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

B7

PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 23 2006

WAC 03 126 52416

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, 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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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)(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 Humberto Salas on July 17, 1986 in Mexico. The petitioner's spouse became a lawful permanent resident of the United States on October 11, 1990. On October 23, 1992, the petitioner's spouse filed a Form I-130 petition in the petitioner's behalf. The Form I-130 was approved on January 7, 1993. On February 14, 2002, the petitioner filed a Form I-485, Application to Adjust Status. The Form I-485 application was denied on October 17, 2002.

The petitioner filed the instant Form I-360 self-petition on March 21, 2003, 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 failed to submit any supporting evidence. Accordingly, on March 10, 2004, the director requested further evidence, to include evidence of the petitioner's spouse's lawful permanent resident status, a copy of the petitioner's marriage certificate, evidence that the petitioner resided with her spouse, evidence that the petitioner or her children

had been battered by or subjected to extreme cruelty by her spouse, evidence of the petitioner's good moral character, and evidence that the petitioner married her spouse in good faith.[1]

The petitioner responded to the director's request on April 26, 2004 and requested an additional 30 days in which to respond to the request. On June 1, 2004, the petitioner submitted copies of her spouse's Form I-551, a lease, her marriage certificate with translation, a police clearance, a print-out from the California Department of Motor Vehicles, five affidavits from acquaintances of the petitioner, and a statement from the petitioner.

After reviewing the evidence submitted by the petitioner, the director denied the petition on July 19, 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, that she is a person of good moral character, and that she entered into the marriage in good faith.

The petitioner files a timely appeal, dated August 19, 2005, with additional evidence to support her claim of battery and extreme cruelty.[2] 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.

With regard to the petitioner's claim that she resided with her spouse, the director noted that the affidavits submitted by the petitioner in support of the petition were identical in text and were not, therefore, "illustrative of each affiant's personal knowledge." The director also determined that the affidavits did not contain any specific information regarding the petitioner's claimed residence with her spouse. As it relates to the lease submitted by the petitioner, which covers the period from January 1999 to January 2000, the director noted that the lease was signed by the petitioner's spouse only. More importantly, the director noted the discrepancy between the dates contained on the lease and the petitioner's claim on the Form I-360 that she resided with her spouse from July 1986 until November 1996 and from January 2000 until January 2001. Given the lack of detail and firsthand knowledge in the petitioner's affidavits and the discrepancies noted in the lease and the information contained on the Form I-360, we concur with the finding that the record did not establish that the petitioner resided with her spouse.

On appeal, the petitioner fails to address the director's finding regarding whether she resided with her spouse.

---

[1] It is unclear why the director requested evidence of the petitioner's marriage certificate and her spouse's permanent resident status given the fact that copies of both of these documents were already contained in the record as they had been submitted in support of the Form I-130 submitted in the petitioner's behalf.

[2] The petitioner provides no explanation for her failure to submit such evidence at the time of filing or when requested to do so by the director in his request for evidence. In cases where 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 does not usually accept evidence offered for the first time on appeal. If the petitioner had wanted the submitted evidence to be considered, she should have submitted the documents in response to the director's request for evidence. *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 instance, however, because the petitioner was not provided with the notice required by regulation, we have reviewed the petitioner's appellate submission in order to determine whether such evidence overcomes the director's stated grounds for denial and could be sustained without remanding to the director for further action.

With regard to the petitioner's claim that she was battered by or subjected to extreme cruelty by her spouse, the director noted that in her statement, the petitioner claimed that she got help from the police, that her spouse was jailed, and that she obtained a restraining order against her spouse. The director then found that the record lacked the "relevant police records and court documentation" to corroborate her claims. While the director acknowledged the fact that the affidavits submitted in support of the petition did indicate that the petitioner was "ph[y]sically abused," the director again noted that because the affidavits contained identical wording, it was unclear "if each affiant has personal knowledge about [the petitioner's] situation and knew sufficient details about specific incidents of abuse or a pattern of abuse." Without any specificity or eyewitness accounts to the petitioner's claims of battery and extreme cruelty and without any corroborating evidence such as police reports or court documents, the petitioner's statement does not carry sufficient weight to establish that she has been battered by or subjected to extreme cruelty by her spouse.

On appeal, the petitioner submits evidence that her spouse was convicted of inflicting corporal injury on his spouse on January 10, 1997,[3] and that he was enrolled in a court mandated domestic violence program. While this evidence appears to establish the petitioner's claim of abuse, the petitioner submits additional documentation that calls into question whether the petitioner is still married to her spouse. Specifically, the petitioner submits evidence that on January 24, 2000, her spouse was arrested for misdemeanor battery against a former spouse or fiancée and subsequently convicted.[4] Although such evidence appears to sufficiently establish that the petitioner was battered by her spouse, it calls into question whether the petitioner has a qualifying marriage as the spouse of a lawful permanent resident of the United States. That the petitioner was referred to as a "former spouse" more than three years prior to the filing of the instant Form I-360 in which she claims to be married, is an issue that needs to be addressed on remand.[5]

With regard to the petitioner's claim of being a person of good moral character, the director noted the fact that in his request for evidence he specifically indicated that if the petitioner submitted a police clearance researched by name only, the petitioner was required to submit police clearances for all names used. In denying the petition, the director indicated that the petitioner had used at least eight different aliases and had submitted a police clearance based upon a name search for only one of the eight names that she has used.

No further evidence regarding the petitioner's good moral character has been submitted on appeal.

As it relates to the petitioner's claim that she entered into the marriage in good faith, the director noted that 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. The director also noted the fact that the petitioner had not submitted copies of her children's birth certificates as evidence to support her claim of a good faith marriage. The director again noted the affidavits submitted in support of the petition and stated that they were not sufficient to support the petitioner's claims. Finally, the director noted the lack of documentary evidence to establish a good faith marriage, despite the petitioner's claim that she has been in a good faith marriage for

[3] No [redacted] Municipal Court of Los Angeles, San Pedro Judicial District.
[4] No [redacted] Municipal Court of South Bay Judicial District, County of Los Angeles, State of California.
[5] Section 204(a)(1)(B)(ii)(II)(aa)(CC) of the Act indicates that at the time of filing a self-petitioner must have been a bona fide spouse of a lawful permanent resident "within the past 2 years" and must also demonstrate "a connection between the legal termination of the marriage with the past 2 years and battering or extreme cruelty by the lawful permanent resident spouse.

eleven years that the two children were born of said marriage. The petitioner's statement alone, without any documentary evidence to corroborate her claims, does not carry sufficient weight to establish that she entered into her marriage in good faith. No further evidence related to the petitioner's claim of a good faith marriage was submitted on appeal.

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.[6] 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, that she is a person of good moral character, 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.

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.[7] On remand, the director should also address the issue raised on appeal regarding whether the petitioner has a qualifying relationship as the spouse of a lawful permanent resident of the United States. 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.

---

[6] *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.]

[7] 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.