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U.S. Department of Homeland Security  
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Washington, DC 20529



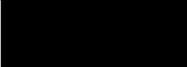
U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: SEP 28 2007

EAC 04 223 50889

IN RE:

Petitioner:



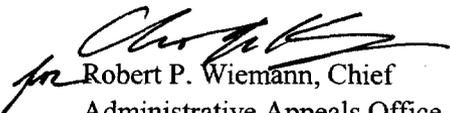
PETITION: Petition for Immigrant Battered Spouse Pursuant to Section 204(a)(1)(A)(iii) of the  
Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the immigrant visa petition. On appeal, the Administrative Appeals Office (AAO) remanded the petition for further action by the director. The matter is now before the AAO upon certification of the director's subsequent, adverse decision. The December 18, 2006, decision of the director will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.

Section 204(a)(1)(A)(iii) of the Act provides that an alien who is the spouse of a United States citizen may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the United States citizen spouse in good faith and that during the marriage, the alien or a child of the alien was battered or subjected to extreme cruelty perpetrated by the alien's spouse. In addition, the alien must show that he or she is eligible to be classified as an immediate relative under section 201(b)(2)(A)(i) of the Act, resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(A)(iii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II).

Section 204(a)(1)(J) of the Act further states, in pertinent part:

In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) . . . , or in making determinations under subparagraphs (C) and (D), the [Secretary of Homeland Security] shall consider any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the [Secretary of Homeland Security].

As the facts and procedural history have been adequately documented in the previous decision of the AAO, we will only repeat certain facts as necessary here. The director initially denied the petition on August 15, 2005, finding that the petitioner failed to establish that he was battered by or subjected to extreme cruelty by his spouse during their marriage. On appeal, the AAO concurred with the findings of the director and found, beyond the decision of the director that the petitioner had also failed to establish that he resided with his spouse. However, the AAO remanded the case because the director denied the petition without first issuing a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii). Upon remand, the director issued a NOID on June 26, 2006. The director received no response to the NOID, denied the petition, and certified the decision to the AAO. In her decision, the director notified the petitioner that he could submit a brief to the AAO within 30 days of service of the director's decision. To date, the AAO has received nothing further from the petitioner or counsel.

Upon review, we find that the NOID was not issued in accordance with the AAO's remand decision and, in addition, was not issued to counsel's address of record. Specifically, the director's NOID failed to address the AAO's concern regarding insufficient evidence to establish that the petitioner resided with his spouse. More significantly, both the NOID and the director's December 18, 2006 decision were issued to counsel's previous address of record at [REDACTED] which appears to have been obtained from the Form G-28 and Form I-360 signed by the petitioner on June 29, 2004. However, the record contains a subsequent letter from counsel, dated September 30, 2005 and received by the Service on October 5, 2005, which indicates counsel's address as [REDACTED]. This is the address to which the AAO issued its remand decision.<sup>1</sup> Citizenship and Immigration Services (CIS) notices and

<sup>1</sup> A review of Westlaw's Litigation Record also lists counsel's address at [REDACTED] as of December 4, 2006 [accessed on August 15, 2007 at "[REDACTED]"]

decisions, when served by mail, must be sent to a person at his or her last known address. 8 C.F.R. § 103.5a(a)(1). The director did not comply with this regulatory requirement in this case.

As it does not appear that the petitioner was provided with proper notice of the NOID and ultimately the final decision, the decision of the director must be withdrawn and the case remanded for the purpose of the issuance of a NOID 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.