

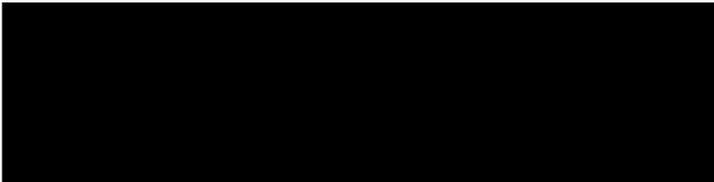
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B9

DATE: AUG 09 2011

OFFICE: [REDACTED]

FILE: [REDACTED]

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:

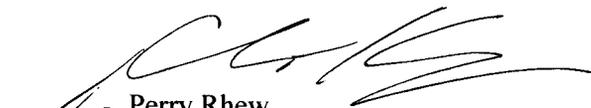


INSTRUCTIONS:

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 \$630. 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: Although the service center director initially approved the immigrant visa petition he subsequently issued a notice of intent to revoke (NOIR), and ultimately revoked, approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks immigrant classification under section 204(a)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien battered or subjected to extreme cruelty by a United States citizen.

The director revoked approval of the petition on the basis of his determination that the petitioner had failed to establish: (1) that he shared a joint residence with his former wife; and (2) that he married his former wife in good faith. On appeal, counsel submits a brief reasserting the petitioner's eligibility.

Applicable Law

Section 205 of the Act, 8 U.S.C. § 1155, states the following:

The Secretary of Homeland Security may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204. Such revocation shall be effective as of the date of approval of any such petition.

The regulation at 8 C.F.R. § 205.2(a) states, in pertinent part, the following:

Any Service officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in § 205.1 [for automatic revocation] when the necessity for the revocation comes to the attention of [U.S. Citizenship and Immigration Services].

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, 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:

(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 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.

* * *

(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.

Pertinent Facts and Procedural History

The petitioner, a citizen of [REDACTED] married M-H-¹ a citizen of the United States, on December 27, 2001. They divorced on December 5, 2003.² The petitioner filed the instant Form I-360 on July 2, 2002, and it was approved on September 29, 2003. The director issued a NOIR on July 7, 2010 and, finding the petitioner's response insufficient to overcome two of his proposed grounds for revocation, he revoked approval of the petition on September 9, 2010.

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, we find that the petitioner has failed to overcome the director's ground for revoking approval of this petition. Revocation of the approval of this petition was therefore proper pursuant to section 205 of the Act and 8 C.F.R. § 205.2(a).

Evidentiary Standard and Burden of Proof

Counsel raises the "any credible evidence" standard on appeal, and notes correctly that the director must consider any credible evidence when adjudicating the petition. However, counsel appears to have conflated the evidentiary standard set forth by section 204(a)(1)(J) of the Act with the petitioner's burden of proof. Section 204(a)(1)(J) of the Act requires U.S. Citizenship and Immigration Services (USCIS) to "consider any credible evidence relevant to the petition." *Id.* This mandate is reiterated in the regulation at 8 C.F.R. § 204.2(c)(2)(i). However, this mandate establishes an evidentiary standard, not a burden of proof. Accordingly, "[t]he determination of what evidence is credible and the weight to be given that evidence shall be within the [agency's] sole discretion." Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J); 8 C.F.R. § 204.2(c)(2)(i). In this case, as in all visa petition proceedings, the petitioner bears the burden of proof to establish his eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The mere submission of relevant evidence of the types listed in the regulation at 8 C.F.R. § 204.2(c)(2) will not necessarily meet the petitioner's burden of proof.

Joint Residence

The petitioner stated on the Form I-360 that he resided with M-H- from November 2001 until January 2002, and that the last address at which they lived together was located at [REDACTED]. His statements on the Form G-325A, Biographic Information, he signed on October 30, 2003 also indicated they lived at that address throughout the duration of the alleged period of joint residence.

¹ Name withheld to protect individual's identity.

