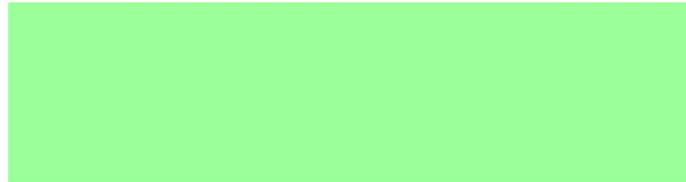




U.S. Citizenship
and Immigration
Services

(b)(6)

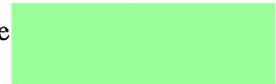


Date:

SEP 25 2014

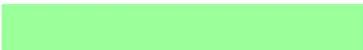
Office: VERMONT SERVICE CENTER

File



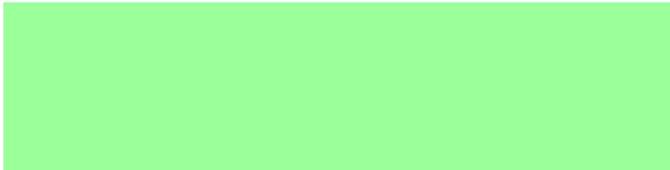
IN RE:

Self-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:

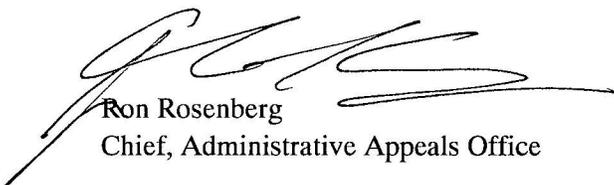


INSTRUCTIONS:

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,



Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Vermont Service Center director (the director) denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the record will be remanded.

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 under section 204(c) of the Act, concluding that the petitioner entered her previous marriage for the purpose of evading the immigration laws. On appeal, counsel provides a statement and additional evidence.

Relevant Law and Regulations

Section 204(a)(1)(A)(iii)(I) 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:

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 further explicated in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

(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.

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

Facts and Procedural History

The petitioner, a citizen of the Philippines, entered the United States on June 18, 2001, as a nonimmigrant exchange visitor. The petitioner stated that she met A-W-, a U.S. citizen, in February 2002 in California and was in an intermittent romantic relationship with him until the birth of their daughter in April 2004. The petitioner indicated that when A-W- declined to provide child support, she sent their daughter to the Philippines to be raised by her parents. The petitioner asserted that she met and married R-V- in Las Vegas in late 2004. R-V- filed an immigrant petition on behalf of the petitioner, which was denied in June 2006. In May 2007, the petitioner was placed in removal proceedings and order removed in absentia on September 6, 2007. The petitioner and R-V- divorced in February 2008. The petitioner stated that later that year she reconnected with A-W- and eventually moved in with him. They married in California on October 17, 2009. The petitioner filed the instant Form I-360 self-petition on March 19, 2012.

The director issued a Notice of Intent to Deny (NOID) on June 20, 2013. In the NOID, the director informed the petitioner that she had met the eligibility criteria of section 204(a)(1)(A)(iii) of the Act; however, the approval of the petition was barred by section 204(c) of the Act because the petitioner stated under oath that she had married her first husband, R-V-, solely to procure an immigration benefit. Counsel responded to the NOID with additional evidence, which the director found did not overcome the petitioner's statement under oath regarding her prior marriage. The director denied the self-petition on October 4, 2013. 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 petitioner's administrative record demonstrates that section 204(c) of the Act does not apply to her self-petition. However, the petition cannot be approved on the present record under section 204(g) of the Act because the petitioner married her second spouse while she was in removal proceedings. Consequently, the matter will be remanded to the director for further action.

