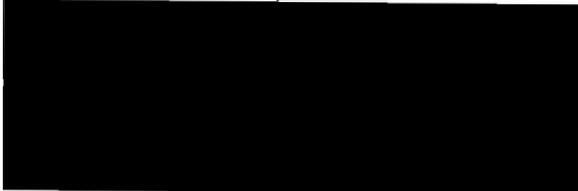


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B9

FILE: [Redacted]  
EAC 05 196 52029

Office: VERMONT SERVICE CENTER

Date: **OCT 20**

IN RE: Petitioner: [Redacted]

PETITION: Petition for Special 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.

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 The decision of the director will be withdrawn and the petition will be remanded for further action.

The petitioner seeks immigrant classification pursuant to section 204(a)(1)(A)(iii) of 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 because the record did not establish that the petitioner's former wife battered or subjected him to extreme cruelty during their marriage.

On appeal, counsel submits a brief and copies of documents previously submitted.

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).

An alien who is no longer married to a United States citizen may still self-petition under this provision of the Act if the alien demonstrates "a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse." Section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc).

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:

(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 . . . , must have been perpetrated against the self-petitioner . . . and must have taken place during the self-petitioner's marriage to the abuser.

The evidentiary standard and 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.

\* \* \*

(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.

The record in this case provides the following pertinent facts and procedural history. The petitioner is a native and citizen of the Philippines who entered the United States as a nonimmigrant visitor (B-2) on October 18, 1990. The petitioner subsequently filed a Form I-589, application for asylum and withholding of deportation, which was denied on April 25, 1994. The petitioner was then served with an Order to Show Cause and placed in deportation proceedings. On November 1, 1994, the Executive Office for Immigration Review, Los Angeles Immigration Court, ordered the petitioner deported *in absentia*. The petitioner subsequently failed to surrender for deportation on February 21, 1995. On September 23, 1995, the petitioner married R-C-<sup>1</sup>, a U.S. citizen, in California. On January 31, 1997, R-C- filed a Form I-130, petition for alien relative on the petitioner's behalf and the petitioner filed a corresponding Form I-485, application for adjustment of status. On November 12, 1997, the petitioner was paroled into the United States pursuant to section 212(d)(5) of the Act.

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

On June 30, 2005, the petitioner filed the instant Form I-360. In these proceedings, the petitioner states that he and R-C- were divorced in March 2004. On September 26, 2005, the director issued a Request for Evidence (RFE), which explained the insufficiency of the supporting documents initially submitted and asked the petitioner to submit further evidence that his former wife battered or subjected him to extreme cruelty. The petitioner timely responded with additional testimonial evidence. The director denied the petition on January 24, 2006 because the record did not establish the requisite battery or extreme cruelty.

On appeal, counsel contends that the director misinterpreted the evidence and did not apply the “any credible evidence standard.” We disagree. We concur with the director’s determination that the record does not establish the requisite battery or extreme cruelty. Beyond the director’s decision, the record also fails to establish that the petitioner had a qualifying relationship with his former wife and was eligible for immediate relative classification based on such a relationship. The director also failed to discuss the application to the petitioner of the prohibition against marriages entered into while an alien is in deportation or removal proceedings at section 204(g) of the Act. The petition will be remanded for consideration of these additional issues and because the director denied the case without first issuing a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

#### I. Battery or Extreme Cruelty

As evidence of battery or extreme cruelty, the petitioner initially submitted the following evidence:

- His own declaration dated June 28, 2005;
- The affidavit of [REDACTED] the petitioner’s friend, dated June 3, 2005;
- A letter from the petitioner’s psychotherapist [REDACTED] dated June 16, 2005; and
- Two letters from the petitioner’s physician, [REDACTED], dated February 9 and March 6, 2005.

