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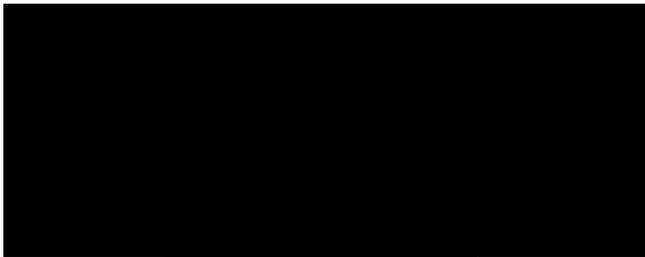
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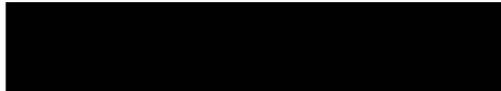
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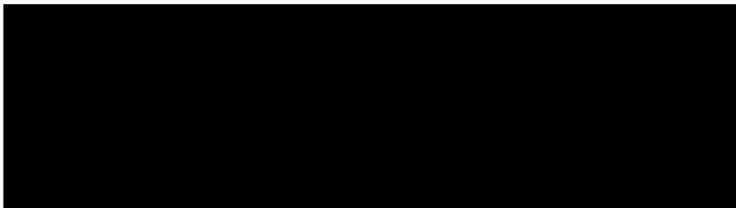
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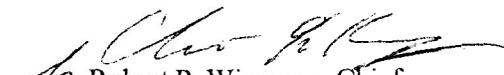
PETITION: Petition for Immigrant Battered Spouse Pursuant to Section 204(a)(1)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
for Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, 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 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 finding that the petitioner failed to establish that she resided with her spouse, that she was battered or subjected to extreme cruelty by her spouse, and that she entered into her marriage in good faith.

The petitioner, through counsel, submits a timely appeal.

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

(v) *Residence.* . . . The self-petitioner is not required to be living with the abuser when the petition is filed, but he or she must have resided with the abuser . . . in the past.

(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 . . . 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 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.

\* \* \*

(iii) *Residence.* One or more documents may be submitted showing that the self-petitioner and the abuser have resided together . . . . Employment records, utility receipts, school records, hospital or medical records, birth certificates of children . . . , deeds, mortgages, rental records, insurance policies, affidavits or any other type of relevant credible evidence of residency may be submitted.

(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 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.

The record in this case provides the following pertinent facts and procedural history. In her initial affidavit, the petitioner claims to have entered the United States in March 1994 without inspection. On April 20, 2001, the petitioner married D-K-<sup>1</sup>, a U.S. citizen, in East Hartford, Connecticut. On August 2, 2005, Citizenship and Immigration Services (CIS) issued a Notice to Appear for removal proceedings charging the petitioner under section 212(a)(6)(A)(i) of the Act as an alien present in the United States without being admitted or paroled or who arrived at a time and place not designated by the Secretary of Homeland Security. The petitioner remains in proceedings before the Hartford Immigration Court and her next hearing is scheduled for January 22, 2008. The petitioner filed this Form I-360 on May 11, 2006. On June 1, 2006 the director issued a Request for Evidence (RFE) of, *inter alia*, the petitioner's residence with her spouse, claimed abuse, and good faith marriage. On August 21, 2006, the director issued a Notice of Intent to Deny (NOID) the petition. The petitioner timely responded to the NOID. The director denied the petition on January 4, 2007, based on the petitioner's failure to establish that she resided with her spouse, that she was battered or subjected to extreme cruelty by her spouse during their marriage, and that she entered into her marriage in good faith. The petitioner, through counsel, submits a timely appeal with additional evidence.

