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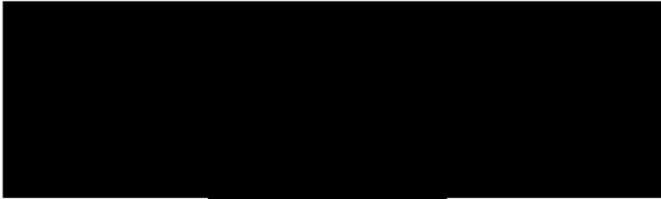
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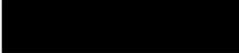
U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date:

FEB 10 2009

EAC 07 102 50036

IN RE:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The service center director 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 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 on the basis of his determination that the petitioner had failed to establish: (1) that he is not subject to the provisions of section 204(g) of the Act; (2) that he has a qualifying relationship with a United States citizen; (3) that his wife subjected him to battery or extreme cruelty; and (4) that he entered into marriage with his wife in good faith.

Counsel submitted a timely appeal on May 5, 2008.

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, 8 U.S.C. § 1154(a)(1)(J) states, in pertinent part:

In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) . . . , or in making determinations under subparagraphs (C) and (D), the [Secretary of Homeland Security] shall consider any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the [Secretary of Homeland Security].

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

- (i) *Basic eligibility requirements.* A spouse may file a self-petition under section 204(a)(1)(A)(iii) . . . of the Act for his or her classification as an immediate relative . . . if he or she:

* * *

- (B) Is eligible for immigrant classification under section 201(b)(2)(A)(i) . . . of the Act based on that relationship [to the U.S. citizen spouse].

* * *

- (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 filed under section 204(a)(1)(A)(iii) of the Act are explained further at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part, the following:

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.
- (ii) *Relationship.* A self-petition file by a spouse must be accompanied by evidence of . . . the relationship. Primary evidence of a marital relationship is a marriage certificate issued by civil authorities. . . .

* * *

- (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.

Section 204(g) of the Act states the following:

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 of proceeding establishes the following pertinent facts and procedural history. The petitioner is a citizen of Guatemala who entered the United States, without inspection, on or around April 5, 1995. He filed Form I-589, Application for Asylum and Withholding of Removal, on February 9, 1998. On March 31, 1998, the application was deemed not credible, and a notice to appear in removal proceedings was issued. Specifically, the petitioner was instructed to appear before an immigration judge on April 21, 1998. On April 21, 1998, his hearing was rescheduled for October 13, 1998. On October 13, 1998, his hearing was rescheduled for November 8, 1999. On November 8, 1999, his hearing was rescheduled for April 16, 2001. On April 13, 2001, his hearing was rescheduled for August 18, 2001. On May 31, 2001, his hearing was rescheduled for August 18, 2003. On August

18, 2003, the applications for asylum and withholding of removal were denied, and the petitioner was granted voluntary departure through October 17, 2003.

The petitioner appealed the immigration judge's denial of the petition to the Board of Immigration Appeals (BIA). On October 15, 2004, the BIA dismissed the petitioner's appeal. The BIA granted the petitioner thirty days in which to depart the United States voluntarily, with an alternate order of removal to Guatemala. The petitioner then filed a motion to reconsider and, on February 9, 2005, the BIA dismissed the motion. The petitioner married C-D-¹ a United States citizen, on August 22, 2005.

The petitioner filed a petition for review of the BIA's decision, and a motion to stay removal, in the United States Court of Appeals for the Ninth Circuit on November 12, 2004. The petitioner's motion to stay removal was granted on March 31, 2005. However, his petition was denied in part, and dismissed in part, on May 19, 2006. Accordingly, a Form I-205, Warrant of Removal/Deportation, was issued on August 2, 2006. A Form I-294, Warning to Alien Ordered Removed or Deported, was also issued on August 2, 2006.

