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U.S. Citizenship
and Immigration
Services

Date: **JUL 29 2014** Office: VERMONT SERVICE CENTER File: [REDACTED]

IN RE: Petitioner: [REDACTED]

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

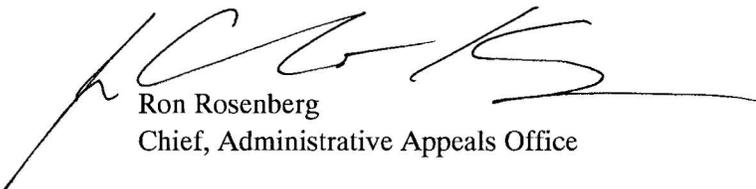
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, (“the 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 pursuant to section 204(a)(1)(B)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(B)(ii), as an alien battered or subjected to extreme cruelty by his lawful permanent resident spouse.

The director denied the petition for failure to establish that the petitioner was subjected to battery or extreme cruelty by his wife, that the petitioner married her in good faith, and that he has good moral character. The director also denied the petition under section 204(g) of the Act because the petitioner married his wife while he was in removal proceedings. On appeal, counsel submits a brief and an additional affidavit from the petitioner.

Relevant Law and Regulations

Section 204(a)(1)(B)(ii)(I) of the Act provides that an alien who is the spouse of a lawful permanent resident of the United States may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the permanent resident spouse in good faith and that during the marriage, the alien or a child of the alien was battered or subjected to extreme cruelty perpetrated by the alien’s spouse. In addition, the alien must show that he or she is eligible for classification under section 203(a)(2)(A) of the Act as the spouse of a lawful permanent resident, resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(B)(ii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(II).

Section 204(a)(1)(J) of the Act further states, in pertinent part:

In acting on petitions filed under . . . clause (ii) or (iii) of subparagraph (B), 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 record in this case indicates that the petitioner was in removal proceedings at the time of his marriage. In such a situation, section 204(g) of the Act, 8 U.S.C. § 1154(g), prescribes, in pertinent part:

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 . . . preference status by reason of a marriage which was entered into during the period [in which administrative or judicial proceedings are pending regarding the alien’s right to remain in the United States], until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.

The record does not indicate that the petitioner resided outside of the United States for two years after his marriage. Accordingly, section 204(g) of the Act bars approval of this petition unless the petitioner can establish eligibility for the bona fide marriage exemption at section 245(e) of the Act, 8 U.S.C. § 1255(e), which 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 regulations, there shall be only one level of administrative appellate review for each alien under the previous sentence.

(Emphasis added).

The eligibility requirements for a self-petition for immigrant classification under section 204(a)(1)(B)(ii) of the Act are further explicated in the regulation at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part:

- (iv) *Eligibility for immigrant classification.* A self-petitioner is required to comply with the provisions of section 204(c) of the Act, section 204(g) of the Act, and section 204(a)(2) of the Act.
- (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 . . . lawful permanent resident 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 self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she . . . 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. . . .

* * *

(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)(B)(ii) of the Act are further explicated in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

(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. . . . 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.

Pertinent Facts and Procedural History

The petitioner is a citizen of India who entered the United States on April 1, 2002, without a valid entry document. On April 8, 2002, the petitioner was issued a Notice to Appear, placing him in removal proceedings as an immigrant without a valid passport and entry document.¹ The petitioner married S-K-,² a lawful permanent resident, on June 2, 2009, in [REDACTED] California. The petitioner filed the instant Form I-360 on November 19, 2012. The director subsequently issued a Request for Evidence (RFE) of: the battery or extreme cruelty; the petitioner's good moral character; his good-faith entry into the marriage; and his eligibility for the bona fide marriage exemption from section 204(g) of the Act. The petitioner, through counsel, responded to the RFE with additional

¹ On July 26, 2007, an Immigration Judge denied the petitioner's requests for relief and ordered him removed, a decision upheld by the Board of Immigration Appeals (BIA) on February 13, 2009. The BIA subsequently denied three motions to reopen the petitioner's proceedings, decisions upheld by the Ninth Circuit Court of Appeals.

² Name withheld to protect the individual's identity.

evidence, which the director found insufficient to establish the petitioner's eligibility. The director denied the petition and counsel filed a timely appeal.

The AAO reviews these proceedings *de novo*. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). A full review of the record fails to establish the petitioner's eligibility. Counsel's claims and the evidence submitted on appeal do not overcome the director's grounds for denial. Beyond the director's decision, the petitioner has also not established that he is eligible for immediate relative classification based on his marriage to S-K- or that he jointly resided with his wife after their marriage.³ The appeal will be dismissed for the following reasons.

