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: MAR 04 2008

EAC 04 114 53369

IN RE: Petitioner: [redacted]

PETITION: Petition for Immigrant Abused 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.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an immigrant pursuant to section 204(a)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien battered or subjected to extreme cruelty by a United States citizen.

The director denied the petition, finding that as the petitioner failed to respond to the director's Notice of Intent to Deny (NOID), he was unable to establish his eligibility.

On appeal, the petitioner, through counsel, submits a brief with additional evidence.

Section 204(a)(1)(A)(iii) of the Act provides that an alien who is the spouse of a United States citizen may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the United States citizen spouse in good faith and that during the marriage, the alien or a child of the alien was battered or subjected to extreme cruelty perpetrated by the alien's spouse. In addition, the alien must show that he or she is eligible to be classified as an immediate relative under section 201(b)(2)(A)(i) of the Act, resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(A)(iii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II).

An alien who has divorced a United States citizen may still self-petition under this provision of the Act if the alien demonstrates "a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse." Section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc).

Section 204(a)(1)(J) of the Act states, in pertinent part:

> In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) or clause (ii) or (iii) of subparagraph (B), or in making determinations under subparagraphs (C) and (D), the [Secretary of Homeland Security] shall consider any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the [Secretary of Homeland Security].

The eligibility requirements are further explicated in the regulation at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part:

> *(vi) 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, including rape, molestation, incest (if the victim is a minor), or forced prostitution 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 . . . spouse, must have been perpetrated against the self-petitioner or the self-petitioner's child and must have taken place during the self-petitioner's marriage to the abuser.

The evidentiary standard and guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are further explicated in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

> Evidence for a spousal self-petition –
>
> (i) *General.* Self-petitioners are encouraged to submit primary evidence whenever possible. The Service will consider, however, any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service.
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> * * *
>
> (iv) *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 abuse 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 record provides the following pertinent facts and procedural history of this case. The petitioner is a native and citizen of Trinidad and Tobago who entered the United States on July 13, 1987 as a nonimmigrant visitor (B-2) with permission to remain in the United States until July 11, 1988. On August 23, 1998, the petitioner married K-W-[1], a United States citizen in Massachusetts. K-W- filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf on December 23, 1998. The petitioner concurrently filed a Form I-485 on that same date. K-W- withdrew the Form I-130 petition on July 2, 2002 and the Form I-485 was denied accordingly on October 15, 2002. On November 19, 2002, the Service issued a Notice to Appear to the petitioner charging him as removable under section 237(a)(1)(B) of the Act for having remained in the United States beyond his period of authorized stay. He remains in proceedings and his next hearing is scheduled for March 25, 2008. The petitioner and

[1] Name withheld to protect individual's identity.

his former spouse were divorced on April 25, 2003.[2] The petitioner filed the instant petition on March 8, 2004.

On February 3, 2005, the director issued a Notice of Intent to Deny (NOID) to the petitioner's former counsel of record, [redacted]s, notifying the petitioner of the deficiencies in the record. The director noted evidence in the record that reflected the petitioner's former spouse had filed an Order of Protection against the petitioner and had been granted a divorce based upon the claim that the petitioner had been "cruel and abusive" to his former spouse. Therefore, in addition to requesting further evidence to establish his claim of abuse, the director requested that the petitioner submit "[all] of the court documentation regarding your divorce" and "legible copies of the restraining order . . . ." On April 11, 2005, the director reissued the NOID to the petitioner's address of record. The petitioner failed to respond to the NOID and the director denied the petition on September 14, 2005. The petitioner, through counsel filed a timely appeal. On appeal, counsel claims that the petitioner did not receive a copy of the director's NOID or final decision and submits additional evidence. As will be discussed, we are not persuaded by counsel's statements on appeal and will not consider the additional evidence submitted on appeal.

The petitioner's Form I-360 was prepared by [redacted], an attorney who had submitted a Form G-28, Notice of Entry of Appearance as Attorney or Representative, indicating her representation of the petitioner. As it relates to the petitioner's address, Part 1 of the Form I-360 contains the following instructions:

> If you are a self-petitioning spouse or child and do not want INS to send notices about this petition to your home, you may show an alternate mailing address here.

