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

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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 01 2006

EAC 05 037 52629

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:

[redacted]

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.

Mari Johnson

S Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Vermont Service Center Director denied the preference visa petition and 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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 citizen of the United States.

The director denied the petition, finding that the petitioner had failed to establish that she had entered into the marriage in good faith.

On appeal, counsel for the petitioner submits a brief and additional evidence.

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 record reflects that the petitioner entered the United States as a B-2 nonimmigrant visitor on April 2, 2001, December 24, 2001 and on July 16, 2002. The petitioner wed U.S. citizen [redacted] on November 4, 2002. Because the petitioner's citizen spouse had failed to terminate an earlier marriage prior to marrying the petition, they wed again on February 22, 2004 after the citizen divorced his first wife in June 2003. The petitioner's spouse filed a Form I-130 petition on the petitioner's behalf. The petitioner filed a Form I-485, Application to Adjust Status, which was denied due to abandonment.

The petitioner filed the instant Form I-360 self-petition on November 19, 2004, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, her citizen spouse during their marriage. With the initial filing, the petitioner failed to submit sufficient evidence. Accordingly, on December 3, 2004 and again on April 18, 2005, the director requested further evidence. The petitioner responded to the director's requests and submitted additional evidence. On August 2, 2005, the director denied the instant petition, finding that the petitioner had failed to establish that she had entered into the marriage in good faith.

The petitioner files a timely appeal with additional evidence. Upon review of the record, including the petitioner's appellate submission, we find that the evidence contained in the record is not sufficient to establish eligibility.

The first issue to be addressed in this proceeding is whether the petitioner established that she entered into the marriage in good faith. The evidence relating to a good faith marriage is as follows:

- A divorce decree dated December 1, 2001, indicating that the petitioner and a former spouse divorced in Taiwan.[1]
- The petitioner's spouse's divorce decree from a prior wife.
- Two marriage certificates.
- Photographs of the bride and groom.
- The petitioner's declarations dated November 16, 2004 and March 16, 2005.
- Visitor's passes to detention facilities.

[1] According to a Form I-130 filed on the petitioner's behalf, her marriage to [redacted] ended on July 2, 2002.

- Two addressed postmarked envelopes addressed to the petitioner from her spouse in jail.
- Two bank statements in the petitioner's name alone dated July and September 2004.
- One income tax return for 2003 jointly filed by the petitioner and her spouse.

While a marriage certificate is evidence that a legal marriage occurred, it is not sufficient evidence to establish that the petitioner entered into the marriage in good faith. Similarly, wedding photographs are insufficient evidence. While the photographs are evidence that the petitioner and her spouse were together at a particular place and time, they do not establish the petitioner's intent at the time of her marriage or that she resided with his spouse. The petitioner provided scant information about her courtship, marriage ceremony and celebration, if any, in her statements. The majority of the content of her declarations relates to the alleged abuse. The petitioner stated that she initially met her citizen spouse in August 2002 through a dating service and after dating for three months, they wed in November 2002. In a request for additional evidence, the director informed the petitioner of the types of evidence that help to establish that she entered into the marriage in good faith. In response, the petitioner asserted that she tried to open joint bank accounts, and to obtain an apartment for the two of them but could not due to her husband's bad credit rating. The petitioner did not submit corroborating evidence. The petitioner submitted visitor's passes as evidence that she visited her spouse while he was in jail.[2] She also submitted copies of two envelopes addressed to the petitioner from her spouse. The director noted the affidavits submitted in support of the petition were insufficient to support the petitioner's claims. Finally, the director noted the lack of documentary evidence to establish a good faith marriage.

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.[3] Accordingly, we concur with the director's findings that the petitioner failed to establish 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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[2] One pass is dated stamped May 10, 2003. The other pass is not dated.

[3] *See* 8 C.F.R. § 204.2(2)(i) which states that the he 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.[4] On remand, the director should also address the issue of whether the petitioner established that she resided with her spouse. The director noted in his decision that the evidence relating to joint residence was contradictory, but did not draw a conclusion.

On remand, the director should further address the issue of whether the petitioner has established that she is a person of good moral character. According to the evidence on the record, the petitioner was arrested on February 3, 2004 by the Chicago Police Department and was charged with prostitution. On May 18, 2004, the petitioner was convicted of the charge.[5] (Case No. 04120783101).

Section 101 of the Act, 8 U.S.C. § 1101, states, in part:

> (f) For the purpose of this Act, no person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was –
>
> > (3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (9)(A) of section 212(a) of this Act . . . if the offense, described therein, for which such person was convicted or of which he admits the commission, was committed during such period.

Section 212(a) of the Act, 8 U.S.C. § 1181(a), provides, in part:

> Classes of aliens ineligible for visas or admission. Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States.
>
> > (2)(D) *Prostitution and commercialized vice.* Any alien who:
> >
> > > (i) is coming to the United States solely, principally, or incidentally to engage in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,
> >
> > * * *

The petitioner asserts that there is a connection between the abuse and her crime. She said that she was forced to flee her husband and her only job experience was as a massage therapist, hence, she sought work as a massage therapist in the United States. Accordingly, the director should evaluate whether the

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[4] When issuing the notice of intent to deny, the director should consider all of the evidence contained in the record, including the evidence submitted by the petitioner on appeal.

[5] Counsel for the petitioner asserts that the petitioner's conviction is not a conviction for immigration law purposes because she was given one-month supervision and "supervision in Illinois is not a conviction." This issue should be addressed further in the Notice of Intent to Deny and in the final decision.

petitioner established a link between the alleged abuse and her criminal conviction(s). *See* Section 204(a)(1)(C) of the Act, 8 U.S.C. § 1154(a)(1)(C).

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 this decision.