

PUBLIC COPY

U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. 3000
Washington, DC 20529-2090

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

By



FILE:



Office: VERMONT SERVICE CENTER

Date: FEB 25 2009

EAC 06 163 50452

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)

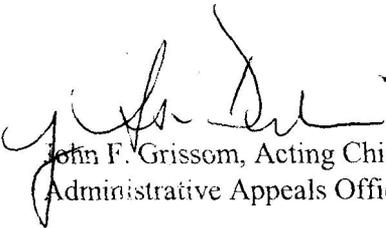
ON BEHALF OF PETITIONER:



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 entered into marriage with her husband in good faith.

On appeal, counsel submits a brief and additional evidence.

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:

(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 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.

* * *

(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 pertinent facts and procedural history. The petitioner is a native and citizen of Mexico who states on the Form I-360 that she entered the United States (U.S.) in February 2004. On June 17, 2005, the petitioner was issued a Notice to Appear for removal proceedings charging her as an alien in the United States without a valid entry document. On June 28, 2005, the petitioner married A-L-¹, a U.S. citizen, in New Mexico. A-L- subsequently filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf, which was approved on December 9, 2005.

The petitioner filed this Form I-360 on May 4, 2006. On July 11, 2006 the El Paso, Texas immigration court terminated the removal proceedings against the petitioner without prejudice because the petitioner had filed the Form I-360 and received a notice of prima facie eligibility. On October 12, 2006, the director issued a Request for Evidence (RFE) of, *inter alia*, the petitioner's entry into the marriage in good faith. The petitioner responded to the RFE with additional evidence which the director found insufficient to establish the requisite good faith. On January 25, 2007, the director issued a Notice of Intent to Deny (NOID) the petition for lack of the requisite good faith in entering the marriage. The petitioner responded to the NOID with further evidence, which the director found insufficient to demonstrate her eligibility. The director denied the petition on the ground cited in the NOID and counsel timely appealed.

¹ Name withheld to protect individual's identity.

On appeal, counsel claims that the approval of A-L-'s Form I-130 petition was based on U.S. Citizenship and Immigration Services' (USCIS') determination that A-L- had submitted clear and convincing evidence that their marriage was made in good faith pursuant to section 245(e) of the Act, 8 U.S.C. § 1255(e). Counsel further asserts that the approval of A-L-'s Form I-130 petition is also sufficient proof that the petitioner entered into the marriage in good faith. Counsel's assertions are not convincing. We concur with the determination of the director. Beyond the decision of the director, the petitioner has also failed to establish that she resided with her husband and that she qualifies for the bonafide marriage exemption from the bar to approval of her petition at section 204(g) of the Act, 8 U.S.C. § 1154(g).

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).

Entry into the Marriage in Good Faith

The record contains the following evidence relevant to the petitioner's claim of entering into marriage with A-L- in good faith:

- The petitioner's undated statement;
- The undated statements of the petitioner's daughters, [REDACTED] and [REDACTED];
- Letters from the petitioner's friends, [REDACTED], and [REDACTED];
- November 25, 2005 letter of the petitioner's husband (submitted by the petitioner);
- July 12, 2005 letter of the petitioner's sister-in-law, [REDACTED];
- Copy of a wedding card with a handwritten message to the petitioner and her husband; [REDACTED]
- September 26, 2005 notice addressed to the petitioner individually at a residence on [REDACTED] in Alamogordo, New Mexico;
- September 9, 2005 electricity bill addressed to the petitioner's husband at the same address;
- Copy of an unsigned joint bank account application dated July 18, 2005 and listing the [REDACTED] residence as the former couple's address; and
- Copies of undated photographs of the petitioner and her husband on their wedding day and one or two other unidentified occasions.

In their undated statements, the petitioner and her daughter [REDACTED] only discuss the abuse of the petitioner's husband. They do not describe how the petitioner met her husband, their courtship, wedding, marital relationship, shared residences and experiences (apart from the abuse). The petitioner's daughter [REDACTED] briefly states that A-L- and her mother "have been seeing each other for a

while.” She states that A-L- seemed like a great guy at the beginning, but then he changed. [REDACTED] does not discuss how the petitioner met her husband, their courtship, wedding, marital relationship, and shared residences and experiences (apart from the abuse). The statements of the petitioner and her daughters are insufficient to establish that the petitioner entered into the marriage in good faith.

The statements of the petitioner’s friends, husband and sister-in-law also fail to establish her claim. [REDACTED] simply states that the petitioner was dating A-L- when they met. Ms. [REDACTED] and the petitioner’s sister-in-law merely state that the petitioner was dating A-L- since the Fall of 2003 and that the former couple married in June 2005. Mr. [REDACTED] only notes that he has known the petitioner and her husband since 1996. Ms. [REDACTED] states that the petitioner and her husband are a “wonderful, honest, friendly and respectful married couple,” but she provides no further, detailed information. The letter of the petitioner’s husband reflects his feelings for the petitioner, but is not evidence of the petitioner’s own intentions in entering their marriage.

The remaining, relevant evidence is insufficient to demonstrate the petitioner’s good faith in marrying her husband. The single wedding card is undated and the brief inscription provides no insight into the petitioner’s feelings, intentions or behavior at the time of her marriage. The notice and electricity bill are addressed to the petitioner and her husband individually and the copy of the bank account application is incomplete, unsigned and unaccompanied by evidence that the account was actually opened and used by both the petitioner and her husband. The relevant evidence fails to demonstrate that the petitioner and her husband shared financial assets and liabilities or other, similar joint responsibilities. Finally, the photographs show that the petitioner and her husband were pictured together at their wedding and on one or two other, unspecified occasions, but the photographs alone do not demonstrate that the petitioner entered into their marriage in good faith.

