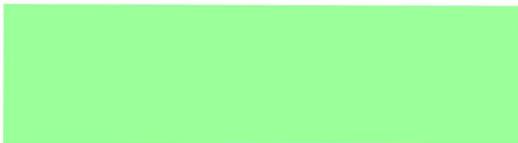


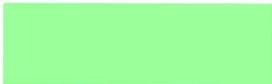
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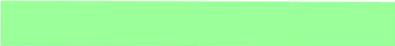
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

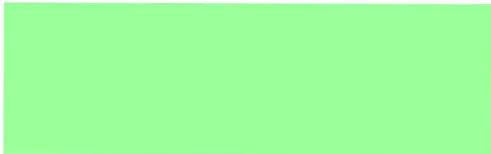


Date: **AUG 29 2013** Office: VERMONT SERVICE CENTER File: 

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)

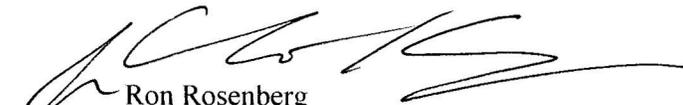
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, (“the director”) denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

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 her U.S. citizen spouse.

The director denied the petition for failure to establish that the petitioner complied with the provisions of section 204(g) of the Act and was therefore eligible for immediate relative classification.

On appeal, counsel submits a brief and additional evidence.

Relevant 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, 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 further 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 record in this case indicates that the petitioner was in removal proceedings at the time of her marriage. In such a situation, section 204(g) of the Act, 8 U.S.C. § 1154(g), prescribes:

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 regarding the alien’s right to remain in the United States], until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.

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 this petition unless the petitioner

can establish eligibility for the bona fide marriage exemption at section 245(e) of the Act, 8 U.S.C. § 1255(e), which states:

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

- (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 eligibility requirements are further explicated in the regulation at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part:

(iv) *Eligibility for immigrant classification.* A self-petitioner is required to comply with the provisions of section 204(c) of the Act, section 204(g) of the Act, and section 204(a)(2) of the Act.

* * *

(ix) *Good faith marriage.* A spousal self-petition cannot be approved if the self-petitioner entered into the marriage to the abuser for the primary purpose of circumventing the immigration laws. A self-petition will not be denied, however, solely because the spouses are not living together and the marriage is no longer viable.

The evidentiary guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are further explicated 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.

* * *

(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 is a citizen of Mexico who entered the United States without inspection on or about January 1, 1990. On July 18, 1996, the petitioner filed an application for asylum (Form I-589). Because the petitioner failed to appear for her asylum interview, she was issued an order to show cause and notice of hearing in deportation proceedings on January 24, 1997. The petitioner was served with the OSC via certified mail on February 4, 1997. She appeared before the Las Vegas, Nevada Immigration Court and her application for suspension of deportation was denied, but she was granted voluntary departure on or before June 10, 1999 with an alternate order of deportation to Mexico if she failed to timely depart the United States. On June 18, 2002, the Board of Immigration Appeals (BIA) administratively closed the deportation proceedings.¹

The petitioner married her second husband, [REDACTED]², a U.S. citizen, on September 15, 2006 in Las Vegas, Nevada. The petitioner filed the instant Form I-360 on May 26, 2011. The director subsequently issued a Request for Evidence (RFE) of, *inter alia*, the petitioner's eligibility for the bona fide marriage exemption from section 204(g) of the Act. The petitioner timely responded to the request with additional evidence which the director found insufficient to establish the petitioner's eligibility. The director denied the petition and the petitioner timely appealed.

The AAO reviews these proceedings *de novo*. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). A full review of the record, including the evidence submitted on appeal, now establishes the petitioner's eligibility. The appeal will be sustained for the following reasons.

¹ Section 204(g) of the Act applies until proceedings are terminated. 8 C.F.R. § 245.1(c)(8)(ii)(D). Administrative closure does not result in a final order and is not equivalent to the termination of removal proceedings. *Matter of Bavakan Avetisyan*, 25 I&N Dec. 688, 695 (BIA 2012). Therefore the petitioner remains in proceedings for the purposes of her eligibility under section 204(a)(1)(A)(iii) of the Act.

² Name withheld to protect the individual's identity.

Section 204(g) of the Act

Because the petitioner married her husband while she was in deportation proceedings and did not remain outside of the United States for two years after their marriage, her self-petition cannot be approved pursuant to section 204(g) of the Act unless she establishes the bona fides of her marriage by clear and convincing evidence pursuant to section 245(e)(3) 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 the bona fide marriage exception 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). See also *Pritchett v. I.N.S.*, 993 F.2d 80, 85 (5th Cir. 1993) (acknowledging “clear and convincing evidence” as an “exacting standard.”) To demonstrate eligibility under section 204(a)(1)(A)(iii)(I)(aa) 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 credible evidence shall be considered. Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J); *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). However, to be eligible for the bona fide marriage exemption under section 245(e)(3) of the Act, the petitioner must establish his or her good-faith entry into the 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). “Clear and convincing evidence” is a more stringent standard. *Arthur*, 20 I&N Dec. at 478.