In his declaration, the petitioner explains that after their marriage, he moved to Las Vegas at his former wife’s insistence and put his savings into their joint bank account. The petitioner states that his former wife “got hooked” on gambling and became “irritated and uneasy” when he asked her how much money she lost. The petitioner reports that his former wife introduced him to her son as “just a friend,” which humiliated the petitioner. The petitioner explains that his former wife took a leave of absence from her job without telling him, that he had to get a part-time job at night and that his former wife lost her job in 1998. According to the petitioner, his former wife continued gambling and began to use their savings. He states:

We argued about it and she would yell at [sic] and demanded more money and if I don’t that she would turn me in to an immigration officer and tell them that our marriage was for inconvenience [sic] or worst fraud. . . . I got so scared that she even told me before if I ever not follow her decision she will and can make me not visit my [s]on in Los Angeles.

The petitioner reports that his wife would complain that he walked too loudly and woke her up when he returned home at night and she told him that she would lock the door and never let him in if he did it again. The petitioner states that his wife returned to the Philippines to care for her ill father and he agreed with her request to withdraw money from their savings account for her trip. However, the petitioner reports that he later discovered that his former wife had withdrawn all of the money from their bank accounts. The petitioner states that his wife did not return, that he could not locate her and that he eventually filed for divorce, which "was approved in March 2004." The petitioner reports feeling hurt, humiliated, confused, and stressed by his former wife's behavior and he states that he has lost his self-confidence and self-respect and has low morale. The petitioner further explains, "It's still hard to come to terms with that [sic] I have been in an abusive relationship, me as the abused. For most men the idea of being a victim is very hard to handle."

the petitioner's friend, states that he was "aware of" the gambling addiction and excessive spending of the petitioner's former wife and that the petitioner took "odd jobs to supplement their living expenses." [REDACTED] further attests that the petitioner stayed with him numerous times when the petitioner's former wife kicked him out or locked him out of their house. [REDACTED] states that he witnessed the "abusive behavior (verbally and emotionally)" of the petitioner's wife, but he does not describe any particular incidents of abuse that he witnessed in any probative detail.

[REDACTED] the petitioner's psychotherapist, states that she has worked with the petitioner for an **unspecified** number of therapy sessions. She reports that the petitioner:

presented with depression as the result of the breakup of his marriage. Despite the fact that it has been some months since the breakup of a relationship in which he experienced emotional abuse, he continues to show signs of severe depression. My diagnosis is based on observation in our sessions and on the Beck Depression Inventory.

[REDACTED] provides no specific, probative information regarding how she came to the conclusion that the petitioner experienced emotional abuse during his former marriage.

In his February 9, 2005 letter, [REDACTED] the petitioner's physician, states that he saw the petitioner on that date "for numerous medical problems." [REDACTED] does not specify the petitioner's medical problems and conveys no further probative information. In his March 6, 2005 letter, [REDACTED] states that the petitioner "has a diagnosis of Depression mixed with Anxiety. Many adults with this disorder may benefit from pshycotherapy. [sic] and medication. I therefore **medically** recommend that this patient in light of his psychiatric and medical history begin Tx [sic]." [REDACTED] again provides no probative information regarding the petitioner's mental health condition and its purported connection to his former wife's alleged abuse.

In the RFE, the director explained the insufficiency of the aforementioned evidence and asked the petitioner to submit further evidence of battery or extreme cruelty of the types listed in the regulation at 8 C.F.R. § 204.2(c)(2)(iv). In response, the petitioner submitted the following:

- The petitioner's affidavit dated October 14, 2005;
- The declaration of [REDACTED], the petitioner's friend, dated November 12, 2005; and
- The undated written statement of [REDACTED] who appears to be the mother of the petitioner's friend, [REDACTED]

In his affidavit, the petitioner reiterates that he worked twelve hours a day, but that all his money was spent by his former wife on gambling. He states that his former wife put him down by calling him "stupid, helpless, idiot, etc." and that she blamed him for not making enough money. Although he only discussed his former wife's threats to lock him out of their home in his initial declaration, the petitioner reports in his affidavit that his former wife often locked him out of their apartment and that he stayed with [REDACTED] who also lent the petitioner money to pay some of his former wife's bills. In addition, the petitioner states that his former wife did not let him use the telephone and would not tell him when his friends or relatives called him. Moreover, the petitioner reports that when he tried to talk to his wife about her gambling problem, she accused him of being unfaithful and threatened him with deportation. The petitioner further states that every time he went to see his son or sent his son money, his former wife blamed him for being unfaithful and threatened him with deportation if he continued to "waste her money on [his] child." The petitioner explains: "I did not know the U.S. Immigration and Family laws at all, I had no time or place to learn them, and I could not afford to hire an attorney at that time, so I believed in everything she was saying."

