



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF J-A-S-

DATE: NOV. 3, 2015

MOTION OF ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-360, PETITION FOR AMERASIAN, WIDOW(ER) OR SPECIAL IMMIGRANT

The Petitioner seeks immigrant classification as an abused spouse of a U.S. citizen. *See* Immigration and Nationality Act (the Act) § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii). The Acting Director, Vermont Service Center, denied the petition, and we rejected a subsequent appeal. The matter is now before us on a motion to reopen and a motion to reconsider. The motion to reopen and the motion to reconsider will be denied.

I. RELEVANT LAW AND REGULATIONS

Section 204(a)(1)(A)(iii)(I) of the Act provides, in pertinent part, 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.

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 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 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 or preference 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 record does not indicate that the Petitioner resided outside of the United States for two years after her second marriage, which forms the basis for the instant proceedings. 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:

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)(8)(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. . . .

The eligibility requirements are further explained 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

....

(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 or the self-petitioner’s child, and must have taken place during the self-petitioner’s marriage to the abuser.

....

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

(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.

....

(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

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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.

II. FACTS AND PROCEDURAL HISTORY

The Petitioner is a citizen of Trinidad and Tobago who last entered the United States as a nonimmigrant visitor on May 27, 2003. The Petitioner married her first spouse, M-T,¹ a U.S. citizen, in [REDACTED] New York on [REDACTED] 2007, and they divorced on [REDACTED] 2009. On January 31, 2011, the Petitioner was placed into removal proceedings.² The Petitioner married her second spouse, J-F,³ on [REDACTED] 2011 in [REDACTED] New York. The Petitioner filed the instant Form I-360 on December 21, 2012. The Director denied the petition as the record did not establish that the Petitioner's spouse subjected her to battery or extreme cruelty during their marriage and that she married him in good faith. The Director also determined that approval of the petition was barred under section 204(g) of the Act, as the Petitioner married while she was in removal proceedings, and did not meet the requirement for the bona fide marriage exemption. We rejected the Petitioner's subsequent appeal as improperly filed, as there was no Form G-28, Notice of Entry or Appearance as Attorney or Accredited Representative, for the Petitioner's attorney, who signed the appeal. The Petitioner timely filed the instant motion to reopen and motion to reconsider.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). On motion, the Petitioner submits a signed copy of a Form G-28 authorizing her attorney to file the appeal, a brief, and previously submitted evidence. We review these proceedings *de novo*.

III. ANALYSIS

A. Battery or Extreme Cruelty

We find no error in the Director's determination that the Petitioner's spouse did not subject her to battery or extreme cruelty and the evidence submitted on motion fails to overcome this ground for denial. The relevant evidence before the Director included two personal statements of the Petitioner,

¹ Name withheld to protect the individual's identity.

² The [REDACTED] Immigration Court scheduled the Petitioner's next hearing for [REDACTED] 2016.

³ Name withheld to protect the individual's identity.

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statements from the Petitioner's family members, [REDACTED] her friends, [REDACTED] and [REDACTED] and her psychiatrist, [REDACTED]

In her first statement, the Petitioner described several instances during her marriage when J-F- drank too much and was verbally abusive to her.⁴ She stated that on their first visit to the immigration office about a week after they married, they had an argument in front of their attorney. On a second occasion, at a family gathering on Mother's Day in 2011, the Petitioner recounted that J-F- had drunk too much, and when she asked him to stop, he acted as if he were going to hit her. At a 4th of July celebration in July 2011, at their mutual friends' home, the Petitioner stated that J-F- accused her of being too friendly with someone, and they argued all the way home. In her second statement, the Petitioner indicated that J-F- had anger problems, picked fights with her at social gatherings, and put her in embarrassing situations. The Petitioner stated that in late July 2011 she started getting calls from a woman using J-F-'s cell phone, who insulted her, and she guessed this woman was having an affair with J-F-. The Petitioner's statements do not indicate that her husband ever battered her or that his behavior involved threatened violence, psychological or sexual abuse, or otherwise constituted extreme cruelty, as that term is defined at 8 C.F.R. § 204.2(c)(1)(vi).

[REDACTED], the Petitioner's sister and brother-in-law, stated that they observed J-F- on several occasions being "very loud and abusive" to the Petitioner. The Petitioner's friend and roommate, [REDACTED] stated that J-F- was often drunk, and he "became argumentative and verbally abusive at times and then very anti-social at other times." [REDACTED] stated that occasionally J-F- would get quite intoxicated and his conversations were somewhat senseless. These witness statements are general in nature and do not describe specific instances of battery or extreme cruelty, as defined in the regulations.

