U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 22 2006

EAC 04 125 54442

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.

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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 is a native and citizen of Brazil who is seeking 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 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 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 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 arrived at a United States port-of-entry on or about December 14, 2000, as a nonimmigrant for pleasure with authorization to remain until June 13, 2001. A notice to appear was issued to the petitioner on January 25, 2001, indicating that the petitioner was employed without authorization and was subject to removal. On July 11, 2001, an immigration judge ordered that the petitioner be removed from the United States. The record contains no evidence that the petitioner left the United States after being ordered removed. Instead, the record reflects that the petitioner married United States citizen [redacted] in Hartford, Connecticut, on July 14, 2003.

The petitioner filed the instant Form I-360 on March 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 U.S. citizen spouse during their marriage. With the initial filing of her petition the petitioner submitted copies of the marriage certificates to her citizen spouse and her former spouse, the divorce decree for her prior marriage and her citizen spouse's prior marriage, the petitioner's passport, the petitioner's citizen spouse's birth certificate and passport information, an ex-parte restraining order issued against her citizen spouse on March 17, 2004, the petitioner's personal statement, a receipt for a limousine, the petitioner's 2003 tax return, photographs and cards from the petitioner's wedding, a psychological and psychosocial assessment, and letters from counselors, advisors and acquaintances of the petitioner.

The director found this evidence was not sufficient to establish the petitioner's eligibility and on November 1, 2004, requested the petitioner to provide further evidence to establish her claim of abuse and that she is a person of good moral character. The director also noted that as the petitioner entered into her marriage with her citizen spouse while she was in removal proceedings, she must provide clear and convincing evidence that she entered into her marriage in good faith.

The petitioner responded to the director's request on December 3, 2004, by resubmitting copies of her previous personal statement, her psychological assessment, letters from church pastors, her 2003 tax returns, and the cards and pictures from her wedding day. The new evidence submitted by the petitioner in response to the director's request for additional evidence consisted of evidence of the petitioner's good moral character, a new psychological assessment, a second restraining order, a letter from Sears Credit Service, and a letter and account information from Webster Bank,

After reviewing the evidence contained in the record, including the evidence submitted in response to the director's request for evidence, the director denied the petition on April 27, 2005, finding that the petitioner failed to establish that she entered into the marriage in good faith.

The petitioner, through counsel, submits a timely appeal dated May 18, 2005. On appeal, the petitioner fails to allege any error on the part of the director or to proffer any argument regarding the director's findings. Instead, counsel resubmits copies of evidence previously submitted into the record. While the petitioner does offer new evidence on appeal, which consists of the petitioner's 2004 federal income tax returns, two affidavits from the petitioner's acquaintances, and a letter from the petitioner's citizen spouse, such evidence does not overcome the director's ground for denial.

In this instance, as correctly noted by the director, because the petitioner entered into the qualifying relationship while she was in removal proceedings, under section 204(g) of the Act, the petitioner has the

increased burden of demonstrating, by clear and convincing evidence, that she entered into the marriage in good faith.

Section 204(g) of the Act states:

> Notwithstanding subsection (a), except as provided in section 245(e)(3), a petition may not be approved to grant an alien immediate relative status by reason of a marriage which was entered into during the period [in which administrative or judicial proceedings are pending], until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.

Section 245(e) of the Act states:

> (1) Except as provided in paragraph (3), an alien who is seeking to receive an immigrant visa on the basis of a marriage which was entered into during the period described in paragraph (2) may not have the alien's status adjusted under subsection (a).
>
> (2) The period described in this paragraph is the period during which administrative or judicial proceedings are pending regarding the alien's right to be admitted or remain in the United States.
>
> (3) Paragraph(1) and section 204(g) shall not apply with respect to a marriage if the alien establishes by clear and convincing evidence to the satisfaction of the [Secretary of Homeland Security] that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition under section 204(a) . . . with respect to the alien spouse or alien son or daughter. In accordance with the regulations, there shall be only one level of administrative appellate review for each alien under the previous sentence.

The regulation at 8 C.F.R. § 245.1(c)(9)(v) states, in pertinent part:

> *Evidence to establish eligibility for the bona fide marriage exemption.* Section 204(g) of the Act provides that certain visa petitions based upon marriages entered into during deportation, exclusion or related judicial proceedings may be approved only if the petitioner provides clear and convincing evidence that the marriage is bona fide . . . .

In her personal statement, the petitioner provides no information regarding her courtship or her intent at the time of her marriage. The petitioner states only that her citizen spouse "asked me to marr[y] him and we married on July 14, 2003." The affidavits submitted by the petitioner's acquaintances provide no further evidence regarding the petitioner's courtship or intent at the time of marrying her citizen spouse. Instead, the

statements focus mainly on the petitioner's claim of abuse and the petitioner's relationship with her citizen spouse *after* they were married.

The documentary evidence submitted by the petitioner to support her claim of a good faith marriage consists of the petitioner's marriage certificate, copies of photographs and cards, the petitioner's 2003 tax return, and evidence related to the petitioner's bank account. We first note that although the petitioner's marriage certificate documents that her marriage *legally* existed, it is not evidence that she entered into the marriage in good faith. Similarly, while the petitioner's photographs are evidence that the petitioner and her spouse engaged in a wedding ceremony, they do not establish that they were engaged in a bona fide marriage.

