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

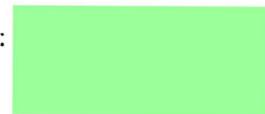


U.S. Citizenship
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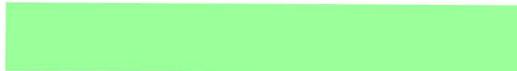


Date: **JUL 01 2014** Office: VERMONT SERVICE CENTER

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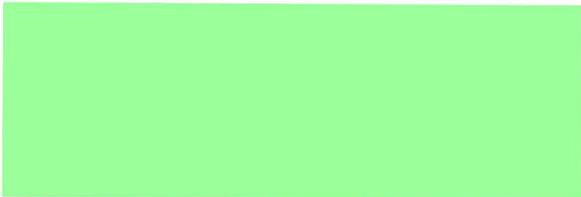


IN RE: Petitioner:



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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

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 dismissed.

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 on the basis of his determination that the petitioner failed to establish that she: (1) married her U.S. citizen husband in good faith; (2) is a person of good moral character; and (3) is eligible for immediate relative classification based on her marriage. The director also determined that the petitioner is subject to the bar on approval of petitions based on marriages entered into while the alien was in removal proceedings at section 204(g) of the Act. On appeal, counsel submits a brief.

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 fourth marriage (upon which this petition is based). 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(g) of the Act

* * *

(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.

* * *

(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.

* * *

(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 is a citizen of Kenya who entered the United States on November 27, 2001 as a visitor and is currently married to D-D-, a U.S. citizen.¹ The petitioner has had three previous marriages. She first married N-K- in Kenya on June 6, 1997. After her entry into the United States, she wed M-D- on April 23, 2004, in Kansas. The petitioner received a divorce from M-D- in Kansas on November 29, 2004. She married D-D-, a U.S. citizen, on March 25, 2010 in Minnesota. On November 22, 2010, D-D- filed a Petition for Alien Relative (Form I-130) on behalf of the petitioner. The director denied the Form I-130 and the petitioner's concurrently filed Application to Adjust Status (Form I-485) because the petitioner's Kenyan divorce records from her first marriage to N-K- were determined to be fraudulent.

On January 9, 2012, the petitioner was issued a Notice to Appear in removal proceedings. She was charged with remaining in the United States beyond her period of authorized stay and seeking to procure admission to the United States by fraud or willfully misrepresenting a material fact.² The petitioner subsequently obtained a divorce from N-K- in Kansas on May 23, 2012. On June 28, 2012, the petitioner and D-D- wed a second time in Kansas. D-D- filed a second Form I-130 on behalf of the petitioner on July 6, 2012. The petitioner filed the instant Form I-360 on April 26, 2013 based upon her June 28, 2012 marriage to D-D-.

The director subsequently issued two Requests for Evidence (RFEs) of, among other things, the petitioner's good moral character and good-faith entry into the marriage by clear and convincing evidence pursuant to section 245(e)(3) of the Act. Counsel responded to the RFEs with additional evidence, which the director found insufficient to establish eligibility. The director denied the petition and counsel 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 fails to establish the petitioner's eligibility. Counsel's claims do not overcome the director's grounds for denial and the appeal will be dismissed for the following reasons.

Entry into the Marriage in Good Faith

The relevant evidence submitted below fails to demonstrate the petitioner's entry into her marriage in good faith. In her first statement, the petitioner recounted that she and D-D- resided in Minneapolis

¹ All names withheld to protect the individuals' identities

² The petitioner remains in removal proceedings before the Kansas City Immigration Court and her next hearing is on August 27, 2014.

from March 2010 until the end of August 2010. She stated that they moved to Kansas to become involved in her uncle's trucking business. The remainder of the petitioner's statement focused on the abuse in the marriage. In response to the RFE, the petitioner submitted a second statement, which also focused on the abuse. The petitioner did not describe how she met D-D-, their courtship, wedding ceremony, joint residence or any of their shared experiences, apart from the abuse.

In response to the RFE, the petitioner submitted letters from her friends, [REDACTED] and her mother-in-law, [REDACTED]. The petitioner's friends all attest to knowing of the petitioner and D-D- as a married couple. However, their statements focus on D-D-'s alcohol abuse and do not provide any probative information regarding the petitioner's good faith in entering the relationship. For example, [REDACTED] state that they visited the petitioner and D-D- at the couple's marital residence, but they do not describe any particular visit or social occasion with the couple. [REDACTED] states that the petitioner and D-D- appeared to be in love, but he did not describe any interactions with the couple. The petitioner's mother-in-law, [REDACTED], also fails to provide any probative information to establish her personal knowledge of the marital relationship. She only briefly states in a three-sentence letter that the petitioner and her son are "happily married."

In response to the RFE, the petitioner submitted: a joint lease agreement; several bank statements; a car insurance policy; three utility bills; and one photograph. The bank statements show a joint account, but the statements were issued near or after the couple's separation. The car insurance policy only shows the petitioner's name as a covered driver. One of the utility bills is jointly issued to the petitioner and D-D-; the other two are in D-D-'s name only. The single photograph submitted by the petitioner appears to be on the couple's wedding day. While these documents reflect the petitioner's shared residence with her husband and some joint finances, they do not establish by a preponderance of the evidence the petitioner's good-faith entry into the marriage.