In an undated psychiatric evaluation, [REDACTED] stated that he evaluated and treated the Petitioner from February 2015 – April 2015. [REDACTED] stated that the Petitioner told him that J-F- was rude, loud and unpredictable when he was drinking. He stated that the Petitioner described several incidents, including on April 20, 2011, when he was rude to her in front of their attorney; on Mother's Day in 2011 at a family gathering when she asked him to stop drinking and he shouted at her and made threatening gestures; and at a 4th of July celebration when he got angry with her for being too familiar with a mutual friend, and shouted at her. [REDACTED] diagnosed the Petitioner with major depressive disorder. While we do not question [REDACTED] credentials, he does not describe any instances of battery or extreme cruelty, as those terms are defined in the regulations.

On motion, the Petitioner contends that she suffered from verbal assaults, humiliations, insults and threats. She resubmits a statement submitted for the first time on appeal, in which she states that J-F- criticized, embarrassed and insulted her in front of others, he used vulgar language, and he made threatening gestures. She indicates that on a Saturday night in May 2011, she and J-F- were arguing

⁴ Before the Director and on motion, the Petitioner and other witnesses describe an incident on New Year's Eve in 2010. Although we will consider this incident generally in determining whether J-F- exhibited a pattern of emotional abuse toward the Petitioner, we will not discuss this incident in detail, as it did not occur during the marriage.

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and J-F- was insulting her when their roommate interrupted them, and J-F- left the apartment. She recounts that in July 2011 both she and her sister started receiving irrational and unpleasant phone calls from a woman using J-F-'s cell phone, who insulted and cursed at her. The Petitioner's statement, however, does not describe particular episodes of battery or extreme cruelty.

On motion, the Petitioner resubmits a statement she first submitted on appeal from her sister, [REDACTED], and nephew, [REDACTED]. [REDACTED] recounts that J-F- was loud and abusive at a few family gatherings. On the weekend of Memorial Day, [REDACTED] states that she heard J-F- arguing loudly with the Petitioner, and she told J-F- that he had to calm down or leave. She said that the Petitioner told her that she was afraid that J-F- would hit her. [REDACTED] however, does not describe any specific incidents of battery or extreme cruelty. The Petitioner's nephew, [REDACTED], indicated that he was very disturbed to hear that on July 30, 2011, J-F- left after an argument with the Petitioner, the couple's marriage had collapsed, J-F- had vanished, and the Petitioner was concerned about her safety. [REDACTED] does not provide any details about particular acts of battery or extreme cruelty. His testimony is also not supported by the Petitioner's, which does not mention an incident in late July 2011 and is inconsistent with the Petitioner's statements regarding the breakup of the marriage.⁵ Accordingly, the Petitioner has not established that her husband subjected her to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

B. Entry into the Marriage in Good Faith

The Director correctly determined that the Petitioner did not enter into the marriage with J-F- in good faith. The relevant evidence before the Director included the Petitioner's three personal statements, statements from the Petitioner's friends, [REDACTED] and [REDACTED] and copies of a joint bank statement, a life insurance notice, utility bills, a 2011 IRS tax return transcript, a 2012 IRS Form 1040X, Amended U.S. Individual Income Tax Return, and photographs.

The Petitioner did not discuss her good faith marital intentions in her first statement. The Petitioner stated in her second statement that she met J-F- on the 4th of July 2010 at the home of [REDACTED] and [REDACTED], and they had an instant connection. She stated that she admired J-F- for being a strong single father to his autistic daughter, and following their initial meeting they frequently spoke on the phone, started dating, and became serious very quickly. The Petitioner stated that she and J-F- liked the same movies, and both appreciated the importance of family and children. She indicated that they planned to tell their families how serious they were at Thanksgiving dinner in 2010. The Petitioner stated that they married in [REDACTED] 2011 at a small ceremony with her sister [REDACTED] and [REDACTED] J-F-'s best friend, in attendance. The Petitioner stated that she and J-F- had different work schedules. She recounted that she worked during the day and J-F- worked at night, except on Saturday night when she would sometimes work late and J-F- would meet her after work. In her third statement,

⁵ The Petitioner stated in her first statement that on August 7, 2011, two days prior to their interview with immigration officials, J-F- went to see his daughter, and never came back. In her statement on motion, she states that she last saw J-F- on the morning of their immigration interview, when they agreed to meet later that day at their attorney's office, and he didn't show up. There is no explanation of record for these inconsistencies.

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the Petitioner reiterated how she first met J-F- and briefly discussed their courtship. The Petitioner's statements lack probative details on her wedding ceremony, shared residence, and experiences with J-F-, apart from the alleged abuse.

