

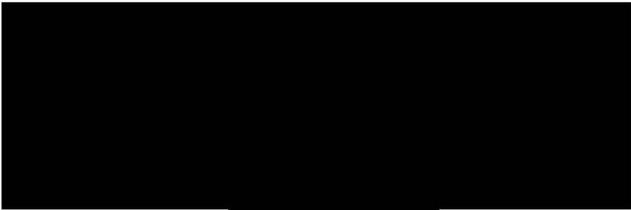
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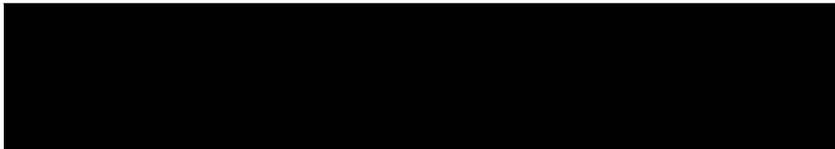
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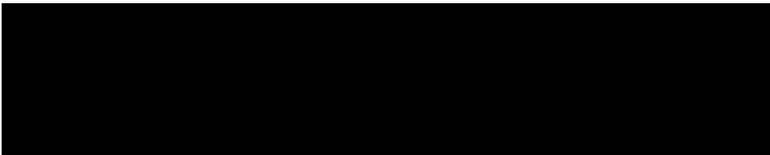
JAN 13 2009

IN RE:



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

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 she did not enter into her previous marriage for the primary purpose of circumventing the immigration laws; (2) that, because she had been divorced for longer than two years at the time she filed the petition, the petitioner failed to establish that she has a qualifying relationship with a United States citizen; and (3) that she entered into marriage with her husband in good faith.

Counsel submitted a timely appeal on May 11, 2007.

Section 204(a)(1)(B)(ii) of the Act provides that an alien who is the spouse of a lawful permanent resident of the United States may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the lawful permanent resident 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 203(a)(2)(A) of the Act, resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(B)(ii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(II).

Section 204(a)(1)(B)(ii)(II)(aa) of the Act states, in pertinent part, that an individual who is no longer married to a citizen of the United States is eligible to self-petition under these provisions if he or she is an alien:

- (CC) who was a bona fide spouse of a lawful permanent resident within the past 2 years and –
 - (aaa) whose spouse lost status within the past 2 years due to an incident of domestic violence; or
 - (bbb) who demonstrates a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the lawful permanent resident spouse. . . .

Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J) states, in pertinent part, the following:

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:

- (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.

* * *

- (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(c) of the Act, 8 U.S.C. § 1154(c), states, in pertinent part, the following:

[N]o petition shall be approved if –

- (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative . . . status as the spouse of a citizen of the United States . . . by reason of a marriage determined by the [Secretary of Homeland Security] to have been entered into for the purpose of evading the immigration laws[.]

The regulation corresponding to section 204(c) of the Act, at 8 C.F.R. § 204.2(a)(ii), states the following:

Fraudulent marriage prohibition. Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

The record of proceeding establishes the following pertinent facts and procedural history. The petitioner is a citizen of Colombia who entered the United States, in B-2 status, on November 28, 1996. She married G-F-¹ a citizen of the United States, on April 8, 1998. G-F- filed Form I-130, Petition for Alien Relative, on behalf of the petitioner on April 14, 1998. The petitioner filed Form I-485, Application to Register Permanent Residence or Adjust Status, on that same date. G-F- and the petitioner appeared for a permanent residency interview on August 12, 1999. During the interview, the petitioner and the G-F- were questioned separately, and they provided conflicting information to several of the interviewer's questions regarding their life together. Accordingly, the district director issued a notice of intent to deny (NOID) the Form I-130 on November 5, 1999. The director informed G-F- and the petitioner of the discrepancies in their testimony, and afforded them 120 days in which to respond to the NOID, and demonstrate the bona fides of their marriage. G-F- and the petitioner divorced on November 16, 1999. They never responded to the NOID, and the Form I-130 was denied on April 20, 2000. In his denial, the district director stated that he was denying the petition for the reasons stated in the NOID; i.e., that G-F- and the petitioner had failed to demonstrate the bona fides of their marriage. The Form I-485 was denied on July 2, 2001.

