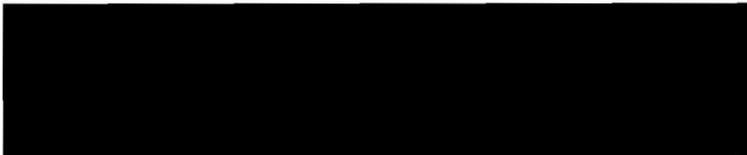


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FILE:

EAC 05 140 53690

Office: VERMONT SERVICE CENTER

Date: AUG 16 2006

IN RE:

Petitioner:



PETITION: Petition for Special Immigrant Battered 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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "R. P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director (Director), Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.

The petitioner seeks classification as a special immigrant pursuant to section 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii), as the battered spouse of a United States citizen. The director denied the petitioner noting that the petitioner had failed to respond to the director's request for evidence and finding that the record did not contain sufficient evidence to establish the petitioner's eligibility.

Section 204(a)(1)(A)(iii) of the Act provides, in pertinent part, that an alien who is the spouse of a citizen of the United States, who is a person of good moral character, who is eligible to be classified as an immediate relative, and who has resided with his or her spouse, may self-petition for immigrant classification if the alien demonstrates to the [Secretary of Homeland Security] that—

- (aa) the marriage or the intent to marry the United States citizen was entered into in good faith by the alien; and
- (bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse.

The regulation at 8 C.F.R. § 204.2(c)(1)(i) states, in pertinent part, that:

A spouse may file a self-petition under section 204(a)(1)(A)(iii) or 204(a)(1)(B)(ii) of the Act for his or her classification as an immigrant relative or as a preference immigrant if he or she:

- (A) Is the spouse of a citizen or lawful permanent resident of the United States;
- (B) Is eligible for immigrant classification under section 201(b)(2)(A)(i) or 203(a)(2)(A) of the Act based on that relationship;
- (C) Is residing in the United States;
- (D) Has resided . . . with the citizen or lawful permanent resident spouse;
- (E) Has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage; or is the parent of a child who has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage;
- (F) Is a person of good moral character; [and]

* * *

(H) Entered into the marriage to the citizen or lawful permanent resident in good faith.

The regulation at 8 C.F.R. § 204.2(c)(2)(iv) states:

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 abused 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.

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

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 . . . 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 or 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.

According to the evidence contained in the record the petitioner married United States citizen [REDACTED] on July 21, 2001 in the Dominican Republic. On March 8, 2002 the petitioner's spouse filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf. The Form I-130 petition was approved on May 22, 2002. On June 3, 2002, the petitioner's spouse filed a Form I-129, Petition for Alien Fiancé(e), on the petitioner's behalf. The Form I-129 was approved on November 19, 2002. The petitioner entered the United States on May 3, 2003 as a K-3 nonimmigrant. On July 30, 2003, the petitioner filed a Form I-485, Application to Adjust Status. The Form I-485 was denied on May 11, 2005 for abandonment because the petitioner failed to appear for an interview before a Service officer.

The petitioner filed the instant Form I-360 self-petition on April 15, 2005, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, his citizen spouse during their marriage. With the initial filing, the petitioner submitted copies of his marriage certificate with translation, his spouse's naturalization certificate, and his child's birth certificate.

After conducting a preliminary review of the evidence submitted with the petition, the director found that the petitioner had failed to establish his prima facie eligibility.¹ Accordingly, on April 25, 2005, the director requested the petitioner to submit evidence to establish that he is a person of good moral character and that he married his spouse in good faith. The record contains no evidence that the petitioner responded to this request.

On July 19, 2005, the director requested further evidence to establish that the petitioner had been battered by or subjected to extreme cruelty by his spouse and that he is a person of good moral character. The petitioner failed to respond to the director's second request and the director denied the petition on November 28, 2005, without the issuance of a notice of intent to deny in accordance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii),² finding that the evidence did not establish the petitioner's eligibility for classification as the battered spouse of a United States citizen.

On appeal, the petitioner submits a personal statement and a police clearance.³ The petitioner does not provide any explanation or excuse for his failure to submit such evidence when requested to by the director on two prior occasions. It is noted that in instances where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO does not usually accept evidence offered for the first time on appeal. If the petitioner had wanted the submitted evidence to be considered, he should have submitted the documents in response to the director's request for evidence. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). In this instance, however, because the petitioner was not provided with the notice of intent to deny required by regulation, we have reviewed the petitioner's appellate submission in order to determine whether such evidence overcomes the director's stated grounds for denial and could be sustained without remanding to the director for further action. As will be discussed, the petitioner's appellate submission does not establish his eligibility for the classification sought. Specifically, the record does not establish that the petitioner resided with his spouse and that he was battered by or subjected to extreme cruelty by his spouse. Therefore, the case must be remanded for further review.

