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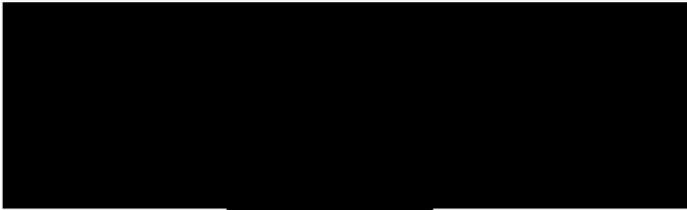


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
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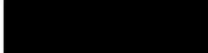
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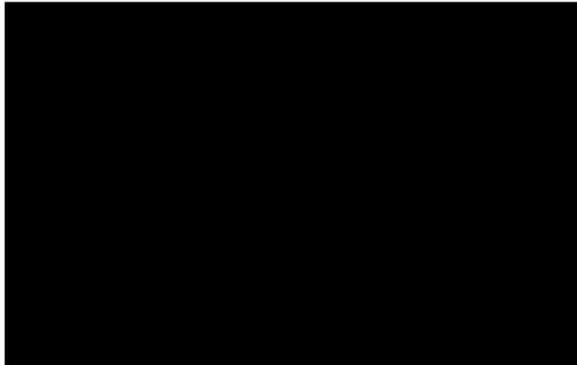


Office: VERMONT SERVICE CENTER

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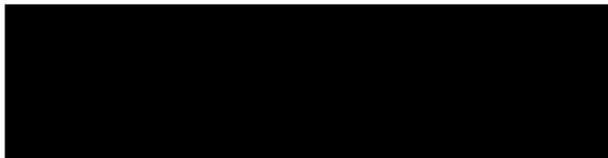
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IN RE:



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.

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 The director's decision will be withdrawn and the matter remanded for further action.

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 lawful permanent resident of the United States.

The director denied the petition on the basis of his determination that the petitioner had failed to establish that he entered into marriage with his wife in good faith.

Counsel filed a timely appeal on August 11, 2008.

Section 204(a)(1)(A)(iii) of the Act provides that an alien who is the spouse of a United States citizen may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the United States citizen spouse in good faith and that during the marriage, the alien or a child of the alien was battered or subjected to extreme cruelty perpetrated by the alien's spouse. In addition, the alien must show that he or she is eligible to be classified as an immediate relative under section 201(b)(2)(A)(i) of the Act, resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(A)(iii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II).

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

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

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

- (v) *Residence.* . . . The self-petitioner is not required to be living with the abuser when the petition is filed, but he or she must have resided with the abuser . . . in the past.
- (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.

* * *

- (iii) *Residence.* One or more documents may be submitted showing that the self-petitioner and the abuser have resided together . . . Employment records, utility receipts, school records, hospital or medical records, birth certificates of children . . . , deeds, mortgages, rental records, insurance policies, affidavits or any other type of relevant credible evidence of residency may be submitted.
- (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.

* * *

- (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 petitioner is a citizen of Tunisia who entered the United States in B-2 visitor status on November 11, 1999. He married E-C-,¹ a citizen of the United States, on April 10, 2000.² E-C- filed Form I-130, Petition for Alien Relative, on behalf of the petitioner on April 13, 2000. The petitioner filed Form I-485, Application to Register Permanent Residence or Adjust Status, on that same date. The petitioner filed the instant Form I-360 on October 22, 2004. The director issued a request for additional evidence on July 18, 2005, and requested additional evidence to establish the citizenship status of E-C- and whether the petitioner is a person of good moral character. The petitioner responded on September 9, 2005. The director issued a second request for additional evidence on March 5, 2008, and requested additional evidence to establish that the petitioner entered into marriage with E-C- in good faith. The petitioner responded on June 2, 2008. After considering the evidence of record, the director denied the petition on July 9, 2008.

Good Faith Entry into Marriage

The sole ground of the director's decision was his determination that the petitioner had failed to establish that he married E-C- in good faith.

