U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

B9

PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 20 2006

EAC 04 014 53422

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, Director
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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 citizen of the United States.

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 married United States citizen on June 17, 2002 in King County, Washington. The petitioner filed the instant Form I-360 self-petition on October 17, 2003, 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, although the petitioner claimed that she resided with her spouse prior to their marriage, the petitioner did not submit any evidence or make any claim that she resided with her citizen spouse after their marriage. Specifically, the record reflects that the petitioner's spouse was arrested on June 7, 2002 and remained in jail thereafter. In fact, it appears that the petitioner's marriage took place while the petitioner's citizen spouse was incarcerated. Accordingly, on August 18, 2004, the director requested further evidence to demonstrate that the petitioner "resided with [her] spouse as a married couple."

The petitioner responded to the director's request on October 18, 2004, by submitting a personal statement and a document from the Superior Court of Washington, County of King, dated October 14, 2003, which indicates that the petitioner's marriage to her citizen spouse was declared invalid. In the personal statement submitted by the petitioner in response to the director's request for evidence, the petitioner states:

> I have never resided with [my citizen spouse] **as a spouse** because he was incarcerated since the very first day of our marriage. I resided with him in Spain and in all the time before he was incarcerated, and our marriage license was signed by him still being a free man.

[Emphasis in the original.]

After reviewing the evidence submitted by the petitioner, including the evidence submitted in response to the director's request for evidence, the director denied the petition on December 21, 2004, based upon the determination that the petitioner failed to establish that she resided with her citizen spouse.

The petitioner submits a timely appeal, dated January 13, 2005. In her statement on appeal, the petitioner claims that she is submitting additional evidence that she lived with her spouse as a married couple. However, the evidence submitted does not establish that the petitioner ever resided with her citizen spouse after the marriage. The petitioner does not dispute the fact that she married her spouse while he was in jail and makes no claim that she ever resided with her spouse after his arrest and their subsequent marriage. Both the statute and regulation make clear that to be eligible for approval, a self-petitioner must establish that he or she resided with his or her *spouse.* The clear language of the statute and the implementing regulation does not allow a self-petitioner to establish eligibility based upon a claimed residence prior to the alleged abuser actually becoming the self-petitioner's spouse. Accordingly, we concur with the director's findings that the evidence contained in the record is not sufficient to establish that she resided with her spouse. However, despite our support of the director's findings, 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.

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. In addition to the issue of the petitioner's residence with her citizen spouse, the record suggests additional issues that must also addressed on remand. First, the record contains evidence that the petitioner may have been married prior to the marriage to her citizen spouse. However, the record does not contain proof of the legal termination of the marriage. Moreover, the record contains a decree from a court which declares the petitioner's marriage to her citizen spouse to be invalid. Accordingly, as it is presently constituted, the record does not appear to establish that the petitioner has a qualifying marriage as the spouse of a United States citizen.

Second, the petitioner has failed to establish that she was battered by or subjected to extreme cruelty by her citizen spouse. The petitioner's claims of abuse appear to be based upon incidents that occurred prior to her marriage. There does not appear to be any claim of abuse or any documentary evidence to establish, as required by the statute, that "during the marriage," the petitioner has been battered by or has been the subject of extreme cruelty perpetrated by her citizen spouse.

Finally, the record does not contain any evidence to establish that the petitioner is a person of good moral character. Although the record contains an employment related background check, the check indicates that the petitioner "is not currently disqualified from unsupervised access to children, individuals with developmental disabilities or mental illness, or vulnerable adults." This background check cannot be substituted for the police clearance required by the regulation.[1]

In accordance with the above discussion, the case must be remanded to the director for further consideration. 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.

[1] 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." *See* 8 C.F.R. § 204.2(c)(2)(v).