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



U.S. Citizenship  
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Services

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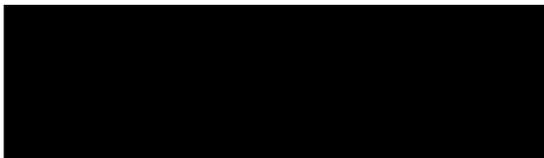
Petitioner:



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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO), and the director treated the appeal as a motion, finding that it was not filed timely. The director affirmed his decision to deny the petition and the petitioner has appealed that decision to the AAO. The appeal will be dismissed. The petition remains denied.

The petitioner seeks immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien battered or subjected to extreme cruelty by a United States citizen.

On September 2, 2009, the director denied the petition, determining that the petitioner had not established that: he had resided with the claimed abusive United States citizen spouse; he had been subjected to battery or extreme cruelty perpetrated by his United States citizen spouse; and he had entered into the marriage in good faith. The director also found that the petitioner was subject to section 204(g) of the Act.

Counsel for the petitioner timely submits a Form I-290B, Notice of Appeal or Motion, and documents in support of the instant appeal. Counsel asserts that the previous Form I-290B had been timely submitted and attaches a UPS tracking and receipt slip. Counsel also asserts that the director improperly issued a denial decision without first issuing a Notice of Intent to Deny (NOID) the petition and that the director's factual determination that the petitioner had not resided with the claimed abusive United States citizen spouse, had not been subjected to battery or extreme cruelty perpetrated by the United States citizen spouse, and had not entered into the marriage in good faith is erroneous. Counsel does not address the applicability of section 204(g) of the Act.

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 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 in the regulation at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part:

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

(vi) *Battery or extreme cruelty*. For the purpose of this chapter, the phrase “was battered by or was the subject of extreme cruelty” includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence. The qualifying abuse must have been committed by the citizen . . . spouse, must have been perpetrated against the self-petitioner . . . and must have taken place during the self-petitioner’s marriage to the abuser.

\* \* \*

(ix) *Good faith marriage*. A spousal self-petition cannot be approved if the self-petitioner entered into the marriage to the abuser for the primary purpose of circumventing the immigration laws. A self-petition will not be denied, however, solely because the spouses are not living together and the marriage is no longer viable.

The evidentiary guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are further explained in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

*Evidence for a spousal self-petition –*

(i) *General*. Self-petitioners are encouraged to submit primary evidence whenever possible. The Service will consider, however, any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service.

\* \* \*

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

(iv) *Abuse.* Evidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel. Persons who have obtained an order of protection against the abuser or have taken other legal steps to end the abuse are strongly encouraged to submit copies of the relating legal documents. Evidence that the abuse victim sought safe-haven in a battered women's shelter or similar refuge may be relevant, as may a combination of documents such as a photograph of the visibly injured self-petitioner supported by affidavits. Other forms of credible relevant evidence will also be considered. Documentary proof of non-qualifying abuses may only be used to establish a pattern of abuse and violence and to support a claim that qualifying abuse also occurred.

\* \* \*

(vii) *Good faith marriage.* Evidence of good faith at the time of marriage may include, but is not limited to, proof that one spouse has been listed as the other's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. Other types of readily available evidence might include the birth certificates of children born to the abuser and the spouse; police, medical, or court documents providing information about the relationship; and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered.

The record in this matter provides the following pertinent facts and procedural history. The petitioner is a native and citizen of Mexico. The petitioner claims he entered the United States on or about June 20, 2000 near Nogales, Arizona, without inspection. On October 3, 2006, a Notice to Appear (NTA), placing the petitioner in immigration proceedings, was issued. On February 16, 2007 the petitioner married M-L-<sup>1</sup>, the claimed abusive United States citizen spouse. On December 6, 2007, the petitioner filed the Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant. The director issued a request for evidence (RFE) on January 16, 2009 and upon consideration of the evidence in the record, including the response to the RFE, denied the petition on September 2, 2009.

Preliminarily, we note that the regulatory requirement to issue a NOID prior to entering a denial decision on a VAWA self-petition was no longer in effect when the instant petition was filed on December 6, 2007. The director is not required to issue a NOID for petitions filed on or after June 18, 2007, in these matters. The regulation at 8 C.F.R. § 204.2(c)(3)(ii) in effect since June 18, 2007, does not require the issuance of a NOID prior to a denial decision.