The petitioner did not discuss his intentions upon entering into the marriage in either his September 20, 2004 or September 6, 2005 affidavits. However, in his August 7, 2008 affidavit, the petitioner discussed the circumstances of his courtship with E-C-. According to the petitioner, he met E-C- in December 1999 in Las Vegas, where he was living at the time. E-C- was visiting Las Vegas with a friend who knew one of the petitioner's friends. The petitioner stated that before she returned home

¹ Name withheld to protect individual's identity.

² On the Form I-360, the petitioner states, incorrectly, that he and E-C- were married on March 17, 2000.

to Los Angeles, E-C- suggested that the petitioner come to visit her. The petitioner testified that he came to visit E-C- in January 2000, who was at that time living in an apartment in Hollywood. He stayed with E-C- for two weeks. During those two weeks, he stayed with both E-C- and with a cousin. The petitioner stated that they were in love, and that E-C- persuaded the petitioner to move from Las Vegas to Los Angeles. The petitioner stated that he moved to Los Angeles in late February 2000, and that he lived with his cousin until he was able to find an apartment. The address of that apartment was [REDACTED], Los Angeles, CA 90028. According to the petitioner, E-C- moved in with him immediately after he was able to find the apartment. The petitioner stated that E-C- was working as a hairdresser, and that she was supporting him. However, after they were married, he found a job and began contributing to the household's expenses. In his September 20, 2004 affidavit, the petitioner testified that, after they began living together, he was working as a busboy, and E-C- was working as a hair designer. After E-C- quit her job around January 2001, he began working two jobs as a waiter.

The AAO notes several inconsistencies and discrepancies between the petitioner's testimony regarding his good faith entry into the marriage and the evidence of record. For example, the petitioner's statement that he and E-C- began sharing a residence after he moved to Los Angeles in late February of 2000 conflicts with his testimony on the Form G-325A, which he signed on April 10, 2000. However, the petitioner testified on the Form G-325A that he began living at [REDACTED] in Los Angeles in 1999. This conflicts with his testimony that he was living in Las Vegas in early 2000 and that he moved to Los Angeles in late February 2000.

His testimony that he and E-C- moved into the [REDACTED] address conflicts with the residential lease agreement, which was signed by both E-C- and the petitioner on March 1, 2000. According to the lease, the petitioner and E-C- took possession of the apartment located at [REDACTED] on March 1, 2000, and the lease extended through March 1, 2001.

The petitioner's testimony that E-C- was living in an apartment in Hollywood before their marriage conflicts with E-C-'s own testimony on her Form G-325A, in which she stated that she had lived at [REDACTED] in Los Angeles from 1995 until 1999, after which she moved in with the petitioner at the [REDACTED] address in 1999. The AAO notes that E-C- also testified on the Form I-864 that, as of April 10, 2000, she and the petitioner had been living together for two years.

The petitioner's statement that E-C- supported him, but that he was able to find a job shortly after their marriage and contribute to the household expenses, also conflicts with the petitioner's previous testimony. On the Form G-325A, the petitioner stated that he had worked in construction since 1999, which undermines his assertion that he was not working. The statement that he was not working also conflicts with the April 10, 2000 letter from Ben Salem Construction (whose letterhead the AAO notes uses the [REDACTED] address), which stated that the petitioner was, at that time, currently employed by that company, and earning \$2,500 per month. This evidence also conflicts with the petitioner's testimony that he was working as a busboy during this time.

The petitioner fails to resolve these inconsistencies between his testimony and the evidence of record. These inconsistencies undermine the credibility of the petitioner's testimony.

Having discounted the weight of the petitioner's testimony with regard to the bona fides of the petitioner's marriage to E-C-, the AAO turns next to the evidence he submits. The AAO turns first to the March 21, 2000 letter from the [REDACTED] at the Celebrity Centre International. First, the AAO notes that the letter is addressed to the petitioner and E-C- at [REDACTED], in Los Angeles. However, according to the petitioner's April 10, 2000 testimony on both the Form G-325A and the Form I-485, as well as E-C-'s testimony on the Forms I-130, G-325A, and I-864, the couple was then living at the [REDACTED] address, and the petitioner testified on both September 20, 2004 and August 7, 2008 that they did not move to the [REDACTED] address until August 1, 2000. It is unclear, therefore, how they could have been receiving mail at the [REDACTED] apartment on March 21, 2000. For this reason alone, the AAO will accord no evidentiary weight to this letter.