² The record contains a copy of a document entitled "Findings of Fact, Conclusions of Law, and Judgment of Divorce" issued by the State of [REDACTED] Circuit Court, [REDACTED] County, Family Branch. A trial at which both the petitioner and M-H- were present took place on November 11, 2003, and the court issued its decision granting the divorce on November 25, 2003. The document was filed by the Clerk of Circuit Court on December 5, 2003.

The record contains both testimonial and documentary evidence of the couple's allegedly joint residence. In the undated statement he submitted when he filed the petition, the petitioner claimed that he lived with M-H- from November 1, 2001 until her January 2002 arrest. In the undated statement he submitted in response to the director's January 6, 2003 request for additional evidence, the petitioner claimed that he and M-H- lived together until December 28, 2001, the day after their wedding, when M-H- called him from jail informing him that she had been arrested. He also claimed that M-H- spent one night at his apartment after being discharged from a hospital in November 2002.

In the July 30, 2010 affidavit he submitted in response to the director's NOIR, the petitioner stated that the joint residence began on October 1, 2001 and ended on December 27, 2001 when, a few hours after their wedding, M-H- was arrested. He stated that he began residing with M-H- again in March 2002, but moved out one month later due to M-H-'s abuse. He also stated that by November 2002, M-H- was living with him on a part-time basis again.

The petitioner's testimony regarding his allegedly joint residence with M-H- is inconsistent. Although the petitioner initially claimed that he and M-H- began living together on November 1, 2001, he later claimed that they actually began living together on October 1, 2001. Nor is his testimony regarding the endpoint of the joint residence consistent. Although he has been consistent in stating that M-H-'s arrest ended one phase of the allegedly joint residence, his provision of the date on which she was arrested has not. As noted, he first stated that M-H- was arrested in January 2002. He then claimed she was arrested on December 28, 2001, the day after their wedding. Later, in response to the NOIR, he claimed she was arrested on December 27, 2001, the day of their wedding. Finally, the petitioner's testimony regarding the length of the allegedly joint residence is inconsistent. For example, in his first statement as well as on the Form I-360 he implied that he and M-H- never resumed living together after her arrest, and he made the same implication in his second statement except that he added M-H- spent one night in his apartment in November 2002. However, in his July 30, 2010 statement the petitioner indicated that he and M-H- had multiple phases of joint residency following her incarceration. These inconsistencies diminish the probative value of the petitioner's testimony regarding the allegedly joint residence.

Although the petitioner submitted a statement from M-H-, it does not establish that the couple shared a joint residence as she did not address the allegedly joint residence in any meaningful way. Nor does the remaining testimonial evidence of record demonstrate the requisite joint residence. The brief statements from [REDACTED] and [REDACTED] are nearly identical to one another, which calls into question their actual authorship and diminishes their probative value. [REDACTED] and [REDACTED] discussed the allegedly joint residence in general terms, but they did not provide any probative details about the couple's apartment or any shared possessions or residential routines.

The residential lease also does not establish that the petitioner and M-H- resided together. First, the lease covers the period beginning November 1, 2002 and ending November 1, 2003, a period of time which does not comport with the statements of the petitioner and several of his affiants, who have claimed that the joint residence began in 2001 and ended well before November 1, 2002. Moreover,

the lease was not signed by both M-H- and the petitioner. Although the petitioner submits two letters from [REDACTED] the individual named on the lease as the lessor, neither letter establishes the couple's joint residence. In his first letter, [REDACTED] stated that the couple paid him \$475 per month in rent, and that this amount included the heat, gas, and electrical utilities. However, the monthly rent amount provided for in the lease was \$495, and the lease specifically stated that the petitioner would "be responsible for arranging for and paying for all utility services." In his July 30, 2010 statement, [REDACTED] stated that the petitioner lived in the apartment from November 1, 2001 until February 2002. However, that letter is not consistent with the timeframe stated in the lease and [REDACTED] did not explain the discrepancy.