#### *Residence*

The petitioner in this matter does not indicate on the Form I-360, when he resided with M-L-. In the

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<sup>1</sup> Name withheld to protect the individual's identity.

petitioner's initial December 3, 2008 personal statement, he indicated that prior to their marriage, he tried to find a place to rent for both of them, but that M-L- left for Orlando, Florida on one occasion and on another occasion she told him she had to serve time in jail. The petitioner stated that he and M-L- lived together from December 2005 to November 2006, a period of time prior to their marriage. The petitioner noted that they were married on February 16, 2007 and that their union did not last long because M-L- was incarcerated on April 17, 2007.

In a supplemental affidavit, dated February 26, 2008, the petitioner declared that at the time of their marriage, he and M-L- lived in separate households and that each household was occupied by many individuals. The petitioner noted that he worked extra hours to try to obtain a nice place to live with M-L-, but "[u]nfortunately [M-L-] was arrested within three months of [their] marriage and [they] were never able to get a place together." The petitioner noted further that M-L- had been sentenced to five years in federal prison for possession of crack cocaine with the intent to sell.

In response to the director's request for evidence (RFE) regarding the couple's joint residence, counsel submitted a LexisNexis printout showing the petitioner and M-L-'s driver's licenses listing the same address.

The director found that the petitioner's own affidavit indicated that the couple did not live together while married. The director noted that section 101(a)(33) of the Act states in pertinent part: "The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." The director determined that the petitioner had not provided satisfactory evidence demonstrating his qualification under this element.

On appeal, counsel for the petitioner asserts that the director's factual determination is erroneous. Neither the November 3, 2009 affidavit of [REDACTED] nor the undated evaluation of [REDACTED] licensed clinical social worker, submitted on appeal addresses the issue of the couple's joint residence. As the record does not contain further information challenging the petitioner's own recollection that he and his spouse did not reside together during their marriage, the director's decision has not been overcome. The petitioner has not established that he resided with M-L- during their marriage.

### *Abuse*

In the petitioner's initial statement, the petitioner indicated that M-L- told him that he was the father of two of her children and that she constantly demanded money from him. He reported that he never saw either of the children that she claimed were his children. The petitioner noted that despite his misgivings about M-L- and her intent, the couple married on February 16, 2007 and that M-L- continues to write to him from jail asking for money. The petitioner does not report that he suffered any battery during the marriage, but rather that the couple did not live together and that shortly after their marriage, M-L- was incarcerated. In the petitioner's February 26, 2008 statement, he declared that he is sick with worry about children that may be his children and is hurt very deeply if M-L- has been untruthful about the existence of his children.

The record also included a number of letters from M-L- to the petitioner indicating that she needed money while she was incarcerated and in which she referenced the couple's children.

On appeal, counsel for the petitioner provides a November 3, 2009 affidavit signed by [REDACTED] [REDACTED] declared that she worked as a clerk and translator. [REDACTED] declared further that she attended a case management appointment with a case manager, an attorney, and the petitioner on March 12, 2009, and at the appointment the case manager spoke with M-L- via telephone. [REDACTED] indicated that when M-L- was asked if any of her children were the children of the petitioner, she replied that they were not. [REDACTED] declared that the petitioner began crying when he heard this information and that when they left the building the petitioner was in a numb state and went to his car and just wept.

The record on appeal also includes an undated evaluation of the petitioner prepared by [REDACTED] [REDACTED] licensed clinical social worker. [REDACTED] indicates that she saw the petitioner on October 19, 2009 and the petitioner reported on his relationship with M-L- prior to their marriage and that he spoke of M-L-'s threats regarding deportation and being victimized by M-L-'s relatives in an attempted armed robbery, all prior to the couple's marriage. [REDACTED] opined that M-L- had premeditated intentions to benefit personally and financially from the petitioner's easy going manner and naïveté and that the petitioner is experiencing a grief reaction and that he resolving the symptomatology of a post traumatic stress disorder.

Other than counsel's assertion that the director's fact determination that the petitioner was not subjected to extreme cruelty is erroneous, counsel does not otherwise address this element.

Upon review of the record, the AAO concurs with the director's determination regarding the petitioner's failure to establish that he was subjected to battery or extreme cruelty perpetrated by M-L-. Neither the petitioner's initial statement nor the supplemental statement provides the detailed, consistent, and probative evidence that establishes eligibility for this benefit. Preliminarily, we note that the Act requires that the battery or extreme cruelty perpetrated by the alien's spouse take place during the marriage. The petitioner does not report that he was threatened by M-L- only that she lied to him about having his children and demanding money from him. The petitioner's statements indicate generally that M-L-'s deceit and demands for money occurred prior to the marriage or when she was incarcerated. Her letters sent while she was incarcerated do not include any threats against the petitioner only that she wants money and wants the relationship to continue when she is released from prison in 2012. Although the petitioner referenced an incident when M-L- grabbed him by the face when he refused to give her money and on another occasions when her brother put a gun to his head when the petitioner refused to give him money and hit him on the head with gun, the petitioner does not provide the requisite details and circumstances of the alleged assaults and indicates that these incidents occurred a significant time prior to the couple's marriage in February 2007.

