

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B9

FILE:

EAC 07 011 53448

Office: VERMONT SERVICE CENTER

Date:

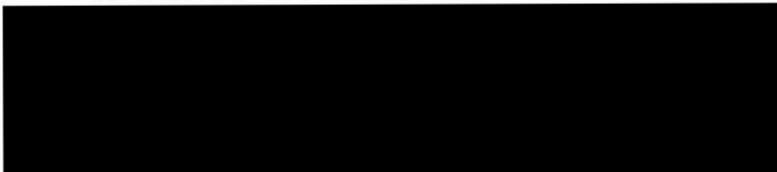
APR 01 2009

IN RE:



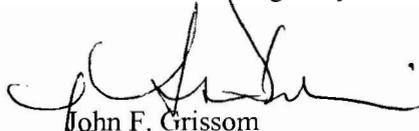
PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(B)(ii) of the
Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(B)(ii)

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.


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for further action.

The petitioner seeks immigrant classification under section 204(a)(1)(B)(ii) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii), as an alien battered or subjected to extreme cruelty by a lawful permanent resident of the United States.

The director denied the petition on the basis of his determination that the petitioner had failed to establish that she entered into marriage with her husband in good faith.

Counsel submitted a timely appeal on October 5, 2007.

Section 204(a)(1)(B)(ii) of the Act provides that an alien who is the spouse of a United States lawful permanent resident may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the United States lawful permanent resident 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)(B)(ii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(II).

Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J) 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 are explained further at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part, the following:

- (v) *Residence.* . . . The self-petitioner is not required to be living with the abuser when the petition is filed, but he or she must have resided with the abuser . . . in the past.

* * *

- (ix) *Good faith marriage.* A spousal self-petition cannot be approved if the self-petitioner entered into the marriage to the abuser for the primary purpose of circumventing the immigration laws. A self-petition will not be denied,

however, solely because the spouses are not living together and the marriage is no longer viable.

The evidentiary guidelines for a self-petition filed under section 204(a)(1)(B)(ii) of the Act are explained further at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part, the following:

Evidence for a spousal self-petition -

- (i) *General.* Self-petitioners are encouraged to submit primary evidence whenever possible. The Service will consider, however, 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 Service.

* * *

- (vii) *Good faith marriage.* Evidence of good faith at the time of marriage may include, but is not limited to, proof that one spouse has been listed as the other's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. Other types of readily available evidence might include the birth certificates of children born to the abuser and the spouse; police, medical, or court documents providing information about the relationship; and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered.

The record of proceeding establishes the following pertinent facts and procedural history. The petitioner is a citizen of Canada. She married J-D-,¹ a lawful permanent resident of the United States, on June 8, 1998 in Nova Scotia.²

The petitioner filed the instant Form I-360 on October 10, 2006. On May 14, 2007, the director issued a request for additional evidence (RFE), which notified the petitioner of the deficiencies of record and afforded her the opportunity to clarify J-D-'s immigration status and to establish that she is a person of good moral character, and that she married J-D- in good faith. The petitioner responded to the director's RFE on July 9, 2007, and submitted additional evidence. After considering the evidence of record, including the evidence submitted by the petitioner in response to the RFE, the director denied the petition on September 10, 2007. Counsel submitted a timely filed appeal.

¹ Name withheld to protect individual's identity.

² The record does not indicate the filing of a Form I-130, Petition for Alien Relative, by J-D- on behalf of the petitioner.

Good Faith Entry into Marriage

The sole issue on appeal is whether the petitioner has established that she married J-D- in good faith. In his May 14, 2007 RFE, the director notified the petitioner that photographs alone do not constitute evidence of the petitioner's good faith entry into the marriage. The director noted that the petitioner stated that she had two children with J-D-, but that she did not submit copies of their birth certificates. The director then specifically requested, in bold typeface, copies of the children's birth certificates. However, in her July 6, 2007 response to the director's RFE, counsel elected not to submit the birth certificates, and offered no explanation for her failure to do so.