The petitioner married J-M-² a lawful permanent resident of the United States, on January 16, 2000. She filed another Form I-485 (based on the Cuban Adjustment Act, as J-M- was born in Cuba and admitted to the United States after 1959) on April 20, 2001.

The petitioner filed a Form I-360 on September 10, 2001. The director issued a request for evidence on January 8, 2002, and requested additional evidence to establish whether she and J-M- shared a joint residence and whether she had married J-M- in good faith. The director also requested copies of any immigration paperwork that J-M- had filed on behalf of the petitioner. The petitioner, however, elected not to respond to the director's request for additional evidence, and the Form I-360 was denied on July 18, 2002.

¹ Name withheld to protect individual's identity.

² Name withheld to protect individual's identity.

In the meantime, the petitioner filed Form I-601, Application for Grounds of Inadmissibility, on March 26, 2002. On the Form I-601, the petitioner stated that she had been found inadmissible to the United States because “the Immigration and Naturalization Service made a finding of fraud on my previous adjustment application.”

The petitioner and J-M- divorced on November 7, 2003. As the petitioner’s marriage to J-M- served as the basis of the Form I-485 filed on April 20, 2001, U.S. Citizenship and Immigration Services (USCIS) denied the Form I-485 on July 12, 2006.

The petitioner filed the instant Form I-360 on June 5, 2006. The director issued a notice of intent to deny (NOID) the petition on December 11, 2006, which notified the petitioner of the deficiencies in the record and afforded her the opportunity to submit further evidence to establish that she has a qualifying relationship with J-M-; whether she married J-M- in good faith; and whether she married G-F- in good faith. Counsel responded to the NOID on February 13, 2007 and submitted additional evidence. After considering the evidence of record, the director denied the petition on April 9, 2007. On appeal, counsel submits additional documentation.

Upon review, the AAO agrees with the director’s decision to deny the petition.

Section 204(c) of the Act

The AAO agrees with the director’s determination that section 204(c) of the Act bars approval of this petition. A decision that section 204(c) of the Act applies must be made in the course of adjudicating a subsequent visa petition. *Matter of Rahmati*, 16 I&N Dec. 538, 539 (BIA 1978). USCIS may rely on any relevant evidence in the record, including evidence from prior USCIS proceedings involving the beneficiary. *Id.* However, the adjudicator must come to his or her own, independent conclusion and should not ordinarily give conclusive effect to determinations made in prior collateral proceedings. *Id.*; *Matter of Tawfik*, 20 I&N Dec. 166, 168 (BIA 1990).

Evidence that a marriage was not entered into for the primary purpose of evading the immigration laws may include, but is not limited to, proof that the beneficiary has been listed as the petitioner’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 together. *Matter of Phillis*, 15 I&N Dec. 385, 386-87 (BIA 1975).

As noted by the director, the district director issued a NOID with regard to the Form I-130 filed on her behalf by G-F-, her first husband. In his NOID, which was issued on November 5, 1999, the district director noted the following inconsistencies and discrepancies between the testimony of G-F- and that of the petitioner:

- The petitioner and G-F- provided testimony conflicting regarding their first meeting. G-F- told the interviewer that the couple met in March 1998 at a party at a friend’s house. The petitioner told the interviewer that they met at a market cafeteria in January or February 1998.

