

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



By

FILE:



Office: VERMONT SERVICE CENTER

Date:

JAN - 2 2009

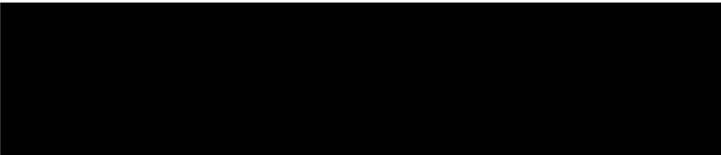
EAC 06 189 50470

IN RE:



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)

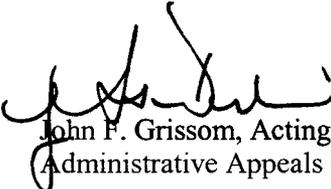
ON BEHALF OF PETITIONER:



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 service center director 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 on the basis of his determination that the petitioner had failed to establish: (1) that he had a qualifying relationship with a United States citizen or lawful permanent resident; (2) that he had resided with his wife; (3) that he had been subjected to battery or extreme cruelty; and (4) that he had entered into marriage in good faith.

Counsel submitted a timely appeal on May 10, 2007.

Section 201(b)(2)(A)(i) of the Act states, in pertinent part, the following:

Immediate relatives.—For purposes of this subsection, the term “immediate relatives” means the children, spouses, and parents of a citizen of the United States. . . .

Section 204(a)(1)(A)(iii) of the Act states, in pertinent part, the following:

- (I) An alien who is described in subclause (II) may file a petition with the [Secretary of Homeland Security] under this clause for classification of the alien (and any child of the alien) if the alien demonstrates to the [Secretary of Homeland Security] 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.
- (II) For purposes of subclause (I), an alien described in this subclause is an alien–
 - (aa) (AA) who is the spouse of a citizen of the United States;
 - (BB) who believed that he or she had married a citizen of the United States and with whom a marriage ceremony was actually performed and who otherwise meets any applicable requirements under this Act to establish the existence of and bona fides of a marriage, but whose marriage is not legitimate

solely because of the bigamy of such citizen of the United States; or

(CC) who was a bona fide spouse of a United States citizen within the past 2 years and –

(aaa) whose spouse died within the past 2 years;

(bbb) whose spouse lost or renounced citizenship status within the past 2 years related to an incident of domestic violence; or

(ccc) who 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;

(bb) who is a person of good moral character;

(cc) who is eligible to be classified as an immediate relative under section 201(b)(2)(A)(i) or who would have been so classified but for the bigamy of the citizen of the United States that the alien intended to marry; and

(dd) who has resided with the alien's spouse or intended spouse.

Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J) states, in pertinent part, the following:

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:

(i) *Basic eligibility requirements.* A spouse may file a self-petition under section 204(a)(1)(A)(iii) . . . of the Act for his or her classification as an immediate relative . . . if he or she:

(B) Is eligible for immigrant classification under section 201(b)(2)(A)(i) . . . of the Act based on that relationship [to the U.S. citizen spouse].

* * *

(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.

(vi) *Battery or extreme cruelty.* For the purpose of this chapter, the phrase “was battered by or was the subject of extreme cruelty” includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence. The qualifying abuse must have been committed by the citizen . . . spouse, must have been perpetrated against the self-petitioner . . . and must have taken place during the self-petitioner’s marriage to the abuser.

* * *

(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.

The evidentiary guidelines for a self-petition filed under section 204(a)(1)(A)(iii) 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.

* * *

- (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.
- (iv) *Abuse.* Evidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel. Persons who have obtained an order of protection against the abuser or have taken other legal steps to end the abuse are strongly encouraged to submit copies of the relating legal documents. Evidence that the abuse victim sought safe-haven in a battered women's shelter or similar

refuge may be relevant, as may a combination of documents such as a photograph of the visibly injured self-petitioner supported by affidavits. Other forms of credible relevant evidence will also be considered. Documentary proof of non-qualifying abuses may only be used to establish a pattern of abuse and violence and to support a claim that qualifying abuse also occurred.

- (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.

* * *

- (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 the Philippines who entered the United States as the K-1 nonimmigrant fiancé of J-G-,¹ a United States citizen, on October 31, 2005. The petitioner did not marry J-G-, and filed the instant Form I-360 on June 5, 2006. At part 3 of the Form I-360 the petitioner marked the box

¹ Name withheld to protect individual's identity.

indicating his marital status as “single,” and at part 7, section B of the Form I-360, where petitioners are instructed to provide the date and place of their marriage, the petitioner stated “N/A.”

The director issued a notice of intent to deny (NOID) the petition on November 17, 2006, which notified the petitioner of the deficiencies in the record and afforded him the opportunity to submit further evidence to establish that he had a qualifying relationship with a U.S. citizen; that he had resided with J-G-; that he had been subjected to battery and/or extreme cruelty by J-G-; and that the petitioner had married J-G- in good faith. Counsel responded to the NOID on January 16, 2007, and submitted additional evidence. After considering the evidence of record, including the response to the NOID, the director denied the petition on April 10, 2007. On appeal, counsel submits a brief.

Qualifying Relationship and Eligibility for Classification as an Immediate Relative

Counsel concedes that the petitioner never married J-G-. However, in his May 8, 2007 appellate brief, counsel asserts the following:

The language of the act does not require that an actual marriage ceremony be conducted in order for a petitioner to qualify as a battered spouse; only that the parties intended for the relationship to culminate in marriage. [The petitioner] falls within the category of intended spouse based on the fact that entered the United States as [J-G-'s] fiancée.