Section 204(c) of the Act

The director denied the instant self-petition pursuant to section 204(c) of the Act, 8 U.S.C. § 1154(c), which states, in pertinent part:

[N]o petition shall be approved if –

- (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative . . . status as the spouse of a citizen of the United States . . . , by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws or
- (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

The regulation corresponding to section 204(c) of the Act, at 8 C.F.R. § 204.2(a)(1)(ii), states:

Fraudulent marriage prohibition. Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

A decision that section 204(c) of the Act applies must be made in the course of adjudicating a subsequent visa petition. *Matter of Rahmati*, 16 I&N Dec. 538, 539 (BIA 1978). United States Citizenship and Immigration Services (USCIS) may rely on any relevant evidence in the record, including evidence from prior USCIS proceedings involving the beneficiary. *Id.* However, the adjudicator must come to his or her own, independent conclusion and should not ordinarily give conclusive effect to determinations made in prior collateral proceedings. *Id.*; *Matter of Tawfik*, 20 I&N Dec. 166, 168 (BIA 1990).

Where there is reason to doubt the validity of a marital relationship, the petitioner must present evidence to show that the marriage was not entered into for the primary purpose of evading the immigration laws. *Matter of Phillis*, 15 I&N Dec. 385, 386 (BIA 1975). Evidence that a marriage was not entered into for the primary purpose of evading the immigration laws may include, but is not limited to, proof that the beneficiary has been listed as the petitioner'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 together. *Id.* at 387.

The director was required to make an independent determination regarding whether the petitioner entered her marriage to R-V- for the purpose of evading immigration laws. *Matter of Rahmati*, 16 I&N Dec. at 539. In the NOID, the director references the denial of R-V-'s immigrant petition filed on behalf of the petitioner, and the petitioner's statement under oath that she "married [R-V-] solely to procure an immigration benefit." However, the record of proceeding does not contain a sworn statement signed by the petitioner attesting that she entered into her marriage with R-V- solely for the purpose of procuring an immigration benefit. Rather, the audio recordings of the petitioner's and R-V-'s immigration interview reflect some discrepancies between the petitioner and R-V-'s answers to questions regarding the details of their relationship and daily lives. The recordings show that the petitioner agreed to withdraw her application for adjustment of status under intense pressure of criminal investigation and prosecution from the interviewing officers and without the presence of counsel. The record lacks any sworn statement of the petitioner admitting to marriage fraud. Rather, the record contains only a form "Withdrawal of Petition or Application" stating that the petitioner withdrew her application for adjustment of status (Form I-485) on May 22, 2006. No reason for the withdrawal is stated.

In response to the NOIR, the petitioner provided additional evidence regarding the bona fides of her marriage to R-V-. In an undated declaration, the petitioner stated that she felt "unfortunate and empty" when she went to Las Vegas in late 2004. The record reflects that the petitioner and A-W-'s daughter had been born in April 2004, and in her previous statement the petitioner credibly

recounted how she sent her daughter to the Philippines to be raised by her mother after A-W- declined to provide financial support. In her undated declaration, the petitioner stated that a friend introduced her to R-V- and he lightened up her life. She asserted that they married after a brief courtship. She indicated that she lived with R-V- at his parents' house in Las Vegas, but ultimately returned to California when she could not find a job. She described the long distance nature of her marriage, noting that she flew to Las Vegas to visit him, and he traveled to California to visit her by car. She also discussed challenges in their marriage stemming from R-V-'s gambling and alcohol problems. In response to the NOIR, the petitioner also provided an affidavit from R-V- dated July 17, 2013, in which he stated that the petitioner went to Las Vegas to escape the difficulties she had suffered in California. He indicated that he and the petitioner became friends and eventually fell in love. He asserted that he had been an irresponsible husband, and that he regretted losing her. The petitioner also provided an affidavit from R-V-'s mother confirming that R-V- and the petitioner lived together as husband and wife in Las Vegas, although the petitioner worked in the Bay Area.

In addition to the affidavits, the petitioner submitted boarding passes and flight itineraries that show that she flew between San Jose and Las Vegas on several occasions during the marriage, and receipts from Las Vegas businesses dated in 2005 and 2006. In a letter dated July 22, 2013, counsel indicated that the petitioner retrieved these documents from storage. The petitioner also provided photographs of her and R-V- at their wedding and on one other occasion with friends.

