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FILE: [Redacted]  
EAC 04 163 53794

Office: VERMONT SERVICE CENTER

Date: MAY 18 2006

IN RE: Petitioner: [Redacted]

PETITION: Petition for Special Immigrant Battered Spouse Pursuant to Section 204(a)(1)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(B)(ii)

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. The petitioner subsequently filed an untimely appeal which was treated as a motion and again denied by the director. 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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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)(B)(ii), 8 U.S.C. § 1154(a)(1)(B)(ii), as the battered spouse of a lawful permanent resident of the United States.

Section 204(a)(1)(B)(ii) of the Act provides, in pertinent part, that an alien who is the spouse of a lawful permanent resident 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 lawful permanent resident 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 lawful permanent resident [REDACTED] on March 26, 1997, in Port Chester, New York. The petitioner's spouse filed a Form I-130 petition in the petitioner's behalf which was approved on February 4, 1998. On September 28, 1998, the petitioner filed a Form I-485, Application to Adjust Status. The Form I-485 application was denied on February 17, 2004.

The petitioner filed the instant Form I-360 self-petition on May 3, 2004, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, her lawful permanent resident spouse during their marriage. With the initial filing, the petitioner submitted her marriage certificate, her birth certificate with translation, a letter from her employer with paystubs, copies of her children's passports, the social security cards for the petitioner, her spouse and children, her spouse's birth certificate, copies of three uncaptioned and undated photographs, bank information and statements from Banco Popular, a lease, ConEdison bills, and tax information.

The director found this evidence was not sufficient to establish the petitioner's prima facie eligibility<sup>1</sup> and on May 25, 2004 requested the petitioner to submit further evidence to establish that the petitioner or her children were battered by or subjected to extreme cruelty by her spouse and that she is a person of good moral character. The petitioner responded to the director's request on June 17, 2004, by submitting a police clearance and three affidavits. Additionally, on October 2, 2004, the petitioner submitted a personal statement.

The director found this evidence insufficient to establish the petitioner's eligibility and on January 10, 2005, requested the petitioner to submit further evidence to establish her claim of abuse, that she resided with her spouse, and that she entered into the marriage in good faith.

The petitioner responded to the request on February 7, 2005, by submitting a lease, the original copies of the ConEdison bills that were previously submitted, the original copies of previously submitted tax documentation, copies of previously submitted employment and bank information, and additional photographs.

After reviewing the evidence submitted by the petitioner, the director denied the petition on March 24, 2005, finding that the evidence was not sufficient to establish that the petitioner resided with her spouse, that she was battered by or subjected to extreme cruelty by her spouse, and that she entered into the marriage in good faith.

In finding that the petitioner failed to establish that she resided with her spouse, the director noted that the initial copy of the lease submitted by the petitioner did not contain the petitioner's spouse's signature and was dated after the time in which the petitioner claimed she no longer resided with her spouse. The director then noted that the second lease appeared to contain "corrections or alterations" and that it also failed to contain the petitioner's spouse's signature. The director also noted that although the petitioner submitted utility bills in both names for the same address, all of the petitioner's tax information during that same period of time indicated that the petitioner filed her taxes as head of household, a status reserved for "single parents, married individuals who are separated at least six months of the tax year or for individuals who are unmarried on the last day of the tax year." As it relates to the affidavits submitted by the petitioner to support her claim that she resided with her spouse, the director noted that the affidavits were both vague and contradicted the evidence submitted by the petitioner regarding the date she stopped residing with her spouse.

In determining that the petitioner failed to establish that she entered into her marriage in good faith, the director noted the inconsistencies between the ConEdison bills and the petitioner's tax status as head of household and stated that because of those inconsistencies, "it could not be concluded that you were jointly responsible for payment of the bills." The director further stated that because the bank information was in the

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<sup>1</sup> 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, which governs aliens eligibility for public assistance and benefits. In accordance with 8 C.F.R. § 204.2(c)(6), a finding of prima facie eligibility does not relieve the petitioner of the burden of providing additional evidence in support of the petition, does not establish eligibility for the underlying petition, is not considered evidence in support of the petition and is not construed as a determination of the credibility or probative value of any evidence submitted along with that petition.

petitioner's name only, "it did not help to establish that a good faith marriage existed." In regard to the photographs and statement submitted by the petitioner, the director found that evidence of a legal wedding ceremony and photographs are not sufficient to establish that a marriage was entered into in good faith. Finally, the director found that the petitioner's statement that they "fell in love and got married" was not sufficiently detailed to establish that she entered into the marriage in good faith.

In finding that the petitioner failed to establish her claim of abuse, the director noted that none of the affidavits submitted in support of the petition contained any discussion of the alleged abuse. As it relates to the petitioner's claim of abuse, the director noted that the petitioner's unsworn statement consisted of the following claims regarding the alleged abuse:

...after awhile I started to notice him being mean to me and my children. He would yell at my kids and treated them badly, he would tell him words that are hurtful and that made them feel bad, he would tell them he didn't love them, everything that my children [sic] did it annoyed him and he would get very upset. He treated me bad and was very unfaithful to me; he was always cheating on me. He also abused of me verbally and physically. He wouldn't come home to sleep; he wouldn't show up at night and wouldn't come until the next day home [sic]. He had other women while he was with me. He made me cry several times because of the way he spoke to me, the way he always disrespected me and made me feel very low as if I was worth anything to him.