The statements from the Petitioner's friends also do not contain probative details regarding the Petitioner's intentions in marrying J-F-. [REDACTED] stated that he has known the Petitioner for 27 years in Trinidad, and that he has seen her at least eight times in New York in recent years. He stated that he first met J-F- in September 2010, and that the Petitioner and J-F- seemed happy together. He also stated that he saw them together at their home in June 2011, and that they were "well settled in a life together." [REDACTED] however, spoke in general terms and did not provide specific detail about his interactions with the couple. [REDACTED] stated that the Petitioner and J-F- "clicked right away" and that "no one was surprised when they got married," but she did not provide any substantive information about the Petitioner's marital intentions. [REDACTED] stated in their joint letter that about a year and a half ago they were "first introduced to [the Petitioner's] then boyfriend [J-F-] who shortly after became her husband," and that they were full of joy and happiness for them. They also did not provide any substantive information about the Petitioner's marital intentions or their interactions with the couple. Moreover, [REDACTED] claim that the Petitioner introduced them to J-F- is inconsistent with the Petitioner's statement that she first met J-F- through [REDACTED]

The Petitioner submitted photographs that depict her and J-F- at their wedding ceremony and a restaurant following the ceremony. The IRS transcripts show that the Petitioner filed her 2011 and 2012 tax returns as single. Her 2012 IRS Form 1040X to change her filing status to married filing separately is not signed and there is no evidence it was filed with the IRS. The joint bank statement reflects one month of activity ending on July 21, 2011. The utility bills addressed to the Petitioner and J-F- include: two electric bills for June and July 2011; and three gas bills for May, June and July 2011. The life insurance notice shows that the Petitioner named J-F- as the primary beneficiary for her [REDACTED] policy. These documents show that the Petitioner and J-F- shared some finances, but without credible, probative testimony do not establish the Petitioner's good-faith entry into the marriage.

On motion, the Petitioner reiterates in her fourth statement that she and J-F- had an instant attraction when they first met at the 4th of July celebration at the [REDACTED] home in 2010, and started dating at the end of August. She described meeting J-F- for coffee, having dinners with him, and watching movies and television together. She stated that they planned to tell their respective families that they were serious over the Thanksgiving holiday, and that he surprised her by asking her to marry him at the Thanksgiving celebration. She recounts their discussions about where they would live after they got married, how they would pool their financial resources, and their plans to buy a home within a few years. The Petitioner's statement on motion contains several inconsistencies with other evidence of record. In the Petitioner's third statement, the Petitioner recounted that she and J-F- spoke about moving in together, but that she suggested they "make it more official and J-F- agreed." In her statement on motion, however, the Petitioner recounts that J-F- surprised her by asking her to marry him at the 2010 Thanksgiving dinner. The Petitioner's statement on motion is also inconsistent with the letter from [REDACTED] who stated that he learned in October 2010 that the

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Petitioner and J-F- were going to become engaged over the Thanksgiving holidays.

As discussed, the Petitioner also submitted on motion, statements from her sister, [REDACTED] and nephew, [REDACTED]. [REDACTED] recounts that she first met J-F- at the Petitioner's home in October 2010, and that he appeared to be very much in love with the Petitioner. [REDACTED] describes how happy the Petitioner and J-F- looked on their wedding day, and observed that J-F- was caring and protective of the Petitioner. [REDACTED] describes making plans with the Petitioner and J-F- to live together in a shared home at a future date. Her statement is of some probative value in establishing the Petitioner's good-faith marital intentions. However, [REDACTED] statement contains the same inconsistencies noted above. [REDACTED] states that the Petitioner is a favorite aunt, and that he witnessed J-F-'s surprise marriage proposal to the Petitioner at their 2010 Thanksgiving dinner, and they were all happy for her. [REDACTED] also states that he was present at the couple's wedding, and that the Petitioner and J-F- appeared to be excited. As noted above, other evidence of record casts doubt on whether there was a surprise proposal, including the Petitioner's third statement to the Director to the effect that it was her idea to make the relationship "more official," and [REDACTED] statement that he heard the couple was going to become engaged during the Thanksgiving holiday.

On motion, the Petitioner contends that the totality of the evidence establishes that her marriage to J-F- was *bona fide*. The Petitioner has submitted some evidence of her shared finances with J-F-. However, the lack of probative details and inconsistencies in her personal statements and the statements of her friends and family members detract from the credibility of her claim. When the credible and relevant evidence is viewed in the totality, the preponderance of the evidence fails to demonstrate that the Petitioner entered into marriage with J-F- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

C. Section 204(g) of the Act Bars Approval

Because the Petitioner married J-F- while she was in removal proceedings and she did not remain outside of the United States for two years after their marriage, her 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 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; *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 her good-faith entry into the marriage by clear and convincing evidence. Section 245(e)(3) of the Act; 8 C.F.R. § 245.1(c)(8)(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 marriage with J-F- 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 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.

D. Eligibility for Immediate Relative Classification

Beyond the director's decision, the Petitioner is also not eligible 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) because she has not complied with, nor is she exempt from section 204(g) of the Act.⁶

IV. CONCLUSION

On motion, the Petitioner has not established that she was subjected to battery or extreme cruelty by her U.S. citizen spouse and entered into marriage with him in good faith. She has also not established that she is eligible for immediate relative classification and is exempt from the bar to approval of her petition under section 204(g) of the Act. The Petitioner is consequently ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act.

The Petitioner bears the burden of proof to establish her eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013); *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Here, that burden has not been met.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of J-A-S-*, ID# 14240 (AAO Nov. 3, 2015)

⁶ 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).