On appeal, counsel argues that the prior approval of the petitioner's Form I-130 is ample evidence to establish that the petitioner's marriage was bona fide and that the petitioner and her spouse resided together. Counsel states that the doctrines of res judicata and collateral estoppel support his argument that "the approval of [the petitioner's] I-130 visa petition is conclusive proof that" the former Immigration and Naturalization Service ("the Service") was "convinced that her marriage was bona fide and that she had shared a common residence with her husband at some time." We are not persuaded by counsel's argument. While counsel states that although the doctrines of res judicata and equitable estoppel "are typically used in court proceedings, . . . they are equally applicable in the context of visa petition proceedings," he provides no support for this assertion. Indeed, contrary to his argument that these doctrines are "equally applicable" in this proceeding, there is no clear rule that either claim can be made against the Government in immigration cases. *See, e.g., Heckler v. Community Health Services*, 467 U.S. 51, 60 (1984) (the court found it "well settled that the Government may not be estopped on the same terms as any other litigant."); *Matter of Tuakoi*, 19 I&N Dec. 341, 348 (BIA 1985) (noting that it has not been determined that estoppel will

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<sup>1</sup> Name withheld to protect individual's identity.

lie against the Government in immigration cases). While some federal circuit courts of appeals have found that *res judicata* applies to immigration proceedings, the majority of these cases address the applicability of the doctrine in removal proceedings. *See, e.g., Hamdan v. Gonzales*, 425 F.3d 1051, 1059 (7<sup>th</sup> Cir. 2005) (citing cases applying *res judicata* to adjudication of petitions for relief from removal in immigration courts); *Medina v. INS*, 993 F.2d 499, 503 (5<sup>th</sup> Cir. 1993) (applying *res judicata* in deportation proceedings and cited by counsel on appeal).

Even if estoppel or *res judicata* can be applied against the Government in the adjudication of visa petitions, the petitioner has not established the necessary elements to satisfy either doctrine. As it relates to estoppel, the petitioner must establish that: (1) the Government's action constituted affirmative misconduct, (2) that she reasonably relied on the action or representation of the Government, and (3) that she was prejudiced by the reliance. *See Heckler*, 467 U.S. at 58, 59. First, we do not find that the director's failure to accept the petitioner's I-130 approval as sufficient evidence of her residence and marital bona fides was in error. We note that the approval of a Form I-130 petition does not automatically entitle the alien to any other benefit. *INS v. Chadha*, 462 U.S. 919, 937 (1983). Instead, while an approved I-130 establishes eligibility for immigrant status, the Secretary of Homeland Security must still decide whether or not to accord the status. *See Amarante v. Rosenberg*, 326 F.2d 58, 62 (9<sup>th</sup> Cir. 1964). In *Agyeman v. I.N.S.*, the Ninth Circuit found the fact that an alien had an approved I-130 did not mean that the evidence submitted in support of the Form I-130 was conclusive evidence in perpetuity that the marriage was bona fide. 296 F.3d 871, 879 (9<sup>th</sup> Cir. 2002). Although [REDACTED] had an approved Form I-130, his application for adjustment of status was denied because the couple failed to attend the scheduled interview and to submit the requisite medical examination. *Id.* at 875. Agyeman argued that because he had an approved I-130 on file and his marriage was consummated prior to his being placed in deportation proceedings, he was not required to prove his bona fide marriage to a United States citizen. *Id.* at 879 n.2. The court rejected Agyeman's argument that "no other evidence of the marriage is ever necessary" and stated:

While the I-130 may suffice in many cases, in cases such as this when the spouse has never testified as to the bona fides of the marriage, the approved petition might not *standing alone* prove by a preponderance of the evidence that the marriage was bona fide and not entered into to evade immigration laws.

[emphasis in original] *Id.*

In this case, like Agyeman, the petitioner and her spouse never attended the required interview.<sup>2</sup> As such, neither the petitioner nor her spouse ever testified regarding their residence or the bona fides of the marriage in conjunction with the approved I-130. Accordingly, it was well within the authority

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<sup>2</sup> The regulation at 8 C.F.R. § 245.6 requires each applicant for adjustment of status to be interviewed by an immigration officer. The Service's authority to request the appearance of the petitioner and her spouse derives from the regulation at 8 C.F.R. § 103.2(b)(9).

of the director to require the petitioner to separately and independently establish these elements as they relate to the filing of the instant petition.