Upon *de novo* review of the petitioner's administrative record, we find that section 204(c) of the Act does not apply to the instant self-petition. The record lacks substantial and probative evidence that the petitioner married R-V- to evade the immigration laws. The record does not contain a sworn statement signed by the petitioner conceding that she married R-V- solely to obtain an immigration benefit. The recordings of the petitioner's immigration interview indicate that she agreed to withdraw her application for adjustment of status under intense pressure, but do not show that that she married R-V- solely to obtain an immigration benefit. In response to the NOIR, the petitioner provided documentation of the bona fides of her marriage to R-V-. Thus the record does not establish that the petitioner entered into a marriage for the purpose of evading the immigration laws, and the director's decision will be withdrawn.

Section 204(g) of the Act Applies to the Instant Self-Petition

Although the petitioner has overcome the basis for the director's denial, the appeal cannot be sustained because the petition remains subject to section 204(g) of the Act, which 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 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 second 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, which states in pertinent part:

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.

8 U.S.C. § 1255(e) (emphasis added).

The corresponding regulation at 8 C.F.R. § 204.2(a)(1)(iii) states, in pertinent part:

Marriage during proceedings – general prohibition against approval of visa petition. A visa petition filed on behalf of an alien by a United States citizen . . . shall not be approved if the marriage creating the relationship occurred on or after November 10, 1986, and while the alien was in . . . removal proceedings, or judicial proceedings relating thereto. . . . [T]he burden in visa petition proceedings to establish eligibility for the exemption . . . shall rest with the petitioner.

(A) *Request for exemption.* . . . The request must be made in writing The request must state the reason for seeking the exemption and must be supported by documentary evidence establishing eligibility for the exemption.

(B) *Evidence to establish eligibility for the bona fide marriage exemption.* The petitioner should submit documents which establish that the marriage was entered into in good faith and not entered into for the purpose of procuring the alien's entry as an immigrant. The types of documents the petitioner may submit include, but are not limited to:

- (1) Documentation showing joint ownership of property;
- (2) Lease showing joint tenancy of a common residence;

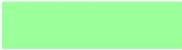
- (3) Documentation showing commingling of financial resources;
- (4) Birth certificate(s) of child(ren) born to the petitioner and beneficiary;
- (5) Affidavits of third parties having knowledge of the bona fides of the marital relationship (Such persons may be required to testify before an immigration 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.

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 petitioner was placed in removal proceedings in May 2007, and married A-W- in October 2009. The petitioner's proceedings have not been terminated under any of the terms specified at 8 C.F.R. § 245.1(c)(8)(ii). Thus, section 204(g) of Act applies to the instant matter. The record contains a birth certificate of the petitioner and A-W-'s child and a lease in the names of the petitioner and A-W-, both dated prior to their October 2009 marriage. The record also contains a detailed statement from the petitioner regarding her relationship with A-W-, which began in 2002, and several photographs of the petitioner and A-W-, including one of their wedding reception. However, the record lacks a written request for the bona fide marriage exemption from the petitioner as well as additional evidence as described in the regulation at 8 C.F.R. § 204.2(a)(1)(iii). The director did not address section 204(g) of the Act. Consequently, the petition will be remanded to the director to provide the petitioner with notice of the requirements for a bona fide marriage exemption from section 204(g) of the Act under section 245(e) of the Act and the opportunity to submit additional evidence.

Conclusion

The director correctly found that the petitioner established eligibility under the criteria at section 204(a)(1)(A)(iii)(I) and (II)(aa),(bb) and (dd) of the Act. On appeal, the petitioner has overcome the



director's denial under section 204(c) of the Act. However, the petition must be remanded to the director because the petitioner married her second husband while she was in removal proceedings and is subject to section 204(g) of the Act, but the director did not address this issue below.

ORDER: The October 4, 2013 decision of the Vermont Service Center is withdrawn. The petition is remanded to the Vermont Service Center for further action and issuance of a new decision, which, if adverse to the petitioner, shall be certified to the Administrative Appeals Office for review.