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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

B9

[REDACTED]

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date:

AUG 11 2010

IN RE:

[REDACTED]

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:

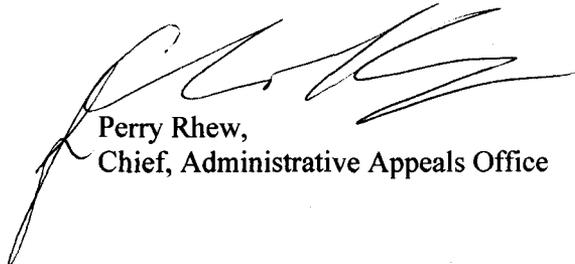
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be affirmed in part and withdrawn in part. The appeal will be dismissed. The petition will be denied.

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: (1) that the petitioner had not established his eligibility for immigrant classification based upon a qualifying relationship with a citizen of the United States because he and his former spouse divorced more than two years before the petition was filed; (2) that the petitioner failed to establish that he and his ex-wife had shared a joint residence; (3) that the petitioner failed to establish that he married his ex-wife in good faith; and (4) that section 204(g) of the Act, 8 U.S.C. § 1154(g), barred approval of this petition. On appeal, counsel submits a memorandum of law and additional testimonial 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)(A)(iii)(II)(aa) of the Act states, in pertinent part, that an individual who is no longer married to a citizen of the United States is eligible to self-petition under these provisions if he or she is an alien:

- (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. . . .

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].

* * *

(iv) *Eligibility for immigrant classification.* A self-petitioner is required to comply with the provisions of section . . . 204(g) of the Act. . . .

(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.

Section 204(g) of the Act states the following:

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.

Section 245(e) of the Act states, in pertinent part, the following:

Restriction on adjustment of status based on marriages entered while in admissibility or deportation proceedings; bona fide marriage exception. –

* * *

- (3) [S]ection 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, the following:

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.

The evidentiary standard and 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.

- (ii) *Relationship.* A self-petition file by a spouse must be accompanied by evidence of ... the relationship. Primary evidence of a marital relationship is a marriage certificate issued by civil authorities. . . .
- (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 petitioner is a citizen of Egypt who entered the United States as a nonimmigrant visitor on or around November 7, 1993. A Form I-862, Notice to Appear for removal proceedings, was issued to the petitioner on September 27, 2004. On December 22, 2004, he married [REDACTED]¹ a citizen of the United States. They divorced on September 21, 2007.

The petitioner filed the instant Form I-360 on December 10, 2007. The director issued a subsequent request for additional evidence (RFE) and notice of intent to deny (NOID) the petition to which the petitioner, through counsel, submitted timely responses. After considering the evidence of record, including the petitioner's responses to the RFE and NOID, the director denied the petition on October 20, 2009.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, the AAO withdraws the director's determination that the petitioner failed to establish a qualifying relationship with a citizen of the United States because he and his former wife divorced more than two years before the petition was filed. Beyond the director's decision, the AAO finds that the petitioner has not established his eligibility for immediate relative classification based on his relationship with his former wife. On appeal, the petitioner also fails to overcome the director's determinations that the petitioner failed to

¹ Name withheld to protect individual's identity.

demonstrate that he and his ex-wife shared a joint residence; that he married her in good faith; and that section 204(g) of the Act bars approval of the petition.

Qualifying Relationship and Corresponding Eligibility for Immediate Relative Classification

The director's determination that the petitioner failed to establish a qualifying relationship with his former wife was based on the petitioner's failure to submit evidence of the legal termination of his marriage, as requested by the director in the NOID. On appeal, the petitioner submits a judgment entry from the Cuyahoga County, Ohio Court of Common Pleas, Division of Domestic Relations, as evidence that he and [REDACTED] divorced on September 21, 2007, which was less than three months before the instant petition was filed.

As the petitioner filed the instant Form I-360 less than two years after his September 21, 2007 divorce from [REDACTED], the director's determination that the petitioner failed to establish a qualifying relationship pursuant to section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act was incorrect. The AAO, therefore, withdraws that portion of his decision.

Nonetheless, beyond the decision of the director,² the petitioner has failed to demonstrate that he is eligible for immigrant classification on the basis of such a relationship, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act.

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 will be discussed below, the petitioner here has failed to comply with section 204(g) of the Act, and he is consequently ineligible for immediate relative classification based on his former marriage to [REDACTED]. He is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act for this additional reason.

Joint Residence

The second issue before the AAO on appeal is whether the petitioner shared a joint residence with E-D-. On the Form I-360, the petitioner stated that he and [REDACTED] lived together from 2004 until 2006. In an undated statement, the petitioner stated that on the morning following their December 22, 2004 wedding, [REDACTED] told him that she would be moving to Florida and that she did so two

² 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); *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

weeks later. In his March 16, 2009 statement, the petitioner stated that [REDACTED] moved to Florida on January 15, 2005; that she returned for a three-day visit in March 2005; that he visited [REDACTED] in Florida in April 2005; that [REDACTED] returned for a one-month visit in July 2005; and that he visited [REDACTED] in Florida in December 2005. The petitioner stated that during his December 2005 visit to Florida, he and [REDACTED] decided to divorce.

In her November 30, 2009 statement, the petitioner's mother stated that [REDACTED] moved into the family home immediately after their wedding, and that "everything was fine" for a period of "about two months." She then described various forms of abuse that [REDACTED] inflicted upon the petitioner over the course of the following two months. After this four-month period of time (two months during which things were fine, and two months during which [REDACTED] was abusive), [REDACTED] moved to Florida. However, in an earlier, undated, statement, the petitioner's mother stated that [REDACTED] and the petitioner lived in her home together for longer than one year before "things changed" and [REDACTED] decided to move to Florida.