However, there are further discrepancies with this letter. [REDACTED] states the following:

Congratulations again for this beautiful party you had at the Manor hotel. This is the remaining of your balance regarding the wedding reception on March 19th 2000 . . . We have served 12 bottles of wine and 6 bottles of Champagne (Toast with wedding cake) . . . We received \$500.00 deposit on March 12th and \$920.78 on March 21st, as agreed I will give you the remaining of the balance after the wedding. Please pay the remaining \$545.58 as soon as possible [emphasis added].

As noted previously, E-C- and the petitioner were married on April 10, 2000. Questioning why E-C- and the petitioner would have had their wedding reception prior to their wedding, the director found [REDACTED] letter insufficient to establish the petitioner's good faith entry into the marriage. On appeal, counsel states that this reception was organized by friends from Tunisia, in keeping with Tunisian tradition of having a pre-marriage reception for the groom.

The AAO rejects counsel's explanation. If the "wedding reception" to which [REDACTED] refers was in fact not a wedding reception, it is unclear to the AAO why the letter was addressed to both E-C- and the petitioner, and not to the petitioner alone, why [REDACTED] refers to the celebration as a "wedding reception," and why there was a toast with a wedding cake. It is also unclear to the AAO why, if this was a reception for the petitioner organized by his friends, the bill was sent to the petitioner. Counsel's explanation that this event was not a wedding reception but rather a reception in honor of the petitioner is further undermined by [REDACTED] statement that he and the petitioner had agreed that the remaining balance of \$545.58 would be paid by the petitioner "after the wedding." Given that the purpose of this letter was to collect payment, that it was dated March 21, 2000, and that [REDACTED] stated that he and the petitioner had agreed that payment would not be

sought until after the wedding, the clear implication is that the wedding had already taken place. For all of these reasons, the AAO finds counsel's explanation deficient.

It is unclear to the AAO why the petitioner and E-C- would have had a wedding reception prior to their wedding. Given this unusual sequence of events, as well as the numerous evidentiary problems with this letter set forth previously, the AAO questions the authenticity of this letter. The AAO questions whether the reception described in this letter actually took place, or whether this letter was produced in an effort to obtain physical evidence to support the petitioner's claim. Regardless, the AAO will not accept this letter as evidence of the petitioner's entry into marriage with E-C- in good faith. Rather than supporting his claim to have entered into the marriage in good faith, the AAO finds that [REDACTED] letter detracts from the credibility of that claim.

The AAO turns next to the petitioner's submission of his tax returns. At the time the petition was filed, the petitioner submitted copies of his 2000 and 2001 federal income tax filings, which indicated that he and E-C- had filed jointly.³ In his March 5, 2008 request for additional evidence, the director noted that these tax returns had not been obtained from the Internal Revenue Service (IRS), nor were they receipt stamped by the IRS. Accordingly, the petitioner submitted information from the IRS regarding his income tax filings for the tax years 2000, 2001, 2002, and 2004 in his June 2, 2008 response. However, the information submitted by the petitioner conflicts with the information he submitted in 2004. First, the AAO notes that the copies of his 2000 and 2001 income tax filings that the petitioner submitted in 2004 indicated that E-C- and the petitioner had filed jointly, and that the petitioner and E-C- were both claimed as exemptions. However, the information from the IRS submitted by the petitioner in 2008 indicates that the tax return actually filed by the petitioner was not a joint filing, and that the petitioner claimed himself as the only exemption. Second, the AAO notes that the copies of his 2000 and 2001 income tax filings that the petitioner submitted in 2004 contained Schedule C, Profit or Loss From Business. However, the information from the IRS submitted by the petitioner in 2008 specifically states that no Schedule C was filed.