- Both the petitioner and G-F- were questioned about where the petitioner was living at the time she met G-F-. G-F- told the interviewer that the petitioner lived on [REDACTED], but that he did not know the address and that, while he visited her there, he never slept there before their marriage. The petitioner, on the other hand, told the interviewer that G-F- did sleep at her apartment on [REDACTED] before their marriage.
- Both the petitioner and G-F- were questioned about where G-F- lived before the marriage took place, whether the petitioner visited him there, and whether the petitioner slept there before the marriage. G-F- told the interviewer that he lived in an efficiency with a friend before the marriage, and that the petitioner never visited him there, and never slept there. The petitioner, on the other hand, told the interviewer that G-F- lived alone before the marriage, and that she both visited and slept at his apartment before the marriage.
- Both the petitioner and G-F- were asked whether G-F- moved any furniture from his efficiency into the petitioner's apartment. G-F- told the interviewer that he moved only his clothing into her apartment, and that he left all the furniture for his roommate to keep (as noted previously, the petitioner told the interviewer that G-F- had been living alone). The petitioner, on the other hand, told the interviewer that G-F- moved his cream-colored bedroom furniture, as well as his clothing, into her apartment.
- Both the petitioner and G-F- were asked whether their current apartment had a dishwasher. G-F- told the interviewer that the apartment did not have a dishwasher. The petitioner, on the other hand, told the interviewer that the apartment had a cream-colored dishwasher.
- Both the petitioner and G-F- were asked about the color of their bedroom furniture, and asked where it came from. G-F- told the interviewer that the bedroom furniture was brown, and that it was already in the bedroom when he moved in. The petitioner, on the other hand, told the interviewer that the bedroom furniture was cream-colored, and that G-F- moved it into the apartment, from his old apartment, when he moved in.
- Both the petitioner and G-F- were asked when they had moved into their current apartment. G-F- told the interviewer that they had moved into the apartment two months after their marriage (i.e., in June 1998). The petitioner, on the other hand, told the interviewer that they had moved their "around the beginning of 1999."
- Both the petitioner and G-F- were asked whether they had exchanged rings at their courthouse wedding ceremony and, if so, who had purchased each of the rings. G-F- told the interviewer that they exchanged rings at the courthouse, but that each of them had purchased the other's ring alone. While agreeing with G-F- that they did exchange rings at the courthouse, the petitioner told the interviewer that they had purchased the rings together.

The district director stated that, based on the inconsistencies and discrepancies between the testimony of G-F- and the petitioner, he had concluded that the couple had failed to establish that they did not

enter into marriage for the primary purpose of circumventing the immigration laws of the United States. He afforded G-F- and the petitioner 120 days to submit evidence establishing the bona fides of their marriage. The petitioner and G-F- however, elected not to respond to the district director's NOID. Rather, on November 16, 1999, eleven days after the district director issued his NOID, G-F- and the petitioner divorced. Two months later, on January 16, 2000, the petitioner married J-M-.

On April 20, 2000, the district director denied the Form I-130. In his denial, the district director stated that "it is determined for the reasons stated in the Notice that the visa petition must be, and hereby is, denied." Thus, the district director concluded that G-F- and the petitioner had entered into marriage for the primary purpose of circumventing the immigration laws of the United States.

In his December 11, 2006 NOID regarding the instant petition, the director brought up the issue of the I-130 denial, and notified the petitioner that "[i]t is now incumbent upon you to establish that your marriage to [G-F-] was not entered into for the primary purpose of circumventing the immigration laws."

In his February 12, 2007 response to the director's NOID, counsel submitted an August 29, 2001 police clearance and a copy of the petitioner's and G-F-'s divorce decree, both of which were already contained in the record of proceeding. Counsel stated that documentation was limited, as G-F- and the petitioner had divorced in 1999.

In finding counsel's response inadequate to establish that the petitioner and G-F- did not enter into marriage for the primary purpose of circumventing the immigration laws, the director stated that these documents failed to prove that she had married G-F- in good faith, and found that section 204(c) of the Act mandates denial of the petition.

On the Form I-290B, received at the service center on May 11, 2007, counsel states that the Form I-130 "was not denied on the basis of fraud but rather was denied for lack of evidence," and states that the petitioner married G-F- in good faith. In a supplemental submission, counsel submits several letters, copies of utility bills, photographs, and other evidence, some of which is already contained in the record of proceeding, as evidence that the petitioner married G-F- in good faith.

