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FILE:



Office: VERMONT SERVICE CENTER

Date: **MAR 30 2009**

EAC 06 012 53404

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 her husband subjected her to battery or extreme cruelty; (2) that she is a person of good moral character; and (3) that she entered into the marriage in good faith.

Previous counsel submitted a timely appeal on May 18, 2007.

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:

- (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.

- (vii) *Good moral character.* A self-petitioner will be found to lack good moral character if he or she is a person described in section 101(f) of the Act. Extenuating circumstances may be taken into account if the person has not been convicted of an offense or offenses but admits to the commission of an act or acts that could show a lack of good moral character under section 101(f) of the Act. A person who was subjected to abuse in the form of forced prostitution or who can establish that he or she was forced to engage in other behavior that could render the person excludable under section 212(a) of the Act would not be precluded from being found to be a person of good moral character, provided the person has not been convicted for the commission of the offense or offenses in a court of law. A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she willfully failed or refused to support dependents; or committed unlawful acts that adversely reflect upon his or her moral character, or was convicted or imprisoned for such acts, although the acts do not require an automatic finding of lack of good moral character. A self-petitioner's claim of good moral character will be evaluated on a case-by-case basis, taking into account the provisions of section 101(f) of the Act and the standards of the average citizen in the community. If the results of record checks conducted prior to the issuance of an immigrant visa or approval of an application for adjustment of status disclose that the self-petitioner is no longer a person of good moral character or that he or she has not been a person of good moral character in the past, a pending self-petition will be denied or the approval of a self-petition will be revoked.

\* \* \*

- (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.

\* \* \*

- (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.
- (v) *Good moral character.* Primary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit. The affidavit should be accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. Self-petitioners who lived outside the United States during this time should submit a police clearance, criminal background check, or similar report issued by the appropriate authority in each foreign country in which he or she resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. If police clearances, criminal background checks, or similar reports are not available for some or all locations, the self-petitioner may include an explanation and submit other evidence with his or her affidavit. The Service will consider other credible evidence of good moral character, such as affidavits from responsible persons who can knowledgeably attest to the self-petitioner's good moral character.

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- (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.

The record of proceeding establishes the following pertinent facts and procedural history. The petitioner is a citizen of the Philippines who entered the United States on or around May 10, 1993, in nonimmigrant visitor status, with authorization to remain in the United States through August 10, 1993. The legacy Immigration and Naturalization Service (INS) issued an Order to Show Cause and Notice of Hearing on January 4, 1996, and the petitioner's application for asylum and withholding of deportation was denied on March 7, 1997, and the petitioner was granted voluntary departure through April 16, 1997.

The petitioner appealed the Immigration Judge's (IJ) decision to the Board of Immigration Appeals (BIA) on March 31, 1997. On March 8, 2002, the BIA remanded the matter to the IJ so that the IJ could make a determination on a substantive matter. Specifically, the BIA instructed the IJ to determine whether the "help" that the petitioner stated that she had provided to the New People's Army in the Philippines constituted engagement in terrorist activity under section 212(a)(3)(B) of the Act. At her hearing on February 14, 2003, the petitioner denied having ever provided support to the New People's Army, which conflicted directly with her 1997 testimony.<sup>1</sup> Accordingly, the IJ denied the application on February 14, 2003, and ordered the petitioner deported.

The petitioner married R-A,<sup>2</sup> a United States citizen, on May 24, 2003. On June 19, 2003, the petitioner appealed the IJ's decision to the BIA. On June 20, 2003, the IJ granted a stay of the petitioner's deportation.

R-A- filed a Form I-130, Petition for Alien Relative, on behalf of the petitioner on March 10, 2004. On March 24, 2004, the petitioner filed a motion to remand to the BIA, arguing that the Form I-130 made the petitioner eligible for adjustment of status. On July 26, 2004, the BIA dismissed the petitioner's appeal of the IJ's asylum denial, and ordered that the IJ's February 14, 2003 decision was final. The BIA also stated that it was without jurisdiction over the petitioner's motion to remand, and returned the record to the IJ.