The AAO also notes a third conflict between the information from the IRS that the petitioner submitted in 2008 and the copies of the tax returns that he submitted in 2004. The information from the IRS, submitted in 2008, states that the petitioner's adjusted gross income (AGI) in 2000 was \$2,985. However, the tax return submitted by the petitioner in 2004 stated that the couple's AGI in 2000 was \$10,113. There is no explanation for this discrepancy. However, the AAO notes that the petitioner's "wages, salaries, tips., etc." in 2000 were \$2,985. The remaining \$7,670 balance of the couple's 2000 income of \$10,113, is from the Schedule C, which states that E-C- earned a net profit of \$7,670 from her hairdressing business. As such, if E-C-'s wages of \$7,670 are discounted, and only the petitioner's wages are factored in calculating the AGI, the AGI drops to \$2,985 which, again, is the figure that the IRS has on record. The information regarding the petitioner's 2001 tax return contains the same discrepancy. The information from the IRS, submitted in 2008, states that

³ The director incorrectly referred to these as the petitioner's 2002 and 2003 tax returns, rather than his 2000 and 2001 tax returns. The AAO finds this to have been a harmless typographical error.

the petitioner's adjusted gross income (AGI) in 2001 was \$12,948. However, the tax return submitted by the petitioner in 2004 stated that the couple's AGI in 2001 was \$20,931. There is no explanation for this discrepancy. However, the AAO notes that the petitioner's "wages, salaries, tips., etc." in 2001 were \$12,948. The remaining \$8,590 balance of the couple's 2000 income of \$20,931, is from the Schedule C, which states that E-C- earned a net profit of \$8,590 from her hairdressing business. As such, if E-C-'s wages of \$8,590 are discounted, and only the petitioner's wages are factored in calculating the AGI, the AGI drops to \$12,948 which, again, is the figure that the IRS has on record. For ease of reading, the AAO has summarized this information below:

Tax Year 2000.

Source	Petitioner's Income	Net Profit from E-C-'s Business	AGI	Number of Exemptions	Schedule C Submitted?
The Petitioner's 2004 submission	\$2,985	\$7,670	\$10,113	Two	Yes
Information from actual IRS records, submitted in 2008	\$2,985	None reported	\$2,985	One	No

Tax Year 2001:

Source	Petitioner's Income	Net Profit from E-C-'s Business	AGI	Number of Exemptions	Schedule C Submitted?
The Petitioner's 2004 submission	\$12,948	\$8,590	\$20,931	Two	Yes
Information from actual IRS records, submitted in 2008	\$12,948	None reported	\$12,948	One	No

Accordingly, it does not appear as though the IRS has on record any of the information regarding E-C- that the petitioner provided to the AAO in 2004 when he submitted the copies of the couple's 2000 and 2001 joint tax returns. It does not appear as though the tax returns from 2000 and 2001 that the petitioner submitted to USCIS in 2004 were actually filed with the IRS. Rather, it appears as though those tax returns were produced by the petitioner as evidence of shared financial responsibilities in an attempt to bolster his case before USCIS. The discrepancies between what the petitioner told USCIS he had filed with the IRS in (i.e., the copies of the 2000 and 2001 tax returns) and what was actually filed with the IRS (i.e., the information contained in the petitioner's 2008

submission) severely undermines the credibility of the petitioner's testimony. The AAO, therefore, will not accept these tax returns as evidence of his good faith entry into the marriage. As was the case with the letter from [REDACTED] the AAO finds that, rather than supporting his claim to have entered into the marriage in good faith, the information regarding the petitioner's tax filings detracts further from the credibility of that claim. Beyond simply impeaching the credibility of the petitioner's testimony, the fact that it does not appear as though the petitioner supplied any information regarding E-C- to the IRS in 2000 or 2001 further undermines his claim to a good faith marriage.

