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

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

EAC 05 083 53115

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director (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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 United States citizen. The director denied the petition on December 19, 2005, finding that the evidence did not establish that the petitioner was battered by or subjected to extreme cruelty by his spouse and that he is a person of good moral character.

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 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.

According to the evidence contained in the record, the petitioner married [redacted] a United States citizen, on November 14, 2002 in Chicago, Illinois. The petitioner's spouse filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf on March 21, 2003. The petitioner concurrently filed a Form I-485, Application to Adjust Status, on that same date. The Form I-130 and the Form I-485 remain unadjudicated.

The petitioner filed the instant Form I-360 self-petition on January 31, 2005, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, his spouse during their marriage. On February 7, 2005, the director requested further evidence to establish the petitioner's prima facie eligibility.[1] The petitioner responded to the director's request on April 5, 2005. On

[1] The determination of prima facie eligibility is made for the purposes of 8 U.S.C. § 1641, as amended by section 501 of Public Law 104-208. A finding of prima facie eligibility does not relieve the petitioner of the burden of providing additional evidence in support of the petition, does not establish eligibility for the underlying petition, is not considered evidence in support of the petition, and is not construed to make a determination of the credibility or probative value of any evidence submitted along with that petition.

May 25, 2005, the director requested the petitioner to submit further evidence to establish that he was battered by or subjected to extreme cruelty by his spouse and that he is a person of good moral character. On August 1, 2005, the petitioner, through counsel requested an additional 60 days in which to respond to the request for evidence. The director granted the request for additional time on August 5, 2005. The petitioner submitted additional evidence on October 5, 2005.

On December 19, 2005, after reviewing the evidence contained in the record, the director denied the petition without the issuance of a Notice of Intent to Deny (NOID) in accordance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii),[2] finding that the petitioner failed to establish that he was battered by or subjected to extreme cruelty by his spouse and that he is a person of good moral character.

On appeal, the petitioner submits a letter and a police clearance from the City of Chicago, Department of Police. Upon review, while the petitioner has overcome the director's findings regarding the petitioner's good moral character, we concur with the director's determination regarding the petitioner's failure to establish his claim of abuse and find that the petitioner's appellate submission is not sufficient to overcome the director's decision.[3]

As constituted before the director, the evidence in the record related to the petitioner's claim of abuse consisted of an unsworn statement from the petitioner and a psychological evaluation. In his statement, the petitioner claims that his spouse was "irresponsible," that she lied about her use of prescription drugs, and that her son was a drug addict. The petitioner also claims that his spouse never tried to get a job, smoked, and preferred "outside food." Finally, the petitioner claims that he feared for his life because on one occasion his spouse stated that "most men are murdered in the United States while in sleep by women."

The psychological assessment, prepared and based upon statements made by the petitioner to [redacted] on September 5, 2005, after a single session, indicates that the petitioner's spouse was "untrustworthy," and told "numerous lies," and that the petitioner's spouse's son "became an increasingly intrusive barrier" which "soured" their marital relationship. The assessment then indicates that as the disagreements "became more pronounced," the petitioner's spouse would lock the petitioner out of the apartment, screamed "vile epithets," "threw objects," and pushed the petitioner out of bed.

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[2] 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.

[3] It is noted that in instances 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, he 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 NOID 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.

The claims made by the petitioner in his statement that his spouse smoked, was irresponsible and lied, that she liked carry-out foods, did not have a job, and that her son was an addict, are not sufficient to establish a claim of abuse as described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). Regarding the petitioner's claims about his spouse's son, the statute requires that the abuse be perpetrated by the citizen spouse. Therefore, the petitioner's statements describing his spouse's son's actions do not support his claim of abuse. While the petitioner also indicates that he lived in fear because of a single statement by his spouse, he does not provide sufficient details regarding this incident to establish why he believed this statement was directed at him and that it was made in order to threaten him.

Further, the claims made in the psychological assessment differ from those made by the petitioner in his written statement. Specifically, the petitioner's written statement does not contain any claim regarding verbal abuse or physical abuse. We note that even if the claims were similarly made, the record does not contain sufficient information about specific events or occurrences to make a finding of abuse. The general statement that the petitioner's spouse screamed epithets, threw objects and pushed the petitioner out of bed does not provide adequate details and fails to describe specific incidents to support the claim that the petitioner was verbally and physically threatened or abused.

Based upon the above discussion, we concur with the finding of the director that at the time of his decision, the record was not sufficient to establish that the petitioner had been battered or subjected to abuse by his spouse. The evidence did not demonstrate that the petitioner was threatened, forcefully detained, psychologically or sexually abused or exploited or that his spouse's actions were part of an overall pattern of violence.

In the letter submitted by the petitioner on appeal, the petitioner reiterates his claims that the petitioner's spouse's son is a drug addict who caused problems in the marriage. As previously noted, these claims are not sufficient to establish that the claimed abuse was caused by the petitioner's spouse. The petitioner also describes the incident he claims precipitated his leaving the relationship which began when his spouse wanted a cat and changed her mind. The petitioner claims that during this incident his spouse said the "F-word" to him, that she pushed him onto the floor, threw the cell phone out the window, and spit in his face. The petitioner then claims that his spouse came into the room with a knife and threw the knife "on" him. Ultimately, the petitioner states that he "escaped" from the room and never tried to go back to the apartment again. The petitioner provides no explanation for his failure to describe this incident in his previous statement or during his assessment with Dr. [redacted] Given the absence of a description or claim related to this particular incident previously, we find the claim on appeal lacks credibility. 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).

As discussed above, we concur with the determination of the director that the petitioner has failed to establish that he was battered by or subjected to extreme cruelty by his citizen spouse. He has failed to overcome that determination on appeal. However, despite our support of the director's findings, the director's decision cannot stand because of her failure to issue a NOID to the petitioner prior the issuance of the denial. Accordingly, 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.