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

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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: JUL 26 2006  
EAC 04 172 52316

IN RE: Petitioner: [Redacted]

PETITION: Petition for Special Immigrant Battered 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:

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 Director, Vermont Service Center. The petitioner filed an appeal and a motion to reopen and reconsider the decision. The appeal was untimely filed and found not to meet the requirements of a motion to reopen or reconsider.<sup>1</sup> The motion was granted but the director upheld his previous decision. 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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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)(B)(ii), 8 U.S.C. § 1154(a)(1)(B)(ii), as the battered spouse of a lawful permanent resident of the United States. The director denied the petition on June 9, 2005, finding that the petitioner failed to establish that he resided with his spouse, that he was battered by or subjected to extreme cruelty by his spouse, that he is a person of good moral character, and that he entered into his marriage in good faith.

Section 204(a)(1)(B)(ii) of the Act provides, in pertinent part, that an alien who is the spouse of a lawful permanent resident 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 lawful permanent resident 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

<sup>1</sup> The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) indicates that if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion.

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 lawful permanent resident [REDACTED] on December 3, 1994 in Palmdale, California. On June 12, 1997, the petitioner's spouse filed a Form I-130 petition in the petitioner's behalf. The Form I-130 petition was approved on July 2, 1997.

The petitioner filed the instant Form I-360 self-petition on May 19, 2004, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, his spouse during their marriage. With the initial filing, the petitioner submitted a copy of his marriage certificate and a personal statement.

After conducting a preliminary review of the evidence submitted, the director found that the petitioner had failed to establish his prima facie eligibility<sup>2</sup> and on June 2, 2004, requested the petitioner to submit evidence of his good moral character. The petitioner responded to the request on October 13, 2004 by submitting a police clearance from the city of Morgan Hill, California police department. On October 29, 2004, the petitioner resubmitted the police clearance and also submitted an affidavit attesting to his good moral character.

On January 20, 2005, the director issued a request for additional evidence to include, evidence that the petitioner resided with his spouse, evidence that the petitioner had been battered by or subjected to extreme cruelty by his spouse, and evidence that the petitioner married his spouse in good faith. Additionally, the director noted that although the petitioner claimed that he had never been arrested, Service records reflected that the petitioner had been arrested on September 14, 1995. Accordingly, the director requested the petitioner to submit a copy of the arrest report, court documents showing the final outcome of the arrest, and evidence showing the maximum penalty possible for the charge.

The petitioner failed to respond to the request and the director denied the petition on June 9, 2005 finding that the petitioner failed to establish that he resided with his spouse, that he was battered by or subjected to extreme cruelty by his spouse, that he is a person of good moral character, and that he entered into his marriage in good faith.

On July 13, 2005, the petitioner filed a motion to reopen and reconsider and also attempted to file an appeal on the director's decision. Neither filing was successful in overcoming the director's decision. First, the petitioner's July 13, 2005 appellate submission was not accepted because the petitioner failed to sign the appeal.<sup>3</sup> The petitioner's appeal was considered to be properly filed on August 22, 2005. However, because it was filed more than 33 days after the director's decision was issued, the appeal was not timely filed as the regulation at 8 C.F.R. § 103.5a(b) indicates that the affected party must file the appeal within 33 days after the service of the mailed decision. In a decision dated December 15, 2005, the director noted the untimely filing of the appeal and further found the appeal did not meet the requirements of a motion to reopen or reconsider.

As it relates to the filing of the petitioner's motion to reopen and reconsider, in a decision dated October 5, 2005, the director found that the evidence submitted on motion was not sufficient to establish that the

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<sup>2</sup> 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 and 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.

<sup>3</sup> The regulation at 8 C.F.R. § 103.2(a)(7) indicates that an application or petition that is stamped to show the time and date of actual receipt shall be regarded as properly filed when so stamped *if it is signed* and executed and contains the required filing fee. An application or petition that is not properly signed or is submitted with the wrong filing fee shall be rejected and will not retain the filing date.

petitioner resided with his spouse, that he was battered by or subjected to extreme cruelty, that he is a person of good moral character, and that he entered into the marriage in good faith.