Although the petitioner submits affidavits from friends and family members regarding his intentions upon entering into marriage with E-C-, given the questionable nature of both the petitioner's own testimony and his evidence, the AAO will accord no weight to those letters. When 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. In this case, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence of the beneficiary's eligibility is not credible. Accordingly, the petitioner has not established the beneficiary's eligibility for the requested immigrant visa classification. The petitioner has failed to establish that he entered into marriage with E-C- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Beyond the decision of the director, the AAO finds that the petition may not be approved for two additional reasons.

Joint Residence

Beyond the decision of the director, the AAO finds that the petitioner has failed to demonstrate that he shared a joint residence with E-C-. As a preliminary matter, the AAO incorporates here its previous discussion with regard to the multiple inconsistencies and discrepancies of record, which have severely undermined the credibility of the petitioner's testimony.

The petitioner testified on the Form I-360 that he and E-C- lived together from March 2000 until April 2003. However, that testimony conflicts with his earlier testimony. In April 2000, the petitioner indicated on the Form G-325A that he had been living with E-C- at the [REDACTED] address in Los Angeles since 1999. This conflicts with the petitioner's August 7, 2008 testimony that he was living in Las Vegas (without E-C-) in early 2000 and that he moved to Los Angeles in late February 2000.

In his August 7, 2008 affidavit, the petitioner stated that he and E-C- moved to the [REDACTED] address in Los Angeles on August 1, 2000. However, the letter from [REDACTED] was sent to the couple at the [REDACTED] address in March 2000. If the couple did not move to this address until August 1, 2000, it is unclear how the petitioner could have received mail at this address in March 2000.

In his August 7, 2008 affidavit, the petitioner stated that he and E-C- moved to the [REDACTED] address in Los Angeles on November 1, 2001. However, in his October 11, 2002 letter to USCIS the petitioner stated that the couple had moved to this address on June 1, 2001.

The November 16, 2000 "Application for Marriage Record" indicates that the couple was living at the [REDACTED] address in Los Angeles at that time. However, although other evidence of record indicates that they were living together in apartment [REDACTED] this application lists their address as apartment [REDACTED]

There is no explanation of record regarding the inconsistencies of record regarding the petitioner's alleged joint residence with E-C-. The joint income tax returns submitted by the petitioner in 2004 do not establish that the petitioner and E-C- shared a joint residence, as it does not appear as though those tax forms were actually submitted to the IRS; rather it appears that they were produced for the purpose of bolstering the petitioner's claim before USCIS. Moreover, the AAO incorporates its earlier discussion of the inconsistencies and discrepancies of record, which severely undermines the credibility of the petitioner's testimony. The petitioner has failed to establish that he shared a joint residence with E-C-, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act. For this additional reason, the petition may not be approved.

Battery or Extreme Cruelty

Beyond the decision of the director, the AAO finds that the petitioner has failed to establish that he was subjected to battery or extreme cruelty by E-C-. Again, as a preliminary matter the AAO incorporates here its previous discussion with regard to the multiple inconsistencies and discrepancies of record, which have severely undermined the credibility of the petitioner's testimony.

The record contains the following evidence relevant to the petitioner's claim of battery or extreme cruelty:

- The petitioner's September 20, 2004 affidavit;
- [REDACTED] September 20, 2004 affidavit;
- [REDACTED] September 20, 2004 affidavit;
- Counsel's September 27, 2004 letter of support;
- Medical documentation pertaining to the injuries sustained by the petitioner at his place of employment in 2002; and
- The petitioner's August 7, 2008 affidavit.

In his September 20, 2004 affidavit, the petitioner stated that, after he and E-C- were married in April 2000, he worked as a busboy, and E-C- worked as a hairdresser; however, E-C- quit her position in January 2001, as she complained that her job was too hard and stressful. Accordingly, the petitioner was forced to obtain a second job in order to support the household. He injured his back in September 2002, and was placed on disability shortly thereafter. As his worker's

compensation benefit was only \$600 per month, the petitioner suggested to E-C- that she find a job. However, E-C- began screaming at him, called him a loser, and told him that he was not man enough to take care of a house. The petitioner also testified that, because he was unable to sexually perform, E-C- began having extramarital affairs, which she made no effort to hide. According to the petitioner E-C- told him that there was nothing he could do about her affairs, as he was not a man. The petitioner testified that, due to E-C-'s cruelty and mental abuse, as well as his disability, he became "a mental and physical wreck," and contemplated suicide frequently. In April 2003 the petitioner returned from a visit to his doctor to find that E-C- had left the apartment, and taken nearly all the furniture.

