

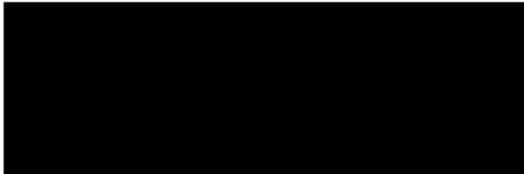


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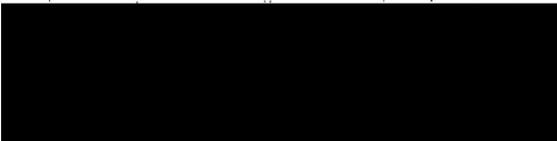
Office: VERMONT SERVICE CENTER

Date: MAR 30 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, Director  
Administrative Appeals Office

**DISCUSSION:** The Vermont Service Center Acting 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 The decision of the director will be withdrawn and the petition will be remanded for further action.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 50-year old native and citizen of Jamaica 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 a Form I-360 on December 14, 2002.

According to the evidence in the record, the petitioner entered the United States on December 20, 1995 as a K-1 nonimmigrant fiancé. The petitioner wed his fiancée, [REDACTED] on January 27, 1996 in Indiana. The petitioner filed a Form I-485 application to register permanent residence or adjust status on or about March 20, 1996. On July 18, 1996, the acting district director denied the Form I-485. On August 16, 1996, the petitioner was placed in removal proceedings. On November 11, 1996, the petitioner and his first wife, [REDACTED] divorced. Two weeks later, the petitioner wed U.S. citizen [REDACTED] on November 25, 1996. The petitioner's wife filed a Form I-130 on the petitioner's behalf on August 25, 1997. An Immigration Judge found the petitioner deportable on February 20, 1998, denied his I-485 application to register permanent residence or adjust status and granted him voluntary departure until August 20, 1998. The petitioner appealed the Immigration Judge's decision to the Board of Immigration Appeals (BIA) on March 9, 1998. On August 29, 2002, the BIA dismissed the petitioner's appeal. The petitioner filed the instant Form I-360 on December 14, 2002. The petitioner and [REDACTED] divorced on February 4, 2003.

Finding the evidence submitted with the Form I-360 insufficient to establish the petitioner's eligibility, on October 6, 2003, the director issued a notice requesting the petitioner to submit evidence (RFE) that his spouse subjected him to battery or extreme cruelty. The petitioner, through counsel, requested an additional 60 days to respond to the notice and on February 3, 2004, submitted additional evidence.

On September 27, 2004, 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.

On appeal, counsel for the petitioner submits a brief.

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)(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 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 insufficient 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 on October 6, 2003. The director listed evidence the petitioner could submit to establish battery or extreme mental cruelty.

In review, the evidence is insufficient to establish that the petitioner was subjected to battery or extreme cruelty by his United States citizen spouse. The evidence consists of the following:

- The petitioner's statement dated October 29, 2002, indicating that he began suspecting his wife of infidelity in early 2001 and that he is unsure whether the child born of the marriage, Princess [REDACTED] is his child. The petitioner further indicated that his wife and her siblings stole all of his personal property. He stated that on November 3, 2001, his brother-in-law punched him at a restaurant.
- Petitioner's statement dated November 20, 2003, indicating that the petitioner's wife allowed her family to fight him.
- A letter written by [REDACTED] Health Services dated November 18, 2003, indicating that she saw the petitioner for an intake because he was requesting help for symptoms of depression and anxiety he relates to events that occurred during his last marriage.

- A January 29, 2002 letter written by the petitioner's landlord relating what the petitioner told him and that the petitioner brought him to his apartment on November 4, 2001, to show him that it was empty.
- A statements prepared by [REDACTED] indicating that on November 3, 2001, the petitioner's in-laws attacked the petitioner in her presence at a restaurant.
- A police report indicating that on October 3, 2001, three of the petitioner's in-laws attacked him and [REDACTED] at a restaurant.
- A police report indicating that on November 3, 2001, the petitioner complained that one of his in-laws damaged his car.
- A temporary restraining order protecting the petitioner from his in-law [REDACTED]. The petitioner's petition for a protection order stating that [REDACTED] followed the petitioner in his car.
- A temporary restraining order protecting the petitioner's spouse, [REDACTED] from the petitioner.
- A permanent protective order restraining the petitioner's wife from abusing, harassing or disturbing the peace of the petitioner.
- A no contact order dated August 19, 2002 indicating that the petitioner had been arrested for a crime of violence and that the court found that a no contact order was necessary as a condition of the petitioner's release from custody.

The evidence is insufficient to establish that the petitioner was subjected to battery or extreme cruelty by his United States citizen spouse. Infidelity is not abuse. The petitioner asserts that his in-laws abused him, in part, because his wife allowed it. The law requires the petitioner to establish that he was abused *by his 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.

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 was subjected to battery or extreme cruelty by his United States citizen spouse. 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.

We concur with the director's determination that the petitioner failed to establish that he was battered or subjected to extreme cruelty by his former spouse during their marriage. Counsel's claims and the evidence submitted do not overcome this basis 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.

On remand, the director should also consider whether the petitioner is subject to section 204(g) of the Act, which states:

Notwithstanding subsection (a), except as provided in section 245(e)(3), a petition may not be approved to grant an alien immediate relative status by reason of a marriage which was entered into during the period [in which administrative or judicial proceedings are pending], until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.

Section 245(e) of the Act states:

- (1) Except as provided in paragraph (3), an alien who is seeking to receive an immigrant visa on the basis of a marriage which was entered into during the period described in paragraph (2) may not have the alien's status adjusted under subsection (a).
- (2) The period described in this paragraph is the period during which administrative or judicial proceedings are pending regarding the alien's right to be admitted or remain in the United States.
- (3) Paragraph (1) and section 204(g) shall not apply with respect to a marriage if the alien establishes by clear and convincing evidence to the satisfaction of the [Secretary of Homeland Security] that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a

lawful petition) for the filing of a petition under section 204(a) . . . with respect to the alien spouse or alien son or daughter. In accordance with the regulations, there shall be only one level of administrative appellate review for each alien under the previous sentence.

The regulation at 8 C.F.R. § 245.1(c)(9)(v) states, in pertinent part:

*Evidence to establish eligibility for the bona fide marriage exemption.* Section 204(g) of the Act provides that certain visa petitions based upon marriages entered into during deportation, exclusion or related judicial proceedings may be approved only if the petitioner provides clear and convincing evidence that the marriage is bona fide . . . .

As noted previously, the record contains no evidence that the petitioner left the United States after being ordered removed from the United States. Thus, the marriage between the petitioner and his citizen spouse was entered into while the petitioner was in proceedings.

On remand, the director should also consider whether the petitioner is subject to section 204(c) of the Act, which provides, in pertinent part:

[N]o petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws....

According to the evidence in the record, the Form I-485 was denied because the petitioner “provided no evidence that [he] entered into the marriage in good faith and since [he and his wife] are not living together.”

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 both the petitioner and counsel. 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.