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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

B9



FILE:

EAC 04 259 53220

Office: VERMONT SERVICE CENTER

Date: JUL 24 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:



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.

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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 petition finding that the record was not sufficient to establish the petitioner's eligibility.

The petitioner filed a timely appeal.

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 petitioner's Form I-360, the petitioner married United States citizen [REDACTED] on March 21, 1997 in Brooklyn, New York. The petitioner filed the instant Form I-360 self-petition on September 16, 2004, 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 failed to submit any supporting evidence. Accordingly, on September 24, 2004, the director requested further evidence to establish the petitioner's prima facie eligibility, to include evidence that the petitioner resided with his spouse, that he is a person of good moral character, and that he married his spouse in good faith. The petitioner failed to respond to this request.

On May 31, 2005, the director issued another request for additional evidence to include, the petitioner's marriage certificate, evidence that the petitioner resided with his spouse, evidence that the petitioner had been battered by or subjected to extreme cruelty by his citizen spouse, evidence of the petitioner's good moral

character, and evidence that the petitioner entered into his marriage in good faith. The petitioner again failed to respond to the request and the director denied the petition on October 14, 2005 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, affidavits from acquaintances, copies of photographs, a police clearance, a letter from a church, his spouse's birth certificate, copies of two utility bills, and a tax document. 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 Obaiqbena*, 19 I&N Dec. 533 (BIA 1988). In this instance, however, because the petitioner was not provided with the NOID 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 overcome the director's findings. Therefore, the case must be remanded for further review.

Evidence regarding whether the petitioner is the spouse of a citizen of the United States and is eligible for immigrant classification based on that relationship.

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

Relationship. A self-petition filed by a spouse must be accompanied . . . by evidence of the relationship. Primary evidence of a marital relationship is a marriage certificate issued by civil authorities . . .

The record does not contain the petitioner's marriage certificate. Although the petitioner has submitted a letter from [REDACTED] Reverend of St. Augustine's Church in Elizabeth, New Jersey, which indicates that the church's records "show this was a bona fide and good faith marriage," there is no evidence that the petitioner and his spouse were married at this church or by this reverend. Accordingly this letter does not serve as secondary evidence of the petitioner's marriage. Moreover, [REDACTED] letter indicates that the petitioner and his spouse "separated in or about 2001," three years prior to the filing of the Form I-360 petition. Without further evidence to document the petitioner's marriage and to demonstrate that the petitioner and his spouse were still married within two years prior to filing the petition, we find that the record does not establish that the petitioner is the spouse of a United States citizen and that he is eligible for classification based upon that relationship.

Evidence that the petitioner has resided with his citizen spouse.

On the Form I-360 the petitioner failed to indicate how long he lived with his spouse and also failed to provide the last address at which he resided with his spouse. In his personal statement, the petitioner indicates that when "we moved into our apartment, my wife was the one who took control over the apartment." The petitioner does

not indicate when he and his spouse moved in together or provide an address for this residence. The affidavits provided by the petitioner's acquaintances also do not provide any information regarding the dates the petitioner resided with his spouse or the address at which they lived together.

Although the record contains a Cat Communication International (CCI) bill in the name of the petitioner's spouse at [REDACTED] a February 2002 Cablevision bill in the petitioner's spouse's name at [REDACTED] there is no evidence that the petitioner also resided at these addresses. We note that the petitioner's statement refers to only one apartment, not multiple addresses shared with his spouse. It is also noted that the Cablevision bill is dated after the time in which [REDACTED] indicates that the petitioner and his wife separated. Finally, although the record also contains a 1997 tax document addressed to the petitioner and his spouse at [REDACTED] the record contains no further evidence such as joint leases, utility bills, financial documents or other evidence to establish the petitioner and his spouse's joint residence at this address.

The record does not establish that the petitioner 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.

In his statement, the petitioner claims that on one occasion his spouse got mad at comments made by a friend of the petitioner and started to call the petitioner names. The petitioner also claims that on another occasion his spouse was mad and "didn't say a word" except for making some derogatory comments about the petitioner. Additionally, the petitioner claims that his wife didn't want to cook or clean the house and would insult him about his sexual prowess and eventually left him. The petitioner's acquaintances similarly describe the two incidents in which the petitioner's spouse called him names and the fact that his wife left him. We do not find the incidents described on these two occasions, the allegations regarding his spouse's failure to cook or clean, or her eventual abandonment of the petitioner sufficiently establish that the petitioner was subjected to extreme cruelty as described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). It is noted that while one of the affidavits indicates that the petitioner's spouse would threaten the petitioner with deportation if he "didn't go out with her or [give] her money," neither the petitioner's statement, nor any of the other affidavits make such a claim. Additionally, we find no claim or evidence regarding battery.

The record does not establish that the petitioner was battered by or subjected to extreme cruelty by his spouse.

Evidence that the petitioner entered into the marriage in good faith.

As it relates to the petitioner's claim that he entered into his marriage in good faith, the record contains the petitioner's statements and the statements of the petitioner's acquaintances. The petitioner's statement contains no information regarding how he met his spouse, how long they dated, or which provides insight as to his intent at the time of the marriage. The affidavits from the petitioner's acquaintances provide no further information regarding the petitioner's relationship with his spouse prior to the marriage or his intent to share a life with his spouse. Although the petitioner has submitted copies of photographs, the photographs are uncaptioned and

undated. Moreover, while the photographs are evidence that the petitioner and her spouse were together at a particular place and time, they are not relevant to the petitioner's intent at the time of his marriage.

The record lacks any documentary evidence, such as a lease, rent receipts or cancelled checks to show that the petitioner and her spouse resided together after their marriage. Although the petitioner has submitted a single tax document, given the petitioner's claim of a marriage of at least six years, we would expect ample evidence of joint assets and liabilities, such as insurance policies, bank information and other financial documentation to show that that the petitioner intended to share a life with his spouse. The single tax document submitted by the petitioner does not carry sufficient weight to establish that the petitioner entered into his marriage in good faith.

Despite our support of the director's findings, 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.