient evidence to establish that she entered into the marriage in good faith, the acting director asked her to submit additional evidence in a notice of intent to deny the petition (NOID) on July 12, 2004. The director listed the types of evidence that would show that the petitioner had married her spouse in good faith. Current counsel for the petitioner submitted an extensive response to the director's NOID.

The evidence on the record relating to the bona fides of the marriage is as follows:

- The petitioner's affidavit dated September 1, 2004.
- Copies of Internet correspondence between the petitioner and her citizen spouse.
- Evidence that the petitioner sold her Arizona home in November 1998 and moved property to Mississippi.
- An application for a Mississippi veterinarian's license dated June 19, 1999.
- A subscription notification addressed to the petitioner at the marital home.
- A tuition bill for the petitioner's son addressed to the petitioner and her citizen spouse.
- A bank overdraft notice to the petitioner and her spouse dated August 21, 1998.
- Bank statements for a joint account dated October 1998 through January 1999 and March 1999 showing respective balances of \$92.78, \$19.26, -\$2.58, and \$3.42.
- A phone bill in the petitioner's name alone.
- Two interest income statements (Form 1099) addressed to the petitioner, her son and [REDACTED].
- A letter from the Great Southern National Bank stating that the citizen spouse has had an account with the bank since April 1994 and that the petitioner has had an account since July 1998.
- An affidavit of [REDACTED] a friend of the petitioner, stating that the petitioner planned to live her new life with her new husband in Hattiesburg, Mississippi.
- An affidavit of a friend of the petitioner's son and a one-time house guest of the petitioner stating that he observed the petitioner and her husband living as husband and wife.
- An affidavit from the former spouse and former mother-in-law of the citizen spouse stating that the petitioner intended to establish a life with the citizen.
- An affidavit of a friend of the petitioner's son stating that he was a witness at the petitioner's wedding.
- 1998 tax return showing married filing separately.
- Transcript of deposition of citizen spouse in which he refers to the petitioner as his wife.
- A letter indicating that the petitioner and her spouse received marital counseling at the Temple Baptist Church in Hattiesburg, Mississippi.

On the instant petition, the petitioner indicated that she resided with her citizen spouse from April 1998 until January 1999. The petitioner failed to provide proof that she or her spouse were listed as the beneficiary on the other spouse's insurance policies. She provided evidence of a joint banking account, which had a nominal balance. She and her husband did not file a joint income tax return. She provided scant evidence showing that

she and her spouse shared financial responsibilities. She provided little evidence concerning her courtship² and marriage ceremony. The petitioner provided transcripts of depositions of spouse. The transcripts indicate that the petitioner was vague when answering questions as to whether she lived with or apart from her spouse.³ No children were born of the marriage. The affidavits provide insufficient detail to be given weight. The evidence is insufficient to establish the bona fides of the marriage. For this additional reason, the petition may not be approved.

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.

² In a deposition, the citizen spouse indicated that he met the petitioner five or six months before they wed through a Christian dating service.

³ "Q. When [REDACTED] interviewed you and your present wife, [REDACTED] he asked her some pointed questions about separation, and he responded in his report . . . that she responded vaguely."