On appeal, counsel asserts that the totality of the evidence establishes that the petitioner was in a bona fide marriage. A full review of the record shows no error in the director's decision. As discussed, the relevant documents show that the couple had a bank account, were photographed together, and at some point resided together. However, the petitioner has not described how she first met D-D-, their courtship, wedding ceremony, joint residence or any of their shared experiences, apart from the abuse. None of the petitioner's friends discuss in probative detail their observations of the petitioner's interactions with or feelings for D-D- during the couple's courtship or marriage. The petitioner's mother-in-law similarly does not provide any detailed, probative information to establish her knowledge of the marital relationship. Accordingly, the petitioner has failed to demonstrate that she entered into marriage with her husband in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Section 204(g) of the Act further Bars Approval

Because the petitioner married D-D- while she was in removal 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.

As the petitioner failed to establish her good-faith entry into her fourth marriage by a preponderance of the evidence under section 204(a)(1)(A)(iii)(I)(aa) of the Act, she also has not demonstrated the bona fides of her fourth marriage under the heightened standard of proof required by section 245(e)(3) of the Act. Section 204(g) of the Act consequently bars approval of this petition.

Eligibility for Immediate Relative Classification

Because the petitioner is not exempt from section 204(g) of the Act, she has also failed to demonstrate 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).

Good Moral Character

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 April 2010 and ending in April 2013). In her initial filing, the petitioner did not submit the requisite local police clearance or state-issued criminal background check and she did not address her moral character in her personal statement. In response to the second RFE, the petitioner provided clearances based upon a name and date of birth search from the Kansas Bureau of Investigation and the Minnesota Department of Public Safety, which reported a no record response. However, she failed to provide an affidavit that addresses her moral character.

In denying the petition, the director determined that the petitioner failed to establish her good moral character because she submitted a fraudulent divorce decree with her Form I-485 application and was charged with attempting to procure an immigration benefit through fraud or willfully misrepresenting a material fact. On appeal, counsel asserts that the petitioner did not misrepresent or conceal any fact and was not aware that the divorce decree was false. Counsel further asserts that the divorce was not material because “a divorce is very easily possible in the U.S.”

Petitioner Lacks Good Moral Character under Section 101(f) and the Regulation

A full review of the record shows no error in the director's decision. While the petitioner's submission of a fraudulent divorce decree with her Form I-485 application does not fall within any of the enumerated bars to good moral character within section 101(f) of the Act, it still evidences a lack of good moral character under the last paragraph of section 101(f) of the Act and the regulation at 8 C.F.R. § 204.2(c)(1)(vii). Section 101(f) of the Act states, in pertinent part, that "[t]he fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character." The regulation at 8 C.F.R. § 204.2(c)(1)(vii) further prescribes that:

A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she . . . 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.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

(i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The principal elements of a misrepresentation that renders an alien inadmissible under section 212(a)(6)(C)(i) of the Act are willfulness and materiality. In *Matter of S- and B-C-*, 9 I&N Dec 436 (BIA 1960), the Attorney General established the following test to determine whether a misrepresentation is material:

A misrepresentation ... is material if either (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded. *Id.* at 447.

The Supreme Court has addressed the issue of material misrepresentations in its decision in *Kungys v. United States*, 485 U.S. 759 (1988). In that case, which involved misrepresentations made in the context of naturalization proceedings, the Supreme Court held that the applicant's misrepresentations were material if either the applicant was ineligible on the true facts, or if the misrepresentations had a natural tendency to influence the decision. *Id.* at 771. By providing a fraudulent divorce decree, when applying for permanent residence based on her marriage to D-D-, the applicant cut off a line of inquiry regarding the validity of her marriage to D-D- and her eligibility to obtain permanent residence based on this marriage. Counsel's assertion that the petitioner was not aware that the divorce decree was false is not supported by any evidence. The petitioner herself provides no such explanation in her personal statement. The petitioner is therefore inadmissible under section 212(a)(6)(C)(i) of the Act for seeking to procure an immigration benefit through fraud or misrepresentation.

Relevant Exceptions Do Not Apply

On appeal, the petitioner submits no evidence that her submission of a fraudulent divorce decree was made under extenuating circumstances; or that she is eligible for a discretionary determination of her good moral character despite her unlawful act pursuant to section 204(a)(1)(C) of the Act, which permits such a finding if: 1) the alien's act or conviction is waivable for the purposes of determining admissibility or deportability under section 212(a) or section 237(a) of the Act; and 2) U.S. Citizenship and Immigration Services (USCIS) determines that the act or conviction was connected to the alien's battery or subjection to extreme cruelty by his or her U.S. citizen spouse. Inadmissibility due to fraud or misrepresentation is waivable for self-petitioners under section 212(i) of the Act. However, the record does not indicate that the fraudulent divorce decree was submitted under duress or otherwise influenced by D-D-'s abuse. The petitioner has not addressed her moral character in an affidavit or demonstrated responsibility for her unlawful act. Nor has she established her good moral character despite this conduct. Although the petitioner submitted a supporting letter from her church and the letters from her friends attest to her good moral character, none of the individuals indicate that they have knowledge of her involvement in a misrepresentation before USCIS. The letters do not outweigh the lack of good moral character shown by the petitioner's submission of a fraudulent document.

The petitioner committed an unlawful act which adversely reflects upon her moral character pursuant to the final paragraph of section 101(f) of the Act and the regulation at 8 C.F.R. § 204.2(c)(1)(vii). She has consequently failed to demonstrate her good moral character as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

Conclusion

On appeal, the petitioner has not demonstrated that she: is a person of good moral character; entered into the marriage in good faith; and is eligible for immediate relative classification based on her marriage. Accordingly, the petitioner is ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act. Approval of the petition is further barred by section 204(g) 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.