Evidence that the petitioner has resided with his citizen spouse.

On the Form I-360 the petitioner indicated that he resided with his spouse from July 2001 until October 2005. As noted above, however, the petitioner did not enter the United States until May 2003. Further, the evidence contained in the record indicates that since at least 1992, the petitioner's spouse has resided in New York, not the

¹ The determination of prima facie eligibility is made for the purposes of 8 U.S.C. § 1641, as amended by section 501 of Public Law 104-208. A finding of prima facie eligibility does not relieve the petitioner of the burden of providing additional evidence in support of the petition, does not establish eligibility for the underlying petition, is not considered evidence in support of the petition, and is not construed to make a determination of the credibility or probative value of any evidence submitted along with that petition. *See* 8 C.F.R. § 204.2(c)(6).

² The regulation at 8 C.F.R. § 204.2(c)(3)(ii) states, in pertinent part:

Notice of intent to deny. If the preliminary decision on a properly filed self-petition is adverse to the self-petitioner, the self-petitioner will be provided with written notice of this fact and offered an opportunity to present additional information or arguments before a final decision is rendered.

³ The petitioner also resubmits copies of his marriage certificate, his spouse's naturalization certificate, and his child's birth certificate.

Dominican Republic. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In addition to the inconsistencies noted regarding the petitioner's claim of joint residence, we note that the record contains no evidence such as leases, financial documents, insurance information, or tax information which demonstrates that the petitioner lived with his spouse. Although the petitioner claims on appeal that he and his spouse were residing with his spouse's parents, the record contains no documentary evidence of a joint residence. Based upon the inconsistencies noted between the petitioner's claims and the evidence in the record, we find the petitioner's statement does not carry sufficient weight to establish that he resided with his spouse.

Evidence that the petitioner has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen during the marriage.

Prior to the director's denial, the record contained no evidence to establish that the petitioner had been battered by or subjected to extreme cruelty by his spouse. On appeal, the petitioner submits a personal statement in which he claims:

For about a year our marriage was going well, but I started noticing that she was changing. She was employed in a travel agency wherein she was in contact with a lot of men. The rumors began that she was seeing someone behind my back, but I failed to believe it a [sic] continued with my relationship. During this time she would [humiliate] me in front of our friends and her family.

* * *

. . . I was forced to work to help support my parents. This would be thrown in my face that I was a piece of garbage, that all I knew how to do was to sell eggs. That she regrets the day that she walked down the [aisle] with me and that I was disgusting to her. She refused to share the same bedroom with me. Until the day she came where she indicated that she was leaving me because she did not want to be with someone like me. That she deserved someone better.

* * *

I would get embarrassed by her, and she would brag to people on how I was a poor idiot that she brought me to the United States and I had to abide by her rules or that she would send me back.

* * *

. . . I had no problem with that because I did not want to keep living the life that I was living. Her hanging out and coming home 4 or 5 in the morning, if she did decide to come home. She

would go out drinking and come home to her daughter drunk and smelling like alcohol. There were times that she would pick fights and start [to] throw things and slamming. It was total torture living with this woman.

As previously noted, the reliability of the petitioner's claims have been called into question. Thus, without any documentary evidence to establish his claim of abuse, we find his statement alone does not carry sufficient weight to establish that he has been battered by or subjected to extreme cruelty by his spouse.

It is noted that even if we found his statement to be reliable, the claims made are not sufficient to establish a claim of abuse. For instance, the petitioner's general statement regarding "times" where his spouse would "pick fights" and "throw things" does not contain sufficient details to establish a claim of battery or extreme cruelty. The petitioner's remaining claims, that his spouse would stay out late or not come home at all, that she would be drunk and call him names, that she embarrassed him and may have had an affair, are not sufficient to demonstrate that the petitioner was threatened, forcefully detained, psychologically or sexually abused or exploited or that his spouse's actions were part of an overall pattern of violence.

Despite the above discussion, the director's decision cannot stand because of his failure to issue a notice of intent to deny to the petitioner prior the issuance of the denial. The regulation at 8 C.F.R. § 204.2(c)(3)(ii) states, in pertinent part:

Notice of intent to deny. If the preliminary decision on a properly filed self-petition is adverse to the self-petitioner, the self-petitioner will be provided with written notice of this fact and offered an opportunity to present additional information or arguments before a final decision is rendered.

Accordingly, the decision of the director must be withdrawn and the case remanded for the purpose of the issuance of a notice of intent to deny as well as a new final decision. The new decision, if adverse to the petitioner, shall be certified to this office for review.

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.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.