However, the AAO does not find this evidence convincing. First, the AAO notes that counsel's assertion with regard to the basis of the Form I-130's denial is incorrect: as noted previously, the district director specifically stated in his January 20, 2000 denial of the Form I-130 that it was being denied for the reasons set forth in the November 5, 1999 NOID. The basis of the November 5, 1999 NOID was the district director's determination that G-F- and the petitioner had entered into marriage for the primary purpose of circumventing the immigration laws. Further, counsel and the petitioner have failed to explain the conflicting testimony that G-F- and the petitioner provided at their interview regarding their life together. 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 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).

While the AAO acknowledges that the petitioner has provided additional documentation on appeal, she has nonetheless failed to explain the conflicting testimony she and G-F- provided in her permanent residency interview. Such an explanation is particularly important in this case, given the particular fact pattern present: G-F- and the petitioner appeared for an interview on August 12, 1999 and attested to the validity of their marriage. On November 5, 1999, the director issued a NOID. On November 16, 1999, G-F- and the petitioner divorced, and on January 16, 2000, the petitioner remarried. Further, the record lacks probative details and substantive information regarding how the petitioner met G-F-, their courtship, their decision to marry, and shared residences and experiences. Moreover, it contains significant, and unresolved, inconsistencies and discrepancies outlined by the district director in his November 5, 1999 NOID. Given this series of events, as well as the conflicting testimony that G-F- and the petitioner provided at their August 12, 1999 interview, as well as the petitioner's repeated failure to explain that conflicting testimony, the AAO finds that the petitioner entered into marriage with G-F- for the primary purpose of circumventing the immigration laws.

An independent review of the record establishes that the petitioner married G-F- for the purpose of evading the immigration laws. Consequently, the AAO agrees with the director's determination that section 204(c) of the Act bars the approval of the instant petition.

Qualifying Relationship and Eligibility for Classification as an Immediate Relative

Counsel and the petitioner concede that the petitioner and J-M- had been divorced for longer than two years at the time the petition was filed: the petitioner's divorce from J-M- became final on November 7, 2003, but she did not file the instant Form I-360 until June 5, 2006. However, on the Form I-290B, counsel contends that the instant Form I-360 "is nunc pro tunc to the initial filing date of 9/10/01," as the petitioner's Form I-485 was still pending at the time the first Form I-360 was denied, and the instant Form I-360 was filed before the Form I-485 was denied. Accordingly, the AAO should consider the filing date of the instant petition to be September 10, 2001, the date the denied Form I-360 was filed.

Counsel offers no legal authority in support of his contention. As noted previously, the petitioner's first Form I-360 was denied on July 18, 2002.³ Although counsel now states that the evidence requested by the director in that petition was in fact provided, that petition is no longer pending, and is not at issue here. The AAO notes further that the petitioner never appealed the director's denial of that petition.

In asserting that the AAO should consider the filing of the instant petition to be September 10, 2001, counsel is in essence making an equitable tolling argument. The doctrine of equitable tolling doctrine

³ See EAC 01 278 50448, filed September 10, 2001, and denied July 18, 2002.

is presumed to apply to every federal statute of limitation. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1188 (9th Cir. 2001). However, not every statutory time limit is a statute of limitations subject to equitable tolling. A crucial distinction exists between statutes of limitation and statutes of repose. *Munoz v. Ashcroft*, 339 F.3d 950, 957 (9th Cir. 2003). A statute of limitations limits the time in which a plaintiff may bring suit after a cause of action accrues. A statute of repose, in contrast, “cuts off a cause of action at a certain time irrespective of the time of accrual of the cause of action.” *Weddel v. Sec’y of H.H.S.*, 100 F.3d 929, 931 (Fed. Cir. 1996). Statutes of repose are not subject to equitable tolling. *Lampf Pleva, Lipkin, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (superseded on other grounds); *Weddel v. Sec’y of H.H.S.*, 100 F.3d at 930-32.

