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**U.S. Citizenship
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Services**

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FILE:

[REDACTED]
EAC 05 081 52243

Office: VERMONT SERVICE CENTER

Date: MAY 17 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:

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office 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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 is a native and citizen of Ghana 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.

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 [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.

According to the evidence in the record, the petitioner married United States citizen _____ on July 9, 2003, in Bronx, New York. On July 31, 2003, the petitioner's spouse filed a Form I-130 petition in the petitioner's behalf. The petitioner concurrently filed a Form I-485 on that same date. The Form I-130 and the Form I-485 were denied on August 18, 2004, but were subsequently reopened.

The petitioner filed the instant Form I-360 self-petition on January 25, 2005, 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.

At the time of filing, the petitioner submitted a copy of his Form I-20 A-B and visa, documenting his status as an F-1 nonimmigrant student, a letter regarding the petitioner's adjustment of status interview based upon the Form I-130 filed in his behalf, the petitioner's statement, an affidavit regarding the petitioner's good moral character, the petitioner's marriage certificate, his spouse's birth certificate, U.S. passport and social security card, the petitioner's 2003 state and federal tax returns, and photographs.

The director issued a Prima Facie Determination notice to the petitioner on February 2, 2005. The determination of prima facie eligibility is made for the purposes of 8 U.S.C. 1641, as amended by section 501 of Public Law 104-208. It is noted that a finding of prima facie eligibility does not relieve the petitioner of the burden of providing additional evidence in support of the petition and does not establish eligibility for the underlying petition, is not considered evidence in support of the petition and is not construed to make a determination of the credibility or probative value of any evidence submitted along with that petition.

On April 1, 2005, the petitioner submitted an evaluation from _____ regarding the petitioner's mental state and police clearances from Oneida County, New York and the Ghana criminal investigation department.

The director found this evidence was not sufficient to establish eligibility and on May 26, 2005, requested the petitioner to submit further evidence to establish his eligibility. First, the director requested the petitioner to indicate whether he was still married to his citizen spouse. If divorced, the director requested the petitioner to submit evidence of the termination of the marriage. Second, the director requested evidence that the petitioner resided with his citizen spouse. Third, in requesting further evidence to establish that he had been battered by and/or subjected to extreme cruelty by his citizen spouse, the director acknowledged the submission of the petitioner's psychological evaluation but found the petitioner's claims did not "appear to rise to the level of extreme mental cruelty." Fourth, the director acknowledged the receipt of the petitioner's two police clearances but requested a third police clearance from the police department in Bronx, New York, where the petitioner also maintained a residence during the three-year period prior to the filing of the petition.¹ Finally, after noting that the copies of the 2003 taxes submitted by the petitioner did not indicate that they were ever received by the Internal Revenue Service (IRS), the director requested the petitioner to provide evidence that the taxes had

¹ The regulation at 8 C.F.R. § 204.2(c)(i) indicates that primary evidence of the petitioner's good moral character is an affidavit from the petitioner accompanied by a police clearance from *each place* the petitioner has lived for at least six months during "the 3-year period immediately preceding the filing of the self-petition."

actually been filed as well as further evidence to establish that the petitioner entered into his marriage in good faith.

The director denied the petition on September 29, 2005, finding that the petitioner failed to respond to the request for evidence and determining that the record was insufficient to establish that that petitioner resided with his spouse, that he was battered by or subjected to extreme cruelty by his spouse, and that he entered into his marriage in good faith. In his denial, it appears that the director overlooked the fact that his request for evidence noted the record was not sufficient to establish good moral character as the petitioner failed to submit a police clearance from Bronx, New York. Although the director specifically noted the lack of evidence regarding the petitioner's good moral character in his request for evidence, the director's decision appears to make an affirmative finding regarding the petitioner's good moral character despite the fact that no further evidence was submitted.

On appeal, the petitioner claims that he never received the director's request for evidence but that based upon information received from the Customer Service Center, he submitted additional evidence in support of his petition prior to the director's denial.

A review of the record confirms that the petitioner did submit additional evidence in support of his petition prior to the director's decision. The record contains a letter from the petitioner that contains a date-stamp from the Vermont Service Center on July 26, 2005, nearly two months prior to the director's denial. The letter was accompanied by the "Action for a Divorce" filed by the petitioner on March 20, 2005 and an affidavit from the petitioner's sister-in-law.

Given that the director did not consider the additional evidence submitted by the petitioner prior to the issuance of the denial, the case must be remanded to the director for further consideration of the submitted material. In addition, the case must be remanded due to the director's failure to issue a Notice of Intent to Deny (NOID) to the petitioner prior to the denial.

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.

The decision of the director must be withdrawn and the case remanded for the purpose of the issuance of a notice of intent to deny as well as a new final decision. The new decision, if adverse to the petitioner, shall be certified to this 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 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.