On August 27, 2004, the petitioner filed a "Motion to Adjudicate Motion to Remand Contained in the File; or Motion to Reopen," and argued that the petitioner should be permitted to apply for adjustment of status before the IJ. On September 9, 2004, the Department of Homeland Security (DHS) responded with its own motion, arguing that the petitioner had not met her "high evidentiary burden" to

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<sup>1</sup> In her February 14, 2003 decision, the IJ stated the following: "Thus, the Court concludes that in this case, while the respondent may not be a terrorist or may not have known that she was helping an organization designated as a terrorist organization, she certainly is not credible."

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

demonstrate the bona fides of her marriage. On November 30, 2004, the IJ ordered the petitioner to submit additional evidence regarding the bona fides of the marriage. The petitioner requested an additional 60 days to submit such evidence on January 13, 2005, which the IJ granted. The petitioner requested another 60 days in which to submit such evidence on March 14, 2005. The IJ denied the petitioner's second request and, on July 13, 2005, denied the petitioner's motion.

The petitioner filed a second motion to reopen on October 6, 2005, based upon her Form I-360. After finding that "[t]he record here raises serious concerns that [the petitioner's] marriage was entered into for the primary purpose of circumventing immigration laws," the IJ denied the motion on December 12, 2005. The petitioner appealed the IJ's decision to the BIA; the BIA dismissed the motion on May 25, 2006.

The petitioner submitted the instant Form I-360 on October 11, 2005. The director issued a notice of intent to deny (NOID) the petition on October 19, 2006, which notified the petitioner of deficiencies in the record and afforded her the opportunity to submit further evidence to establish that she was subjected to battery and/or extreme cruelty by R-A-; that she is a person of good moral character; and that she entered into marriage with R-A- in good faith. The petitioner responded to the director's NOID on December 18, 2006, and submitted additional evidence. After considering the evidence of record, the director denied the petition on April 18, 2007.

### **Battery or Extreme Cruelty**

In finding the evidence of record insufficient to establish that the petitioner was subjected to battery and/or extreme cruelty by R-A-, the director stated that the petitioner's statement alone was not sufficient, as she had been found to be lacking credibility in a previous immigration proceeding. The director further found that the evidence submitted did not constitute extreme cruelty as defined for immigration purposes. Upon review of the record, the AAO agrees with the director's determination that the petitioner has failed to establish that she was the victim of battery and/or extreme cruelty.

In her October 6, 2005 affidavit, the petitioner states that she met R-A- in Nevada August 2002, and became engaged in December 2002. She states that when they moved to California, R-A- had difficulty finding employment. After asking him why he could not find employment, R-A- admitted to the petitioner that he had a criminal record: he had been convicted of a drug offense in California, and had violated his parole when he moved to Nevada. As he was unable to secure employment, odd jobs were his only source of income. The petitioner states that when her employer died he left her his car. The petitioner gave that car to R-A- so that he would have a means of transportation, but R-A- sold it. The petitioner states that the couple began having arguments over finances, as R-A- was unable to contribute much money toward the household budget. Because R-A- was not working, he had a great deal of free time, which he spent sleeping and drinking. The couple also began having sexual problems: because the petitioner is diabetic and was going through menopause, she was unable to meet R-A-'s expectations with regard to the frequency of intimate relations. This angered R-A-, and he threatened to leave the marriage and

find someone else to make him happy when the petitioner found it difficult to satisfy his demands. The couple's arguments over household finances escalated, and R-A- began threatening to turn her in to immigration authorities if she did not stop asking him to find a job. R-A- convinced the petitioner to allow a female friend to move into the apartment and, although he had assured the petitioner they were merely friends, the two of them soon moved into their own apartment together. The petitioner and R-A- reconciled briefly, but soon began arguing again. In September 2005, he decided to turn himself in to authorities and "get a fresh start." The petitioner reported that he is now in the custody of the State of California.

