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FILE: [REDACTED]  
EAC 04 246 53318

Office: VERMONT SERVICE CENTER

Date: **MAY 08 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.

A handwritten signature in black ink, appearing to read "D. Wiemann".

Robert P. Wiemann, Chief  
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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii), as the battered spouse of a United States citizen.

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 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)(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.

The record reflects that the petitioner married United States citizen, [REDACTED] on March 29, 2001, in Chicago, Illinois. The petitioner's spouse filed a Form I-130 on the petitioner's behalf which was approved on July 9, 2002. The petitioner filed the instant Form I-360 self-petition on August 27, 2004, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, his citizen spouse during their marriage.

With the initial filing, the petitioner submitted a personal statement, evidence of the approval of the Form I-130 filed in his behalf, a copy of his marriage certificate, his daughter's birth certificate, three letters from acquaintances, copies of the petitioner's medical insurance documents, a bank statement, a doctor's letter, documents regarding the petitioner's spouse's credit, the deed for the petitioner's home, copies of documents related to the petitioner's filing for divorce, evidence of the petitioner's child support payments, the petitioner's employment evaluations, and 2001, 2002, 2003, tax returns, and a police clearance from the Illinois state police.

The director found this evidence was not sufficient to establish eligibility and on April 4, 2005, requested the petitioner to submit further evidence to establish his eligibility.

The petitioner responded to the director's request on August 16, 2005. In addition to submitting copies of documents that were previously submitted, the petitioner submitted two new statements from his

acquaintances, and three letters from Congressman Luis V. Gutierrez regarding the Form I-130 filed in the petitioner's behalf.

On September 22, 2005, after reviewing the evidence submitted by the petitioner, including the evidence submitted after the director's request for evidence, the director denied the petition based upon the determination that the petitioner failed to establish that he had been battered by or subjected to extreme cruelty by his citizen spouse.

The petitioner through counsel files a timely appeal, dated October 24, 2005. To support his appeal, the petitioner submits a letter from a domestic violence counselor regarding the petitioner's claim of abuse. The petitioner provides no explanation for his failure to submit such evidence when requested to do so by the director in his request for evidence.<sup>1</sup> In cases 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 Obaighena*, 19 I&N Dec. 533 (BIA 1988). In this instance, however, because the petitioner was not provided with the notice of intent to deny (NOID) 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.

Upon review of the record, including the petitioner's appellate submission, we concur with the director's decision and find that the evidence contained in the record is not sufficient to establish that the petitioner was battered by or subjected to extreme cruelty by his citizen spouse.

In his statement, the petitioner indicates that his spouse had bad credit, came home late, and went out with other men. These claims are not sufficient to establish a claim of extreme cruelty as described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). Further, although the petitioner makes general statements about his wife's purported behavior, such as being "constantly threatened . . . verbally," by his spouse and that his spouse would curse and throw things at him, the petitioner does not describe any single incident in sufficient detail to establish that he was battered by or subjected to extreme cruelty.

The statements submitted by the petitioner's acquaintances also lack specific details regarding the purported abuse. For instance, the statement by [REDACTED] indicates only that the petitioner's spouse was "very abusive." The statement from [REDACTED] indicates that the petitioner's spouse is "lazy and a big spender," and that she cursed at the petitioner and told him to "go back to Mexico." These statements are not sufficient to establish that the petitioner was battered or that he was subjected to extreme cruelty.

The statement from the petitioner's counselor, based upon two telephonic counseling sessions, describes the petitioner's claims that his spouse was "aggressive, hurtful and bizarre," that she "wouldn't clean, iron, cook or play with their daughter" and "criticized" the petitioner because "he liked to keep house in order and clean." Further, the petitioner indicated that his spouse is "financially irresponsible" and was unfaithful. It is noted that in

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<sup>1</sup> The letter from the counselor indicates that she was first introduced to the petitioner in January 2005 and that she counseled the petitioner in April and September.

the petitioner's statement, the petitioner indicates that his wife would threaten "to call the police and tell them I was undocumented," yet he indicated to the counselor that on three occasions, his spouse "called the police . . . and falsely accused him of doing things to her . . ."

Based upon the above discussion, we find the director properly considered the evidence submitted by the petitioner and that such evidence was afforded the proper weight. It should be noted that CIS has the sole discretion in determining what evidence is credible and the weight to be given the evidence.<sup>2</sup> Accordingly, we concur with the director's findings that the petitioner failed to establish that he has been battered by or subjected to extreme cruelty perpetrated by his citizen spouse. The petitioner's appellate submission does not overcome the director's stated grounds for denial.

Despite our support of the director's findings, however, the director's decision cannot stand because of the director's failure to issue a NOID to the petitioner prior the issuance of the denial. The regulation at 8 C.F.R. § 204.2(c)(3)(ii) 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 . . . ." Accordingly, the case must be remanded to the director for issuance of an NOID pursuant to the regulation.

Despite the fact that the director's decision rested on the single issue discussed above, we find an additional issue that should be addressed on remand. Specifically, the record contains insufficient and conflicting evidence regarding the petitioner's claim of joint residence. On the Form I-360, the petitioner indicates that he resided with his spouse beginning in May 1994. However, in his personal statement, the petitioner indicates that he did not even meet his wife until the "summer of 1996," more than two years after the date the petitioner claimed on the Form I-360 to have begun residing with his spouse.

Further, on the Form I-360, the petitioner indicates that he last resided with his spouse at [REDACTED] Chicago, Illinois. The petitioner indicates that he last resided with his spouse in May 2002. Although the record contains a single document, dated January 3, 2000, listing the petitioner's spouse's address at [REDACTED], the address is listed as "[REDACTED] not [REDACTED]". The record does not contain any documentation to show the petitioner's residence at this address. Instead, the record contains a copy of the petitioner's deed for the property located at [REDACTED]. The deed was recorded in October 2001. Causing further confusion is the fact that the record contains copies of the petitioner's 2001 and 2002 tax returns which indicate that the petitioner was residing at [REDACTED]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Finally, as evidence of the petitioner's joint residence with his spouse, counsel points to several documents which are dated *after* the petitioner claims to have stopped residing with his spouse. The Form I-797 approval notice is dated July 9, 2002 while the correspondence with the Congressman Gutierrez and the petitioner's insurance policy are dated in 2003. The petitioner cannot establish joint residence with his spouse based upon documents dated months after the petitioner indicates that he stopped residing with his spouse.

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<sup>2</sup> See 8 C.F.R. § 204.2(2)(i) which states that the determination of what evidence is credible and the weight to be given that evidence "shall be *within the sole discretion* of the Service." [Emphasis added.]

Therefore, in addition to allowing the petitioner an opportunity to provide additional evidence to establish his claim of abuse, the director should also allow the petitioner to submit further evidence to establish his joint residence with his spouse, including a specific list containing all of the petitioner's and his spouse's addresses during the claimed period of joint residence with the specific dates of residence at each address.

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.