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U.S. Citizenship
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[REDACTED]

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: MAR 27 2006

EAC 04 224 53189

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:

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Vermont Service Center Director 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 The decision of the director will be withdrawn and the petition will be remanded for further action.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 is a 40-year old male native and citizen of the Dominican Republic who is seeking classification as a special immigrant pursuant to section 204(a)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(A)(iii), as the battered spouse of a United States citizen. The petitioner filed his Form I-360 on July 29, 2004.

The petitioner submitted the following evidence with his Form I-360 petition: A completed G-325A form, a copy of his work authorization and social security cards, his birth certificate, marriage certificate, divorce decree terminating his first marriage, and a partial copy of his passport.

Finding the evidence submitted with the Form I-360 insufficient to establish the petitioner's eligibility, on August 9, 2004, the director issued a notice requesting the petitioner to submit evidence that he entered into their marriage in good faith and is a person of good moral character. On September 13, 2004, the petitioner submitted his criminal record indicating that he was arrested on April 9, 1991 and was charged with criminal possession of a controlled substance in the second degree, a Class A felony (PL § 220.18), criminal possession of a weapon in the third degree, a Class D felony (PL § 265.02) and criminal possession of stolen property in the fourth degree, a Class E felony (PL § 165.45). On May 28, 1991, the petitioner pled guilty to the charge of criminal possession of a controlled substance in the fifth degree (PL § 220.06), a Class D felony and was sentenced to time served plus given five years probation. He was discharged from probation on May 27, 1996.

On February 17, 2005, the director issued another request for additional evidence, requesting that the petitioner submit evidence that the petitioner had resided with the U.S. citizen spouse, had been battered or the subject of extreme cruelty perpetrated by his U.S. citizen spouse, is a person of good moral character, and entered into the marriage to the citizen in good faith. On March 16, 2005, the petitioner responded to the request by submitting his New York criminal record.

On July 20, 2005, the director denied the petition because the record failed to establish that the petitioner had been battered or the subject of extreme cruelty perpetrated by his U.S. citizen spouse, is a person of good moral character, and entered into the marriage to the citizen in good faith.

On appeal, the petitioner asserts that he is "ready to complete all the requirements [sic] of that Department in [his] process [sic]." The petitioner did not submit any additional evidence in support of his appeal.

Section 204(a)(1)(A)(iii) of the Act provides, in pertinent part, that an alien who is the spouse of a United States citizen, 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 Attorney General 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)(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.

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

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.

According to the evidence on the record, petitioner wed United States citizen [REDACTED] on February 15, 2001 in New York City. The petitioner's wife filed a Form I-130 on the petitioner's behalf. On February 27, 2001, the petitioner filed a Form I-485 application for adjustment of status based on the I-130 visa petition. On February 18, 2004, the interim director for New York district denied the petitioner's Form I-485 application, because the underlying Form I-130 petition had been withdrawn.

The first issue to be addressed in this proceeding is whether the petitioner established that he has been battered by or has been the subject of extreme cruelty perpetrated by his citizen spouse. The regulation at 8 C.F.R. § 204.2(c)(1)(i)(E) requires the petitioner to establish that he has been battered by, or has been the subject of extreme cruelty perpetrated by, his U.S. citizen spouse during their marriage.

Because the petitioner furnished no evidence to establish that he has been abused by, or the subject of extreme cruelty perpetrated by his citizen spouse, the director asked him to submit additional evidence. The director listed evidence the petitioner could submit to establish battery or extreme mental cruelty. The petitioner responded to the request but provided nothing relating to abuse or extreme cruelty. The evidence is insufficient to establish that the petitioner was subjected to battery or extreme cruelty by his United States citizen spouse.

Accordingly, the petitioner has not established that he has been battered by, or subjected to extreme cruelty by, his U.S. citizen spouse. He is thus ineligible for classification under section 204(a)(1)(A)(iii) of the Act, and his self-petition must be denied.

The next issue to be addressed in this proceeding is whether the petitioner established that he had entered into the marriage in good faith, as required by 8 C.F.R. § 204.2(c)(1)(i)(H). The petitioner initially submitted a copy of his marriage certificate. In a request for additional evidence, the director listed the types of evidence that would show that the petitioner had married his wife in good faith. The petitioner failed to submit any evidence relating to this issue. The record contains a photograph of the petitioner and his wife in front of a wedding cake. The evidence on the record is insufficient to establish that the petitioner married his citizen spouse in good faith.

The last issue to be addressed is whether the petitioner established that he is a person of good moral character as required by the regulation at 8 C.F.R. § 204.2(c)(1)(i)(F). In several requests for additional evidence, the director specifically requested that the petitioner submit police clearances or records from each place he had resided for at least six months during the 3-year period before filing the Form I-360 petition. The petitioner provided Citizenship Immigration Services (CIS) with his criminal record and evidence that he completed probation.

The alien, in any application where good moral character is a necessary element of eligibility, has the burden of establishing good moral character. *See Brownell v. Cohen*, 250 F.2d 770 (D.C. Cir. 1957); *Estrada-Oreja v. Del Guercio*, 252 F.2d 904 (9th Cir. 1958); *Matter of Turcotte*, 12 I&N Dec. 206 (BIA 1967).

Section 101 of the Act, 8 U.S.C. § 1101, states, in part:

(f) For the purpose of this Act, no person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was –

* * *

(8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43) of this subsection).

Section 101(a) of the Act, provides, in part:

(43) The term “aggravated felony” means - -

* * *

(B) Illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18).

According to the evidence in the record, the petitioner pled guilty to the charge of criminal possession of a controlled substance in the fifth degree (PL § 220.06), a Class D felony, on May 28, 1991. (Case # SCI – 1B31 – 91). Therefore, the petitioner is statutorily barred from establishing that he is a person of good moral character.

We concur with the director’s determination that the petitioner failed to establish that he was battered or subjected to extreme cruelty by his spouse, entered into the marriage in good faith and is a person of good moral character. The reason for the petitioner’s appeal does not overcome these bases for denial and the petition may not be approved. However, the case will be remanded because the director failed to issue a Notice of Intent to Deny (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-petition, 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.

In this case, the director denied the petition without first issuing a NOID. Consequently, the case must be remanded for issuance of an NOID pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii), which will give the petitioner a final opportunity to overcome the deficiencies of his/her case.

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

As always in these proceedings, the burden of proof rests solely 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 this decision.