The petitioner repeats that in 2002, his former wife withdrew all of their money, went to the Philippines and that he was unable to locate her again. The petitioner reports that he is still paying the debts incurred by his former wife, but states, "Since I filed for divorce my life was starting to get better[.]" due to his therapy with [REDACTED]

[REDACTED] states that the petitioner's former wife did not let him make friends without her approval, threatened to leave the petitioner when he could not give her more money, accused him of being unfaithful and threatened to divorce him whenever they argued. [REDACTED] states that he "witnessed these situations many times," but he does not describe particular incidents of the allegedly abusive behavior of the petitioner's former wife in any probative detail. [REDACTED] further states:

I noticed a couple of scratches and bruises on [the petitioner's] face numerous times. I always asked him how it happened. He would just disregard my questions and say that it's none of my business. . . . I know that [the petitioner's former wife] gets physical with him and very abusive verbally. I was not the only one who noticed it but some of our friends did too.

Again, [REDACTED] does not specifically describe any incident where he witnessed the petitioner's former wife physically assault the petitioner and he does not otherwise explain the basis for his knowledge that she did so.

states that on one occasion, she and her son went to the former couple's residence for dinner and the petitioner's former wife "got mad at [the petitioner] and threw a bowl of hot noodle soup in his lap, which off [sic] course caused some burns." further reports, "[the petitioner] came to us one day with cuts, scratches, and bruises. I took care of his cuts and scratches without saying anything because I don't want to embarrass him."

The testimonial evidence presents several inconsistencies. First, the petitioner does not state that his wife ever physically assaulted him, as and intimate, and only states that the petitioner experienced emotional abuse during his former marriage. Second, the petitioner does not state that his wife threatened him with divorce every time they argued or that she always threatened to leave him when he could not give her more money, as attested by . To the contrary, the petitioner states in his affidavit that his former wife "vigorously oppos[ed]" his request for a divorce. Third, the petitioner does not discuss the incident where his former wife purportedly threw hot soup on him and burned him. Fourth, although indicates that her son, was present during the hot soup incident and when the petitioner came to them with injuries on his face does not mention either of these incidents in his affidavit. These inconsistencies detract from the credibility of the petitioner's claims regarding his former wife's alleged battery or extreme cruelty.

The letters of and also fail to support the petitioner's claims. Although their testimony shows that the petitioner was diagnosed and treated for depression and anxiety, their letters provide no substantive analysis, probative details or professional insight that would demonstrate a connection between the petitioner's mental health condition and the alleged abuse of his former wife.

On appeal, counsel cites *Hernandez v. Ashcroft*, 345 F.3d 824 (9<sup>th</sup> Cir. 2003) in support of his claim that the petitioner's former wife subjected him to battery and extreme cruelty. Counsel's reliance on *Hernandez* is misplaced for two reasons. First, *Hernandez* addressed an alien's eligibility for suspension of deportation under former section 244(a)(3) of the Act, 8 U.S.C. § 1254(a)(3) (1996), a different statutory provision than that involved in this case, namely section 204(a)(1)(A)(iii) of the Act. Second, while the *Hernandez* court gave deference to the regulation at 8 C.F.R. § 204.2(c)(1)(vi) in its interpretation of the term "extreme cruelty" as used in former section 244(a)(3) of the Act, the court applied the term to facts that are starkly distinguishable from those in this case. *Id.* at 839.