In his October 13, 2005 affidavit, \_\_\_\_\_ states that he observed arguments between the petitioner and R-A-; that the "worst scenario" of the petitioner's life was R-A-'s inability to find employment; that the petitioner was forced to work two jobs per day, seven days per week; that the petitioner was "hard-up" physically, emotionally, and financially; that R-A- turned himself in to his parole officer, and is now in his custody; and that the petitioner is sad, because, although she still loves R-A-, she is happy that he has taken responsibility for his actions.

Section 204(a)(1)(J) of the Act requires USCIS to "consider any credible evidence relevant to the petition." Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J). This mandate is reiterated in **the regulation at 8 C.F.R. § 204.2(c)(2)(i)**. However, **this mandate establishes an evidentiary standard, not a burden of proof.** Accordingly, "[t]he determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of [USCIS]. Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J); 8 C.F.R. § 204.2(c)(2)(i). The evidentiary guidelines for demonstrating the requisite battery or extreme cruelty lists examples of the types of documents that may be submitted and states, "Other forms of relevant credible evidence will also be considered." 8 C.F.R. § 204.2(c)(2)(iv). In this case, as in all visa petition proceedings, the petitioner bears the burden of proof to establish her eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The mere submission of relevant evidence of the types listed in the regulation at 8 C.F.R. § 204.2(c)(2) will not necessarily meet the petitioner's burden of proof. While USCIS must consider all credible evidence relevant to a petitioner's claim of abuse, the agency is not obligated to determine that all such evidence is credible or sufficient to meet the petitioner's burden of proof. Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J); 8 C.F.R. § 204.2(c)(2)(i). To require otherwise would render the adjudicatory process meaningless.

USCIS has applied the "any credible evidence" standard to this case. It has considered all credible evidence relevant to the case. While the AAO finds the petitioner's evidence credible, it is insufficient to satisfy the petitioner's burden of proof to establish that she was the victim of battery and/or extreme cruelty perpetuated by R-A-.

On appeal, counsel raises *Hernandez v. Ashcroft*, 345 F.3d 824 (9<sup>th</sup> Cir. 2004). However, counsel's citation to *Hernandez* is not persuasive. The actions and incidents described in the affidavits of record fail to meet the standard described in the *Hernandez*. In *Hernandez*, the petitioner had been violently physically assaulted by her spouse on several occasions. After two assaults, which took

place while [REDACTED] resided with her spouse in Mexico [REDACTED] fled to the United States fearing that her spouse would be able to find her in Mexico. After a time, the petitioner's spouse obtained [REDACTED]'s phone number in the United States and persuaded her to let him visit her in the United States. Once in the United States, [REDACTED] spouse convinced [REDACTED] of his remorse and agreed to marriage counseling. The two returned to Mexico where, after a brief period, [REDACTED] was again brutally attacked by her spouse. After receiving medical treatment for her injuries, the petitioner returned to the United States. The petitioner was placed in proceedings and sought suspension of deportation. The immigration judge denied [REDACTED] suspension request finding that her testimony lacked credibility and that she failed to prove that she was a victim of domestic violence. On appeal to the BIA, the BIA reversed the IJ's adverse credibility determination but concluded that because the physical violence occurred in Mexico, [REDACTED] was unable to show that she had been battered by or subjected to extreme cruelty in the United States.<sup>3</sup> In reviewing the BIA's decision, the Ninth Circuit found there was no dispute that the abuse suffered by the petitioner in Mexico would qualify as battery or extreme cruelty. The sole question considered by that Court was whether [REDACTED]'s spouse's actions "in seeking to convince [her] to leave her safe haven in the United States in which she had taken refuge can be deemed to constitute extreme cruelty." *Id.* at 836. In determining that the petitioner had been subjected to extreme cruelty, the court found that the "interaction between [REDACTED] and her spouse in Los Angeles made up an integral stage in the cycle of domestic violence, and thus the actions taken by [REDACTED]'s spouse in order to lure [REDACTED] back to the violent relationship constitute extreme cruelty." *Id.*

These facts are not applicable to the instant case in which the petitioner has not shown that there was any cycle of domestic violence. The Ninth Circuit recognized that the interaction that took place between [REDACTED] and her spouse in the United States was during "a well-recognized stage within the cycle of violence," known as the "contrite" phase, which is both "psychologically and practically crucial to maintaining the batterer's control." *Id.* at 828.

