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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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Services

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FILE: [REDACTED]  
EAC 07 102 50036

Office: VERMONT SERVICE CENTER

Date: **AUG 04 2009**

IN RE: [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)

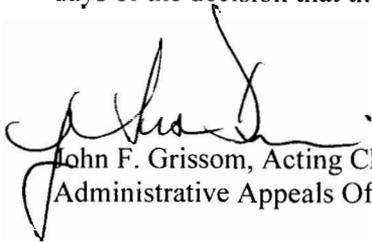
ON BEHALF OF PETITIONER:



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 Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion. The previous decisions of the director and the AAO will be affirmed.

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 April 1, 2008, 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 filed a timely appeal on May 5, 2008.

The AAO dismissed the petitioner's appeal on February 10, 2009. The AAO withdrew the director's findings with regard to the existence of a qualifying relationship, but affirmed the director's findings 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 his wife subjected him to battery or extreme cruelty; and (3) that he entered into marriage with his wife in good faith.

Counsel filed the instant matter on March 12, 2009. Upon review, the AAO finds that counsel's assertions do not satisfy the requirements of a motion to reopen.

8 C.F.R. 103.5(a)(2) states, in pertinent part, the following:

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

Based on the plain meaning of the word "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.<sup>1</sup>

On motion, counsel submits another brief; an affidavit from the self-petitioner's wife; and a journal article dated February 9, 2002. Review of this evidence reveals no fact that could be considered *new* under 8 C.F.R. 103.5(a)(2). This evidence was either previously available and could have been discovered or presented in the previous proceeding, or post-dates the petition. The AAO, therefore, will not consider this evidence.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v.*

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<sup>1</sup> The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . . ." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

*Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a “heavy burden.” *INS v. Abudu*, 485 U.S. at 110. With this motion, the self-petitioner has not met that burden. The motion to reopen, therefore, will be dismissed.

Although counsel specifically marked the Form I-290B to indicate that he was filing a motion to reopen only, and that he was not filing a motion to reconsider, the AAO notes that he nonetheless discusses the requirements of a motion to reconsider in his brief.

The regulation at 8 CFR 103.5(a)(2) states, in pertinent part the following:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Counsel’s submission satisfies the requirements of a motion to reconsider, and the AAO will adjudicate the matter on that basis.

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].

\* \* \*

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

\* \* \*

- (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 pertinent facts and procedural history of this case were set forth in the AAO's February 10, 2009 decision. Hence, the AAO will only repeat such facts as necessary here. The petitioner, a citizen of Guatemala, filed the instant Form I-360 on the basis of his marriage to C-D-,<sup>2</sup> a citizen of the United States, on February 27, 2007. The director denied the petition on April 1, 2008.

On motion, counsel states that the AAO erred in its analysis. Specifically, counsel asserts that the AAO erred in its determination that the petitioner had failed to establish that he was subjected to abuse; that he married C-D- in good faith; and that he is not subject to the provisions of section 204(g) of the Act.

### **Battery or Extreme Cruelty**

The AAO affirms its February 10, 2009 determination that the petitioner has failed to establish that he was subjected to battery or extreme cruelty by C-D-. On motion, counsel contends that the AAO should not have questioned the credibility of the petitioner's testimony, and that the AAO should have accorded more weight to the psychological evaluations of record. Counsel also cites to *Hernandez v. Ashcroft*, 345 F.3d 824, 836 (9<sup>th</sup> Cir. 2003).

Counsel states that the AAO erred in questioning the credibility of the petitioner's testimony regarding the abuse to which he was allegedly subjected during his marriage. Counsel states that the AAO should not have considered the inconsistencies contained in the petitioner's testimony regarding his asylum claim, and submits the previously-mentioned 2002 journal article in support of the assertion that discrepancies in the testimony of asylum-seekers does not necessarily indicate poor credibility. However, a review of the portion of the AAO's February 10, 2009 decision discussing the alleged abuse establishes that it was the discrepancies contained in the petitioner's testimony in support of the instant self-petition,<sup>3</sup> and not those of the asylum claim, that led the AAO to question the credibility of the petitioner's testimony in support of the self-petition.

The petitioner stated on the Form I-360 that he and C-D- shared a joint residence between August 2005 and November 2006. As the AAO noted in its February 10, 2009 decision, the petitioner stated in his January 29, 2007 that C-D- began abusing him in November 2005. However, in his December 21, 2007 affidavit, the petitioner stated that life was blissful through Christmas 2005, and that C-D- began to threaten and insult him at an unspecified date in 2006. As the AAO noted, this testimony was inconsistent, as the threats and name-calling that the petitioner described as occurring in November 2005 conflicted with his later claims of marital bliss during that same period. On motion, counsel states that this was likely a typographical error, and that even if it were not such an error, that "the difference between these two statements is one to two months." The AAO disagrees. First, the record does not support counsel's math: the self-petitioner did not

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<sup>2</sup> Name withheld to protect individual's identity.