Counsel asserts on appeal that the joint residence need not have taken place during the marriage in order to satisfy the regulation. Contrary to counsel's claim, the plain language of the statute requires residence with the abuser 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." The word "spouse" in the residence requirement shows that residence with the abuser must have occurred during the marriage or qualifying intended marriage. The history of the relevant amendments to the statute supports this 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 [Secretary of Homeland Security] 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 [Secretary of Homeland Security] 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 [Secretary of Homeland Security], 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 demonstrate further that the statute does not encompass joint residence outside of the marriage or qualifying intended 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.

Nor do the regulations support counsel's argument. 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, the language of the statute in 1996 – "who has resided in the United States with the alien's spouse" – did not encompass residence outside of the marriage. USCIS has not yet issued a final rule encompassing all of the post-1994 amendments to the self-petitioning provisions.

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 statutory amendments to 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.

Counsel also asserts on appeal that USCIS cannot require that the petitioner demonstrate his joint residence with M-H- several years after approving the petition. Counsel is incorrect. As set forth above, section 205 of the Act empowers USCIS to revoke approval of a petition upon notice to the petitioner "at any time" for "good and sufficient cause" when the necessity for revocation comes to the agency's attention. *See also* 8 C.F.R. § 205.2(a).

Counsel also argues on appeal that "[a] married person's residence for immigration purposes while they are incarcerated would presumably be their marital residence, and not the jail." Counsel's argument fails to overcome this ground of ineligibility because the petitioner has not demonstrated that he and his former wife ever shared a marital residence. Moreover, section 101(a)(33) of the Act, 8 U.S.C. § 1101(a)(33), which specifically states "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," undermines counsel's argument regarding the intent of M-H- and the petitioner.

Considered in the aggregate, the relevant evidence fails to establish that the petitioner resided with M-H-, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act, and the director had good and sufficient cause to revoke approval of the petition on this ground.

Good Faith Entry into Marriage

In the undated statement he submitted when he filed the petition, the petitioner claimed that he met M-H- in July 2001, but no further details regarding the couple's first introductions or courtship were provided. In the undated statement he submitted in response to the director's January 6, 2003 request for additional evidence, the petitioner claimed that he arrived in the United States in May 2001, and that he met M-H- "several months later." No details regarding the couple's first introductions or courtship were provided beyond the petitioner's vague statement that his relationship with M-H- "started getting stronger."

In his July 30, 2010 affidavit submitted in response to the director's NOIR, the petitioner briefly stated that he was introduced to M-H- by a friend, and that they began dating shortly thereafter. He stated that during their courtship they listened to music; talked to each other on the telephone; ate out together at restaurants; and danced. The petitioner stated that he fell in love with both M-H- and her daughter.

The petitioner's testimony does not establish that he married M-H- in good faith. Although he did provide some testimony regarding his alleged good faith entry into the marriage in response to the director's NOIR, it nonetheless lacks probative and detailed information regarding the relationship.

Nor does the remaining testimonial evidence of record demonstrate that the petitioner married M-H- in good faith. The statements from [REDACTED] and [REDACTED] discussing the

couple's relationship do not establish that the petitioner married M-H- in good faith. Contrary to counsel's assertions on appeal, their statements were not detailed; they contained generalized testimony and did not offer meaningful insight into the petitioner's relationship with M-H-.

Nor does the undated letter from [REDACTED] establish that the petitioner married M-H- in good faith. [REDACTED] a rehabilitation counselor, stated that the petitioner contacted him in 2002 to assist M-H- with her problems. He stated that although he scheduled the couple for an interview, they did not come. As no further details were provided, [REDACTED] letter does not establish the petitioner's good faith entry into the marriage.

The petitioner has failed to establish that he married M-H- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act and the director had good and sufficient cause to revoke approval of the petition on this ground.

Conclusion

The petitioner has failed to overcome the director's grounds for revocation and has failed to establish that he resided with M-H- or that he married her in good faith as required by section 204(a)(1)(A)(iii)(I) of the Act. The petitioner's failure to meet these statutory and regulatory criteria provided the director with good and sufficient cause to revoke approval of the petition pursuant to section 205 of Act and 8 C.F.R. § 205.2(a).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden and the appeal will be dismissed.

ORDER: The appeal is dismissed. Approval of the petition remains revoked.