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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

B5

APR 27 2009

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:
EAC 07 148 51548

IN RE: Petitioner: [redacted]

PETITION: Petition for 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:

[redacted]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting 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 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.

The director denied the petition because the petitioner did not establish that she was a person of good moral character and that she was eligible for the bona fide marriage exemption from the bar at section 204(g) of the Act to approval of petitions based on marriages entered into while the alien was in proceedings.

On appeal, counsel submits a brief letter, one additional document and copies of materials previously filed.

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, 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 further explicated in the regulation at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part:

> (iv) *Eligibility for immigrant classification.* A self-petitioner is required to comply with the provisions of section 204(c) of the Act, section 204(g) of the Act, and section 204(a)(2) of the Act.
>
> * * *
>
> (vii) *Good moral character.* A self-petitioner will be found to lack good moral character if he or she is a person described in section 101(f) of the Act. Extenuating circumstances may be taken into account if the person has not been convicted of an offense or offenses but admits to the commission of an act or acts that could show a lack of good moral character under

section 101(f) of the Act. A person who was subjected to abuse in the form of forced prostitution or who can establish that he or she was forced to engage in other behavior that could render the person excludable under section 212(a) of the Act would not be precluded from being found to be a person of good moral character, provided the person has not been convicted for the commission of the offense or offenses in a court of law. A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she willfully failed or refused to support dependents; or committed unlawful acts that adversely reflect upon his or her moral character, or was convicted or imprisoned for such acts, although the acts do not require an automatic finding of lack of good moral character. A self-petitioner's claim of good moral character will be evaluated on a case-by-case basis, taking into account the provisions of section 101(f) of the Act and the standards of the average citizen in the community. If the results of record checks conducted prior to the issuance of an immigrant visa or approval of an application for adjustment of status disclose that the self-petitioner is no longer a person of good moral character or that he or she has not been a person of good moral character in the past, a pending self-petition will be denied or the approval of a self-petition will be revoked.

* * *

(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.

Section 101(f) of the Act, 8 U.S.C. §1101(f), states, in pertinent part:

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was –

* * *

(6) one who has given false testimony for the purpose of obtaining any benefits under this Act[.]

The evidentiary guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are contained in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

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.

* * *

(v) *Good moral character*. Primary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit. The affidavit should be accompanied by a local police

> clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. Self-petitioners who lived outside the United States during this time should submit a police clearance, criminal background check, or similar report issued by the appropriate authority in each foreign country in which he or she resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. If police clearances, criminal background checks, or similar reports are not available for some or all locations, the self-petitioner may include an explanation and submit other evidence with his or her affidavit. The Service will consider other credible evidence of good moral character, such as affidavits from responsible persons who can knowledgeably attest to the self-petitioner's good moral character.
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> * * *
>
> (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 in this case provides the following facts and procedural history. The petitioner is a native and citizen of Haiti who entered the United States on June 12, 1999 as a nonimmigrant visitor (B-2). On April 18, 2000, the Miami Asylum Office referred the petitioner's Form I-589, Request for Asylum, to the Miami Immigration Court and served the petitioner with a Notice to Appear for removal proceedings. On June 5, 2001, the immigration judge denied the petitioner's applications for asylum and withholding of removal and ordered the petitioner removed to Haiti. On August 2, 2003, the Board of Immigration Appeals affirmed the immigration judge's decision.

On August 27, 2004, the petitioner married F-A-[1], a U.S. citizen, in New York. F-A- subsequently filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf, which remains pending before the New York City Field Office. The petitioner filed this Form I-360 on April 25, 2007. On May 24, 2007, the director issued a Notice of Intent to Deny (NOID) the petition for failure to establish the petitioner's good moral character, her good-faith entry into the marriage and her request and eligibility for a bona fide marriage exemption from section 204(g) of the Act. The petitioner, through counsel, timely responded with additional evidence, which the director found insufficient to establish her eligibility. On October 16, 2007, the director denied the petition on the grounds cited in the NOID and counsel timely appealed.