The opinion of [REDACTED] appears to be based upon a single interview with the petitioner and, as such, it fails to reflect the insight and elaboration commensurate with an established relationship

with a mental health professional, thereby diminishing the value of her evaluation. Moreover, [REDACTED] evaluation reports on incidents and events that occurred prior to the couple's marriage. In addition, [REDACTED] does not offer a diagnosis of the petitioner's condition that is causally connected to specific events or incidents of battery or extreme cruelty as defined in the statute and regulation. [REDACTED] does not provide substantive, probative information indicating that M-L-'s behavior during the marriage included actual threats, controlling actions or other abusive behavior that was part of a cycle of psychological or sexual violence.

The petitioner's testimony and the testimony of [REDACTED] focus primarily on the petitioner's belief that M-L- bore his children and his distress when he learned that this was not true. Although the petitioner references M-L-'s constant demands for money prior to their marriage, he does not offer any probative evidence that he was the victim of any act or threatened act of physical violence or extreme cruelty or that M-L-'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 him, during the marriage. In this matter, the petitioner has failed to establish that M-L-'s actions are comparable to 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 record is simply insufficient in this regard.

The petitioner's general statements and the affidavits submitted on his behalf are not probative in establishing that he was subjected to battery or extreme cruelty by his spouse. When evaluating the record as a whole, the AAO finds the record lacks information regarding specific instances of abuse that could be categorized as battery or extreme cruelty as set out in the statute or regulation. The AAO is aware of the difficulties of obtaining information to establish eligibility for this benefit; however, the petitioner must provide credible evidence that he has been subjected to battery or extreme cruelty perpetrated by his spouse in order to meet his burden of proof. In this matter, he has failed to do so. The petitioner in this matter has not provided sufficient probative evidence to establish that he was subjected to battery or extreme cruelty perpetrated by his spouse.

#### *Good Faith Entry into Marriage*

The petitioner has also failed to establish that he entered into the marriage in good faith. The petitioner's initial statement indicates generally that he met M-L- in 2004 at a Laundromat and that as he was working at night and his roommates worked in the day, M-L- started visiting him during the day and their relationship became intimate. The petitioner indicates that M-L- told him in November 2004 that she was pregnant with his child but before he could find a place to rent for the two of them, she left for Orlando, Florida. The petitioner indicated that M-L- called and told him she had delivered a baby girl in May 2005. Although the petitioner sent her money to return to Fort Myers, she did not return and instead called him from Puerto Rico at which time he questioned whether she had had a child. The petitioner reported that when M-L- did return to Fort Myers, he still did not see the baby and M-L- was incarcerated on July 29, 2005 and was not released until December 7, 2005. The petitioner reported that he and M-L- resided together from December 2005 until November 2006. The petitioner does not indicate why their baby girl did not live with them.

The petitioner indicated that in December 2006, M-L- told him she was pregnant with their second child. The petitioner indicated that at that time M-L- accepted his proposal and the couple were married on February 16, 2007. The petitioner declared however that the "union did not last long" as M-L- was incarcerated again on April 17, 2007. The petitioner noted his confusion and suspicion of M-L- and whether she was lying just to get money from him.

In the petitioner's second statement, he reported that: he and M-L- lived together for three months prior to their marriage; he paid for cell phones that he and M-L- used; he gave M-L- a truck to use but it was impounded after M-L- was involved in a hit and run accident; and that he has been giving M-L- money while she is incarcerated.

The record included: copies of receipts for cellular phone usage and the handwritten note that "I paid cellular phones;" copies of receipts illustrating that the petitioner sent M-L- money while she was incarcerated; the couple's marriage certificate, and a photograph of M-L- and a baby.

In the undated evaluation of [REDACTED] indicated that the petitioner reported that he was in love with M-L- and that these bonds were strengthened when he learned she was pregnant with his child. [REDACTED] opined that although the petitioner was suspicious of M-L- and her motives, he used the defense mechanism of denial to convince himself that he was in a faithful and committed relationship with M-L-.

Counsel does not address this element, other than to assert that the director's determination that the petitioner did not enter into the marriage in good faith is erroneous.