The petitioner, through counsel, appealed the director's October 5, 2005 decision on November 3, 2005 and indicates that he meets all of the eligibility requirements for classification as the battered spouse of a lawful permanent resident of the United States. The petitioner submits additional evidence on appeal as well as copies of documents previously submitted. The petitioner does not provide any explanation or excuse for his failure to submit such evidence when requested to by the director. 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 Obaigbena*, 19 I&N Dec. 533 (BIA 1988). In this instance, however, because the petitioner was not provided with the notice of intent to deny as 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 that the petitioner has resided with his citizen spouse.*

On the petitioner's Form I-360, the petitioner indicated that he resided with his spouse from December 1994 until December 2003. The petitioner indicated that he last resided with his spouse at [REDACTED]. The petitioner has submitted no evidence, such as a lease or mortgage, rent receipts or mortgage statements, or other evidence to establish that the petitioner resided with his spouse at this address during the time period claimed.

The record contains the petitioner's 2000, 2001, 2002 federal income taxes which indicate that the petitioner filed his taxes as married filing separately. Although the petitioner's income taxes list his address at the [REDACTED] address, the record does contain the petitioner's spouse's income tax returns for these years or any other evidence that establishes that the petitioner's spouse also lived at this address.

The record also contains a copy of the petitioner's 2003 federal income tax returns, which list the petitioner's address as [REDACTED] and indicate that the petitioner filed as married filing separately. The record contains no evidence that the petitioner's spouse resided with the petitioner at this address.

The affidavits from the petitioner's acquaintances provide no further evidence of the petitioner's residence with his spouse. The first affidavit, written by [REDACTED] indicates that the petitioner became [REDACTED]'s roommate when he left his wife in the summer of 1995. The second and third affidavits, provided by [REDACTED] and [REDACTED] offer no information regarding the petitioner's or his spouse's residence. The remaining affidavit, submitted by [REDACTED], provides no details about how [REDACTED] knows the petitioner and his spouse. Although [REDACTED] indicates that the petitioner and his spouse resided at [REDACTED] from April 2000 until July 2004, this statement is not consistent with the information provided by the petitioner, which indicates that he last resided with his spouse in December 2003. It is incumbent upon the petitioner to

resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Given the lack of evidence related to the petitioner's joint residence with his spouse, and the general and inconsistent information contained in the affidavits submitted on the petitioner's behalf, we concur with the decision of the director that the record is insufficient to 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.*

The affidavits submitted on the petitioner's behalf offer no support of the petitioner's claim of extreme cruelty or battery. The affidavit from [REDACTED] describes one incident in which the petitioner's spouse cut the petitioner's clothes with scissors when the petitioner was not at home. The affidavit from [REDACTED] confirms the petitioner's belief that his spouse was cheating on him. The affidavit from [REDACTED] indicates only that the petitioner and his spouse had "three sessions" in which the petitioner and his spouse were counseled in "biblical principals [sic] about marriage."

In his personal statement, the petitioner claims that his spouse rarely worked outside the home or doing "domestic chores" at home. The petitioner claims that his spouse demanded money, that she would stalk him at work, and that his spouse's family's involvement in their marriage was made life "unbearable." The petitioner also claims that he found out his wife was having an affair and asked her to leave. We do not find that any of these claims rise to the level of extreme cruelty as described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi).

As it relates to a claim of physical abuse, the petitioner claims that his spouse would "become violent" and describes one incident in which she slashed the petitioner's arm with a kitchen knife. This information is not supported by witness statements of the actual abuse or the aftereffect or any other documentary evidence. We find the petitioner's statement, on its own, carries insufficient weight to establish that he has been battered.

*Evidence that the petitioner is a person of good moral character.*

In his request for evidence, the director noted that Service records indicated that contrary to the petitioner's claim of never having been arrested, the petitioner had been arrested in September 1995. Although the director offered the petitioner an opportunity to provide details regarding this arrest and his claim of being a person of good moral character, the petitioner failed to provide any further information.

On appeal, the petitioner does not address the finding of the director regarding the petitioner's good moral character or provide any further evidence related to his arrest. Without this information we concur with the finding of the director that the petitioner has failed to establish that he is a person of good moral character.

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

As it relates to the petitioner's claim that he entered into her marriage in good faith, the record contains the petitioner's statement, the statements of the petitioner's acquaintances, and tax documents. 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.

The record lacks any documentary evidence, such as a lease, rent receipts or cancelled checks to show that the petitioner and his spouse resided together after their marriage. Although the petitioner has submitted a several tax documents, the taxes all indicate that the petitioner filed as married filing separately. The petitioner provides no evidence of his spouse's tax filings for these years. Given the petitioner's claim of a marriage of at least nine 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 record does not contain sufficient evidence 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.