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U.S. Citizenship
and Immigration
Services

B4



FILE:

EAC 06 098 52310

Office: VERMONT SERVICE CENTER

Date: **FEB 02 2009**

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)

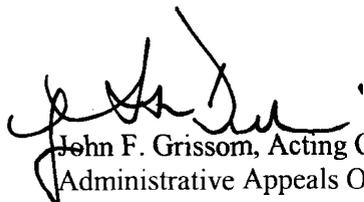
ON BEHALF OF PETITIONER:



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.

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 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 resided with her former husband during their marriage.

On appeal, counsel submits a brief and copies of legacy Immigration and Naturalization Service (INS) policy memoranda.

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).

An alien who has divorced a United States citizen may still self-petition under this provision of the Act if the alien demonstrates "a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse." Section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc).

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:

(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.

The evidentiary guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are further explicated 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.

* * *

(iii) *Residence.* One or more documents may be submitted showing that the self-petitioner and the abuser have resided together Employment records, utility receipts, school records, hospital or medical records, birth certificates of children . . . , deeds, mortgages, rental records, insurance policies, affidavits or any other type of relevant credible evidence of residency may be submitted.

The record in this case provides the following pertinent facts and procedural history. The petitioner is a native and citizen of Jamaica who entered the United States (U.S.) on March 21, 2001 as a nonimmigrant visitor (B-2). On July 25, 2003, the petitioner married G-C-¹, a U.S. citizen. On March 9, 2005, G-C- obtained a default judgment of divorce against the petitioner.² The petitioner subsequently obtained an order vacating the default judgment and the court entered a dual judgment of divorce based on the former couple's 18-month separation on October 4, 2005.³

The petitioner filed this Form I-360 on February 8, 2006 based on her relationship with G-C-. The director subsequently issued a Request for Evidence (RFE) of, *inter alia*, the petitioner's residence with G-C- after their marriage. The petitioner, through counsel, requested additional time to respond. On August 7, 2006, the director issued a Notice of Intent to Deny (NOID) the petition for, *inter alia*, failure to establish the requisite residence with her former spouse. The NOID acknowledged the petitioner's request for additional time and granted the petitioner 60 days to respond to the NOID. On August 24, 2006, the petitioner, through counsel, submitted additional evidence, which the director found insufficient to establish the petitioner's eligibility. On October 31, 2006, the director denied the petition for failure to establish joint residency after marriage. The petitioner, through counsel, timely appealed.

On appeal, counsel claims that the petitioner and her husband did reside together after their marriage. Counsel further asserts that the statute and regulations do not require joint residency after marriage, but merely mandate residence with the abuser during some period in the past. We agree with the

¹ Name withheld to protect individual's identity.

Superior Court of New Jersey, Essex County Chancery Division, Docket No. [REDACTED]
Superior Court of New Jersey, Essex County Chancery Division, Docket No. [REDACTED] Order
(vacating default judgment of divorce) (June 24, 2005) and Dual Judgment of Divorce (Oct. 4, 2005).

director's determination. Contrary to counsel's assertion, the plain language of the statute requires residence with the abuser during the marriage.

The Statutory Language Clearly Requires Residence During the Marriage

Section 204(a)(1)(A)(iii)(II)(dd) of the Act requires a self-petitioner to be a person "who has resided with the alien's spouse or intended spouse." On appeal, counsel claims that the plain language of this provision "does not require battered spouses to reside with their abusers during any particular period, nor does it specifically limit cohabitation to periods 'during the marriage.'" Counsel asserts that if Congress had meant to require residence during the marriage, it would have used the words "during the marriage" for the residence requirement as it does for battery or extreme cruelty at section 204(a)(1)(A)(iii)(I)(bb) of the Act, which states: "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." Counsel argues that if the use of the word "spouse" in the residence requirement mandated residence during the marriage, then the same would be true of the abuse requirement, which would render the words "during the marriage" in that subsection to be superfluous.