<sup>3</sup> The AAO discussed the inconsistencies in the petitioner's testimony regarding the alleged abuse at page seven of the February 10, 2009 decision.

provide a month in his second affidavit, and stated only that the abuse began at an unspecified date in 2006. While the AAO takes counsel's points that the affidavits were prepared several months apart, and that exact dates are often difficult to remember, the AAO notes that the petitioner and C-D- lived together between August 2005 and November 2006, a period of only fifteen months. In a joint residence of a relatively short duration, such as that between C-D- and the petitioner, each month comprised a significant proportion of the entire joint residence. In a relationship involving a joint residence of fifteen months, testimony stating first that the abuse began during a specific point in time, and later that it began at an uncertain point several months later, is significant. The AAO affirms its previous finding that the self-petitioner's evolving testimony as to when the alleged abuse began was sufficient reason to question the credibility of that testimony.

Counsel also states on motion that the psychological evaluations of record "should have been given full evidentiary weight." The AAO disagrees. As the AAO noted in its February 10, 2009 decision, [REDACTED] and [REDACTED] relate what the petitioner told them with regard to his alleged maltreatment by C-D-. Neither of them witnessed the alleged abuse; their testimony is based solely upon that of the petitioner. That the petitioner provided testimony to these two individuals does not bolster his claim of abuse. That the credibility of the petitioner's testimony with regard to the alleged abuse has been called into testimony further diminishes the value of these evaluations, as they are based solely upon such testimony.

For all of these reasons, the AAO affirms its previous determination that the petitioner has failed to establish, by a preponderance of the evidence, that he was subjected to battery or extreme cruelty by C-D-, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

### **Good Faith Entry into Marriage**

The AAO also affirms its February 10, 2009 determination that the petitioner has failed to establish that he entered into marriage with C-D- in good faith. First and foremost, the AAO notes again the timing of the marriage, which occurred while the petitioner's 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.

On motion, counsel contends that the March 25, 2007 affidavit from [REDACTED] and [REDACTED] which the AAO found insufficiently detailed to establish that the petitioner married C-D- in good faith, contains a "wealth of details." The AAO disagrees. The [REDACTED] affidavit is seven sentences long. The [REDACTED] state that they met C-D- on March 30, 2006, seven months after the couple's marriage, and they provide no information regarding the petitioner's intentions upon entering into the marriage. The AAO affirms its previous determination that this affidavit is insufficiently detailed to establish that the petitioner married C-D- in good faith.

Counsel also contends that the AAO erred in its determination that because the affidavits from [REDACTED] and [REDACTED] are nearly identical, there is question as to who in fact wrote the affidavits, and diminishes their evidentiary value. The AAO disagrees. The affidavit of [REDACTED]

██████████ is eighteen sentences long, and the affidavit of ██████████ is twenty sentences long. Twelve of the sentences in their affidavits are identical to one another, and the AAO notes that each affidavit contains an autobiographical section which would obviously differ. Only two sentences in these affidavits regarding the petitioner's alleged good faith entry into the marriage differ from one another. The AAO affirms its previous determination that these affidavits are nearly identical to one another, as well as its question as to who in fact wrote these affidavits. Given both the brevity and generalized nature of these affidavits, the AAO also affirms its previous determination that they are of little probative value toward a determination of the petitioner's good faith entry into the marriage. For all of these reasons, the AAO affirms its previous decision to accord little weight to these affidavits.

The AAO also reiterates its previous questioning as to why many of the banking and utility statements submitted by the petitioner in support of his good faith entry into the marriage were not sent to the couple's joint residence, but were instead sent to the address of the condominium that the petitioner owned before the marriage. Counsel makes no attempt on motion to address this matter.

The AAO also affirms its previous determination to accord little weight to the Interspousal Transfer Grant Deed. As noted by the AAO, a portion of that deed was blackened out, and neither counsel nor the petitioner offered any explanation as to why such was the case. On motion, counsel does not answer the AAO's question; rather, he states that the blackened portion of the deed is irrelevant. The AAO disagrees. The director specifically raised this issue in his April 1, 2008 denial, as did the AAO in its February 10, 2009 dismissal: counsel and the petitioner have now been placed on notice twice that USCIS has concerns over this matter. Absent a clear explanation as to why a portion of the deed is blackened out, the AAO will not accept counsel's assertion that the matter is "irrelevant," and it will not consider the deed as evidence of the petitioner's good faith entry into the marriage.

With regard to the petitioner's own testimony regarding his intentions upon entering into the marriage, the AAO affirms its previous determination that such testimony was insufficiently vague and lacking in probative detail. For all of these reasons, the AAO affirms its previous determination that the petitioner has failed to establish, by a preponderance of the evidence, that he 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**

Finally, the AAO affirms its February 10, 2009 determination that section 204(g) of the Act bars approval of this petition. Again, 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 (5<sup>th</sup> 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 affirms its previous determination that section 204(g) of the Act mandates denial of this petition.

### **Conclusion**

Counsel’s submission failed to qualify as a motion to reopen. Although counsel’s submission did qualify as a motion to reconsider, he failed to meet his burden. A motion to reconsider must establish that the decision was based on an incorrect application of law or USCIS policy based on the evidence of record at the time the decision was rendered. 8 C.F.R. § 103.5(a)(3). Counsel has demonstrated no misapplication of law or policy in the AAO’s February 10, 2009 decision and his motion to reconsider that decision will consequently be dismissed. *Id.* at § 103.5(a)(4) (A motion that fails to meet the applicable requirements shall be dismissed.). The petitioner has failed to establish that he was subjected to battery or extreme cruelty by C-D-; that he married C-D- in good faith; or that he is not subject to the provisions of section 204(g) of the Act.

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 motion is dismissed. The AAO affirms its February 10, 2009 decision.