For example, several federal circuits have held that the 90 and 180 day filing deadlines for motions to reopen removal (or deportation) proceedings are statutes of limitation subject to equitable tolling. *See Socop-Gonzalez*, 272 F.3d at 1187-90; *Iavorski v. I.N.S.*, 232 F.3d 124, 134 (2nd Cir. 2000); *Riley v. I.N.S.*, 310 F.3d 1253, 1257 (10th Cir. 2002); *Borges v. Gonzalez*, 402 F.3d 398, 406 (3d Cir. 2005); *Pervais v. Gonzalez*, 405 F.3d 488, 490 (7th Cir. 2005). Yet, the Eleventh Circuit Court of Appeals has held that the filing deadlines for motions to reopen deportation and removal proceedings are mandatory and jurisdictional and consequently not subject to equitable tolling. *Abdi v. U.S. Atty Gen.*, 430 F.3d 1148, 1150 (11th Cir. 2005); *Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999). In addition, the Ninth Circuit Court of Appeals has held that the filing deadline for special rule cancellation under the Nicaraguan Adjustment and Central American Relief (NACARA) is statute of repose not subject to equitable tolling, *Munoz v. Ashcroft*, 339 F.3d at 957, but has held that the time limit for filing motions to reopen under NACARA is a statute of limitations subject to equitable tolling, *Albillo-DeLeon v. Gonzalez*, 410 F.3d 1090, 1098 (9th Cir. 2005).

Counsel provides no basis upon which to conclude that the two-year, post-divorce filing period of section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act is a statute of limitations subject to equitable tolling (and not a statute of repose not subject to equitable tolling), and presents no argument as to why this portion of the Act is comparable to other immigration statutes that federal circuit courts have found subject to equitable tolling.

Counsel has failed to establish that this section of the Act is a statute of limitations subject to equitable tolling, and it is uncontroverted that the instant petition was filed on June 5, 2006, which was more than two years after the petitioner’s divorce from J-M-. Accordingly, the AAO concurs with the director’s finding that the petitioner has failed to establish a qualifying relationship, as required by section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act. The director, therefore, properly denied the petition on this ground. Further, as the petitioner did not have a qualifying relationship as the spouse of a lawful permanent resident pursuant to section 204(a)(1)(B)(ii)(II) of the Act, she also was not eligible for preference immigrant classification based on such a relationship, as required by section 204(a)(1)(B)(ii)(II)(cc) of the Act.

Good Faith Entry into Marriage

The AAO agrees with the director's determination that the petitioner has failed to demonstrate that she married J-M- in good faith. As discussed previously, the petitioner and G-F- appeared for a permanent residency interview on August 12, 1999. They were divorced on November 16, 1999, and the petitioner married J-M- on January 16, 2000.

While the petitioner submits items such as bank statements, utility bills, photographs, and other evidence to demonstrate that she married J-M- in good faith, the AAO notes that none of these items speak to her intentions prior to entering the marriage. There is very little information in the record regarding the petitioner's good faith entry into the marriage. The petitioner provides no information regarding the circumstances surrounding the petitioner and J-M-'s first introductions; their first impressions of each other; their courtship; their decision to marry; the types of activities they enjoyed together; or their early life together. The record lacks such information as how long the couple dated before they became engaged or the length of the engagement. Given the quick nature of the petitioner's marriage to J-M- after her divorce from G-F-, and the AAO's own determination that she entered into that marriage with the primary purpose of evading the immigration laws, such information is critical in order to establish that she married him in good faith. However, the record is devoid of such information. Accordingly, the AAO finds that the evidence of record fails to demonstrate that the petitioner entered into marriage with J-M- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Conclusion

The AAO agrees with the director's determination that the petitioner has failed to establish that she did not enter into her previous marriage for the primary purpose of circumventing the immigration laws; that the petitioner has failed to establish that she has a qualifying relationship with a lawful permanent resident of the United States; and that she entered into marriage with J-M- in good faith. She is therefore ineligible for immigrant classification pursuant to section 204(a)(1)(B)(ii) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii), 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.