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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

FILE:  Office: VERMONT SERVICE CENTER Date: FEB 07 2011

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:

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:** The service center director denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen and reconsider. The motion to reconsider will be granted. Upon reconsideration, the AAO will affirm its dismissal of the appeal.

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 denied the petition on the basis of his determination that the petitioner had failed to establish: (1) that her husband subjected her to battery or extreme cruelty during their marriage; (2) that she is a person of good moral character; and (3) that she entered into the marriage in good faith. Counsel filed a timely appeal, which we dismissed on March 30, 2009. In our March 30, 2009 decision, we agreed with the director's grounds for denying the petition and found additionally that section 204(g) of the Act, 8 U.S.C. § 1154(g), further barred approval of the petition.

The petitioner timely filed the instant motion to reopen and reconsider on May 1, 2009. On motion, counsel submits a memorandum of law reasserting the petitioner's eligibility.

The submission does not meet the requirements for a motion to reopen at 8 C.F.R. §103.5(a)(2). The petitioner's submission does however qualify as a motion to reconsider at 8 C.F.R. § 103.5(a)(3).

*Applicable Law*

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:

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

\* \* \*

- (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.

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.

\* \* \*

- (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.

#### *Pertinent Facts and Procedural History*

The petitioner, a citizen of the Philippines, married R-A-<sup>1</sup> a United States citizen, on May 24, 2003.<sup>2</sup> She filed the instant Form I-360 on October 11, 2005. The director issued a subsequent notice of intent to deny (NOID) the petition to which the petitioner, through previous counsel, filed a timely response. After considering the evidence of record, the director denied the petition, and we dismissed the petitioner's timely appeal. In addition, the petitioner filed a subsequent Form I-360 on November 23, 2009, which was denied on August 23, 2010.<sup>3</sup>

Counsel filed the instant motion on May 1, 2009. The AAO reviews these matters on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon reconsideration and review of the entire record, we find that the petitioner has failed to establish any error in our prior decision.

On motion, counsel requests that the AAO "recuse itself from adjudicating this matter" because it demonstrated a bias against the petitioner in its prior decision. Counsel cites no authority for such recusal, and there is no other office within U.S. Citizenship and Immigration Services with jurisdiction to review the petitioner's motion.

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<sup>1</sup> Name withheld to protect individual's identity.

<sup>2</sup> The petitioner married R-A- while in immigration proceedings: an Order to Show Cause and Notice of Hearing was issued to the petitioner on January 4, 1996. Her applications for relief were denied on March 7, 1997. She was granted voluntary departure through April 16, 1997, but failed to depart the United States. On February 14, 2003, an immigration judge ordered the petitioner deported and on December 12, 2005, her motion to reopen her deportation proceedings was denied.

<sup>3</sup> *See* Form I-360, EAC 10 040 50386.

*Battery or Extreme Cruelty*

The first issue before the AAO on motion is whether the petitioner established that R-A- subjected her to battery or extreme cruelty during their marriage. In our March 30, 2009 decision, we found the assertions of the petitioner insufficient for a finding that she had been subjected to battery or extreme cruelty. Counsel erroneously asserts that we reached a “baseless legal conclusion that the Petitioner did not present credible evidence.” To the contrary, we specifically stated that the petitioner’s evidence was credible. However, as we noted in our decision, although that evidence was credible, it was not sufficient to meet her burden of proof.

After repeating the arguments made by previous counsel on appeal, counsel states on motion that we did not follow the governing principles of *Hernandez v. Ashcroft*, 345 F.3d 824 (9<sup>th</sup> Cir. 2004) in our decision. According to counsel, the petitioner was subjected to a cycle of violence “not unlike that which sufferers of domestic violence undergo.” We disagree with both arguments.

The statute and regulations require the petitioner to establish that she was subjected to battery and/or extreme cruelty during her marriage to R-A-. The testimony of the petitioner and her affiant were set forth in our March 30, 2009 decision, and need not be repeated. The petitioner does not allege, and the record does not establish, that she was subjected to battery perpetrated by R-A-. Nor do the claims that R-A- refused to work, failed to help with household expenses, had an extra-marital affair, drank too much, failed to disclose a criminal past, and threatened to leave the marriage over sexual problems demonstrate that his actions amounted to extreme cruelty. With regard to the “governing principles” enunciated by the court in *Hernandez*, the Ninth Circuit Court of Appeals explained that “[b]ecause every insult or unhealthy interaction in a relationship does not rise to the level of domestic violence . . . , Congress required a showing of extreme cruelty in order to ensure that [the law] protected against the extreme concept of domestic violence, rather than mere unkindness.” *See id.* at 840 (9<sup>th</sup> Cir. 2003) (interpreting the definition of extreme cruelty at 8 C.F.R. § 204.2(c)(1)(vi)).