Contrary to counsel’s assertion, the approval of A-L-’s Form I-130 petition does not demonstrate the petitioner’s good faith in entering their marriage. While approval of a Form I-130 petition may establish eligibility for immediate relative classification, the approved petition alone may not suffice to show that the alien beneficiary is entitled to related immigration benefits. *See Agyeman v. I.N.S.*, 296 F.3d 871, 878-79 (9th Cir. 2002). Although relevant, the Form I-130 adjudication under section 204(a)(1)(A)(i) of the Act, 8 U.S.C. § 1154(a)(1)(A)(i), is not binding on the determination of the petitioner’s good faith pursuant to section 204(a)(1)(A)(iii)(I)(aa) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(I)(aa). In this case, the record shows that copies of the same evidence submitted by A-L- with his Form I-130 petition were also submitted by the petitioner with her Form I-360, although the petitioner submitted additional evidence with her Form I-360. The fact that A-L-’s petition was approved based on less evidence than that which we have found to be insufficient here does not demonstrate that the petitioner entered into the marriage in good faith.

Considered in the aggregate, the relevant evidence fails to demonstrate that the petitioner entered into marriage with A-L- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Section 204(g) of the Act

Beyond the director's decision, section 204(g) of the Act also bars the approval of this petition. The record shows that the petitioner married A-L- while removal proceedings were pending against her. Consequently, she is subject to section 204(g) of the Act, which states:

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 to A-L-. The record also does not indicate that the petitioner has satisfied the bona fide marriage exception to section 204(g) of the Act, pursuant to 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 Admissibility or Deportation Proceedings; Bona Fide Marriage Exception. –

- (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).
- (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 exemption 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. 8 C.F.R. § 204.2(c)(2)(i); *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)(9)(v). “Clear and convincing evidence” is a more stringent standard. *Arthur*, 20 I&N Dec. at 478.

As the petitioner has failed to establish that she entered into marriage with A-L- in good faith by a preponderance of the evidence, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act, she has also failed to demonstrate that she qualifies for the bona fide marriage exemption from section 204(g) of the Act under the heightened standard of proof required by section 245(e) of the Act. While counsel suggests that the petitioner qualifies for the bona fide marriage exemption because A-L-'s Form I-130 petition was approved, the prior adjudication of A-L-'s petition is not binding on the determination of the petitioner's eligibility in these proceedings. Accordingly, section 204(g) of the Act also requires the denial of this petition.

Joint Residence

Beyond the decision of the director, the petitioner has also failed to establish that she resided with her husband. The evidence listed in the preceding section addressing good-faith entry into the marriage is also relevant to the petitioner's alleged residence with A-L-, with the addition of the Forms G-325A of the petitioner and her husband signed on July 20, 2005 and submitted with A-L-'s Form I-130 petition.

On the Form I-360, the petitioner stated that she resided with her husband from June 2005 until May 2006 and that they last lived together at the residence on [REDACTED] in Alamogordo, New

Mexico. In her statement, the petitioner does not discuss her residence with her husband. The petitioner's daughters, sister-in-law and friends also do not mention the former couple's residence. In his 2005 letter, the petitioner's husband states that he works in Texas during the week and stays with the petitioner and her daughter on the weekends. The petitioner's husband explains that he is looking for a job in Alamogordo because he and the petitioner want to live there together.

Although on the Form I-360 the petitioner lists "[REDACTED]" as the name of the street on which she resided with her husband, the documents containing this address list the name as "[REDACTED]". The only documents that list "[REDACTED]" as the address of both the petitioner and her husband are their Forms G-325A, signed on July 20, 2005. The partial and unsigned copy of the July 18, 2005 bank account application and the September 2005 notice and bill addressed to the petitioner and her husband individually spell the street as "[REDACTED]". The wedding card is not accompanied by a postmarked envelope and the inscription contains no indication that the petitioner and her husband were residing together. Although three of the photographs appear to have been taken in a residence, the pictures are undated and unidentified.

The petitioner did not discuss her residence with her husband and the statements of her daughter, sister-in-law and friends also contain no reference to their living arrangements. In addition, the petitioner's husband's 2005 letter indicates that he worked in Texas and only stayed with the petitioner on the weekends, although they intended to live together in New Mexico. Residence is a person's "principal, actual dwelling place in fact, without regard to intent." Section 101(a)(33) of the Act, 8 U.S.C. § 1101(a)(33). A-L-'s letter indicates that the petitioner did not, in fact, actually reside with her husband. Moreover, the only jointly addressed document in the record is the impartial copy of an undated bank account application. The petitioner spells the name of the street in this address differently than how it is listed on the bank account application and she submitted no evidence of bank statements from the account jointly mailed to the former couple at the purportedly shared residence. The preponderance of the relevant evidence fails to demonstrate that the petitioner resided with A-L-, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

The petitioner has not demonstrated that she entered into marriage with A-L- in good faith and resided with him. The petitioner is consequently ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act and her petition must be denied. Section 204(g) of the Act further bars approval of this petition.

The petition will be denied for the above stated reasons, 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.