Contrary to counsel's assertion, the plain language of the residence requirement mandates that the self-petitioner have resided with the abuser during the marriage (or the qualifying intended marriage). Counsel, in essence, asserts that the word "spouse" in the residence requirement refers to the abuser and that residence with the abuser outside of the marriage or qualifying intended marriage is sufficient. The history of the relevant amendments to the statute clearly forestalls that interpretation. The self-petitioning provisions were first enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (Sept. 13, 1994) (VAWA 1994). Section 40701 of Subtitle G of that legislation amended section 204(a)(1) of the Act by renumbering the subsections and adding, in pertinent part:

(iii) An alien *who is the spouse of a citizen of the United States*, who is a person of good moral character, who is eligible to be classified as an immediate relative under section 201(b)(2)(A)(i), *and who has resided in the United States with the alien's spouse* may file a petition with the Attorney General under this subparagraph for classification of the alien (and any child of the alien if such a child has not been classified under clause (iv)) under such section if the alien demonstrates to the Attorney General that—

(I) the alien is residing in the United States, the marriage between the alien and the spouse was entered into in good faith by the alien, and during the marriage the alien or a child of the alien has been battered by or has been the subject of extreme cruelty perpetrated by the alien's spouse; and

(II) the alien is a person whose deportation, in the opinion of the Attorney General, would result in extreme hardship to the alien or a child of the alien.

Pub. L. No. 103-322, § 40701 (1994) (codified at 8 U.S.C. § 1154(a)(1)(A) (1995)) (emphasis added). Upon their enactment in 1994, the self-petitioning provisions required marriage to the abusive U.S. citizen or lawful permanent resident at the time of filing. Consequently, the words “has resided with the alien’s spouse” clearly required residence with the abuser during the qualifying marriage.

The 2000 amendments to the self-petitioning provisions further show that the statute does not encompass joint residence outside of the marriage. The Battered Immigrant Women Protection Act of 2000, Title V of the Victims of Trafficking and Violence Protection Act of 2000 (VAWA 2000), amended section 204(a)(1) of the Act to extend eligibility to, *inter alia*: aliens whose marriage was invalid due to the abuser’s bigamy, aliens whose U.S. citizen spouse had died within two years prior to filing the self-petition, aliens who had divorced the abuser within the past two years if the divorce was connected to the abuse and aliens whose abuser had lost permanent resident status or lost or renounced citizenship within the past two years related to an incident of domestic violence. Pub. L. No. 106-386, § 1503(b), (c) (Oct. 28, 2000) (codified at 8 U.S.C. § 1154(a)(1)(A)(iii), (a)(1)(B)(ii)).

While expanding the definition of a qualifying relationship, VAWA 2000 did not alter the requirement that the self-petitioner have resided with the abuser during the marriage or the qualifying intended marriage. Rather, VAWA 2000 amended the residence requirement to clarify that the joint residence must have been either with the alien’s “spouse” or “intended spouse.” The amendment reordered the eligibility requirements and changed the relevant residence from that of “[a]n alien who is the spouse of a citizen of the United States . . . and who has resided in the United States with the alien’s spouse” (prior section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A) (1995)) to that of an alien “who has resided with the alien’s spouse or intended spouse” (section 204(a)(1)(A)(iii)(II)(dd) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(dd)). The addition of “intended spouse” accounted for the bigamy provision, but still required that the residence occur during the marriage or the qualifying intended marriage. Notably, the VAWA 2000 amendments did not change the residence requirement to encompass residence with the abuser as a “former spouse.” Hence, it is clear that residence during the marriage was still required for aliens who were no longer married to their abusers at the time of filing.

Counsel cites two legacy INS policy memoranda issued after VAWA 2000 in support of her interpretation. The memoranda address the amended provisions expanding the definition of a qualifying relationship: divorce within two years of filing and the bigamy provision. Both memoranda note that apart from the qualifying relationship, the self-petitioner must also demonstrate, *inter alia*, that he or she “resided with the abuser at some point.” Neither memorandum specifically addresses the residency requirement and the memoranda’s rephrasing of the residence requirement does not supercede the statute or indicate that USCIS’ policy is to interpret the residence provision to include *any* residence with the abuser, even that outside of the marriage or the qualifying intended marriage. To date, USCIS has issued no policy memorandum regarding the residence requirement.