In his September 20, 2004 affidavit, [REDACTED] the petitioner's brother, stated that E-C- began mentally and physically abusing the petitioner. He testifies that he personally witnessed E-C- calling the petitioner names, and that he knows E-C- engaged in extramarital affairs as a result of the petitioner's inability to perform sexually. He stated that, in October 2002, E-C-'s abusive behavior toward the petitioner in front of guests at the petitioner's birthday party brought the party to an abrupt halt. [REDACTED] also stated that although he personally tried to resolve the couple's differences, E-C- continued engaging in her abusive behavior.

In his September 20, 2004 affidavit, [REDACTED] testified that after the petitioner's injury, E-C- became mentally and emotionally abusive. He stated that he personally witnessed several incidents in which E-C- embarrassed the petitioner and made him cry. He also described an incident that occurred at a party in which E-C- called the petitioner names in front of everyone, and emptied a bowl of food onto the petitioner in front of everyone.

In his August 7, 2008 affidavit, the petitioner stated that he believes sincerely that had he not had his accident, he and E-C- would still be together.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to establish that he was subjected to battery or extreme cruelty by E-C-. Although counsel pointed to the medical documentation referenced above as evidence that E-C- abused the petitioner in his September 27, 2004 letter in support of the petition, the AAO notes that none of this documentation indicates that E-C- caused the petitioner's injury. Nor does the petitioner indicate that E-C- caused his back injury; rather, he states that the injury occurred at work, and the medical documentation, as well as the testimony of the other witnesses, supports that determination. Accordingly, the medical documentation is not evidence that the petitioner was subjected to battery or extreme cruelty.

Nor does the record indicate that the petitioner was subjected to battery. Although [REDACTED] stated that the petitioner was subjected to physical abuse, he describes no incidents of physical abuse.

The petitioner's claim that he was subjected to extreme cruelty by E-C- consists of testimony that E-C- called him names, engaged in extramarital affairs, and dumped a bowl of food on him at a party. While the AAO does not discount the emotional pain caused by a cheating spouse,

extramarital affairs do not constitute extreme cruelty for immigration purposes. While E-C's behavior may have been unkind and inconsiderate, it did 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 testimony of record fails to establish that the petitioner was the victim of physical violence or extreme cruelty, that E-C's non-physical behavior was accompanied by any coercive actions or threats of harm, or that her actions were aimed at insuring dominance or control over the petitioner. As noted by the court in *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2004), 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. . . ." The petitioner has failed to establish that his wife subjected him to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act. For this additional reason, the petition may not be approved.

Conclusion

The AAO concurs with the director's determination that the petitioner has failed to demonstrate that he entered into marriage with E-C- in good faith. Beyond the decision of the director, the AAO finds further that the petitioner has failed to establish that he shared a joint residence with E-C-, and that E-C- subjected him to battery or extreme cruelty.

However, the record indicates that the director did not issue a notice of intent to deny the petition (NOID) before he issued his decision. Although the record establishes that the petitioner is ineligible for the benefit sought, the petition must be remanded, solely on procedural grounds, so that the petitioner has the opportunity to respond to a NOID. The petition must be remanded to the director for issuance of a NOID in compliance with the regulation in effect at 8 C.F.R. § 204.2(c)(3)(ii)⁴ on the date this petition was filed. As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's July 9, 2008 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

⁴ USCIS promulgated a rule on April 17, 2007 related to the issuance of requests for evidence and NOIDs. 72 Fed. Reg. 19100 (Apr. 17, 2007). The rule became effective on June 18, 2007, *after* the filing of this petition on October 22, 2004.