

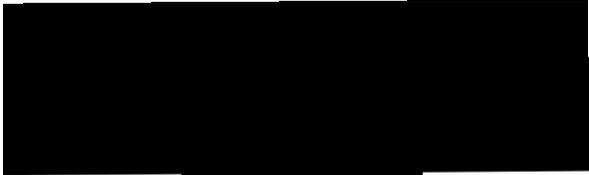


U.S. Citizenship
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FILE:



Office: VERMONT SERVICE CENTER

Date: MAR 29 2006

EAC 05 014 52762

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.

2 Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision shall be withdrawn and the matter will be remanded.

The petitioner is a native and citizen of India who is seeking 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 petitioner arrived in the United States on October 3, 2000 at Chicago as a C-1 alien in transit.

According to the evidence in the record, the petitioner married United States citizen [REDACTED] 20 years his senior, on October 3, 2002 in Sayerville, New Jersey. The petitioner's spouse filed a Form I-130 on the petitioner's behalf on January 23, 2003, which was approved on September 2, 2003.

The petitioner filed the instant Form I-360 on October 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 U.S. citizen spouse during their marriage. The director denied the petition on July 6, 2005, finding that the petitioner failed to establish that he entered into the marriage in good faith.

The petitioner, through counsel, submits a timely appeal on August 8, 2005.

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.

Finding the evidence insufficient to establish eligibility, on November 3, 2004, the director requested the petitioner to submit further evidence (RFE) to establish that he resided with his spouse, that he is a person of good moral character, and that he entered into his marriage in good faith. Through counsel, the petitioner requested a 60-day extension in which to respond to the RFE. The director granted the request for an extension and on March 4, 2005, the petitioner responded to the RFE by submitting additional evidence.

After reviewing the evidence contained the director denied the petition finding that the record contained insufficient evidence to establish that the petitioner had he entered into the marriage in good faith.

On appeal, counsel asserts that the record is sufficient to establish a good faith marriage. Subsequent to filing the appeal, counsel submitted one additional piece of evidence, i.e., a letter written by the petitioner's sister-in-law.

The evidence relating to the petitioner's claim of a good faith marriage consists of the following evidence:

1. Affidavit of the petitioner.
2. Affidavits of [REDACTED] and [REDACTED] friends of the petitioner.
3. Copy of marriage certificate.
4. Copy of rental agreement dated March 10, 2003.
5. Bank statements in the petitioner's wife's name alone.
6. Copies of checks signed by the petitioner's wife indicating she took the petitioner's surname.
7. An unsigned joint federal tax return for 2003.
8. Six photographs of the petitioner and his wife and other unidentified people.
9. Copies of paystubs indicating that the petitioner's wife took the petitioner's surname.
10. A letter written by [REDACTED] the petitioner's sister-in-law, stating that her sister's alcoholism progressed rapidly six months after she wed the petitioner but "initially their lives were going well."
11. The assertions of counsel.

The "key factor in determining whether a person entered into a marriage in good faith is whether he or she intended to establish a life together with the spouse at the time of marriage." *See Bark v. INS*, 511 F.2d 1200

(9th Cir. 1975). Based upon a review of the evidence contained in the record, we do not find it contains any information related to the petitioner's intent at the time of his marriage, much less that the petitioner's intent was in good faith. On appeal, counsel asserted that the director failed to note that the petitioner lacked work authorization; hence, he was unable to obtain documentation to show he married his wife in good faith. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Affidavits of the petitioner's friends speak to the petitioner's wife's mistreatment of the petitioner and to the petitioner's good moral character, rather than to his intent at the out start of his marriage. The affidavits contain no details regarding the petitioner's courtship, feelings or intent at the time of his marriage. Although the marriage certificate is evidence of a legal marriage, the fact that a legal marriage took place does not establish that the marriage was entered into in good faith or that the petitioner resided with his spouse after the marriage ceremony. Similarly, the photographs have no bearing on his intent at the time of his marriage. Evidence that the petitioner's wife took the petitioner's surname is not evidence of the petitioner's intent at the time of marriage. The bank statements are in the petitioner's wife's name alone. One utility bill is insufficient evidence of a good faith marriage.

Pursuant to the regulation at 8 C.F.R. § 204.2(2)(i), the determination of what evidence is credible *and the weight to be given that evidence* shall be within the sole discretion of the Service. As discussed above, we find the evidence contained in the record does not carry sufficient weight to establish that the petitioner entered into his marriage in good faith. However, because the director failed to issue a Notice of Intent to Deny (NOID) in accordance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii) which requires the director to issue a NOID in all cases where "the preliminary decision on a properly filed self-petition is adverse to the self-petitioner . . . , " the case must be remanded to the director for further consideration.

On remand, the director should also consider whether the petitioner established that he is a person of good moral character. According to the evidence in the record, the petitioner was arrested on June 9, 2002 and was charged with sexual assault (N.J.S. § 2C:14-2B) and endangering children's welfare (N.J.S. § 2C:24-4A). On September 6, 2002, he pled guilty to harassment (N.J.S. § 2C:33-4B). The petitioner submitted a letter dated September 16, 2004 written by his probation officer that states that the petitioner was sentenced on October 28, 2002 to two years probation and was charged with Offensive Touching [REDACTED]. The letter states that the petitioner would terminate probation on October 27, 2004. It is noted that the petitioner failed to submit an arrest record, even though the director asked him to submit it in the RFE.

In accordance with the above discussion, the director's decision is withdrawn. The petition is remanded to the director further action in accordance with the forgoing and entry of a new decision that, if adverse to the petitioner, shall be certified to the Administrative Appeals 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 this decision.