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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

Date: AUG 2 7 2013 Office: VERMONT SERVICE CENTER File: [redacted]

IN RE: Petitioner: [redacted]

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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, ("the 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 pursuant to 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 his U.S. citizen spouse.

The director denied the petition for failure to establish that the petitioner resided with his wife, entered into marriage with his wife in good faith, and that he complied with the provisions of section 204(g) of the Act.

On appeal, counsel submits: a statement from the petitioner; a notice of hearing in removal proceedings; and the petitioner's previously filed evidence.

Relevant Law and Regulations

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 further states, in pertinent part:

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

The record in this case indicates that the petitioner was in removal proceedings at the time of his marriage. In such a situation, section 204(g) of the Act, 8 U.S.C. § 1154(g), prescribes:

> *Restriction on petitions based on marriages entered while in exclusion or deportation proceedings.* – Notwithstanding subsection (a), except as provided in section 245(e)(3), a petition may not be approved to grant an alien immediate relative status by reason of a marriage which was entered into during the period [in which administrative or judicial proceedings are pending regarding the alien's right to remain in the United States], until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.

The record does not indicate that the petitioner resided outside of the United States for two years after his marriage. Accordingly, section 204(g) of the Act bars approval of this petition unless the petitioner can establish eligibility for the bona fide marriage exemption at section 245(e) of the Act, 8 U.S.C. § 1255(e), 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 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.
>
> * * *
>
> (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.

* * *

(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.

Pertinent Facts and Procedural History

The petitioner is a citizen of Nigeria who was admitted to the United States on March 25, 2008 as a B2 visitor. On September 23, 2008, the petitioner filed an adjustment of status application (Form I-485) based upon an underlying alien relative petition (Form I-130) filed by his first wife. On March 4, 2009, the petitioner requested that his adjustment of status application be withdrawn. Because the petitioner had remained in the United States beyond his period of authorized stay, he was served with a notice to appear in removal proceedings on July 19, 2009.[1] The petitioner then married L-B-[2], a U.S. citizen, on January 8, 2010 in Houston, Texas.

The petitioner filed the instant Form I-360 on April 19, 2011. The director subsequently issued a Request for Evidence (RFE) of, *inter alia*, the petitioner's good-faith entry into the marriage and residence with his wife. The petitioner timely responded to the request with additional evidence which the director found insufficient to establish the petitioner's eligibility. The director denied the petition and the petitioner timely appealed.

The AAO reviews these proceedings *de novo*. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). A full review of the record, including the evidence submitted on appeal, fails to establish the

[1] The petitioner remains in removal proceedings and his next hearing is on November 6, 2013 before the Houston Immigration Court.

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

petitioner's eligibility. The evidence submitted on appeal does not overcome the director's grounds for denial and the appeal will be dismissed for the following reasons.

Entry into the Marriage in Good Faith

The relevant evidence submitted below and on appeal fails to demonstrate the petitioner's entry into his second marriage in good faith. In his affidavit dated February 15, 2011, the petitioner stated that he met his wife in June 2009 while he was working at an automobile parts store. He recounted that they began dating and they were introduced to each other's families. The petitioner stated that he purchased an engagement ring and proposed to his wife in December 2009. He stated that they wed in a civil ceremony and then he moved into his wife's apartment. In the October 11, 2012 affidavit he submitted in response to the RFE, the petitioner added that during their courtship he spent time with his wife's 15-year-old son and 8-month-old daughter. He also briefly stated that during their courtship they would go to cook-outs, holiday celebrations, parties and dinner with their friends. Neither of the petitioner's two statements describes his shared residence and experiences with his wife, apart from the abuse.

The petitioner submitted letters from his uncle, his friend, and his employer, who briefly attested to knowing the petitioner and his wife as a married couple, but spoke predominately of the abuse. stated that she knew that the petitioner and his wife were dating. stated in her first letter that the petitioner told her about his marriage. In her second letter, recounted that she met the petitioner's wife a couple of times when the petitioner's wife picked up the petitioner from work. recounted in both of his statements that he witnessed the couple dine at his restaurant. Although these individuals discuss seeing the petitioner with his wife, none of them describe their interactions with the couple in detail or otherwise provide detailed information establishing their personal knowledge of the relationship.