The petitioner's address is listed as [redacted], Chicago, Illinois 60660.

On March 4, 2005, [redacted] submitted a letter indicating her withdrawal as the petitioner's representative. In her letter, [redacted] indicated her receipt of the director's initial NOID and further stated:

> On February 18, 2005, counsel met with [the petitioner] to discuss the Notice. Counsel determined that [the petitioner] was unwilling to cooperate in gathering material documentary evidence, and that a conflict of interest existed between counsel and Respondent.
>
> Counsel spoke with [the petitioner] about [counsel's] intent to withdraw representation, and [the petitioner] agreed that [counsel] should withdraw.

Counsel also reaffirmed the petitioner's address as [redacted] After receiving

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[2] Docket No. [redacted] Commonwealth of Massachusetts, Worcester Division, Trial Court, Probate and Family Court Department.

counsel's withdrawal letter, the director reissued the NOID to the petitioner's address of record, as indicated on the petitioner's Form I-360, counsel's G-28, signed by the petitioner, and in counsel's withdrawal letter. A contemporaneous notation was made in Citizenship and Immigration Service's (CIS) computer database acknowledging the change from counsel's address of record to the petitioner's address of record and the reissuance of the NOID. The denial was also sent to the petitioner at his address of record. We note that although the record contains a Form EOIR-33/IC, Alien's Change of Address Form/Immigration Court, submitted by the petitioner to the Immigration Court on September 30, 2005, the record contains no notification to the director of the petitioner's change of address prior to the issuance of the director's NOID or final decision. Similarly, current counsel did not enter his appearance until October 13, 2005, when he filed the appeal on the petitioner's behalf concurrently with his Form G-28. Although counsel indicates on the Form I-290B that the petitioner did not receive a copy of the NOID or the decision, he does not explain how he became aware of the final decision or how he was able to file his appeal in a timely manner. Moreover, former counsel's statements clearly indicate that the petitioner was aware of the NOID and, in fact, discussed the NOID with former counsel. It is also noted that neither decision was returned to CIS as undeliverable.

Based upon the above discussion, we find the record does not support counsel's contention that the petitioner did not receive a copy of the NOID. Moreover, even if the record contained no evidence that the petitioner actually received the NOID or the final decision, the petitioner's contention of non-receipt would be of no consequence given that the director issued both the NOID and the final decision to the petitioner's address of record. *See* 8 C.F.R. § 103.5a(a)(1) (Service of notices and decisions consists of mailing copies to a person's last known address). The director's reliance on the petitioner's unrevoked address of record furnished by the petitioner and his former counsel when mailing the NOID and final decision was proper. *See e.g., Tobeth-Tangang v. Gonzales,* 440 F.3d 537, 540 (1st Cir. 2006); *Radkov v. Ashcroft,* 375 F.3d 96, 99 (1st Cir. 2004).

As the record demonstrates that the petitioner was properly notified of the deficiencies in the record and failed to respond,[3] we will not accept the evidence submitted by the petitioner on appeal. In instances such as this one, where a petitioner has been put on notice of deficiencies 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, 766 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). The petitioner has provided no credible explanation and documentation of why the evidence submitted on appeal was not available for submission below. Accordingly, the AAO need not and will not consider the evidence submitted for the first time on appeal.

Accordingly, we concur with the director's determinations, based on the record before him. The petitioner failed to establish that his spouse subjected him or his child to battery or extreme cruelty during their marriage, that he had a qualifying relationship as the spouse of a United States citizen

[3] In fact, as indicated by former counsel, the petitioner was "unwilling to cooperate in gathering material documentary evidence" and to submit further evidence in response to the NOID.

because he failed to establish that his divorce was connected to his wife's battery or extreme cruelty, and that he is eligible for immediate relative classification based on their former marriage. The petitioner is consequently ineligible for immigration classification under section 204(a)(1)(A)(iii) of the Act and his petition must be denied.

The petition will be denied for the three reasons cited above, with each considered an independent and alternative basis for denial. 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 appeal is dismissed.