Second, even if we assume that the director's actions were erroneous, the approval of the Form I-130 was not intended nor could reasonably have been intended to induce reliance. Although similar, the statutory eligibility provisions and benefits procured through sections 201(b)(2)(A)(i) and 204(a)(1)(A)(iii) of the Act are not identical. Therefore, the approval of the Form I-130 was made under a separate provision of the Act, independent of the current Form I-360 petition. As such, the petitioner should have expected that the merits of the Form I-360 battered spouse petition would be evaluated independently of any decision made with respect to the Form I-130 alien relative petition. Moreover, the petitioner's failure to establish her residence and the marital bona fides were not the sole reasons for the denial of the Form I-360. The director's denial was also based upon the petitioner's failure to establish that she had been battered or subjected to extreme cruelty by her spouse. Therefore, even if the grant of the Form I-130 could reasonably have been intended to induce reliance that the petitioner could establish certain eligibility requirements for the separate battered spouse petition, it could not possibly have led her to believe that she would not have to comply with the other prerequisites for approval, *i.e.*, good moral character and battery or extreme cruelty during the marriage. Accordingly, the petitioner has also not shown that she has been prejudiced by the director's failure to accept the approval of the petitioner's Form I-130 as evidence of her eligibility for the instant petition. As such, we find no merit in counsel's contention that CIS should be estopped from finding that the petitioner has failed to establish her residence and good faith entry into her marriage given the prior approval of the Form I-130.

Similarly, even if *res judicata* may be applied in these proceedings, the principle requires identical claims and parties, both of which are lacking in this case. As noted above, the statutory and regulatory requirements pertaining to a Form I-130 alien relative petition and a Form I-360 self-petition are not the same. First, during the adjudication of the Form I-130, the petitioner's husband was the petitioner and bore the burden of proof to establish his citizenship and the validity of their marriage. Section 201(b)(2)(A)(i) of the Act; 8 C.F.R. §§ 204.1(g), 204.2(a)(2). In contrast, in this case, the petitioner bears the burden of proof to establish not only the validity of their marriage, but also her own good-faith entry into their union. Section 204(a)(1)(A)(iii)(I)(aa) of the Act. The regulations for self-petitions under section 204(a)(1)(A)(iii) of the Act further explicate the statutory requirement of the self-petitioner's good-faith entry into the marriage or qualifying relationship. 8 C.F.R. §§ 204.2(c)(1)(ix), 204.2(c)(2)(vii). However, the regulations concerning spousal, immediate relative petitions contain no similar evidentiary requirements to establish the bona fides of the marriage except in cases of marriage fraud (8 C.F.R. § 204.2(a)(1)(ii)); marriages entered into when the alien spouse was in proceedings (8 C.F.R. § 204.2(a)(1)(iii)); and marriage within five years of the petitioner's obtainment of lawful permanent resident status based upon a prior marriage (8 C.F.R. § 204.2(a)(1)(i)). Accordingly, even if applicable in these proceedings, the principle of *res judicata* does not bar an examination of the petitioner's residence and good-faith entry into her marriage or relieve the petitioner of her burden to establish those statutory requirements in the instant case.

The remainder of counsel's arguments and the additional evidence submitted on appeal are further discussed below.

### *Residence*

On the Form I-360, the petitioner indicated that she resided with her spouse from 2001 until 2003 and that she last resided with her spouse at [REDACTED], East Hartford, Connecticut. The petitioner provided no documentary evidence of their residence together such as a lease, financial documents, or other correspondence. Although the petitioner submitted her 2002 federal income tax return and her 2003 state and federal income tax returns, these documents list her address as [REDACTED]. Additionally, the documents show that the petitioner filed as "Head of Household," not jointly with her spouse or as married but filing separately. We note that while the petitioner did not submit her 2001 tax returns at the time of filing this petition, she did submit a copy with the filing of her I-485, Application to Adjust Status. It is noted that although the petitioner's 2001 tax returns did contain the [REDACTED], the returns were again filed as "Head of Household" and thus offer no evidentiary weight regarding the petitioner's spouse's residence at the claimed address. Although the petitioner submitted a personal statement at the time of filing, her statement offered no testimonial evidence of her residence with her spouse other than to state that her spouse moved in with her before they were married and that she paid all of the bills, including rent and utilities with her own money. The petitioner does not describe their residence, their shared activities, schedules or provide any other details related to her claim of a joint residence.

