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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:
JUL 05 2012

Office: VERMONT SERVICE CENTER

File: 

IN RE:

Petitioner: 

PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON BEHALF OF PETITIONER:

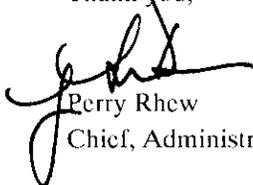


INSTRUCTIONS:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630, or a request for a fee waiver. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 Director, Vermont Service Center, (“the director”) denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

The petitioner seeks immigrant classification pursuant to 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 (USC).

The director denied the petition after determining that the petitioner is subject to section 204(g) of the Act as he had entered into the marriage while in removal proceedings and he had not established he had entered into the marriage in good faith with clear and convincing evidence.

Applicable Law and Regulations

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 based on his or her relationship to the abusive spouse, 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 states, in pertinent part:

In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) . . . , or in making determinations under subparagraphs (C) and (D), the [Secretary of Homeland Security] shall consider any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the [Secretary of Homeland Security].

The evidentiary guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are set forth in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

Evidence for a spousal self-petition –

(i) *General.* Self-petitioners are encouraged to submit primary evidence whenever possible. The Service will consider, however, any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service.

Section 204(g) of the Act, 8 U.S.C. § 1154(g), states:

Restriction on petitions based on marriages entered while in exclusion or deportation proceedings. – Notwithstanding subsection (a), except as provided in section 245(e)(3), a

petition may not be approved to grant an alien immediate relative status by reason of a marriage which was entered into during the period [in which administrative or judicial proceedings are pending], until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.

Section 245(e) of the Act, 8 U.S.C. § 1255(e), provides:

Restriction on adjustment of status based on marriages entered while in exclusion or deportation proceedings –

- (1) Except as provided in paragraph (3), an alien who is seeking to receive an immigrant visa on the basis of a marriage which was entered into during the period described in paragraph (2) may not have the alien's status adjusted under subsection (a).
- (2) The period described in this paragraph is the period during which administrative or judicial proceedings are pending regarding the alien's right to be admitted or remain in the United States.
- (3) Paragraph (1) and section 204(g) shall not apply with respect to a marriage if the alien establishes by clear and convincing evidence to the satisfaction of the [Secretary of Homeland Security] that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition under section 204(a) . . . with respect to the alien spouse or alien son or daughter. In accordance with the regulations, there shall be only one level of administrative appellate review for each alien under the previous sentence.

The corresponding regulation at 8 C.F.R. § 245.1(c)(9)(v) states, in pertinent part:

Evidence to establish eligibility for the bona fide marriage exemption. Section 204(g) of the Act provides that certain visa petitions based upon marriages entered into during deportation, exclusion or related judicial proceedings may be approved only if the petitioner provides clear and convincing evidence that the marriage is bona fide.

Facts and Procedural History

The petitioner is a citizen and native of Tunisia who claims he last entered the United States on July 26, 2000 as a visitor. On January 15, 2003, the petitioner was issued a Notice to Appear (NTA) and placed in removal proceedings before an immigration judge. On May 22, 2003, the petitioner was

ordered removed in absentia. On December 14, 2006, the petitioner married T-S-¹ the claimed abusive USC. On September 5, 2008, T-S- filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf. The petitioner concurrently filed a Form I-485, Application to Register Permanent Residence or Adjust Status. On July 8, 2008 the Form I-130 was denied and on July 8, 2009 the Form I-485 was administratively closed. On December 19, 2009, the removal order dated May 22, 2003 was vacated and the petitioner was re-scheduled to appear in immigration court. The petitioner filed the instant Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant, on June 21, 2010. As the initial record was insufficient to establish the petitioner's eligibility, the director issued a request for evidence (RFE). Upon review of the totality of the record, including the petitioner's response to the RFE, the director determined that the petitioner had not established that he had entered into the marriage in good faith with clear and convincing evidence, the required standard when a petitioner enters into marriage while in removal proceedings. The director granted a subsequent motion to reopen and reconsider the matter but ultimately found that the petitioner had not provided additional evidence sufficient to overcome the prior decision and to establish eligibility. The petitioner timely appealed the director's decision.

The Petitioner is Subject to Section 204(g)

On appeal, counsel asserts that the director applied an improper standard when requiring that the petitioner establish that he had married T-S- in good faith with clear and convincing evidence. Counsel contends that as the petitioner was unaware that he was in removal proceedings in 2006 when he married T-S- he is not subject to section 204(g) of the Act and thus is not required to establish his good faith intent when entering the marriage under the heightened clear and convincing standard. Counsel points out that the removal order issued on May 22, 2003 has been vacated and claims the removal order was vacated because the petitioner established that he had not been given notice of the removal proceedings.