On appeal, the petitioner asserts that he married his wife in good faith, but does not provide any further, relevant information. A full review of the relevant evidence submitted below fails to reveal any error in the director's determination. The relevant documents consist of: a receipt for an engagement ring; several photographs of the couple's civil wedding ceremony; two statements from the petitioner; and supporting letters from the petitioner's uncle, employer and friend. In his statements, the petitioner discusses his courtship and wedding ceremony, but fails to describe his shared residence and experiences with his wife, apart from the abuse. The supporting letters also do not discuss in probative detail the petitioner's interactions with or feelings for his wife during their courtship or marriage. Accordingly, the petitioner has failed to demonstrate that he entered into marriage with his second wife in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Section 204(g) of the Act further Bars Approval

Because the petitioner married his second wife while he was in removal proceedings and he did not remain outside of the United States for two years after their marriage, his self-petition cannot be approved pursuant to section 204(g) of the Act unless he establishes the bona fides of his marriage by clear and convincing evidence pursuant to section 245(e)(3) of the Act. While identical or similar evidence may be submitted to establish a good faith marriage pursuant to section 204(a)(1)(A)(iii)(I)(aa) of the Act and the bona fide marriage exception at section 245(e)(3) of the

Act, the latter provision imposes a heightened burden of proof. *Matter of Arthur*, 20 I&N Dec. 475, 478 (BIA 1992). *See also Pritchett v. I.N.S.*, 993 F.2d 80, 85 (5th Cir. 1993) (acknowledging "clear and convincing evidence" as an "exacting standard.") To demonstrate eligibility under section 204(a)(1)(A)(iii)(I)(aa) of the Act, the petitioner must establish his or her good-faith entry into the qualifying relationship by a preponderance of the evidence and any credible evidence shall be considered. Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J); *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). However, to be eligible for the bona fide marriage exemption under section 245(e)(3) of the Act, the petitioner must establish 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.

On appeal, the petitioner asserts that he should be granted a "good faith marriage exemption" pursuant to section 245(e)(3) of the Act because he provided clear and convincing evidence that his second marriage was bona fide and not entered into for immigration purposes. He further asserts that he had not received the notice of intent to appear in removal proceedings (NTA) until he appeared in immigration court on June 9, 2010. He claims that he "was totally not aware" that he was in removal proceedings as of the date he married his wife, January 8, 2010, because he received a notice for his first hearing on March 23, 2010. The petitioner submits as evidence a notice from the Houston Immigration Court, dated March 23, 2010, which informed him of his June 9, 2010 master calendar hearing. The record, however, shows that on July 19, 2009, United States Citizenship and Immigration Services (USCIS) mailed an NTA to the petitioner at his address on in Sugar Land, Texas. The petitioner had provided this address on his March 4, 2009 request to withdraw his Form I-485 application. The also sent the petitioner the March 23, 2010 notice for a master calendar hearing at the address and the petitioner claims to have received this notice. The petitioner has failed to provide probative, credible testimony to demonstrate that he did not receive the NTA prior to his second marriage.

Since the petitioner was placed in removal proceedings prior to his second marriage, he must establish the bona fides of his marriage by clear and convincing evidence pursuant to section 245(e)(3) of the Act. As the petitioner failed to establish his good-faith entry into his marriage by a preponderance of the evidence under section 204(a)(1)(A)(iii)(I)(aa) of the Act, he also has not demonstrated the bona fides of his marriage under the heightened standard of proof required by section 245(e)(3) of the Act. Section 204(g) of the Act consequently bars approval of this petition.

Eligibility for Immediate Relative Classification

Beyond the decision of the director, because the petitioner is not exempt from section 204(g) of the Act, he has also failed to demonstrate his eligibility for immediate relative classification, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act and as explicated in the regulation at 8 C.F.R. § 204.2(c)(1)(iv).[3]

[3] A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer*

Joint Residence

The director also correctly determined that the petitioner failed to demonstrate that he resided with his second wife. On the Form I-360, the petitioner stated that he began residing with his wife on December 1, 2009 in Houston, Texas, but he left blank the section of the petition that requests him to specify the last date that they resided together. In his affidavits, the petitioner also does not specify the dates of his residence with his wife. Nor does he describe their home or shared residential routines in any detail, apart from the abuse. and also do not describe having made any visits to the couple's residence. The photographs submitted by the petitioner appear to be at the courthouse where the couple had their civil wedding ceremony and are not identified as having been taken at the couple's residence. On appeal, the petitioner does not discuss the director's determination that he failed to submit evidence of his joint residence with his wife. Nor does he submit any evidence of their joint residence. Accordingly, the record does not establish that the petitioner resided with his second wife, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

Conclusion

On appeal, the petitioner has not overcome the director's grounds for denial. He has not established that he entered into his second marriage in good faith and resided with his wife. Beyond the decision of the director, the petitioner has not established that he is eligible for immediate relative classification based on his second marriage. He is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act. Approval of the petition is further barred by section 204(g) of the Act.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Enterprises, Inc. v. United States, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003).