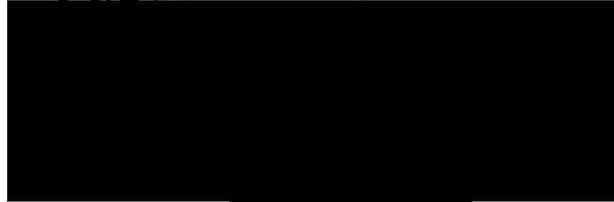




U.S. Citizenship  
and Immigration  
Services

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

**PUBLIC COPY**



139

FILE: [Redacted]  
EAC 04 046 50204

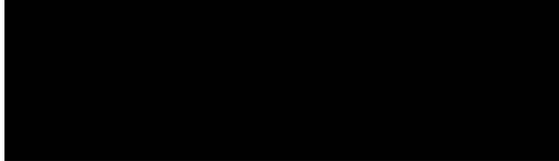
Office: VERMONT SERVICE CENTER

Date: JUN 23 2006

IN RE: Petitioner: [Redacted]

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 Director, Vermont Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action.

The petitioner seeks classification as a special immigrant pursuant to section 204(a)(1)(A)(iii) of 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.

The director denied the petition, finding that the petitioner failed to establish that he had a qualifying relationship with a U.S. citizen, was eligible for immediate relative status based on such a relationship, that he was battered or subjected to extreme cruelty by his U.S. citizen former spouse, and that he was a person of good moral character.

On appeal, counsel submits a brief.

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 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).

Pursuant to section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act, an alien who has divorced an abusive United States citizen may still self-petition for immigrant classification under section 204(a)(1)(A)(iii) of the Act if the alien demonstrates that he or she is a person

who was a bona fide spouse of a United States citizen within the past 2 years and –

\* \* \*

(ccc) who demonstrates a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse.

Section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC).

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

*(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 . . . , 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 standard and guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are contained 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.

(ii) *Relationship.* A self-petition filed by a spouse must be accompanied by evidence of citizenship of the United States citizen or proof of the immigration status of the lawful permanent resident abuser. It must also be accompanied by evidence of the relationship. Primary evidence of a marital relationship is a marriage certificate issued by civil authorities, and proof of the termination of all prior marriages, if any, of . . . the self-petitioner . . . .

\* \* \*

(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 evidence will be considered.

**The petitioner in this case is a native and citizen of Mexico who was paroled into the United States on March 28, 1999. On August 19, 2001, the petitioner married [REDACTED] a U.S. citizen, in El Paso, Texas. On April 3, 2003 their marriage was annulled by order of the District Court of El Paso County, Texas. On December 1, 2003, the petitioner filed this Form I-360. On August 23, 2004, the director issued a notice requesting evidence of the petitioner's marriage to Ms. [REDACTED] her battery or extreme cruelty and the petitioner's good moral character. Counsel requested and was granted additional time to respond and on February 26, 2005 submitted the petitioner's unsigned statement. On June 15, 2005, the director denied the petition because the record did not establish that the petitioner had a qualifying relationship with Ms. [REDACTED] that he was eligible for immediate relative classification based on such a relationship, that he was battered or subjected to extreme cruelty by Ms. [REDACTED] or that he was a person of good moral character. Counsel timely appealed.**

At the outset, we address two claims made by counsel on appeal. First, counsel claims that the Vermont Service Center and the Act "violate the Due Process Clause of the United States Constitution and the Separation of Powers Doctrine under Article III of the United States Constitution." Although counsel's claim is entitled "Summary of the Argument," counsel does not further discuss his contention. Even if supported, counsel's claim is outside of our jurisdiction. The AAO, like the Board of Immigration Appeals, cannot rule on the constitutionality of laws enacted by Congress. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992). Second, counsel claims that the petitioner is eligible for cancellation of removal under section 240A(b)(2) of the Act, as well as suspension of deportation under former section 244(a) of the Act (as in effect before April 1, 1997). Cancellation of removal and suspension of deportation are only available to aliens in removal or deportation proceedings. 8 C.F.R. §§ 1240.11(a)(1), 1240.20, 1240.21. The record does not indicate that the petitioner is in removal or deportation proceedings. Moreover, the AAO does not have jurisdiction to consider applications for cancellation or suspension.

The AAO exercises appellate jurisdiction only over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003).

Counsel's claims on appeal do not overcome the grounds for denial. Beyond the director's decision, the present record also fails to establish that the petitioner entered into marriage with Ms. [REDACTED] in good faith. Despite these deficiencies, the case will be remanded because the director denied the petition without first issuing a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

#### *Good Moral Character*

The petitioner submitted no evidence of his good moral character with his Form I-360. However, the petitioner's administrative record contains a clearance letter from the El Paso, Texas Police Department dated October 22, 2003, which states that no arrest data was found for the petitioner. The record shows that the petitioner has resided in El Paso, Texas since 1991. Accordingly, the letter from the El Paso, Texas Police Department establishes the petitioner's good moral character pursuant to the regulation at 8 C.F.R. § 204.2(c)(2)(v).

#### *Battery or Extreme Cruelty*

As evidence of Ms. [REDACTED] extreme cruelty, the petitioner initially submitted his own statement and letters from three friends. In his statement notarized on October 23, 2003, the petitioner reports that two months after their marriage, he and Ms. [REDACTED] separated. He states that she did not want to go out with friends, did not want him to go to his mother's house and got mad whenever he came home late. The petitioner explains that the couple reconciled in March 2001, but that on Thanksgiving in 2002, Ms. [REDACTED] told him that she wanted to separate permanently and that she was seeing another man. In April 2003, the petitioner learned that Ms. [REDACTED] was pregnant and that her baby was born in August 2003. The petitioner's friends verify that Ms. [REDACTED] had an extramarital affair with another man with whom she had a child, that she ended their marriage and that the petitioner was very depressed and upset by these events.

