U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF L-A-R-T-

DATE: FEB. 9, 2016

APPEAL OF VERMONT SERVICE CENTER 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. Immigration and Nationality Act (the Act) § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be sustained.

I. APPLICABLE LAW

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.

The record in this case indicates that the Petitioner was in removal proceedings at the time of his 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 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 his 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 eligibility requirements for immigrant classification as an abused spouse under section 204(a)(1)(A)(iii) of the Act are explained at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part, the following:

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

II. RELEVANT FACTS AND PROCEDURAL HISTORY

The Petitioner claims to have entered the United States on December 5, 1992, near Arizona, without inspection, admission, or parole. The Petitioner was placed into removal proceedings on 2009.[1] The Petitioner married D-M-,[2] a U.S. citizen, on 2011, in Colorado. The Petitioner filed the Form I-360, Petition for Amerasian, Widow(er), or

[1] On appeal, the Petitioner contends that the removal proceedings will be terminated. The proceedings were administratively closed on March 4, 2015. 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 Avetisyan*, 25 I&N Dec. 688, 695 (BIA 2012). As such, the proceedings remain pending, and the provisions of sections 204(g) and 245(e) of the Act are applicable.

[2] Name withheld to protect the individual's identity.

Special Immigrant, on May 9, 2014. The Director issued a request for evidence (RFE) followed by a notice of intent to deny (NOID).[3] In the NOID, the Director stated that as the Petitioner married D-M- while in removal proceedings, he was therefore subject to the bar at section 204(g) of the Act unless he could show by clear and convincing evidence that his marriage to D-M- was *bona fide*. The Director initially denied the petition for abandonment, as she determined that the Petitioner had not timely responded to her NOID. Upon subsequent motion, the Director reopened the proceedings to consider the Petitioner's responsive evidence. The Director applied the section 204(g) bar, found the evidence insufficient to establish the Petitioner's eligibility for the *bona fide* marriage exemption under section 245(e) of the Act, and denied the petition accordingly. The Petitioner filed a timely appeal. On appeal, the Petitioner submits a brief and supplemental evidence.

III. ANALYSIS

We review these proceedings *de novo*. Upon a full review of the record as supplemented on appeal, the Petitioner has overcome the Director's ground for denial. We will sustain the appeal for the following reasons.

A. Section 204(g) of the Act

Because the Petitioner married his spouse while he was in removal proceedings and did not remain outside of the United States for two years after their marriage, he is subject to the bar at section 204(g) of the Act, unless he qualifies for the exception to the bar pursuant to section 245(e)(3) of the Act by establishing by clear and convincing evidence that his marriage to D-M- was *bona fide*. When a marriage is contracted during removal proceedings, the petitioner must overcome a regulatory presumption of fraud. *See Ahmed v. Mukasey*, 548 F.3d 768, 772-73 (9th Cir. 2008); 8 C.F.R. § 204.2(a)(1)(iii). The Petitioner must offer evidence that is probative of his motivation for marriage, not just the fact that he married, and that his marriage was based on a legitimate relationship rather than on a subjective desire to adjust status based on his marriage. *See Malhi v. INS,* 336 F.3d 989, 994 (9th Cir. 2003). The Director determined that the Petitioner did not establish that his marriage to D-M- was *bona fide* by clear and convincing evidence.

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; 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.

[3] While the Petitioner's response to the Director's RFE is in the record, a copy of the RFE is not. As we are sustaining the appeal, we will not remand the proceedings for the Director to complete the record with a copy of the RFE.

The Petitioner submitted two personal affidavits, a letter from his father and sister, copies of Facebook pages, and photographs of the Petitioner and D-M-. In his first affidavit, the Petitioner stated that he first met D-M- in October 2010 at the home of a mutual friend, that they were friends for about three months before they started to date, and they dated for five months before moving in together. He stated that they were in constant communication by text and phone calls, he called her "apple pie," and she called him "ducky," and they went to movies and dinner dates, and got married in 2011. In his second affidavit, the Petitioner stated that he first met D-M- on a social media outlet, , in February 2010 and they met in person in October 2010. He stated that they went to the movies on their first date, became very close over the next five months of dating, and he moved in with D-M- around Valentine's Day 2011.[4] The Petitioner described the types of things he and D-M- did together. On the copies of posts from Facebook, the Petitioner indicated that he loved D-M-, and D-M- likewise expressed her love for the Petitioner.