Reconsidered in the aggregate, the relevant evidence fails to demonstrate that R-A- subjected the petitioner to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

*Good Moral Character*

As we discussed in our March 30, 2009 decision, the regulation at 8 C.F.R. § 204.2(c)(2)(v) states that primary evidence of a petitioner’s good moral character is an affidavit from the petitioner, accompanied by local police clearances or state-issued criminal background checks from each place the petitioner has lived for at least six months during the three-year period immediately preceding the filing of the self-petition (in this case, during the period beginning in October 2002 and ending in October 2005).

The petitioner submitted a criminal background check issued by the State of California on June 15, 2003. However, the record contains no local police clearances or state-issued criminal background checks covering the period June 15, 2003 through October 2005, as required by 8 C.F.R. § 204.2(c)(2)(v). The petitioner was placed on notice that the 2003 criminal background check was insufficient by the director in both the October 19, 2006 NOID and the April 18, 2007 denial. We agreed with the director in our March 30, 2009 decision, which marked the third time the petitioner was placed on notice that this deficiency existed.

On motion, counsel argues that we “arbitrarily applied an unknown amorphous standard that is not possible to meet because it is impossible to identify,” which is “the cornerstone of an abuse of discretion,” and that we “effectively altered the standard of demonstrating good moral character without prior notice to the Petitioner of what [our] new unannounced standard in fact is.” Counsel also contends that the AAO presumed criminality on the part of the petitioner.

We disagree with counsel’s analysis. The regulation at 8 C.F.R. § 204.2(c)(2)(v) is clear: in order to establish that she is a person of good moral character, the petitioner is required to submit local police clearances or state-issued criminal background checks from each place the petitioner has lived for at least six months during the three-year period immediately preceding the filing of the self-petition (in this case, during the period beginning in October 2002 and ending in October 2005). The June 15, 2003 criminal background check does not satisfy the regulation, as it does not cover the entire three-year period immediately preceding the filing of the self-petition. The petitioner has now been afforded three opportunities to submit the requisite police clearance but has elected not to do so.

The language of 8 C.F.R. § 204.2(c)(2)(v) is clear, and we lack authority to waive that regulatory requirement. Counsel’s assertion that compliance with 8 C.F.R. § 204.2(c)(2)(v) is arbitrary and capricious lacks merit. Absent local police clearances or state-issued criminal background checks from each place the petitioner has lived for at least six months during the three-year period immediately preceding the filing of the self-petition, the petitioner has failed to establish that she is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

#### *Good Faith Entry into Marriage*

Counsel argues on motion that our March 30, 2009 decision on this issue was arbitrary and capricious, that our statement acknowledging certain evidence was insincere, and that any conclusion the petitioner did not marry R-A- in good faith “can only be premised on bias.”

Counsel does not, however, address the inconsistencies identified by both the director and the AAO and does not address the fact that the petitioner married R-A- while in immigration proceedings. Nor does counsel submit additional testimony from the petitioner regarding the details of her relationship with R-A-. Reconsidered in the aggregate, the relevant evidence fails to demonstrate that the petitioner married R-A- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

*Section 204(g) of the Act*

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, and the record does not indicate that the petitioner resided outside of the United States for two years after her marriage. Accordingly, section 204(g) of the Act bars approval of the petition unless the petitioner establishes eligibility for the bona fide marriage exemption at section 245(e) of the Act.

In our March 30, 2009 decision, we affirmed the director's determination that the petitioner failed to establish that she entered into marriage with R-A- 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 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 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 (9<sup>th</sup> 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 (5<sup>th</sup> Cir. 1993) (acknowledging "clear and convincing evidence" as an "exacting standard").

On motion, counsel does not address this ground of our March 30, 2009 decision. As the petitioner failed to establish that she entered into marriage with R-A- in good faith by a preponderance of the evidence, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act, she also failed to demonstrate that she qualifies for the bona fide marriage exemption under the heightened standard of proof required by section 245(e)(3) of the Act. Accordingly, we affirm our determination that section 204(g) of the Act mandates denial of this petition.

*Conclusion*

Counsel's motion to reopen is dismissed. Although the motion to reconsider has been granted, it fails to establish any error in our prior decision. The petitioner has failed to establish: (1) that she was subjected to battery or extreme cruelty by R-A- during their marriage; (2) that she is a person of good moral character; (3) that she married R-A- in good faith; and (4) 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)(3) of the Act. 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 this petition must remain denied.

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.

**ORDER:** The March 30, 2009 decision of the Administrative Appeals Office is affirmed. The appeal remains dismissed. The petition remains denied.