In this case, the affidavits of record fail to demonstrate that the petitioner was forced to submit to the control of R-A-. Nor do claims that R-A- refused to work, failed to help with household expenses, had an extra-marital affair, drank too much, failed to disclose a criminal past, or threatened to leave the marriage over sexual problems demonstrate that his actions amounted to extreme cruelty. As noted by the court in *Hernandez*, because Congress "required a showing of extreme cruelty in order to ensure that [a petitioner is] protected against the extreme concept of domestic violence, rather than mere unkindness," not "every insult or unhealthy interaction in a relationship [rises] to the level of domestic violence . . . ." Again, such acts do not rise to the level of the acts described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi), which include forceful detention, psychological or sexual abuse or exploitation, rape, molestation, incest, or forced prostitution. While the AAO acknowledges the petitioner's assertion that R-A- threatened to report her to immigration authorities if she did not stop asking him to get a job, the petitioner's affidavit

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<sup>3</sup> Although the current law does not contain the requirement that the abuse have occurred in the United States, the law applicable at the time of [REDACTED] petition did include this requirement.

offers only a generalized statement that he made such a threat. Nor does she indicate how frequently such threats occurred.

While R-A-'s actions as described in the affidavits may have been unkind and inconsiderate, they do not rise to the level of the acts described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi), which include forceful detention, psychological or sexual abuse or exploitation, rape, molestation, incest, or forced prostitution. The affidavits submitted on behalf of the petitioner fail to establish that the petitioner was the victim of any act or threatened act of physical violence or extreme cruelty, that R-A-'s non-physical behavior was accompanied by any coercive actions or threats of harm, or that his actions were aimed at insuring dominance or control over the petitioner. The petitioner has failed to establish that her husband subjected her to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

### **Good Moral Character**

The regulation at 8 C.F.R. § 204.2(c)(2)(v) states that primary evidence of a petitioner's good moral character is an affidavit from the petitioner, accompanied by local police clearances or state-issued criminal background checks from each place the petitioner has lived for at least six months during the three-year period immediately preceding the filing of the self-petition (in this case, during the period beginning in October 2002 and ending in October 2005).

The record contains a criminal background check issued by the State of California on June 15, 2003. However, the record has no local police clearances or state-issued criminal background checks covering the period June 15, 2003 through October 2005, as required by 8 C.F.R. § 204.2(c)(2)(v). The petitioner was placed on notice by the director in his October 19, 2006 NOID, as well as in his April 18, 2007 denial, that this criminal background check was insufficient.

On appeal, previous counsel contends that the record is sufficient to establish that the petitioner is a person of good moral character. Counsel states that the petitioner "has been fingerprinted on a number of occasions," that her moral character has never been called into question, and that submission of a police clearance to cover the missing time period (June 15, 2003 through October 2005) would "do nothing more than provide the agency with cumulative evidence of facts that have already been established." Counsel contends that requiring the submission of an additional police clearance "is arbitrary and a clear abuse of discretion."

The AAO disagrees with previous counsel's analysis. The regulation at 8 C.F.R. § 204.2(c)(2)(v) is clear. In order to establish that she is a person of good moral character as defined at 8 C.F.R. § 204.2(c)(2)(v), she is required to submit local police clearances or state-issued criminal background checks from each place the petitioner has lived for at least six months during the three-year period immediately preceding the filing of the self-petition (in this case, during the period beginning in October 2002 and ending in October 2005). The June 15, 2003 criminal background check does not satisfy the regulation, as it does not cover the entire three-year period immediately preceding the

filing of the self-petition. The petitioner has now been afforded two opportunities to submit the requisite police clearance, but has elected not to do so. Counsel's opinion that submission of the clearance would "do nothing more than provide the agency with cumulative evidence of facts that have already been established" is irrelevant. The language of 8 C.F.R. § 204.2(c)(2)(v) is clear, and the AAO is without authority to waive that regulation. Counsel's assertion that compliance with 8 C.F.R. § 204.2(c)(2)(v) is "arbitrary and a clear abuse of discretion" lacks merit. Absent local police clearances or state-issued criminal background checks from each place the petitioner has lived for at least six months during the three-year period immediately preceding the filing of the self-petition, the petitioner has failed to establish that she is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