The director found that the petitioner failed to "furnish any details about specific incidents of abuse" and determined that her single statement did not carry sufficient weight to establish that she had been battered by or subjected to extreme cruelty by her spouse.

The petitioner filed an untimely appeal with the Vermont Service Center on May 21, 2005,<sup>2</sup> with additional evidence. Although the appeal was not received in a timely manner, the director treated the appeal as a motion in accordance with the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2). After considering his previous decision and the evidence which was submitted with the Form I-290B, the director reaffirmed his denial of the petition. The additional evidence submitted by the petitioner included:

- The petitioner's statement.
- A medical record for the petitioner's child.
- Spouse's social security card previously submitted.
- Children's birth certificates.
- Two receipts from "Easy Shopping Dept. Store."
- Registration information from the public school system for the petitioner's children.
- New affidavits from the affiants who had previously submitted written affidavits.
- Second copy of petitioner's birth certificate.

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<sup>2</sup> In his decision, dated July 6, 2005, the director indicated the date of the filing of the appeal as "May 3, 2005." However, this date is the date the Form I-290B appeal form was received at the AAO. In accordance with the regulation at 8 C.F.R. § 103.2(a)(7), the appeal is not considered timely filed until properly appealed. In this case, the appeal was considered filed on May 21, 2005, when it was received by the Vermont Service Center.

- Several ConEdison bills

In discussing the evidence, the director noted that the school and hospital records and the birth certificates indicate that the petitioner and her children resided together but do not establish that the petitioner resided with her spouse or that she entered into the marriage in good faith. The director acknowledged the petitioner's submission of a receipt in the petitioner's spouse's name at the claimed joint residence but found this single piece of evidence did not carry sufficient weight to establish a joint residence and fails to "dispel the questions raised by the inconsistent and contradictory evidence contained in the record."

As it relates to the affidavits submitted in support of the Form I-290B, the director noted that the affiants [REDACTED] and [REDACTED], had previously submitted affidavits that were found to be incomplete and inconsistent with the petitioner's claims. Because of the inconsistencies previously noted, the director found the "corrected" statements could "not be considered sufficiently reliable." In addition, the director stated:

On appeal both affiants have corrected their statements to reflect that you resided with your spouse from 1996 until about August 2002. Also, [REDACTED] statement lacks specific detail regarding your shared residence with [REDACTED] claims of abuse and your intentions in marriage. While [REDACTED] offers some information about your abuse claims, shared residence with [REDACTED], and indicates that you married your spouse in good faith, her statement is not sufficiently specific about the incidents of abuse or about your relationship with your spouse.

Regarding the additional ConEdison utility bills submitted by the petitioner, the director indicated that numerous bills were dated in 2004, two years after the petitioner claims to have stopped residing with her spouse. As it relates to the bills that were dated during the period in which the petitioner claimed she resided with her spouse, the director again referred to the tax information submitted by the petitioner which indicated that she filed her taxes as head of household during this time. The director also noted that the bill dated September 21, 1998 was issued in the petitioner's name only and that it appears that the petitioner's spouse was not added to the account until "at least a year and a half after [the] marriage."

Finally, the director acknowledged the fact that the petitioner submitted a statement in which she attempted to explain the inconsistencies in the record but found that the petitioner had "not furnished sufficient evidence of an independent, objective nature to outweigh the questions raised by the contradictory and conflicting evidence."

On August 4, 2004, the petitioner appealed this decision of the director to the AAO. In the statement submitted on appeal, the petitioner claims that she sent her previous appeal within the prescribed time limits. We do not find the petitioner's appellate statement persuasively overcomes the director's stated grounds for denial.

The regulation at 8 C.F.R. § 103.2(a)(1) provides:

*General.* Every application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions (including where an application or

petition should be filed) being hereby incorporated into the particular section of the regulations in this chapter requiring its submission.

As it pertains to the proper filing of an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides:

*Filing Appeal.* The affected party shall file an appeal on Form I-290B. Except as otherwise provided in this chapter, the affected party must pay the fee required by §103.7 of this part. The affected party shall file the complete appeal including any supporting brief *with the office where the unfavorable decision was made* within 30 days after service of the decision.<sup>3</sup>

[Emphasis added.]

Despite the regulations, the clear instructions of the director in his decision and the instructions on the Form I-290B, rather than submitting her first appeal to the Director, Vermont Service Center, the office where the unfavorable decision was made, the petitioner submitted her appeal directly to the AAO. As noted previously in this decision, the regulation at 8 C.F.R. § 103.2(a)(7) indicates that an appeal is regarded as properly filed when it is actually received and properly stamped, not as the petitioner argues, when it is *sent*.

The petitioner does not submit any further argument or evidence regarding the director's findings that the petitioner failed to establish that she resided with her spouse, that she entered into the marriage in good faith, and that she was battered by or subjected to extreme cruelty by her spouse. 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>4</sup> Accordingly, we concur with the director's findings that the petitioner failed to establish that she resided with her spouse, that she has been battered by or the subject of extreme cruelty perpetrated by her citizen spouse, and that she entered into her marriage in good faith. 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 Notice of Intent to Deny (NOID) to the petitioner prior the issuance of 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.

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<sup>3</sup> If the decision was mailed, the appeal must be filed within 33 days. See 8 C.F.R. § 103.5a(b).

<sup>4</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.]

Accordingly, 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.