The petitioner's tax returns and bank information also do not clearly and convincingly establish the petitioner's good faith marriage. The March 16, 2004 letter from Webster Bank indicates that the petitioner opened an account in her name on March 11, 2004. On the Form I-360 the petitioner indicates that as of March 2004, she was no longer residing with her spouse. Although the record contains a bank letter and a blank check showing a joint account, the record does not contain any evidence that the petitioner and her spouse had joint access to and joint use of the account in question. The remaining piece of evidence, the petitioner's 2003 federal tax returns do indicate that the petitioner and her citizen spouse filed as married filing separately. However, it is noted that the petitioner's spouse's address is listed at 154 Brunswick Avenue, while the petitioner listed her address as a post office box.

The remaining evidence, the petitioner's appellate submission, which consists of the petitioner's 2004 tax returns, bank information, and affidavits, does not overcome the director's finding. The affidavits from the petitioner's acquaintances provide no details regarding the petitioner's courtship or intent at the time of her marriage. The affiants state only that they were "physically present" at the petitioner's marriage. Although the affiants claim that the petitioner's marriage was "bon[a]-fide and in good faith," they provide no insight as to the petitioner's feelings, emotional state, or intent at the time of her marriage. Similarly, although the petitioner's spouse claims in his letter on appeal that they "married because [they] loved one another," such a claim only indicates why the citizen spouse married the petitioner, not why the petitioner married her citizen spouse. Moreover, although the citizen spouse claims that he tried to enroll the petitioner on his Blue Cross health insurance and that they had a bank account together, no evidence has been submitted regarding the heath insurance, and no further evidence has been submitted to establish the petitioner and her spouse jointly used the bank account at Webster Bank. Further, as the petitioner's 2004 tax returns show the petitioner filed her returns as single and as they are filed after the date the petitioner claims to have stopped residing with her spouse, they provide no support for the petitioner's claim that she entered her marriage in good faith. Finally, although the petitioner submits a letter from Sears Credit Service, dated May 6, 2005, indicating that the petitioner's name has been removed from the account, the petitioner does not provide any further details regarding this account, such as whether she shared this account with her citizen spouse.

Accordingly, we concur with the director's findings that the evidence contained in the record is not sufficient to establish, by clear and convincing evidence, that the petitioner entered into her marriage in good faith. The

evidence submitted on appeal does not overcome this finding.[1] 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.

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 good faith marriage, the record suggests an additional issue that must also be addressed on remand. Specifically, the record as it is presently constituted contains both insufficient and conflicting evidence to support the petitioner's claim of abuse. In her personal statement, the petitioner claimed only that her citizen spouse was gay, asked her to pay all of the bills, and did not want to file immigration papers for her. The petitioner does not allege any physical abuse. Although the petitioner provided copies of an order of protection dated March 17, 2004, which was continued for six months on March 30, 2004, the petitioner failed to provide any details surrounding the incident or circumstances which caused the order of protection to be issued.

In the initial psychological assessment provided by the petitioner, [redacted] MSW, LCSW, indicates that the petitioner's spouse was "secretive," would "drink heavily," and demanded "sexual practices that the [petitioner] felt were 'bizarre' and embarrassing to her." We note that in her statement, the petitioner makes no mention of her spouse's heavy drinking or "bizarre" sexual practices. In fact, as it relates to sexual relations with her spouse, the petitioner's statement indicates that their "sex life decresed [sic]."

In the second assessment provided by Ms. [redacted] Ms. [redacted] states:

> This session started with the patient's stating that some of her previous narration of her relationship with her estranged husband . . . hadn't been completely accurate. She stated that she was "ashamed" and felt that this writer would have "thought that she is not very bright" if she told me the events surrounding her marriage and the week after their nuptials.

[1] It is noted that in most instances where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). In this case, however, as the petitioner was not afforded a proper opportunity to respond to the deficiencies in the record through the regulatory mandated NOID process and the case is being remanded to the director for reconsideration, a review of the petitioner's appellate submission was necessary to determine whether the petitioner's evidence overcame the director's ground for denial and could be sustained without remanding to the director for a determination.

> The patient proceeded to tell this writer that in reality [her spouse] had informed her of him being a homosexual a week after their marriage.

In addition to this change in the petitioner's previous statement to Ms. the second assessment indicates that the petitioner's spouse called her names and threatened her "almost in a daily basis." The petitioner further describes an incident in which her spouse threw a cup at her and hit her in the arm. Finally, on appeal, the statement from [redacted] indicates that he picked the petitioner up after her "husband beat her while in a drunken rage. He hit her with a pool cue."

The petitioner's claims that she was called names and that her spouse is a homosexual, are not sufficient to establish a claim of extreme cruelty in accordance with the regulation at 8 C.F.R. § 204.2(c)(1)(vi) which states:

> *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.

As it relates to the remaining claims contained in the psychological assessments and the affidavit submitted on appeal, which contradict the petitioner's own statement submitted in support of the petition, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In accordance with the above discussion, the decision of the director is withdrawn. The case must be remanded to the director for the purpose of the issuance of a new notice of intent to deny as well as a new final decision to both the applicant and counsel. 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.