On appeal, counsel claims that the director's determination that the petitioner lacked good moral

[1] Name withheld to protect individual's identity.

character was arbitrary and capricious and that the petitioner has submitted sufficient evidence that she entered into marriage with F-A- in good faith. We concur with the director's determinations. Counsel's claims and the new evidence submitted on appeal fail to overcome the grounds for denial. Beyond the director's decision, the petitioner also failed to establish that she was eligible for immediate relative classification based on her marriage to F-A-.

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 Maka v. INS*, 904 F.2d 1351, 1356 (9th Cir. 1990); *Mester Manufacturing Co. v. INS*, 900 F.2d 201, 203-04 (9th Cir. 1990).

Good Faith Entry into Marriage

The record contains the following evidence relevant to the petitioner's claim that she entered into marriage with her husband in good-faith:

- The petitioner's April 10, 2007 affidavit and her July 6, 2007 letter;
- Letters of the petitioner's friends, [redacted] and [redacted]
- Copy of the birth certificate of the petitioner's daughter, [redacted], dated September 30, 2003 and a copy of the birth certificate amended on August 17, 2006 to include the name of the petitioner's husband as the child's father (submitted on appeal); and
- Copies of photographs of the petitioner, her husband and other individuals at their wedding and their daughter's baptism.

In her affidavit, the petitioner stated that she met F-A- in September 2001 when she was looking for a larger apartment and her friend introduced her to F-A- who was planning to move out of his apartment. The petitioner reported that F-A- confirmed his intent to move, but then kept calling her, delaying his move and eventually indicated that he wanted her to live with him. The petitioner explained that she was hesitant, but finally agreed to move in with F-A- on September 28, 2002 after her sister spoke to him and told the petitioner that he seemed concerned for her and could help her. At the end of October 2002, the petitioner stated that she found out she was pregnant. On December 5, 2002, the petitioner reported that she left F-A- after an argument with him and his adult daughter. The petitioner and her children stayed with a friend until shortly after the baby was born and she and F-A- reconciled.

The petitioner explained that she gave F-A- $7,000 to help him with the down payment for a cooperative apartment, where they moved back in together on November 15, 2003. In July 2004, the petitioner obtained an order of protection against her husband, but explained that she later reconciled

[2] This individual's last name is illegible on his or her handwritten letter.

with him when he promised not to hurt her again and told her they belonged together for the sake of their daughter. The petitioner stated that she married her husband on August 27, 2004 and has remained with him, despite subsequent abuse.
In her letter submitted in response to the NOID, the petitioner reiterated that she "did not just jump into marriage with" her husband, but instead "spent a lot of time" with him before he convinced her to marry him. The petitioner asserted that she married F-A- because she loved him and believed the promises he made to her during their courtship.

The petitioner's friends, and both stated that they attended the baptism ceremony and party for the couple's daughter where they observed the petitioner and her husband happily dancing together. also recounted that the couple came to his home for a party, where he described the petitioner and her husband interacting as a happily married couple. The petitioner's other friend, stated that he or she attended a party for the couple's daughter where the petitioner and her husband were dancing together and appeared happy and in love.

Although no father is identified on the original birth certificate of the couple's daughter submitted below, on appeal, the petitioner submits a copy of the birth certificate amended on August 17, 2006, which identifies F-A- as the child's father. The photographs show the petitioner and her husband at their daughter's baptism in addition to their wedding. Although the petitioner submitted no other relevant evidence, she explained in her affidavit that her husband paid the bills for electricity and the mortgage while she gave him between $500 and $600 for the mortgage and paid for groceries and the children's necessities. The petitioner stated that her husband did not give her money and she indicated that they had no shared assets.

The preponderance of the relevant evidence demonstrates that the petitioner married her husband in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act. The director did not make a specific determination regarding the petitioner's eligibility under this criterion. To the extent that the director's decision may be read as making a negative finding under this requirement, that portion of his decision is hereby withdrawn.