Counsel’s interpretation of the regulations is also misguided. The regulation at 8 C.F.R. § 204.2(c)(1)(i)(D) states that the self-petitioner must establish that he or she “[h]as resided in the

United States with the citizen or lawful permanent resident spouse” as a basic eligibility requirement. Although the regulation at 8 C.F.R. §§ 204.2(c)(1)(v), 204.2(c)(2)(iii) references residence with “the abuser,” those provisions do not expand the residence requirement to include residence outside of the marriage or the qualifying intended marriage. To interpret the regulation otherwise would ignore the history of the statute and the promulgation of the regulation. The regulation at 8 C.F.R. § 204.2(c) is an interim rule that became effective upon publication on March 26, 1996. The regulation implemented VAWA 1994 and under that statute, an alien was required to be married to the abuser at the time of filing. Hence, there was no way that the language of the statute in 1996 – “who has resided in the United States with the alien’s spouse” – could encompass residence outside of the marriage. We note that USCIS has not yet issued a final rule encompassing all of the post-1994 amendments to the self-petitioning provisions.

Finally, counsel contends that requiring residence during the marriage “undermines the remedial purpose of VAWA and Congressional intent.” Statutory construction begins with the language of the statute. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). Where the statutory language is clear, the inquiry ends and there is no need to examine congressional intent. *Id.* See also *Matter of W-F-*, 21 I&N Dec. 503, 506 (BIA 1996). As discussed above, the statute requires the self-petitioner to have “resided with the alien’s spouse or intended spouse.” The language of the statute is clear: the use of the words “spouse” and “intended spouse” show that the joint residence must have occurred during the marriage or the relationship intended to be a marriage, but rendered invalid by the abuser’s bigamy. Residence outside of the marriage or intended marriage will not qualify.⁴

Even if the statutory language was unclear, as discussed above, the statutory history shows that residence during the marriage (or qualifying relationship) has been an independent requirement since the self-petitioning provisions were first enacted in 1994. Counsel nonetheless asserts that requiring the petitioner to establish residence during the marriage would sanction the idea that she should endure further harm in order to establish her eligibility and would violate congressional intent that the VAWA self-petitioning provisions allow abused immigrant women to leave their abusers without fearing deportation. In support of her position, however, counsel cites the House Report for VAWA 1994, which required a self-petitioner to be married at the time of filing and have resided with his or her spouse.

In VAWA 2000, Congress explicitly modified the residence provision to require residence with the “spouse” or “intended spouse.” Congress did not extend residence to that with the alien’s “former spouse” or person the alien intended to marry, outside of the specific exception for the abuser’s bigamy.

⁴ In her August 18, 2006 letter submitted in response to the RFE and NOID, counsel claimed that the words “intended spouse” as used in section 204(a)(1)(A)(iii)(II)(dd) encompassed pre-marital relationships. As noted by the director, the term “intended spouse” refers only to a U.S. citizen who the self-petitioner believed she had married, but who committed bigamy, as explicated at section 204(a)(1)(A)(iii)(II)(aa)(BB) of the Act. Counsel does not raise this claim on appeal.

The fact that Congress preserved the requirement of residence during the marriage or qualifying intended marriage clearly did not violate the stated purposes of VAWA 2000 to:

- (1) remove barriers to criminal prosecutions of persons who commit acts of battery or extreme cruelty against immigrant women and children; and (2) to offer protection against domestic violence occurring in family and intimate relationships that are covered in State and tribal protection orders, domestic violence, and family law statutes.

VAWA 2000 at § 1502(b). To the contrary, the amendment of the residence requirement to include residence with the “intended spouse” furthered congressional intent to expand “access to the immigration protections of the Violence Against Women Act of 1994.” *Id.* at § 1502(a)(3). The fact that VAWA 2000 did not further expand access to aliens who only resided with their abuser outside of their marriage or qualifying intended marriage does not show that the statutory requirement violates congressional intent. Furthermore, subsequent amendment of the self-petitioning provisions has left the residence requirement intact. *See* Violence Against Women And Department Of Justice Reauthorization Act Of 2005, Subtitle B, §§ 811-17, Pub. L. No. 109-162 (Jan. 5, 2006).

The statutory language of the residence requirement is clear. Section 204(a)(1)(A)(iii)(II)(dd) of the Act requires the self-petitioner to show that he or she “has resided with the alien’s spouse or intended spouse.” The statute and regulations do not encompass residence outside of the marriage or qualifying intended marriage. Even if the statutory language were unclear, the history of the self-petitioning provisions negates counsel’s interpretation. Since their enactment in 1994 and through two major subsequent amendments, the self-petitioning provisions have retained the requirement that the self-petitioner demonstrate residence with the abuser during the marriage or the qualifying intended marriage.