On appeal, the petitioner states that she has been involved with J-D- since 1994, when they were in high school; that they had their first child before they were married and were married while she was pregnant with their second child; and that immigrating to the United States had nothing to do with her decision to marry J-D-. She also states, with regard to her intentions upon entering the marriage, that although the marriage was not a good marriage, it was nonetheless a bona fide marriage, and that she married him because she loved him, because they had children, and because she wanted her children to be raised by two parents in the same home. The petitioner also submits copies of a card and a letter that were purportedly written by J-D-. She does not, however, submit copies of the children's birth certificates, nor did she submit any explanation for her continued failure to do so.

The AAO agrees with the director's decision to deny the petition on the basis of the petitioner's failure to demonstrate that she married J-D- in good faith. First and foremost, the AAO echoes the director's concern with regard to the petitioner's failure to submit the requested birth certificates. Unless their parentage is established, the existence of children does not establish a good faith marriage. Nor has any explanation of the petitioner's failure to submit such birth certificates been attempted. As established at 8 C.F.R. § 204.2(c)(2)(vii), "birth certificates of children born to the abuser and the spouse" are "readily available evidence" of a good faith marriage. It is unclear to the AAO why the petitioner has not submitted such readily available evidence. Even if J-D- destroyed the petitioner's documents, or if she was forced to leave them behind when she fled the marital residence for the shelter, she is presumably capable of obtaining new copies of her children's birth certificates from the vital statistics office of the province in which the children were born.

While the AAO acknowledges the handwritten letter and card submitted on appeal, there is no proof that these items in fact came from J-D-. Further, although counsel submits additional evidence on appeal to demonstrate the couple "living at the same address," section 204(a)(1)(B)(ii)(II)(dd) of the Act is not at issue here; the director found that the petitioner had established that she and J-D- shared a joint residence. Joint residence is not at issue on appeal.

The evidence submitted by the petitioner fails to establish her intentions upon entering into the marriage, and she has failed to submit copies of her children's birth certificates. Accordingly, the only evidence of record is her two affidavits. However, in this case the petitioner's affidavits are

insufficient to establish her intentions upon entering into the marriage. The petitioner fails to provide a detailed account of the couple's courtship, which would assist the AAO in evaluating her intentions upon entering the marriage. In a case such as this, where there is little physical evidence of the petitioner's intentions upon entering the marriage, the petitioner's testimony is crucial. However, the petitioner's testimony, with regard to her intentions upon entering the marriage, is vague.

For example, the petitioner fails to describe the couple's first meeting; her first impressions of J-D-; their decision to begin dating; their courtship; or the types of activities the couple enjoyed together. Such information would allow the AAO to examine the petitioner's intentions upon entering into the marriage. Without such information, the AAO cannot examine the petitioner's intentions, as there is no physical evidence that speaks to her intentions upon entering the marriage. Although the petitioner indicates that the couple's children were a major factor in the decision to marry, she has failed, despite being specifically afforded the opportunity to do so by the director, to provide copies of the children's birth certificates. The evidence of record fails to demonstrate that the petitioner entered into marriage with J-D- in good faith, as required by section 204(a)(1)(B)(ii)(I)(aa) of the Act.

Conclusion

The AAO concurs with the director's determination that the petitioner has failed to demonstrate that she entered into marriage with J-D- in good faith. However, the record indicates that the director did not issue a notice of intent to deny the petition (NOID) before he issued his decision. Although the record establishes that the petitioner is ineligible for the benefit sought, the petition must be remanded, solely on procedural grounds, so that the petitioner has the opportunity to respond to a NOID. The petition must be remanded to the director for issuance of a NOID in compliance with the regulation in effect at 8 C.F.R. § 204.2(c)(3)(ii)³ on the date this petition was filed, and the director must afford the petitioner the opportunity to submit a response within the 60-day period. On remand, the director need only address the issues before the AAO on appeal; i.e., whether the petitioner has established that she entered into marriage with J-D- in good faith..

As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's September 10, 2007 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

³ USCIS promulgated a rule on April 17, 2007 related to the issuance of requests for evidence and NOIDs. 72 Fed. Reg. 19100 (Apr. 17, 2007). The rule became effective on June 18, 2007, *after* the filing of this petition on October 10, 2006.