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

As noted previously, the petitioner married R-A- on May 24, 2003, while she was in removal proceedings. In her affidavit, the petitioner states that she met R-A- in August 2002, at a birthday party for a mutual friend in Las Vegas, Nevada. She states that they began speaking by telephone almost every month, that she visited him in Las Vegas twice monthly, and that he visited her in San Jose, California when she was unable to make the trip to Las Vegas. She states that they enjoyed karaoke, barbecues, and entertaining friends. They became engaged in December 2002, and they married a few months later. She states that R-A- moved to San Jose in September 2003.

The AAO agrees with the director's determination that the petitioner has failed to establish that she entered into the marriage in good faith. First, the AAO notes again that the petitioner married R-A- while in removal proceedings.

As evidence of the petitioner's intentions upon entering the marriage, she submits copies of utility bills, bank statements, a lease agreement, photographs, title to an automobile, and affidavits from friends and family.

As noted by the director, although the petitioner stated that R-A- joined her in San Jose in September 2003, the affidavits of [REDACTED] and [REDACTED] specifically state that R-A- lived with them, in Las Vegas, until April 16, 2004. In his NOID, the director requested that the petitioner explain this discrepancy. The petitioner, however, elected not to resolve the discrepancy. 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, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

The director also noted in his NOID that R-A-'s Form W-2 for 2003 (which would have been issued in early 2004) indicated a Las Vegas, Nevada address. The director raised this issue in his NOID, but the petitioner opted to not address it. Nor does counsel address the matter on appeal. *See id.*

The lease agreement states that the property at [REDACTED] in San Jose, California would be occupied by four individuals, one of whom was R-A-. It does not, however, indicate that the petitioner would be one of those occupants. The director questioned this living arrangement in his NOID, but the petitioner opted not to respond. *See id.*

While the AAO acknowledges the utility bills, car title, car insurance bill, and bank statements indicating that the petitioner and R-A- did share a joint residence at some point, these items do not speak to the petitioner's intentions upon entering into the marriage. The record lacks details regarding the couple's courtship (beyond the generalities contained in the petitioner's affidavit); their first meeting; their first impressions of each other; and their engagement. Nor do the photographs speak to the petitioner's intentions upon entering into the marriage, as they are undated and unexplained. The evidence of record fails to demonstrate that the petitioner entered into marriage with R-A- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Accordingly, the AAO agrees with the director's decision to deny the petition. Beyond the decision of the director, the AAO finds that the petition may not be approved for an additional reason.

#### **Section 204(g) of the Act**

Beyond the decision of the director, the AAO finds that section 204(g) of the Act further bars approval of this petition. 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.

Again, the record demonstrates that the petitioner married the petitioner while she was in deportation proceedings, and the record does not indicate that the petitioner resided outside of the United States for a period of two years after the marriage. The bona fide marriage exception to section 204(g) of the Act 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 she entered into marriage with R-A- in good faith by a preponderance of the evidence, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act, she has

also failed to demonstrate that she qualifies for the bona fide marriage exemption under the heightened standard of proof required by section 245(e)(3) of the Act. Accordingly, section 204(g) of the Act mandates denial of this petition. For this additional reason, the petition may not be approved.

### **Conclusion**

The AAO agrees with the director's determination that the petitioner has failed to establish that her husband subjected her to battery or extreme cruelty; that she is a person of good moral character; and that she married her husband in good faith. Beyond the decision of the director, the AAO finds that section 204(g) of the Act further bars approval of this petition. 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 AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.