Counsel argues that both the Department of Homeland Security and the Department of State recognized the petitioner as J-G-'s fiancé; that the petitioner applied for a marriage license and made plans for a wedding; and cared for J-G-'s two children. Accordingly, counsel contends, both the petitioner and J-G- intended to be married.

However, counsel's interpretation of the statute is incorrect. Although sections 204(a)(1)(A)(iii)(I)(aa) and (bb) of the Act reference “the intent to marry the United States citizen” and the “relationship intended by the alien to be legally a marriage,” these clauses do not describe the qualifying relationship requisite to immigrant classification under this self-petitioning provision of the statute. Section 204(a)(1)(A)(iii)(I) of the Act specifically states that only an alien “described in subclause (II)” is eligible to file a self-petition. In the instant case, the pertinent provisions of subclause (II) describe an alien who is either “the spouse of a citizen of the United States” or believed that he or she had married a U.S. citizen with whom a marriage ceremony was actually performed, but whose marriage was invalid “solely because of the bigamy of such citizen of the United States.” Sections 204(a)(1)(A)(iii)(II)(aa)(AA) and (BB) of the Act, 8 U.S.C. §§ 1154(a)(1)(A)(iii)(II)(aa)(AA) and (BB). In this case, the petitioner's mere intent to marry his fiancé is insufficient to establish a qualifying relationship under section 204(a)(1)(A)(iii)(II)(aa) of the Act: he is neither the spouse of a U.S. citizen nor a party to a U.S. citizen's bigamy. Further, section 201(b)(2)(A)(i) of the Act specifically defines the term “immediate relative” as someone who is the child, spouse, or parent of a U.S. citizen. The petitioner is none of these.

The AAO concurs with the director's finding. The petitioner has not established that he has, or had, a qualifying spousal relationship with J-G-, his fiancé, because they were never married, and no marriage ceremony was actually performed. Aliens who have been abused by their U.S. citizen fiancés are not eligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act. The director, therefore, properly denied the petition on this ground.

Joint Residence

The record fails to establish the joint residence required by section 204(a)(1)(A)(iii)(II)(dd) of the Act. On the Form I-360, the petitioner stated that he resided with the petitioner between October 2005 and February 2006. In his November 17, 2006 NOID, the director requested evidence to establish that the petitioner and J-G- had lived together. In his January 12, 2007 response to the director's NOID, counsel submitted eleven photographs and four documents which, according to counsel, were sent to the petitioner's and J-G-'s "shared address."

However, the four documents that counsel submitted were not sent to the same address. The petitioner's two Northwest Airlines frequent flier miles account statements were sent to [REDACTED] in Philadelphia, Pennsylvania, the location the petitioner indicated was the last address he shared with J-G-, but the petitioner's correspondence from the Social Security Administration and [REDACTED] was sent to [REDACTED] in Philadelphia.

The AAO takes particular note of the correspondence from the Social Security Administration, which was postmarked January 20, 2006. As noted previously, the petitioner stated on the Form I-360 that he and J-G- shared a residence until February 2006. The petitioner also stated on the Form I-360 that the [REDACTED] address was the last address he shared with J-G-. As J-G- indicated on her Form G-325A that she has lived at that address since August 2002, a date prior to the commencement of the relationship between she and the petitioner, the record establishes that the [REDACTED] address was the couple's only shared address. If the petitioner lived with J-G- until February 2006 at that address, then it is unclear why the petitioner would have been receiving mail at another address. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

The petitioner has not established by a preponderance of the evidence that he resided with J-G-, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

Battery or Extreme Cruelty

The petitioner has failed to establish battery or extreme cruelty pursuant to section 204(a)(1)(A)(iii)(I)(bb) of the Act, because that provision only applies to individuals who have been battered or subjected to extreme cruelty by a U.S. citizen with whom they had a qualifying spousal relationship. As discussed in the preceding section, the petitioner did not have a qualifying relationship with J-G- because they were never married, J-G- did not commit bigamy, and no marriage ceremony was actually performed. The director, therefore, properly denied the petition on this ground.

Good Faith Entry into Marriage

As the petitioner never married J-G-, he is unable to demonstrate that he married her in good faith. The petitioner, therefore, has not demonstrated that she entered into marriage with her husband in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act. The director, therefore, properly denied the petition on this ground. For all of these reasons, the AAO concurs with the director's decision to deny the petition.

Good Moral Character

Beyond the decision of the director, the AAO finds that the petition may not be approved for another reason, as the petitioner has failed to establish that he is a person of good moral character. As noted previously, the primary evidence of the petitioner's good moral character is an affidavit from the petitioner, accompanied by a police clearance from each place the petitioner has resided for at least six months during the three-year period immediately preceding the filing of the petition. 8 C.F.R. § 204.2(c)(2)(v).

Although the record of proceeding contains a police certificate and an affidavit from the petitioner, the petitioner does not address his good moral character in his affidavit. Accordingly, he has not satisfied 8 C.F.R. § 204.2(c)(2)(v), as that regulation specifically states that the petitioner's own affidavit is the primary evidence of his good moral character. For this additional reason, the petition may not be approved.

Conclusion

The AAO concurs with the director's determination that the petitioner has failed to establish that he had a qualifying relationship with a United States citizen or lawful permanent resident; that he had resided with J-G-; that he had been subjected to battery or extreme cruelty; and that he had entered into marriage in good faith. Beyond the decision of the director, the AAO finds that the petitioner has failed to demonstrate that he is a person of good moral character. He is therefore ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), and the petition must be denied.

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).

Approval of the petition will be revoked and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

ORDER: The appeal is dismissed.