In his August 23, 2004 notice, the director explained the insufficiency of these testimonials and asked the petitioner to submit additional evidence of Ms. [REDACTED] s battery or extreme cruelty. In response, the petitioner submitted an unsigned "response," in which he states that he was socially isolated for about a year after Ms. [REDACTED] ended their marriage and that he felt very depressed, emotionally hurt and confused. The petitioner further states that his wife was very possessive because she always wanted things done her way. The petitioner reiterates that his wife had an extramarital affair with another man, to whom she is now married and with whom she has a child. The petitioner reports feeling worthless, depressed and experiencing emotional trauma as a result of his wife's behavior.

On appeal, counsel claims that the petitioner "suffered mental abuse from [Ms. [REDACTED] to the extreme where [she] became impregnated from another man while still married to Appellant." Ms. [REDACTED]

extramarital affair and resultant pregnancy do not rise to the level of extreme cruelty, as that term is described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). The current record does not establish that Ms. [REDACTED] actions amounted to psychological or sexual abuse or exploitation, or that Ms. [REDACTED] nonviolent actions were part of an overall pattern of violence. Apart from his letter and those of his friends, the petitioner submits no other evidence of the types listed in the regulation at 8 C.F.R. § 204.2(c)(2)(iv). The record is devoid of any documentation that the petitioner sought assistance in ending or coping with Ms. [REDACTED] alleged extreme cruelty from law enforcement or court officials, medical or mental health personnel, clergy, social workers or other social service agency personnel. Although he is not required to do so, the petitioner does not explain why such evidence does not exist or is unobtainable. See 8 C.F.R. §§ 204.1(f)(1), 204.2(c)(2)(i). The present record does not establish that Ms. [REDACTED] subjected the petitioner to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii) of the Act.

#### *Qualifying Relationship and Eligibility for Immediate Relative Classification*

Although the petitioner's Form I-360 was filed within two years of the legal termination of his marriage to Ms. [REDACTED] the present record does not demonstrate a connection between the annulment of his marriage and Ms. [REDACTED] battery or extreme cruelty because, as discussed above, the present record does not establish the requisite battery or extreme cruelty. Consequently, the petitioner has not established that he had a qualifying relationship with Ms. [REDACTED] at the time of filing pursuant to section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act or that he was eligible for immediate relative classification based on such a relationship, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act.

#### *Entry into the Marriage in Good Faith*

The record also fails to establish that the petitioner married Ms. [REDACTED] in good faith. In his letter notarized on October 23, 2003, the petitioner states that he met Ms. [REDACTED] at the airport where they used to work together, that the former couple dated for six months, that Ms. [REDACTED] then proposed to him and told him that she would help him get ahead in life. The petitioner states that his family liked Ms. [REDACTED] and that the former couple went to social events with their friends and families. In their letters, the petitioner's friends state that they knew the petitioner and Ms. [REDACTED] as a couple and would go out socially with them. The petitioner also submitted copies of unidentified photographs of himself and Ms. [REDACTED] with other individuals. These documents do not provide probative details about the petitioner's courtship, marriage, marital relationship or any of his shared experiences with Ms. [REDACTED] apart from her alleged abuse.

The petitioner submitted three other relevant documents: a joint bank account statement dated November 26, 2001 that shows a balance of \$10.02; a change of address notice dated April 23, 2002 for this bank account; and a statement dated February 5, 2003 from the petitioner's automobile insurance company verifying that Ms. [REDACTED] was an excluded driver from his insurance policy. The banking documents do not indicate a history of joint usage that spans the course of the former couple's marriage and the automobile insurance statement is dated three months after the couple's separation.

In addition, the former couple's annulment decree states, "The Court finds that Respondent [the petitioner in this case] induced Petitioner [Ms. ██████████] into marriage by fraud." In his letter notarized on October 23, 2003, the petitioner explains that he and Ms. ██████████ went to a lawyer who advised Ms. ██████████ get an annulment by saying that the marriage was a fraud. He states, "She went to get the annulment, and I just sign for it." The petitioner does not further explain his actions or offer corroborative documentation that he did not, in fact, induce Ms. ██████████ into marriage by fraud.

The petitioner submitted no other documents of the types listed in the regulation at 8 C.F.R. § 204.2(c)(2)(vii). Although he is not required to do so, the petitioner does not explain why such evidence does not exist or is unobtainable. See 8 C.F.R. §§ 204.1(f)(1), 204.2(c)(2)(i). The present record fails to establish that the petitioner entered into marriage with Ms. ██████████ in good faith, as required by section 204(a)(1)(A)(iii) of the Act.

The present record does not demonstrate that the petitioner had a qualifying relationship with Ms. ██████████ that he was eligible for immediate relative classification based on such a relationship, that he was battered or subjected to extreme cruelty by Ms. ██████████ during their marriage, or that he entered into their marriage in good faith. The petitioner is thus ineligible for special immigrant classification under section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii).

However, the case will be remanded because the director denied the petition without first issuing a NOID. 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 case will be remanded for issuance of a NOID, which will give the petitioner a final opportunity to overcome the deficiencies of his case.

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 that, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.