In *Hernandez*, the alien's husband severely beat her repeatedly in Mexico and once attacked her with a knife, cutting the alien's hand to the bone. *Hernandez*, 345 F.3d at 829-30. Her husband's battery resulted in physical injuries that left visible scars on the alien's head and hand that were observed by the Immigration Judge. *Id.* at 830-31. After beating the alien, her husband refused to let her leave their home to go to the hospital and physically locked her in their house after he slashed her hand. *Id.* After one severe beating, the alien fled to her sister's home in the United States. *Id.* at 830. Her husband called her repeatedly and then came to the United States to see her, apologized and promised to see a marriage counselor if the alien returned to Mexico with him. *Id.* Yet when the

alien returned to Mexico, her husband became violent again and eventually attacked the petitioner with a knife. *Id.*

The pertinent issue in *Hernandez* was whether the alien was "subjected to extreme cruelty in the United States" by her husband, as required by the former section 244(a)(3) of the Act, when her husband never physically assaulted her in this country. The *Hernandez* court held that the alien's husband subjected her to extreme cruelty in the United States because although not overtly violent, his actions were part of a contrite phase in his cycle of domestic violence and hence fit the regulatory description of extreme cruelty as acts that, in and of themselves, "may not initially appear violent but that are part of an overall pattern of violence." *Id.* at 840-41 (quoting 8 C.F.R. § 204.2(c)(1)(vi)). In support of its interpretation of the term "extreme cruelty," the *Hernandez* court cited "substantial evidence regarding the cycle of violence and clinical and psychological understanding of domestic violence, evidence that was entirely unrebutted." *Id.* at 837. Moreover, the alien's testimony in *Hernandez* was found credible by the Board of Immigration Appeals and was accepted as undisputed by the *Hernandez* court. *Id.* at 829 n.3.

Despite counsel's assertions, the alleged facts of this case are not analogous to the established facts in *Hernandez*. The record in this case fails to establish that the petitioner's former wife battered him or that her nonviolent actions were part of an overall pattern of physical or psychological violence. On appeal, counsel cites scholarly publications regarding domestic violence and trauma, but counsel does not submit those publications as evidence or persuasively articulate how they support the specific claims of abuse in this case. As previously discussed, we are also unable to credit the petitioner's claims of abuse as fully credible given the inconsistencies in the testimonial evidence and the lack of probative information in the letters of the petitioner's physician and psychotherapist. *Hernandez* thus does not support a finding of battery or extreme cruelty in this case.

On appeal, counsel states that the petitioner "did not call the police or did not [sic] discuss the incidents of the abuse by his spouse with his friends and/or doctors because he was simply embarrassed to tell any one." Yet the petitioner himself does not so attest and the record does not otherwise support counsel's claim. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On appeal, counsel also cites six scholarly publications, but does not provide copies as evidence and fails to articulate how these sources specifically support a finding that the petitioner was battered and subjected to extreme cruelty by his former wife. On page seven of his appellate brief, counsel cites two articles regarding violence against women as authority for his description of certain reactions to physical assault and then states, "Further, male victims may suffer embarrassment in sharing information regarding abusive behavior of his [sic] spouses toward them." Counsel cites no authority for this assertion. Moreover, while the record indicates that the petitioner may have been

embarrassed by his wife's mistreatment, the record documents his disclosure of her alleged abuse to his friends and psychotherapist.

Counsel also cites four scholarly publications in support of his claim that the petitioner minimized his former wife's abuse and that the petitioner's cultural views may have made him reluctant to discuss the abuse with his friends, physician and psychotherapist. We do not dispute that survivors of domestic violence often minimize the severity of abuse they have endured, may be reluctant to discuss the abuse with others and that certain cultural mores may further prevent an alien's full disclosure of the abuse to strangers. However, the record in this case fails to establish that the petitioner minimized his former wife's alleged abuse or that his culture impeded his full disclosure of, and prevented further documentation of, his former wife's alleged battery and extreme cruelty. Counsel submitted no scholarly articles or clinical studies of abuse in general or specifically in Filipino culture to support his assertions. In his declaration and affidavit, the petitioner also makes no reference to the influence of Filipino cultural views of domestic violence on his behavior. Rather, in his declaration, the petitioner simply states that it is hard for him as a man "to handle" the "idea of being a victim" and in his affidavit, the petitioner states that it was extremely hard for him to file for divorce because "according to our [C]atholic traditions, there is no divorce." Hence, the petitioner cites his gender and religion – but not his culture – as factors influencing his reaction to his former wife's behavior. Moreover, the petitioner states that his therapy sessions with [REDACTED] "were really helpful" and he does not indicate any reluctance to fully discuss his wife's alleged abuse with [REDACTED] or explain that his culture otherwise inhibited his complete disclosure of the alleged abuse to [REDACTED].