As noted above, section 204(g) states that a petition may not be approved to grant an alien immediate relative status by reason of a marriage which was entered into during the period in which administrative or judicial proceedings are pending, until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage. The petitioner has not offered evidence that he resided outside the United States after his marriage to T-S-, and the petitioner was subject to removal when he married T-S- in December 2006. Although the removal order was subsequently vacated in December 2009, the petitioner remains in proceedings before the immigration court, and his next hearing date is scheduled for September 5, 2012.² The petitioner has not demonstrated that any of the exceptions at 8 C.F.R. § 245.1(c)(8)(iii) apply to him.

The petitioner in this matter is subject to section 204(g) of the Act and to obtain approval of the Form I-360 petition he must establish that he qualifies for one of the exceptions at 8 C.F.R. § 245.1(c)(8)(iii). Here, counsel asserts that the petitioner qualifies for the bona fide marriage

¹ Name withheld to protect the individual's identity.

² The petitioner's removal proceedings are recorded under a different alien registration number, A79 733 426.

exemption at 8 C.F.R. §245.1(c)(8)(iii)(F) under the heightened standard of proof required by section 245(e)(3) of the Act.

Bona Fide Marriage

In the petitioner's initial statement appended to the Form I-360 petition, the petitioner declared that he met T-S- in 2006 when she was working at the Dollar store in the neighborhood. He indicated they started talking, became friendly, and dated for about six months before he proposed. The petitioner noted he had met one of T-S-'s three adult children prior to marriage. The petitioner explained that T-S- moved into the two-bedroom apartment he was renting after their wedding in December 2006. The petitioner indicated that shortly after their marriage, one of T-S-'s children moved in to his apartment with her child and subsequently the petitioner's other two adult children moved in with them and that is when the problems started between the couple. The remainder of the petitioner's statement relates to his claims of abuse.

The petitioner provided a copy of the marriage certificate, a one-year apartment lease dated December 1, 2006 and a second one-year apartment lease for the same residence dated January 2008, and a third one-year apartment lease for a new residence dated September 15, 2008. The initial record also included a bank statement dated March 5, 2009 and unidentified photographs. The petitioner provided three brief statements from T-S- and two of her children noting the couple had separated because of T-S-'s alcohol problem.

In response to the director's RFE, the petitioner provided a second personal statement. The petitioner declared that he married T-S- because he loved her not to get a green card. The petitioner noted that he did not have a significant amount of documentation to prove their relationship because T-S- did not work during the marriage and he did not have a social security number. The petitioner explained that they could not afford health or life insurance and did not file taxes together because he did not have a social security number. The petitioner referenced their joint bank account and indicated he deposited funds in the account but that T-S- overdrew the account on several occasions and he limited the amount of money he deposited because of her excesses.

The petitioner also provided a February 9, 2011 letter signed by the landlord of the petitioner's first joint residence with T-S- who stated that the couple lived together at the apartment from December 2006 until August 2008. The landlord noted that she asked them to move out in August 2008 because of complaints from neighbors and the overcrowding in their apartment. The petitioner also submitted a letter signed by [REDACTED] who reported that the petitioner seemed upset and lonely after he married T-S-. The record also included three bank statements covering the time period between February 11, 2009 and May 5, 2009 addressed to T-S- but listing the petitioner as a joint account holder. The petitioner provided two anniversary cards, a photocopy of a gift card, and photographs with captions identifying the individuals in the photographs.

Upon review of the evidence submitted, the director determined that the petitioner had not established that he had entered into the marriage in good faith with clear and convincing evidence.

On motion, the petitioner submitted a third personal statement. The petitioner reiterated that he married T-S- for love and the relationship did not work out because of her abuse and her children invading their space. The petitioner again noted his lack of a social security number. The petitioner stated that he tried to get T-S- to put his name on the utility bills and although she put her child's name on a utility bill, she would not include his name. The petitioner stated that although his name was not on the utility bills he paid the utility bills, as well as the rent, in cash. The petitioner indicated that he did not understand the director's decision because the director found that he had suffered abuse but still required a lot of documents because he was in removal proceedings of which he was unaware³ prior to the marriage. The petitioner provided a letter from T-S- who stated that she met the petitioner in May 2006, they liked each other, and went out to dinner many times and to movies. She also noted that they initially tried to include the petitioner's name on the electric and gas bill but could not because the petitioner did not have a social security number. She indicated that when she moved to the second residence she signed a sublease to her daughter and put the electric and phone utilities in her daughter's name so that her daughter could get government benefits. The petitioner also provided two statements dated February 2009 and signed by [REDACTED] who stated that the petitioner and T-S- resided together from December 2005.