Restriction on Petitions Based on Marriages Entered while in Proceedings and the Bona Fide Marriage Exception

The petitioner has not, however, met the higher burden of proof for the bona fide marriage exception to the bar against the approval of petitions based on marriages entered into while the alien spouse is in removal proceedings. The petitioner married F-A- while her removal proceedings remained pending.[3] In such a situation, section 204(g) of the Act, 8 U.S.C. § 1154(g), prescribes:

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[3] While the petitioner's removal order was finalized before her marriage, she remained in proceedings because she never left the United States in compliance with the order. *See* 8 C.F.R. § 204.2(a)(1)(iii).

> *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 by reason of a marriage which was entered into during the period [in which administrative or judicial proceedings are pending], until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.

The record does not indicate that the petitioner resided outside of the United States for two years after her marriage. Accordingly, section 204(g) of the Act bars approval of this petition unless the petitioner can establish eligibility for the bona fide marriage exemption at section 245(e) of the Act, 8 U.S.C. § 1255(e), which states:

> *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).
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> (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 or alien son or daughter. In accordance with the 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. § 245.1(c)(9)(v) states, in pertinent part:

> *Evidence to establish eligibility for the bona fide marriage exemption.* Section 204(g) of the Act provides that certain visa petitions based upon marriages entered into during deportation, exclusion or related judicial proceedings may be approved only if the petitioner provides clear and convincing evidence that the marriage is bona fide.

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 exception 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). *See also Pritchett v. I.N.S.*, 993 F.2d 80, 85 (5th Cir. 1993) (acknowledging "clear and convincing evidence" as an "exacting standard.") To demonstrate good faith entry into the qualifying relationship for a self-petition under section 204(a)(1)(A)(iii)(I)(aa) 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 credible evidence shall be considered. Section 204(a)(1)(J) of the Act, 8 U.S.C. § 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); 8 C.F.R. § 245.1(c)(9)(v). "Clear and convincing evidence" is a more stringent standard. *Arthur*, 20 I&N Dec. at 478.

While the petitioner established her good-faith entry into her marriage by a preponderance of the evidence under section 204(a)(1)(A)(iii)(I)(aa) of the Act, she has not provided clear and convincing evidence that her marriage is bona fide under the heightened standard of proof required by section 245(e)(3) of the Act. The testimony of the petitioner and her friends fails to provide sufficiently detailed and probative information regarding the petitioner's courtship, wedding, shared residence and experiences with her husband, apart from the abuse. Although she explained her lack of documentation of shared assets and submitted a few copied family photographs and the amended birth certificate of the couple's daughter, the petitioner did not submit any further evidence from third parties which the record indicates would be available to her. For example, although she stated that both her sister and her friend, [redacted] spoke to her husband and were aware of their relationship, the petitioner submitted no supporting statements from either of them. The petitioner also submitted no tax returns or employment documents indicating her marital status although she stated that she had been employed ever since she received work authorization based on her pending asylum application. These documents are not required, but provide examples of the type of evidence from third parties that would help meet the petitioner's burden of proof to establish the bona fides of her marriage to F-A-, with whom she had been involved for nearly six years at the time this petition was filed.

The petitioner has failed to demonstrate the bona fides of her marriage by clear and convincing evidence and section 204(g) of the Act consequently bars approval of this petition.

Eligibility for Immediate Relative Classification

Section 204(a)(1)(A)(iii)(II)(cc) of the Act requires a self-petitioner to demonstrate his or her eligibility for immediate relative classification based on his or her relationship to the U.S. citizen abuser. The regulation at 8 C.F.R. § 204.2(c)(1)(iv) explicates that such eligibility requires the self-petitioner to comply with, *inter alia*, section 204(g) of the Act. As discussed above, the petitioner here has failed to comply with section 204(g) of the Act. She is consequently ineligible for immediate relative classification based on her marriage to F-A- and is ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act for this additional reason.