In response to the director's NOID, counsel argued that the petitioner's affidavit and 2000 tax returns are sufficient evidence to establish that the petitioner resided with her spouse. We do not agree. As discussed above, the petitioner's affidavit contains no probative details regarding her residence with her spouse. While counsel correctly states that the petitioner's 2000 tax return lists her address at [REDACTED], a second printout from the Internal Revenue Service for 2000 lists a separate address for the petitioner at [REDACTED]. Notwithstanding the disparate addresses, as noted previously, while the petitioner has established her residence at the claimed address, none of the evidence connects the petitioner's spouse to the claimed address. Counsel additionally argued that the prior approval of the Form I-130, Petition for Alien Relative, is "very strong evidence that the petitioner had a common residence with her husband . . ." The director rejected this argument, stating that despite the approval of the Form I-130, the "bona fides of the [petitioner's] marriage was not previously confirmed." Finally, the petitioner submitted an affidavit from [REDACTED] who generally stated that he visited the petitioner and her spouse "a couple of times." [REDACTED] did not provide any dates, address, description of the petitioner's and her spouse's residence, or other probative details regarding their joint residence.

On appeal, counsel argues that the statute and regulation do not require the petitioner to establish a common residence for a specific period of time and that "even if the common residence was only shared for the year 2001, it would be enough to meet this element of eligibility." As it relates to the different addresses listed on the petitioner's tax returns, the petitioner states that on the Form I-360

she mistakenly listed [REDACTED] as her *last* address rather than her *first* address. While we concur with counsel that there is no specific requirement regarding the length of time a petitioner must reside with his or her spouse, we find no evidence in the record that places the petitioner's spouse at any of the claimed addresses. Although the lack of documentary evidence is not necessarily disqualifying, neither the petitioner's statements, nor the statement submitted on her behalf have provided any probative details regarding her claimed residence with her spouse.

Accordingly, we concur with the finding of the director that the petitioner has failed to establish that she resided with her spouse, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

#### *Battery or Extreme Cruelty*

In her initial affidavit, the petitioner stated that after their marriage, her spouse "began drinking a lot," would get "very upset" if the petitioner asked him about money, and threatened to "call the INS and get [her] deported." The petitioner also claimed that her spouse destroyed her pictures, would push her, throw objects, step on her feet, and would punch her. The petitioner describes one incident where her spouse threw a knife at her. The evaluation from [REDACTED], Certified Domestic Violence Counselor, appears to be based upon a single interview with the petitioner in October 2005. The evaluation indicates that the petitioner told [REDACTED] that during her marriage, she was physically, verbally, emotionally, and financially abused. The evaluation, however, contains descriptions of actions and events that were not discussed by the petitioner in her initial statement. Specifically, the evaluation indicates that the petitioner's spouse "raped [the petitioner] on more than one occasions [sic]," would not let her receive phone calls, told her what to wear, criticized her parenting, and controlled activities in the home such as snacking. In response to the director's RFE and NOID, the petitioner submitted an evaluation from [REDACTED], LMFT, LADC. [REDACTED] evaluation, which also appears to have been based upon a single session with the petitioner, reiterates the claims contained in [REDACTED]'s evaluation. The petitioner does not submit any additional statement in which she describes the claims contained in the two evaluations. In finding that the petitioner failed to establish her claim of abuse, in her RFE and final decision, the director found, in part, that because the evaluations were based solely on the testimony of the petitioner, they were not "sufficient to corroborate [the petitioner's] allegations."

On appeal, counsel argues that the director "erroneously required the petitioner to provide objective corroborative evidence" of her abuse and gave "no justification for [this] requirement." We agree with counsel that the lack of corroborating evidence is not a sufficient reason to deny this petition. While we also agree that we must consider any relevant and credible evidence, as noted previously, the determination of what evidence is credible and the weight to be given that evidence "shall be *within the sole discretion* of the Service." Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J). Here, the petitioner has not submitted any documentary evidence, such as police reports or court documents in support of her claim. Instead, the petitioner's claims are supported solely by her single statement and two evaluations made by individuals with no first hand knowledge of the claimed abuse. Therefore, any deficiencies or inconsistencies identified in the testimonial evidence must