The petitioner's testimony does not include probative evidence of his intent to enter into the marriage in good faith. The petitioner's statements are dedicated to describing M-L-'s deceitful actions and demands for money. He does not provide specific information regarding his intent in marrying his spouse other than to indicate that he wanted his second child to be born in wedlock. Upon review of the petitioner's two statements, however, he has presented information that undermines his credibility regarding his continued belief that he was the father of two of M-L-'s children. For example, although he accused M-L- of lying about his first child and noting that she never allowed him to meet the child, he continued to express his belief that he might be the father of this first child. The petitioner, however, offers no explanation regarding the failure of M-L- to produce the alleged child when he claimed to jointly reside with M-L- prior to their marriage. This undermines the petitioner's stated belief that M-L- was pregnant with his second child and the intent to marry was to provide legitimacy for the second child. An intent to obtain something other than or in addition to love and companionship from that life does not make a marriage a sham. Rather, the sham arises from the intent not 'to establish a life together.'" *U.S. v. Orellana-Blanco*, 294 F.3d 1143, 1151 (9<sup>th</sup> Cir. 2002). The petitioner has not provided the requisite testimony to support his claim that he entered into the marriage in good faith. The petitioner's acknowledgment that M-L- was in and out of his life and that the couple did not reside together after their marriage detracts from the petitioner's credibility and his claim that he entered into the marriage in good faith.

A marriage certificate, documentation that the petitioner paid M-L- while she was incarcerated, and the petitioner's statement that he provided her a cellular phone and a truck, do not establish the petitioner's own good faith in entering into the marriage. These documents, as well as the documents referenced above in the determination regarding the couple's claimed residence, are insufficient to establish that the petitioner intended to establish a life with M-L-. While the lack of documentary evidence is not necessarily disqualifying, the petitioner's testimonial evidence and the testimony submitted on his behalf, including Ms. [REDACTED] evaluation, also fail to support a finding that he entered into the marriage in good faith. Considered in the aggregate, the relevant evidence fails to demonstrate that the petitioner entered into marriage with M-L- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

*Section 204(g) of the Act*

As the director determined, section 204(g) of the Act further bars approval of this petition. Section 204(g) of the Act states:

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

The record in this matter shows that the petitioner married his spouse after being placed in removal proceedings before an Immigration Judge. The record does not indicate that the petitioner resided outside of the United States for two years after his marriage. Counsel does not address this element on appeal.

The AAO finds that 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:

*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:

*Evidence to establish eligibility for the bona fide marriage exemption.* Section 204(g) of the Act provides that certain visa petitions based upon marriages entered into during deportation, exclusion or related judicial proceedings may be approved only if the petitioner provides clear and convincing evidence that the marriage is bona fide.

While identical or similar evidence may be submitted to establish a good faith marriage pursuant to section 204(a)(1)(A)(iii)(I)(aa) of the Act and eligibility for the bona fide marriage exemption at section 245(e)(3) of the Act, the latter provision imposes a heightened burden of proof. *Matter of Arthur*, 20 I&N Dec. 475, 478 (BIA 1992). To demonstrate eligibility for immigrant classification under section 204(a)(1)(A)(iii) of the Act, the petitioner must establish his or her good faith entry into the qualifying relationship by a preponderance of the evidence and any relevant, credible evidence shall be considered. Sections 204(a)(1)(A)(iii)(I)(aa) and 204(a)(1)(J) of the Act, 8 U.S.C. §§ 1154(a)(1)(A)(iii)(I)(aa), 1154(a)(1)(J); *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774, 782-83 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965). However, to be eligible for the bona fide marriage exception under section 245(e)(3) of the Act, the petitioner must establish his or her good-faith entry into marriage by clear and convincing evidence. Section 245(e)(3) of the Act, 8 U.S.C. § 1255(e)(3); 8 C.F.R. § 245.1(c)(9)(v). "Clear and convincing evidence" is a more stringent standard. *Arthur*, 20 I&N Dec. at 478. *See also Pritchett v. I.N.S.*, 993 F.2d 80, 85 (5<sup>th</sup> Cir. 1993) (acknowledging "clear and convincing evidence" as an "exacting standard").

As the petitioner has failed to establish that he entered into his marriage with his spouse in good faith by a preponderance of the evidence, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act, he has also failed to demonstrate that he qualifies for the bona fide marriage exemption under the heightened standard of proof required by section 245(e)(3) of the Act. Accordingly, section 204(g) of the Act requires the denial of this petition.

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The petition will be denied and the appeal dismissed for the above stated reasons. As always, the burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here that burden has not been met.

**ORDER:** The appeal is dismissed. The petition remains denied.