Battery or Extreme Cruelty

The petitioner failed to establish that S-K- subjected him to battery or extreme cruelty. In the petitioner's first affidavit, he stated that he is an interstate truck driver and spends only a few days at home with his wife and five-year old son. He asserted that his wife frequently pulled his hair, pushed him off the bed while he was asleep, and called him names in public to humiliate him. In his evaluation of the petitioner, licensed psychologist Dr. [REDACTED] stated the petitioner reported that S-K- abused alcohol and physically assaulted him. D. [REDACTED] recounted that S-K- was having an affair, and that she and the couple's son would stay with S-K-'s ex-husband when the petitioner was away, which humiliated and devastated the petitioner. Dr. [REDACTED] diagnosed the petitioner with Major Depressive Disorder, Generalized Anxiety Disorder, and Panic Disorder.

The petitioner's first affidavit did not describe in probative detail any battery or other behavior that would constitute extreme cruelty as that term is defined under the regulation at 8 C.F.R. 204.2(c)(1)(vi). The petitioner's affidavit is also inconsistent with the psychological report. The petitioner made no mention of the violent behavior and resultant injuries described in the report. Referencing a letter from his doctor, the petitioner asserted the abuse led to abdominal pain and chronic pain. Although Dr. [REDACTED] evaluation recites numerous physical symptoms the petitioner reported, it does not mention abdominal or chronic pain and there is no other medical documentation in the record.

Moreover, the petitioner's affidavit contains unexplained internal inconsistencies. Although the petitioner is from India and has one five-year old son, at the same time, the petitioner described in his affidavit that his removal to Mexico would separate him from his three children who are 16, 8, and 2 years old. He also described himself as "a victim of prolonged domestic abuse . . . [from his] current husband" beginning in 1997 despite the fact that did not marry his wife until 2009 and has never previously been married. These discrepancies indicate that the affidavit was written for another individual and they greatly detract from the credibility of the petitioner's statements.

On appeal, counsel does not specifically address the director's decision regarding battery or extreme cruelty, but merely asserts that the petitioner was battered which caused him to suffer major depression.

³ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

Similarly, although the petitioner submitted an additional affidavit on appeal, he failed to articulate any further probative information of the abuse and simply stated that he was “battered or subjected to extreme cruelty, threatened acts of violence.” The record does not establish that the petitioner’s wife’s behavior included actual or threatened violence, psychological or sexual abuse, or otherwise constituted extreme cruelty as that term is defined in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). Accordingly, the petitioner has not established that his wife subjected him or their son to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(B)(ii)(I)(bb) of the Act.

Entry into the Marriage in Good Faith

The relevant evidence submitted below fails to demonstrate the petitioner entered his marriage in good faith. In the petitioner’s initial affidavit as well as in his subsequent affidavit submitted on appeal, he asserted that he entered the marriage in good faith, but did not probatively describe how he met his wife, their courtship, wedding ceremony, joint residence or any of their shared experiences. Although the record contains a copy of the couple’s son’s birth certificate, the petitioner did not marry S-K- until almost two years after their child was born and the petitioner did not address the couple’s relationship during the two years leading up to their marriage. On appeal, the petitioner claims he resided with his spouse until their son was six years old and that the couple’s “tax return and joint documents [are] on file with I-130, I-360 with USCIS [U.S. Citizenship and Immigration Services].” However, the petitioner’s USCIS administrative record contains no income tax return or other documents jointly filed by the petitioner and his wife.

On appeal, counsel relies on *Choin v. Mukasey*, 537 F.3d 1116 (9th Cir. 2008), and asserts, among other things, that additional documents are not needed to establish a good-faith marriage. *Choin* is inapplicable to the petitioner’s case. *Choin* held that a fiancée who enters the United States using a K visa remains eligible to adjust her status after her marriage of over two years ended in divorce. In the instant case, the petitioner did not enter the United States using a K visa and he is still married to his wife.⁴ To the extent counsel asserts that joint documentation is not required to establish a self-petitioner’s good-faith entry into the marriage, he is correct. Traditional forms of joint documentation are not required to demonstrate a self-petitioner’s entry into the marriage in good faith. See 8 C.F.R. §§ 103.2(b)(2)(iii), 204.2(c)(2)(i). Rather, a self-petitioner may submit “testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. . . . and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered.” See 8 C.F.R. § 204.2(c)(2)(vii). However, in this case, the petitioner’s affidavits provide no probative account of their courtship, wedding ceremony, shared