In his November 30, 2009 statement, the petitioner's brother stated that [REDACTED] and the petitioner lived in the family home for "a couple of months" after their wedding before [REDACTED] moved to Florida.

Although the record contains additional testimonial evidence that the couple lived together, that testimony did not contain dates or any other probative details. With regard to documentary evidence of a shared residence, the petitioner submitted what he claims to be a lease signed by him and [REDACTED]. That lease, which was dated October 20, 2004, was for a one-year term of residence beginning on October 1, 2004 and ending September 30, 2005.

The record, therefore, contains conflicting information regarding both the length and timeframe of the alleged joint residence. As noted, the petitioner stated on the Form I-360 that he began living with [REDACTED] in 2004, and in his March 16, 2009 statement he stated that she moved to Florida on January 15, 2005. However, in her November 30, 2009 statement, the petitioner's mother stated that the two began living together immediately after their wedding on December 22, 2004. The language of the residential lease allegedly signed by [REDACTED] and the petitioner indicates that they began living together in October 2004. The testimony of the petitioner's mother that [REDACTED] and the petitioner lived with her for longer than one year before [REDACTED] moved to Florida indicates that the two began living together, at the latest, in January 2004, and her alternate testimony that they lived together for four months before [REDACTED] moved to Florida indicated that the two began living together, at the latest, in September 2004. Finally, the testimony of the petitioner's brother that [REDACTED] and the petitioner lived together for "a couple of months" after their wedding before [REDACTED] moved to Florida indicates that [REDACTED] moved to Florida no earlier than February 2005, which does not match the January 15, 2005 date provided by the petitioner. The AAO finds that the inconsistencies and discrepancies contained in the testimony of the petitioner, his mother, and his brother undermines the probative value of their testimony with regard to the alleged joint residence of [REDACTED] and the petitioner, and the generalized nature of the remaining testimonial evidence of record lacks sufficient probative detail to establish that the couple jointly resided together.

Considered in the aggregate, the relevant evidence fails to demonstrate that the petitioner resided with [REDACTED], as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

Good Faith Entry into Marriage

The third issue before the AAO is whether the petitioner has established that he married [REDACTED] in good faith. The petitioner stated that he met [REDACTED] in the fall of 2000, during his senior year of high school. According to the petitioner, he was introduced to [REDACTED] by the daughter of his mother's friend. They dated for several years, and he proposed marriage in the spring of 2004.

The record also contains testimony from several of the petitioner's friends and family members who state, in general terms, that the petitioner and [REDACTED] began dating while in high school and that by the time of their wedding they had been dating for several years. With regard to documentary evidence, the petitioner submits the previously-discussed residential lease; several pictures from what appears to be the couple's wedding day; and copies of statements regarding the petitioner's checking account.

The AAO has reviewed the entire record and finds that, in sum, the relevant testimonial and documentary evidence fails to establish that the petitioner married [REDACTED] in good faith. The statements submitted by the petitioner and his affiants lack probative detail providing insight into the petitioner's intentions upon entering into the marriage. The previously discussed inconsistencies regarding both the length and timeframe of the couple's alleged joint residence undermine the value of the residential lease submitted by the petitioner as evidence of any shared financial obligation. The pictures of the couple's wedding day document that event, but do not establish the petitioner's good-faith entry into the marriage. There is also no evidence that [REDACTED] utilized, or even had access to, the checking account and the record lacks further evidence of any other shared financial or marital obligations. The petitioner has not overcome this ground for the director's denial on appeal. The petitioner has failed to establish that he entered into marriage with [REDACTED] in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Section 204(g) of the Act

The fourth issue before the AAO is whether section 204(g) of the Act further bars approval of this petition. Again, the petitioner and [REDACTED] were married on December 22, 2004, while the petitioner was in immigration proceedings.

As was set forth previously, the regulation at 8 C.F.R. § 204.2(c)(1)(iv) clarifies that a self-petitioner is required to comply with section 204(g) of the Act. The record does not indicate that the petitioner resided outside of the United States for two years after his 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.

As set forth above, the AAO has affirmed the director's determination that the petitioner failed to establish that he entered into marriage with ██████ in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act. 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 eligibility for 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). To demonstrate eligibility for immigrant classification under section 204(a)(1)(A)(iii) 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 relevant, credible evidence shall be considered. Sections 204(a)(1)(A)(iii)(I)(aa) and 204(a)(1)(J) of the Act, 8 U.S.C. §§ 1154(a)(1)(A)(iii)(I)(aa), 1154(a)(1)(J); *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 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); *Dielmann v. I.N.S.*, 34 F.3d 851, 853 (9th Cir. 1994). "Clear and convincing evidence" is a more stringent standard. *Matter of Arthur*, 20 I&N Dec. at 478. See *Pritchett v. I.N.S.*, 993 F.2d 80, 85 (5th Cir. 1993) (acknowledging "clear and convincing evidence" as an "exacting standard").

As the petitioner has failed to establish that he entered into marriage with E-D- in good faith by a preponderance of the evidence, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act, he has also failed to demonstrate that he qualifies for the bona fide marriage exemption under the heightened standard of proof required by section 245(e)(3) of the Act. Accordingly, the AAO agrees with the director's determination that section 204(g) of the Act mandates denial of this petition.

Conclusion

The petitioner has failed to establish that he is eligible for immediate relative classification based on his relationship with ██████ that he and ██████ shared a joint residence; that he married ██████ in good faith; and that section 204(g) of the Act does not bar approval of this petition. The petitioner, therefore, is 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 his petition must be denied. Accordingly, the AAO affirms the director's denial of the petition.

The petition will be denied 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 and the appeal will be dismissed.

ORDER: The director's October 20, 2009 decision is withdrawn in part and affirmed in part. The appeal is dismissed. The petition remains denied.