The Petitioner further recounted in his second statement that he and D-M- joked about getting married, yet he found and purchased a unique ring with three diamonds,[5] he proposed one morning before work, and she accepted his proposal. He described their wedding at the courthouse and the barbeque they held afterwards. The Petitioner indicated that he and D-M- hoped to have a larger traditional wedding ceremony when they could afford it, and talked about wanting to have children and a home of their own in The Petitioner indicated that D-M-'s father and sister were on the lease, they did not own property together, and he and D-M- paid their share of household expenses to D-M-'s family in cash; as such, the Petitioner stated that he could not submit objective documentation of the marriage as described at 8 C.F.R. § 204.2(a)(1)(iii)(B).

In their letters, the Petitioner's father, and sister, indicated how happy the couple looked on their wedding day. observed that the couple smiled, held hands and kissed one another the entire time at the barbeque following the wedding. She added that she spent time with her brother and D-M- at barbeques and at the movies, and she observed D-M- before the wedding proudly displaying her engagement ring.

On appeal, the Petitioner submits supplemental affidavits from his sister and his father. states that she had never seen her brother so committed to a relationship, that he and D-M- took care of one another and each other's extended families, and were very loving and kind to one other. recounts that after a fight the Petitioner spent an entire evening composing a love poem for D-M-, and when he dislocated his arm, D-M- helped the Petitioner to heal by bringing his dinner to him at the table. She describes various things the Petitioner did to please D-M-. states that he is very close to his son and could tell that he was very much in love with D-M-. describes discussing marriage with his son and his own relationship with D-M-. states that when D-M- was in the hospital, the Petitioner walked to the hospital to see her, and when D-M- was in a bad mood, his son could always make her laugh and cheer her up. indicates

[4] The record contains inconsistent dates about when the Petitioner and D-M- first met and moved in together. These minor inconsistencies are overcome by the detailed statements submitted into the record on appeal.
[5] The Petitioner submits the receipt for the ring on appeal.

that all of his son's girlfriends have been U.S. citizens, and he did not marry any of them until he fell in love with D-M-.

A full review of the evidence establishes the Petitioner's good-faith entry into the marriage by clear and convincing evidence. The Petitioner's description of buying D-M- the perfect ring, their mutual likes, the activities they participated in together, and other particulars in his affidavits provide sufficient probative details of their courtship, marriage, and shared experiences. The [redacted] posts demonstrate contemporaneous expressions of the Petitioner's and D-M-'s love for one another. The Petitioner's father and sister observed the Petitioner and D-M-'s interactions during their courtship, wedding and early marriage, and describe specific activities of the Petitioner that show his good faith intention at the inception of the marriage. The Petitioner's explanation of why he did not have any documents listed at 8 C.F.R. § 204.2(a)(1)(iii)(B) is reasonable and credible. Accordingly, the Petitioner has demonstrated the *bona fides* of his marriage under the clear and convincing standard of proof required by section 245(e)(3) of the Act. The Petitioner has therefore established that he is exempt from section 204(g) of the Act.

B. Eligibility for Immediate Relative Classification

Because the Petitioner is exempt from section 204(g) of the Act, he has also demonstrated his 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).

IV. CONCLUSION

On appeal, the Petitioner has demonstrated that he complied with the provisions of section 204(g) of the Act, and therefore he is eligible for immediate relative classification based on his marriage to a U.S. citizen. He is thus eligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

In these proceedings, the Petitioner bears the burden of proving eligibility for the benefit sought. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has met that burden.

ORDER: The appeal is sustained.

Cite as *Matter of L-A-R-T-*, ID# 15222 (AAO Feb. 9, 2016)