necessarily diminish the credibility of the claims and undermine the evidentiary value of the evidence. In this instance, as described above, the evaluations contain numerous claims that were never discussed by the petitioner in her own statement. We further note that even if we found the testimonial evidence to be sufficiently credible, such a fact does not mean that such evidence automatically demonstrates the petitioner's eligibility. The statute does not state that all credible, relevant evidence will meet the petitioner's burden of proof, only that CIS *consider* such evidence when making a determination as to whether the petitioner meets the eligibility requirements. We find that the petitioner's statement and the evaluations provided on her behalf only generally discuss the petitioner's claims. None of the testimonial evidence provides a detailed discussion of the claimed abuse and sufficiently describes specific instances of the claimed abuse.

Accordingly, based upon the inconsistencies noted and the lack of specific and detailed descriptions of the claimed abuse, we find the petitioner has failed to establish that she was battered or subjected to extreme cruelty by her spouse during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

#### *Good Faith Entry into Marriage*

In her affidavit, submitted at the time of filing, the petitioner described meeting her spouse in 2001 at a club in Hartford, Connecticut. She states that initially they were "just friends," but started dating about three months later. The petitioner generally states that they "went to movies [and] out to dinner" and that after two or three months of dating, decided to get married. The petitioner states that she felt her spouse was "a good man and that [they] would have a good life together." The petitioner described little else about their relationship and shared events except as it relates to her claim of abuse. The petitioner also submitted copies of income tax returns that were filed during her marriage. However, as discussed previously, none of the returns indicate that the petitioner filed her taxes as married or married but filing separately. Instead, all of the petitioner's returns indicate her filing status as "head of household."

In response to the director's RFE and NOID, the petitioner submitted a letter from First New England Federal Credit Union (FNEFCU) that verified the petitioner had an account with FNEFCU since December 2002 and that her spouse was "an authorized joint signer" on the account. The petitioner did not, however, submit evidence of the joint use of the account, such as cancelled checks or bank statements. The petitioner also submitted a "Certificate of Group Health Plan Coverage" which shows coverage of the petitioner, her spouse and daughters from April 2003 until August 2006. Finally, the petitioner submitted the letter from [REDACTED] who generally states that he knew the petitioner and her spouse "as married couples [sic] since the year 2001." [REDACTED] does not identify his relationship with the petitioner and her spouse and fails to provide any probative details about their relationship or interaction with each other except to state that he visited with them a couple of times and had them to his home on one occasion.

In finding that the petitioner failed to establish her good faith marriage, the director noted that the

petitioner had not submitted evidence to show that her bank account was “an active account,” that the medical insurance was not obtained until two years after they were married, and that [REDACTED]’s statement “did not provide specific information” about the petitioner’s relationship with her spouse. Additionally, the director noted that the petitioner failed to address the director’s concerns regarding the petitioner’s tax returns and extramarital relationship.

On appeal, counsel points to the petitioner’s previously approved Form I-130 as “the strongest” evidence of her bona fide marriage. As previously discussed, however, this argument is not persuasive. Additionally, the petitioner submits an affidavit in which she states that she did not have “an ongoing romantic relationship” with the father of her child and that the birth of her second child with him was the result of “one time of being unfaithful” to her spouse. Despite the director’s discussion regarding the petitioner’s bank account and health insurance, on appeal, the petitioner offers no evidence of the joint use of the bank account with FNEFCU and no explanation for why this account and the health insurance were obtained two years after they were married.

As discussed above, the evidence submitted by the petitioner to establish her good faith marriage consists of only the general statements of the petitioner and a friend, a letter showing the petitioner opened a joint account with her spouse nearly two years after their marriage and evidence of joint health insurance coverage two years after their marriage. Although the petitioner also submitted tax returns covering the period during which she was married, the returns all indicate that she filed as “head of household.” We do not find such evidence sufficiently establishes the petitioner’s intent to share a life with her spouse and that she entered into the marriage in good faith. Accordingly, we concur with the finding of the director that the petitioner has not demonstrated that she entered into marriage with her spouse in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.