The petitioner filed the instant Form I-360 on February 27, 2007. On October 3, 2007, the director issued a notice of intent to deny the petition (NOID), and requested additional evidence to determine whether he has a qualifying relationship with a United States citizen; whether his wife was divorced from her first husband prior to marrying the petitioner; whether he and C-D- had shared a joint residence; whether he had been subjected to battery or extreme cruelty; whether he is a person of good moral character; and whether he married C-D- in good faith. The petitioner responded to the NOID on December 26, 2007, and submitted additional evidence. After considering the evidence of record, the director denied the petition on April 1, 2008.

On appeal, counsel submits a brief and additional supporting documentation.

At the outset of its analysis, the AAO points out several inconsistencies in the record which undermine the credibility of the petitioner's assertions. For example, in his July 18, 2003 statement, the petitioner stated that, when he was seventeen years of age, approximately twenty guerrillas came to his family's house, and asked for his father. The petitioner and his family lied to the guerrillas, and told him that his father was not in the home. The guerrillas said they would be back later that same evening but, when they returned, the petitioner's father was gone, and the family has not heard from him since. It was that day that the petitioner decided to leave Guatemala.

However, in his testimony before an immigration court on August 18, 2003, the petitioner testified that his father had in fact been present inside the house both times the guerrillas came, hiding under the bed. He also stated at that time that these were the only two times that the guerrillas ever came to bother the family.

¹ Name withheld to protect individual's identity.

However, in his testimony to [REDACTED] on December 1, 2006, upon which her psychological evaluation was based, and submitted as evidence, the petitioner stated that the petitioner's family thinks that his father was kidnapped by the guerrillas when the petitioner was "12-13 years old." Further, the petitioner also told [REDACTED] that the guerrillas came to the house "about 5 times."

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

These inconsistencies and discrepancies were brought to the petitioner's attention by the director in his April 1, 2008 denial, and they have not been resolved on appeal. A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after U.S. Citizenship and Immigration Services (USCIS) provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Upon review of the entire record of proceeding, the AAO agrees with the director's decision to deny the petition. For ease of discussion, the AAO will not address all the grounds for denial in the order in which they were raised by the director. Instead, the AAO will first address the issue of battery and/or extreme cruelty, followed by the issue of whether the petitioner entered into the marriage in good faith. The AAO will then turn to the issue of whether the petitioner is subject to the provisions of section 204(g) of the Act. Finally, the AAO will address the issue of whether the petitioner has established that he has a qualifying relationship with a United States citizen.

Battery or Extreme Cruelty

The AAO agrees with the director's determination that the petitioner failed to establish that C-D- subjected him to battery and/or extreme cruelty. In support of his assertion that he was the victim of battery and/or extreme cruelty, the petitioner submits several affidavits and three psychological evaluations.

In his January 29, 2007 affidavit, the petitioner stated that the abuse inflicted upon him by C-D- has led him to lose control of his life, and that he feels that nothing seems to matter, and that nothing is worth living for. The petitioner states that he bought a house on July 1, 2005, with a monthly mortgage of \$5987.55. Although she earned \$4000 per month, C-D- made no contribution toward the mortgage payment. Instead, the petitioner worked two jobs to pay the mortgage. After several months, he requested that C-D- help him with the mortgage payments, but she refused, and became

angry. He stated that, by November 2005 she was calling him an “immigrant wetback,” and was threatening to call immigration agents to make sure he was removed from the country so that she could keep the house. He stated that C-D- insulted him while she was under the influence of alcohol and marijuana, telling him that he was not man enough to meet her needs. The petitioner states that C-D- began throwing dishes and cups at him, which caused cuts and bruises. He stated that in May 2006, C-D- told him that the marriage was a mistake. He stated that in September 2006, C-D- withdrew large amounts of money earmarked for the mortgage payment and kept it for her own use, telling the petitioner that she could do with the money what she pleased. In November 2006, he found C-D- in bed with another man, who told the petitioner that he had met C-D- through the internet. The petitioner immediately left the house and, the following month, sought professional help upon the advice of his attorney.