⁴ Counsel also contends, among other things, that our denial of the Form I-360 would deprive the petitioner of his Fifth Amendment right to a “due process hearing.” To the extent counsel is requesting a hearing on the petitioner’s Form I-360, although an oral argument is available pursuant to 8 C.F.R. § 103.3(b), counsel has not explained why oral argument is necessary. USCIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. Counsel has not identified any unique factors or issues of law to be resolved in this case. Counsel set forth no specific reasons why oral argument should be held and the written record of proceedings fully represents the facts and issues in this matter. The remainder of counsel’s appellate brief requests a stay of removal and is addressed to the Ninth Circuit Court of Appeals and the BIA. Counsel’s request is outside of these proceedings and beyond our jurisdiction.

residence, or shared experiences, and there are no additional affidavits in the record from persons with personal knowledge of the couple's relationship. A full review of the evidence fails to establish the petitioner's good-faith entry into the marriage, as required by section 204(a)(1)(B)(ii)(I)(aa) of the Act.

Section 204(g) of the Act further Bars Approval

The record reflects that section 204(g) of the Act also bars approval of the petition. Because the petitioner married his wife while he was in removal proceedings and he did not remain outside of the United States for two years after their marriage, his self-petition cannot be approved pursuant to section 204(g) of the Act unless he establishes the bona fides of his marriage by clear and convincing evidence pursuant to section 245(e)(3) of the Act. While identical or similar evidence may be submitted to establish a good faith marriage pursuant to section 204(a)(1)(B)(ii)(I)(aa) of the Act and the bona fide marriage exception 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); *see also Pritchett v. I.N.S.*, 993 F.2d 80, 85 (5th Cir. 1993) (acknowledging "clear and convincing evidence" as an "exacting" standard). To demonstrate eligibility under section 204(a)(1)(B)(ii)(I)(aa) 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 credible evidence shall be considered. Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J); *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). However, to be eligible for the bona fide marriage exemption under section 245(e)(3) of the Act, the petitioner must establish his or her good-faith entry into the 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.

As the petitioner failed to establish his good-faith entry into his marriage by a preponderance of the evidence under section 204(a)(1)(B)(ii)(I)(aa) of the Act, he also has not demonstrated the bona fides of his marriage under the heightened standard of proof required by section 245(e)(3) of the Act. Section 204(g) of the Act consequently bars approval of this petition.

Eligibility for Immediate Relative Classification

Beyond the director's decision, the petitioner is also not eligible for immediate relative classification based on his marriage to S-K-, as required by section 204(a)(1)(B)(ii)(II)(cc) of the Act and as explained in the regulation at 8 C.F.R. § 204.2(c)(1)(iv) because he has not complied with, nor is he exempt from, section 204(g) of the Act.

Good Moral Character

The petitioner has also not established his 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 November 2009 and ending in November 2012). Counsel merely asserts on appeal that the

petitioner has no criminal history that would bar him from relief, but fails to submit any criminal background checks. Neither counsel nor the petitioner has discussed whether police clearances or background checks are unavailable. There is no other evidence in the record addressing the petitioner's character. The petitioner has consequently failed to demonstrate his good moral character as required by section 204(a)(1)(B)(ii)(II)(bb) of the Act.

Joint Residence

Beyond the director's decision, the petitioner has also not established his joint residence with S-K- after their marriage as required by section 204(a)(1)(B)(ii)(II)(dd) of the Act. In the RFE, the director indicated that the Form I-360 was incomplete and requested that the petitioner fill out and submit page four of the self-petition. The petitioner failed to submit a completed Form I-360 and has not identified the dates or address(es) of his joint residence with his spouse. The couple's marriage certificate in the record lists the same address for an apartment in [REDACTED] California for the petitioner and S-K-. However, the petitioner has not provided any other documentation or discussed in probative detail their apartment or other homes, their shared belongings, or any other substantive information regarding living with S-K- after their marriage. On appeal, he merely states that he resided with his wife. The marriage certificate alone is insufficient to establish that the petitioner and S-K- resided together. Accordingly, the petitioner has failed to establish that he resided with his wife after their marriage as required by section 204(a)(1)(B)(ii)(II)(dd) of the Act.

Conclusion

After a careful review of the entire record, the petitioner has not demonstrated that he was subjected to battery or extreme cruelty by his wife, married her in good faith, is exempt from the bar to approval of his petition under section 204(g) of the Act, or has good moral character. Beyond the director's decision, the record also fails to demonstrate that the petitioner is eligible for immediate relative classification or jointly resided with his wife after their marriage. He is consequently ineligible for immigrant classification under section 204(a)(1)(B)(ii) of the Act.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met and the appeal will be dismissed.

ORDER: The appeal is dismissed.