The Petitioner Has Not Demonstrated That She Lived With Her Former Spouse During Their Marriage

On the Form I-360, the petitioner stated that she lived with her former husband from March 2001 to March 2002 and again from June 2002 until December 2002, but did not list any periods of joint residence after the former couple’s marriage on July 25, 2003. The petitioner also stated that she last lived with her former husband in “October 2001” in an apartment on [REDACTED] in New Jersey. In her January 29, 2006 affidavit, the petitioner explained that after their marriage, her former husband reverted back to his abusive behavior and they “never moved in together again. We remained in our separate apartments and our marriage quickly started to deteriorate.” However, in response to the RFE and NOID requesting evidence of the petitioner’s residence with her former husband during their marriage, the petitioner stated, in her June 16, 2006 affidavit, that after their marriage, “[We] still had our separate apartments but practically, we were living together. We would live as a married couple at both apartments – always staying together at one apartment or the other. We planned to obtain new joint housing.” The petitioner does not explain the contradiction between her first affidavit in which she clearly stated that she did not live with her former husband after their marriage and her second affidavit in which she asserts that she did. The petitioner also does not describe the former

couple's allegedly marital residences in any probative detail. Rather, the petitioner explains that two months after their marriage, she permanently separated from her husband due to his abuse.

In response to the RFE and NOID, the petitioner submitted letters from her relatives and friends, which all fail to provide probative testimony regarding the former couple's purportedly joint residence during their marriage. The petitioner's mother, [REDACTED], states that the former couple "shared each others apartment with the discussed plan for [the petitioner's former husband] to move into [the petitioner's] place which was more convenient for their little family," yet [REDACTED] indicates that she was in Jamaica and never visited the former couple during this time. The petitioner's sister and brother also state that the former couple had "their own apartments which they mutually shared" and that the petitioner's former spouse "had agreed to leave his apartment to reside in [the petitioner's] apartment, because it was bigger and already set up for the baby." However, the petitioner's siblings indicate that they were in the United Kingdom and never visited the former couple at this time, but only learned of the allegedly joint residence after the former couple had separated. The petitioner's friend, [REDACTED], states that he has "always kept in touch via telephone" with the petitioner and her former husband and "occasionally have visited with them where ever [sic] they lived together while on business to New York." [REDACTED] does not describe any particular visit that he made to the former couple after their marriage and provides no further, relevant information.

In response to the RFE and NOID, counsel asserts that after their marriage, although the petitioner and her former husband "still had two leases, they were looking for new housing together and functionally resided together." As discussed above, the relevant evidence does not establish that the petitioner and her former husband resided together during their marriage. While they may have "stay[ed] together at one apartment or the other" and "planned to obtain new joint housing," as the petitioner asserts in her second affidavit, the statute requires more than mutual visits and an intent to reside together in the future.

Section 101(a)(33) of the Act prescribes that, as used in the Act: "The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33). This definition represents a codification of the Supreme Court's holding in *Savorgnan v. United States*, in which the Court determined that, in contrast to domicile or permanent residence, intent is not material to establish actual residence, principal dwelling place, or place of abode. *Savorgnan v. United States*, 338 U.S. 491, 504-06 (1950). The preamble to the interim rule regarding the self-petitioning provisions cited section 101(a)(33) of the Act as the binding definition of "residence" and further clarified that "[a] self-petitioner cannot meet the residency requirements by merely . . . visiting the abuser's home in the United States while continuing to maintain a general place of abode or principal dwelling place elsewhere." 61 Fed. Reg. 13061, 13065 (Mar. 26, 1996).

In this case, the record shows that the petitioner maintained her own principal dwelling place apart from her former husband's apartment during their marriage. The petitioner also indicates that she was the primary caregiver to the former couple's child during this time and the letters of her mother

and siblings state that her apartment was furnished for the toddler. The petitioner does not explain how, if she was primarily responsible for her son, she was able to reside with her former husband “at one apartment or the other,” as she asserts in her second affidavit.

While the relevant evidence indicates that the petitioner may have resided with her former spouse prior to their marriage and intended to live with him after their marriage, it does not demonstrate that the petitioner and her former spouse actually resided together during their marriage, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act. The petitioner is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act and her 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.