In his December 21, 2007 affidavit, the petitioner stated that things went well after he married C-D- and that, through Christmas 2005, life was blissful. However, things changed in 2006. The petitioner stated that C-D- began threatening and insulting him in 2006. She called him an illegal immigrant and told him he was not a worthwhile man. She threatened to have him deported. He stated that on October 22, 2006, C-D- hit him with a telephone and threw dishes at him. She told the petitioner that if he called the police, they would not do anything to her because he was an illegal immigrant. He stated that on October 31, 2006, she called him an uneducated Mexican Indian, scratched his face and back, and broke a dish on his back. He stated that on November 5, 2006 C-D- became angry with him for not coming straight home from work and accused him of infidelity. The petitioner states that she hit him with her fists and kicked him and threw a glass at him. He discovered that she had destroyed several articles of his clothing with scissors as punishment for coming home late. He stated that on November 15, 2006, he kissed her while she was asleep, but C-D- got on top of him and beat him with her fists. He repeated his earlier story about discovering C-D- in bed with the man she had met online, stating that it occurred on November 28, 2006.

The petitioner’s affidavits conflict with each other. As noted previously, the petitioner states in his December 21, 2007 affidavit that things went well in the beginning, and that life was blissful through Christmas 2005. However, in his January 29, 2007 affidavit, he had stated that C-D- began showing signs of abuse by November 2005, as she began distancing herself from him; threatening him; calling him an immigrant wetback; telling him he “wasn’t worth it”; and threatening to have him deported so that she could keep their property. Such threats and name-calling are inconsistent with the marital bliss claimed in the later affidavit. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner’s proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* The inconsistencies in the petitioner’s testimony diminish the credibility of that testimony.

Nor do the psychological evaluations establish battery and/or extreme cruelty. The record contains three such evaluations: two from [REDACTED] and one from [REDACTED]. In his affidavits, [REDACTED] relates what the petitioner told him with regard to his alleged maltreatment by C-D-, and states that the petitioner suffers from severe depression. [REDACTED] also relates what the petitioner told her with regard to his alleged maltreatment by C-D-, and states that the petitioner suffers from severe post-traumatic stress disorder (PTSD) and depression, and that he is in urgent need of treatment. Further, and as noted previously, the account of events that the petitioner provided [REDACTED] conflicts with the account provided to the immigration court in his earlier proceeding.

While the AAO does not question the expertise of [REDACTED] or [REDACTED], their testimony fails to establish that the behavior of the petitioner's wife rose to the level of battery and/or extreme cruelty as defined in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). First, the factual information relayed in their accounts of the abuse allegedly suffered by the petitioner is based solely upon their interviews with him. As set forth previously, the AAO has diminished the evidentiary weight accorded to the petitioner's testimony, as his repeated inconsistencies and discrepancies have called his credibility into question. Accordingly, their accounts of the abuse he suffered are given little evidentiary weight.

In a case such as this, where there is little or no physical evidence of battery and/or extreme cruelty, the petitioner's own testimony is critical. However, in the instant case the petitioner has provided conflicting testimony that detracts from his credibility. He has failed to establish that his wife subjected him to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Good Faith Entry into Marriage

The director also found that the petitioner had failed to establish that he married C-D- in good faith. The AAO agrees. First and foremost, the AAO notes the timing of the marriage, as did the director. As noted previously, the petitioner and C-D- were married on August 22, 2005, while his petition for review of the BIA's decision dismissing his appeal of the immigration judge's denial of his application for asylum and withholding of removal was pending before the U.S. Court of Appeals for the Ninth Circuit.

With regard to his intentions upon entering the marriage, the petitioner submits his own affidavits as well as several affidavits from friends. According to his January 29, 2007 affidavit, the petitioner met C-D- in December 2003, and the two began dating in October 2004. He states that C-D- twice proposed marriage in April 2005 before he accepted. They were married in August 2005, several weeks after moving in together.

The March 25, 2007 affidavit from [REDACTED] and [REDACTED] is insufficiently detailed to establish that the petitioner married C-D- in good faith.