The present record does not demonstrate that the petitioner's former wife subjected him or his child to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

## II. Qualifying Relationship and Eligibility for Immediate Relative Classification

Beyond the director's decision, the present record fails to establish that the petitioner had a qualifying relationship with his former spouse. Section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act extends eligibility to aliens who have divorced their U.S. citizen spouses only if they can demonstrate "a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse." The petitioner fails to meet this requirement on two counts. First, he does not state the exact date of his divorce from his former spouse and does not provide documentation of their divorce even though he attests that he filed for divorce and indicates that he was fully aware of the legal proceedings. Accordingly, the petitioner has not established that this petition was filed within two years of the legal termination of his marriage. Second, as discussed in the preceding section, the petitioner failed to establish his former wife's battery or extreme cruelty and consequently has not demonstrated the requisite connection between their divorce and such abuse. Accordingly, the present record fails to establish that the

petitioner had a qualifying relationship with a U.S. citizen, as required by section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act.

Beyond the director's decision, the present record also fails to demonstrate that the petitioner was eligible for immediate relative classification based on his relationship with his former wife, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act. The regulation at 8 C.F.R. § 204.2(c)(1)(i)(B) requires a self-petitioner to be eligible for immediate relative classification under section 201(b)(2)(A)(i) of the Act based on his or her relationship to the abusive spouse. Because the petitioner failed to demonstrate a qualifying relationship with his former wife, he has also not established that he was eligible for immediate relative classification based on such a relationship, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act.

### III. Restriction on Petitions Based on Marriages Entered while in Proceedings and the Bona Fide Marriage Exception

The director determined that the petitioner married his former wife in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa). However, the petitioner married his former wife while he was in deportation proceedings. The petitioner was ordered deported *in absentia* on November 1, 1994 and married his former wife on September 23, 1995. The record contains no evidence that prior to his marriage: the petitioner left the United States under the deportation order, the petitioner was found not to be deportable, that the OSC was canceled, that his deportation proceedings were terminated, or that the petitioner filed a petition for review or a habeas corpus action that was granted by a federal court. Accordingly, the petitioner remained in deportation proceedings on the date he was married. *See* 8 C.F.R. § 245.1(c)(8)(ii). The petitioner is consequently subject to the restriction at 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], 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. In her decision, the director did not state that the petitioner satisfied the bona fide marriage exception to section 204(g) of the Act, pursuant to section 245(e) of the Act, which states:

*Restriction on adjustment of status based on marriages entered while in admissibility or deportation proceedings; bona fide marriage exception.* –

- (1) Except as provided in paragraph (3), an alien who is seeking to receive an immigrant visa on the basis of a marriage which was entered into during the period described in paragraph (2) may not have the alien's status adjusted under subsection (a).
- (2) The period described in this paragraph is the period during which administrative or judicial proceedings are pending regarding the alien's right to be admitted or remain in the United States.
- (3) Paragraph(1) and section 204(g) shall not apply with respect to a marriage if the alien establishes by clear and convincing evidence to the satisfaction of the [Secretary of Homeland Security] that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition under section 204(a) . . . with respect to the alien spouse or alien son or daughter. In accordance with the regulations, there shall be only one level of administrative appellate review for each alien under the previous sentence.

The corresponding regulation at 8 C.F.R. § 245.1(c)(9)(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.