Upon review of the additional evidence submitted on motion, the director again determined that the petitioner had not provided clear and convincing evidence that he had entered into the marriage with T-S- in good faith and thus, the petitioner had not established eligibility for the desired classification.

On appeal, counsel for the petitioner observes that the director appears to suggest that the petitioner should provide documentation of his state of mind prior to his marriage. Counsel asserts that all the documentation submitted, including the photographs, anniversary cards, bank statements, and leases, show by clear and convincing evidence that the petitioner entered into the marriage in good faith. Counsel avers that the reason the bank statements show limited transactional activity is because T-S- withdrew the money for drinking binges rather than the payment of bills, a significant part of the abuse that the director recognized. Counsel contends that it is unjust to find that the petitioner was subjected to abuse and to not find that the petitioner entered into the marriage in good faith.

Upon review of the totality of the record, we concur with the director's assessment of the relevant

³ In a separate statement, the petitioner declares that on January 10, 2003 he presented himself to United States Immigration and Customs, and Enforcement (USICE) and that the officer made a note in his passport and sent him home and told that he would receive some papers in the mail. The petitioner indicates that he was not told he would be put in removal proceedings and that he provided the officer with his home address. The petitioner states that he did not find out he had been ordered removed until January 2009 and that although the notice was mailed to his address on February 12, 2003, it was returned to the immigration court.

evidence. The petitioner in this matter has not provided any probative detail of the couple's courtship, their decision to marry, their shared residence(s) or shared experiences, except as it relates to a general claim of abuse. The petitioner's general assertion that he married T-S- for love and not for a green card does not include the requisite testimonial evidence that would assist in ascertaining his intent when he entered into the marriage. His testimony lacks the probative detail providing insight into his intention when entering into the marriage. The key factor in determining whether a petitioner entered into a marriage in good faith is whether he or she intended to establish a life together with the spouse at the time of the marriage. *See Bark v. INS*, 511 F.2d 1200 (9th Cir.1975). While the petitioner offered explanations regarding his lack of documentary evidence, he fails to supply the in-depth detail of his courtship, wedding, marriage, and subsequent life together with T-S-. Accordingly, the record is insufficient to establish that the petitioner entered into the marriage with good faith and an intent to establish a life together with T-S-.

Upon review of the documentary evidence in the record, we concur with the director's determination that the documentary evidence submitted is insufficient to establish the bona fides of the petitioner's marriage by clear and convincing evidence. The 2009 statements of [REDACTED] and [REDACTED], the statement of the landlord of the petitioner's first residence with T-S-, and the leases suggest that the couple may have resided together; however, these documents do not clearly and convincingly establish that the marriage was entered into in good faith. Similarly, the declarations of T-S-'s children do not assist in demonstrating the petitioner's intent when entering into the marriage. Their statements do not provide probative detail of their knowledge of the interactions of the couple, despite allegedly living with the couple. T-S-'s statements likewise, do not include the necessary probative information that demonstrates the couple intended to and did establish a life together. Moreover, her statement reflects her feelings and does not provide insight into the petitioner's intent. The photographs submitted, while showing the couple was together on a few occasions, also fail to establish that the marriage was bona fide from its inception. The two anniversary cards and the photocopy of a gift card do not provide information regarding the underlying circumstances of the marriage. As the director determined, the three bank statements covering a four-month period of time is insufficient to establish the petitioner's intent when entering the marriage and lacks the underlying transactional data that would assist in demonstrating the couple established a life together. As noted above, the petitioner in this matter has offered explanations for his lack of documentary evidence; however, while the lack of documentary evidence is not necessarily disqualifying, the petitioner has not provided sufficient probative testimonial evidence to demonstrate clearly and convincingly that he entered into the marriage in good faith.

Counsel's implied assertion that a finding of abuse requires a finding that the petitioner entered into the marriage in good faith is misguided. The petitioner must establish each element to establish his eligibility for this benefit. The petitioner has not provided the requisite evidence to establish that he entered into the marriage in good faith by clear and convincing evidence such that he is not subject to section 204(g) of the Act. Upon review of the totality of the record in this matter, the record does not demonstrate that the petitioner qualifies for the bona fide marriage exemption under the heightened standard of proof required by section 245(e)(3) of the Act. Accordingly, section 204(g) of the Act requires the denial of this petition.

Beyond the director's decision, because the petitioner has not complied with section 204(g) of the Act, he is ineligible for immigrant classification as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act. 8 C.F.R. § 204.2(c)(1)(iv).⁴

Conclusion

The petitioner has not established that he is exempt from section 204(g) of the Act. As always, the burden of proof in visa petition proceedings 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. The petition remains denied.

⁴ 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).