In their April 2, 2007 affidavits, [REDACTED] and [REDACTED] state that in speaking with the petitioner, it sounded as though the couple's courtship was strong and caring; that they could tell the petitioner loved C-D- very much; that, upon seeing the couple's interactions with one another they were able to confirm that the relationship was strong and caring; and that they had no doubt in their minds that the relationship was one of the special ones that would last. The AAO notes that the text of these two affidavits is nearly identical, which raises the question of who in fact wrote the affidavits, and diminishes their evidentiary value. Moreover, both affidavits are insufficiently general in nature to provide probative value. The April 30, 2008 affidavits of these two individuals are nearly identical to their April 2, 2007 affidavits, and therefore contain the same deficiencies.

While the AAO acknowledges the banking and utility statements of record, it also questions why many of those statements were sent to the address of the condominium that the petitioner owned before the marriage. The AAO also questions, as did the director, why a portion of the Interspousal Transfer Grant Deed was blackened out. On appeal, neither counsel nor the petitioner states why that portion of the deed was blackened out.

The evidence of record regarding the petitioner's good faith entry into the marriage is very general in nature. The petitioner provides no information regarding the circumstances surrounding the petitioner and A-C-'s first introductions; their first impressions of each other; their courtship; their decision to marry; and the types of activities they enjoyed together; or their early life together. Given the timing of the marriage, as well as the large age gap between the couple, such information is necessary in order to establish good faith entry into the marriage. The finds that the evidence of record fails to demonstrate that the petitioner entered into marriage with C-D- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Section 204(g) of the Act

The AAO agrees with the director's determination that section 204(g) of the Act bars approval of this petition. The record establishes that the petitioner married C-D- while his petition for review of the BIA's decision was pending before the U.S. Court of Appeals for the Ninth Circuit, and the record does not indicate that the petitioner resided outside of the United States for a period of two years after the marriage. As was noted previously, the petitioner filed a petition for review of the BIA's decision, and a motion to stay removal, in the United States Court of Appeals for the Ninth Circuit on November 12, 2004. The petition was denied in part, and dismissed in part, on May 19, 2006. The petitioner's marriage to C-D- took place on August 22, 2005, while that petition was pending.

The bona fide marriage exception to section 204(g) of the Act also does not apply to the petitioner. Section 245(e) of the Act states, in pertinent part, the following:

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, the following:

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 eligibility for the bona fide marriage exemption 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). To demonstrate eligibility for immigrant classification under section 204(a)(1)(A)(iii) 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 relevant, credible evidence shall be considered. Sections 204(a)(1)(A)(iii)(I)(aa) and 204(a)(1)(J) of the Act, 8 U.S.C. §§ 1154(a)(1)(A)(iii)(I)(aa), 1154(a)(1)(J); *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 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. *See also Pritchett v. I.N.S.*, 993 F.2d 80, 85 (5th Cir. 1993) (acknowledging "clear and convincing evidence" as an "exacting standard").

As the petitioner has failed to establish that he entered into marriage with C-D- in good faith by a preponderance of the evidence, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act, he has also failed to demonstrate that he qualifies for the bona fide marriage exemption under the heightened standard of proof required by section 245(e)(3) of the Act. Accordingly, the AAO agrees with the director's determination that section 204(g) of the Act mandates denial of this petition.

Qualifying Relationship

As noted previously, the AAO agrees with the director's determination that the petitioner is subject to section 204(g) of the Act. In his decision, the director found that, since the provisions of section 204(g) had not been overcome, the petitioner's marriage was not a qualifying relationship. The AAO disagrees with the director's reasoning on this ground. The record establishes that the petitioner married C-D- on August 22, 2005. Therefore, he has a qualifying relationship with a United States citizen. Although the petitioner's failure to overcome section 204(g) of the Act prevents him from gaining immigration benefits on the basis of the relationship, the marriage nonetheless constitutes a qualifying relationship. The AAO, therefore, withdraws the director's comments indicating otherwise.

Conclusion

The AAO agrees with the director's determination that the petitioner has failed to establish that he was subjected to battery and/or extreme cruelty; that he entered into marriage with his wife in good faith; and that he is not subject to the provisions of section 204(g) of the Act. The petitioner, therefore, is ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), and the petition must be denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.