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 (5<sup>th</sup> Cir. 1993) (acknowledging "clear and convincing evidence" as an "exacting standard.") To demonstrate good faith entry into the qualifying relationship for a self-petition 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. 8 C.F.R. § 204.2(c)(2)(i); *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774, 782-83 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965). However, to be eligible for the bona fide marriage exception 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. Accordingly, the director should address upon remand whether or not the petitioner has established his good faith marriage pursuant to section 245(e)(3) of the Act.

#### IV. Additional Issues Raised by Counsel on Appeal

##### 1. The Director did Not Violate the Requirement to Consider Any Credible Evidence Relevant to the Petition.

Counsel claims that the director “misinterpret[ed] internally consistent testimony as contradictory, a clear violation of the ‘any credible evidence’ standard.” While the director did not fully articulate and identify all the discrepancies between the petitioner’s statements and other evidence in the record, we do not find that the director’s decision went beyond the statute or the regulation. In these proceedings, as in all visa petition proceedings, the petitioner bears the burden of proof to establish eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Soo Hoo*, 11 I&N Dec. at 152. From the mandate to consider any credible evidence relevant to petitions filed under section 204(a)(1)(A)(iii) of the Act, it does not follow that all relevant evidence will be found credible or be sufficient to meet the petitioner’s burden of proof. Rather, the determination of what evidence is credible and the weight to be given that evidence is within the sole discretion of CIS. Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J); 8 C.F.R. § 204.2(c)(1)(i).

##### 2. The Records Corresponding to the Petitioner’s Two Alien Registration Numbers were Consolidated and Fully Reviewed in These Proceedings.

Counsel further contends that the director committed a “gross error” by identifying the petitioner with an incorrect alien registration number (“A number”). Counsel states, “It appears that the USCIS compared the Petitioner’s case with another alien’s case and found ‘multiple discrepancies’ between these two cases.” Counsel is mistaken. The A number stated in the director’s decision, [REDACTED] was assigned to the petitioner during his asylum and deportation proceedings. The petitioner was later assigned a second A number, [REDACTED] when he filed his Form I-485 application based on the Form I-130 petition filed by his former wife. The records pertaining to both of these A numbers were consolidated and reviewed by the director below and by the AAO on appeal.

##### 3. The Director did Not Violate the Regulation at 8 C.F.R. § 204.1(h)

Finally, counsel claims that the director failed to comply with the regulation at 8 C.F.R. § 204.1(h) because she did not provide an explanation of the deficiencies in the record and request additional evidence. To the contrary, the director issued an RFE, which explained the deficiencies of the evidence initially submitted. The RFE also provided the petitioner with both a detailed list of the types of evidence he could submit to establish battery or extreme cruelty and an explanation of the types of specific issues that the evidence should address to establish extreme cruelty. In response, the petitioner submitted additional testimony, which presented further inconsistencies in the record, as generally

referenced in the director's decision and as discussed in detail in this decision. The petitioner did not submit any further documentary evidence of the types listed in the regulation at 8 C.F.R. § 204.2(c)(2)(iv). Although he was not required to do so, the petitioner did not fully explain why such evidence did not exist or was unobtainable. *See* 8 C.F.R. §§ 204.1(f)(1), 204.2(c)(2)(i).

Counsel suggests that the director should have issued an additional RFE before denying the petition. The regulation at 8 C.F.R. § 204.1(h) does not require issuance of further RFEs when the response to an initial RFE fails to establish the petitioner's eligibility. However, the regulation at 8 C.F.R. § 204.2(c)(3)(ii) requires CIS to provide a self-petitioner with a NOID and an opportunity to present additional information and arguments before a final adverse decision is made. Accordingly, the case will be remanded for issuance of a NOID, which will give the petitioner a final opportunity to overcome the deficiencies of his case.

The petitioner failed to demonstrate his eligibility for immigrant classification under section 204(a)(1)(A)(iii) of the Act. Nonetheless, the case will be remanded for issuance of a NOID in compliance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

As always, the burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision that, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.