Good Moral Character

The petitioner has also failed to establish her good moral character because she did not submit required evidence and gave false testimony to obtain an immigration benefit.
The regulation at 8 C.F.R. § 204.2(c)(2)(v) prescribes that "[p]rimary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit." The petitioner did not discuss her moral character in her affidavit or letter submitted below and submits no further statement on appeal. Accordingly, the petitioner has failed to submit requisite primary evidence of her good moral character.

We also concur with the director's determination that the petitioner provided false testimony before the immigration judge regarding her asylum application. The Board of Immigration Appeals affirmed the immigration judge's decision in which she discussed over 13 specific discrepancies in the petitioner's testimony, which conflicted with evidence of the country conditions in Haiti, other documentation in the record and the petitioner's own prior testimony and statements on her Form I-589. In response to the NOID, counsel asserted that the petitioner was never given the opportunity to explain the inconsistencies. Counsel is mistaken. The immigration judge repeatedly referenced the petitioner's inability to explain contradictions upon direct and cross-examination.

Counsel further asserted that the immigration judge failed to make specific findings that the petitioner deliberately fabricated material elements of her asylum claim, as required for a determination that an alien's asylum claim is frivolous. Counsel relies on the Board's decision in *In re Y-L-*, 24 I&N Dec. 151 (BIA 2007). That case articulated standards for determining the frivolousness of an asylum application and is inapposite to the issue of the petitioner's moral character. The immigration judge specifically noted that the petitioner had not been given the requisite warnings regarding the consequences of filing a frivolous asylum application and so she did not make such a finding. Nonetheless, the immigration judge specifically concluded that the petitioner "testified in a false manner under oath."

A finding that an alien's testimony lacked credibility is not alone sufficient to conclude that the alien has given false testimony under section 101(f) of the Act. *See Rodriguez-Gutierrez v. I.N.S.*, 59 F.3d 504, 507 (5th Cir. 1995) (explaining that false testimony requires knowingly giving false information with an intent to deceive). However, in this case, the immigration judge cited over 13 discrepancies both within the petitioner's testimony and between her testimony and evidence of Haitian country conditions and other documents in the record. The numerous inconsistencies, discrepancies and contradictions provided substantial evidence to support the immigration judge's conclusion that the petitioner had given false testimony for the purpose of obtaining asylum in the United States. *See Akinwande v. Ashcroft*, 380 F.3d 517, 523 (1st Cir. 2004) (immigration judge's finding of false testimony supported by inconsistencies in the alien's own testimony coupled with contradictions between his testimony and that of another, credible witness).

Counsel further claims that the petitioner's testimony before the immigration judge cannot bar a finding of her good moral character because the hearing occurred nearly six years before this petition was filed,

which is outside of the period during which the petitioner is required to establish her good moral character. Counsel is again misguided. Although the regulation at 8 C.F.R. § 204.2(c)(2)(v) states that a self-petitioner should submit police clearances or state criminal background checks from every place of residence during the three years preceding the filing of the petition, the regulation and the statute do not bar an investigation of the self-petitioner's character beyond those three years when there is reason to believe that the self-petitioner lacked good moral character during that time. *See* Preamble to Interim Regulations, 61 Fed. Reg. 13061, 13066 (Mar. 26, 1996).

Although the petitioner submitted a criminal background check from the New York State Division of Criminal Justice Services, she failed to provide an affidavit addressing her moral character, as required by the regulation at 8 C.F.R. § 204.2(c)(2)(v). Section 101(f)(6) of the Act further bars a finding of her good moral character because the petitioner provided false testimony for the purpose of obtaining asylum in the United States. Consequently, the petitioner has not demonstrated that she is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

Conclusion

The petitioner failed to provide clear and convincing evidence of the bona fides of her marriage entered into while she was in removal proceedings. Section 204(g) of the Act consequently bars approval of this petition. The petitioner has also failed to demonstrate that she is eligible for immediate relative classification and that she is a person of good moral character. Accordingly, she is ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act for these additional reasons.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner here has failed to meet that burden and her petition must be denied. The petition will be denied for the reasons stated above, with each considered an independent and alternative basis for denial.

ORDER: The appeal is dismissed.