The director determined that the petitioner established by a preponderance of the evidence that she married her husband in good faith, but failed to establish the bona fides of her marriage by clear and convincing evidence pursuant to section 245(e)(3) of the Act. The regulation at 8 C.F.R. § 204.2(a)(1)(iii)(B) provides that the types of documents an alien may submit to establish eligibility for the bona fide marriage exemption include, but are not limited to: (1) Documentation showing joint ownership of property; (2) Lease showing joint tenancy of a common residence; (3) Documentation showing commingling of financial resources; (4) Birth certificate(s) of child(ren) born to the petitioner and beneficiary; (5) Affidavits of third parties having knowledge of the bona fides of the marital relationship (Such persons may be required to testify before an immigration officer as to the information contained in the affidavit. Affidavits must be sworn to or affirmed by people who have personal knowledge of the marital relationship. Each affidavit must contain the full name and address, date and place of birth of the person making the affidavit and his or her relationship to the spouses, if any. The affidavit must contain complete information and details explaining how the person acquired his or her knowledge of the marriage. Affidavits should be supported, if possible, by one or more types of documentary evidence listed in this paragraph); or (6) Any other documentation which is relevant to establish that the marriage was not entered into in order to evade the immigration laws of the United States.

In the petitioner’s affidavit dated November 13, 2012 she stated that her husband, [REDACTED] was her coworker at a rental car company and she first met him in May 2003. She recounted that during their courtship her husband brought her flowers and coffee at their workplace. She recounted that they quickly fell in love and her husband proposed two weeks after they started dating. The petitioner stated that they wed on October 13, 2004 and her husband then moved into her home. She

explained that they had to wed a second time on September 15, 2006 because she did not realize that her divorce from her prior marriage was not final when they married in October 2004.³ The petitioner stated that in December 2004 she started accompanying her husband to his doctor's appointments and learned that he has bipolar disorder. She recounted that her husband became emotionally and physically abusive and she had him move out of her residence on July 1, 2007. She obtained a protection order against him on July 3, 2007. The petitioner asserted that she loved her husband and she continues to keep him as a dependent spouse on her health insurance policy because she wants to help him receive his medications.

The petitioner submitted eight photographs of herself and her husband and evidence of her husband's coverage on her health insurance policy since January 2007 and his continued usage of the policy for his medical appointments and prescriptions throughout their marriage. The petitioner also submitted copies of her husband's applications in July 2006 for disability insurance benefits and supplemental security income under the Social Security Act, which list her as his spouse. Although the letters the petitioner submitted from her brother [REDACTED] and her daughter, [REDACTED] mainly focus on the abuse in the petitioner's marriage, they also affirm that the couple married with good intentions and the petitioner believed things were going to go well.

On appeal, counsel asserts that the petitioner and her spouse intended to establish a life together at the time they entered into their marriage. Counsel submits as additional evidence: an affidavit from the petitioner's husband; the petitioner's husband's life insurance policy showing the petitioner listed as the sole beneficiary of the policy; and the petitioner's automobile insurance policy with her husband listed as a driver. In his March 4, 2013 affidavit, the petitioner's husband states that although he is separated from the petitioner, they speak on the telephone almost every day. He asserts that they entered the marriage in good faith and he still loves her and she cares about him. He recounts that during their courtship he brought the petitioner coffee and flowers. He states that they separated because of his "own bad conduct." He notes that in July 2010, three years after their separation, he took out a life insurance policy and named the petitioner as the beneficiary. He states that he is currently a driver on the petitioner's automobile insurance and a dependent on her health insurance. He contends that they cannot divorce because of their religious beliefs and they are still trying to work on their marital problems.

Upon a full review of the record as supplemented on appeal, the petitioner has demonstrated the bona fides of her marriage under the heightened standard of proof required by section 245(e)(3) of the Act. The petitioner has submitted her own affidavit and an affidavit from her husband detailing their courtship and marriage as well as documents establishing their joint assets and liabilities held prior to and throughout their marriage. These documents comply with the evidentiary requirements pursuant to 8 C.F.R. § 204.2(a)(1)(iii)(B) for establishing eligibility for the bona fide marriage exemption. The petitioner has therefore established that she is exempt from section 204(g) of the Act.

Eligibility for Immediate Relative Classification

³ The record shows that the petitioner's divorce became final on December 16, 2004.

Since the petitioner established that she has a qualifying relationship with a United States citizen and that she is exempt from section 204(g) of the Act, she has demonstrated her eligibility for immediate relative classification, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act and as explicated in the regulation at 8 C.F.R. § 204.2(c)(1)(iv).

Conclusion

On appeal, the petitioner has established that she has complied with the provisions of section 204(g) of the Act and is therefore eligible for immediate relative classification based on her marriage to a U.S. citizen. She is consequently eligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is sustained.