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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

Bq.

FILE:

[REDACTED] Office: VERMONT SERVICE CENTER

Date: SEP 23 2010

[REDACTED]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you.

A handwritten signature in black ink, appearing to read "Perry Khew".
Perry Khew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision; however, because the petition is not approvable, it will be remanded for further action and consideration.

The petitioner seeks immigrant classification 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 on August 12, 2005, determining that the petitioner had not established: that he had resided with the claimed abusive United States citizen spouse; that he had been subjected to battery or extreme cruelty by his spouse; that he is a person of good moral character; and that he entered into the marriage in good faith.

On appeal, the petitioner in this matter timely submits a Form I-290B, Notice of Appeal, and indicates that he will not be submitting a separate brief or additional evidence. The petitioner's statement on the Form I-290B reads:

The Service Center erred in denying my self petition as a battered spouse. I provided sufficient documentary evidence that was enough to warrant an approval. The Service Center erred in not according enough weight to the documentary evidence provided. The Service [sic] erred in not giving any weight to the evaluation that was prepared by the psychotherapist merely because the therapist misspelled my name and it was based on only three interviews. A totality of the documentary evidence will establish that I am a battered spouse. The Service [sic] failed to consider that a lot of documentation was not availbale [sic] because they were taken by my wife.

We concur with the director's articulate determination that the petitioner failed to establish: that he had resided with the claimed abusive United States citizen spouse; that he had been subjected to battery or extreme cruelty by his spouse; and that he entered into the marriage in good faith. The AAO observes that the director pointed out numerous inconsistencies that the petitioner failed to address on appeal. In addition, the AAO finds that the director specifically considered the reports of the psychotherapist and, although noting that the therapist made errors in her report, found that the therapist had based her report on the petitioner's inconsistent statements and had not identified the testing methods used in preparing her evaluation. Despite the director's thorough and in-depth request for further evidence (RFE) on May 12, 2005 and the petitioner's inadequate response, this matter must be remanded because the director denied the petition without first issuing a Notice of Intent to Deny (NOID) the petition pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii), in existence when the instant petition was filed on September 22, 2004.

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 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).

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 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 explained in the regulation at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part:

(v) *Residence.* . . . The self-petitioner is not required to be living with the abuser when the petition is filed, but he or she must have resided with the abuser . . . in the past.

(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 . . . and must have taken place during the self-petitioner's marriage to the abuser.

(vii) *Good moral character.* A self-petitioner will be found to lack good moral character if he or she is a person described in section 101(f) of the Act. Extenuating circumstances may be taken into account if the person has not been convicted of an offense or offenses but admits to the commission of an act or acts that could show a lack of good moral character under section 101(f) of the Act. A person who was subjected to abuse in the form of forced prostitution or who can establish that he or she was forced to engage in other behavior that could render the person excludable under section 212(a) of the Act would not be precluded from being found to be a person of good moral character, provided the person has not been convicted for the commission of the offense or offenses in a court of law. A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating

circumstances, if he or she willfully failed or refused to support dependents; or committed unlawful acts that adversely reflect upon his or her moral character, or was convicted or imprisoned for such acts, although the acts do not require an automatic finding of lack of good moral character. A self-petitioner's claim of good moral character will be evaluated on a case-by-case basis, taking into account the provisions of section 101(f) of the Act and the standards of the average citizen in the community.

If the results of record checks conducted prior to the issuance of an immigrant visa or approval of an application for adjustment of status disclose that the self-petitioner is no longer a person of good moral character or that he or she has not been a person of good moral character in the past, a pending self-petition will be denied or the approval of a self-petition will be revoked.

* * *

(ix) *Good faith marriage.* A spousal self-petition cannot be approved if the self-petitioner entered into the marriage to the abuser for the primary purpose of circumventing the immigration laws. A self-petition will not be denied, however, solely because the spouses are not living together and the marriage is no longer viable.

The evidentiary guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are further explained 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.

* * *

(iii) *Residence.* One or more documents may be submitted showing that the self-petitioner and the abuser have resided together Employment records, utility receipts, school records, hospital or medical records, birth certificates of children . . . , deeds, mortgages, rental records, insurance policies, affidavits or any other type of relevant credible evidence of residency may be submitted.

(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.

(v) *Good moral character.* Primary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit. The affidavit should be accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. Self-petitioners who lived outside the United States during this time should submit a police clearance, criminal background check, or similar report issued by the appropriate authority in each foreign country in which he or she resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. If police clearances, criminal background checks, or similar reports are not available for some or all locations, the self-petitioner may include an explanation and submit other evidence with his or her affidavit. The Service will consider other credible evidence of good moral character, such as affidavits from responsible persons who can knowledgeably attest to the self-petitioner's good moral character.

* * *

(vii) *Good faith marriage.* Evidence of good faith at the time of marriage may include, but is not limited to, proof that one spouse has been listed as the other's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. Other types of readily available evidence might include the birth certificates of children born to the abuser and the spouse; police, medical, or court documents providing information about the relationship; and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered.

The record in this matter provides the following pertinent facts and procedural history. The petitioner is a native and citizen of the Dominican Republic. He initially entered the United States in or about November 1994 without inspection. On October 22, 1996, the petitioner married S-G-¹, the claimed abusive United States citizen spouse. The petitioner's spouse filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf and the petitioner concurrently filed a Form I-485, Application to Register Permanent Residence or Adjust Status, all on or about October 1996. The Form I-130 was denied on October 21, 1999 for failure of S-G- and the petitioner to appear for a scheduled interview. The petitioner's Form I-485 was denied based on the denial of the Form I-130. The petitioner filed the

¹ Name withheld to protect the individual's identity.

Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant, on September 22, 2004.²

The AAO first observes that the petitioner included a good conduct certificate certified by the City of New York Police Department indicating that the petitioner did not have a criminal history based upon a review of the New York Police Department records and the petitioner's fingerprints. The good conduct certificate is dated June 25, 2004. The director failed to reference this certificate in his August 12, 2005 decision. The AAO specifically withdraws the director's determination that the petitioner had not submitted evidence that he is a person of good moral character. The AAO observes, however, on remand, the director may note in the NOI that the length of time that has passed between the August 12, 2005 good conduct certificate and the date of the NOI requires a finding that the petitioner is not a person of good moral character until up-to-date police clearances are submitted or an explanation of why such clearances are unavailable is provided.

As observed above, the AAO concurs with the director's discussion and determination that the petitioner has failed to establish that he resided with the claimed abusive spouse, that he was subjected to battery or extreme cruelty by his United States citizen spouse, and that he entered into the marriage in good faith. As this matter will be remanded and the petitioner did not provide a brief or other evidence on appeal specifically identifying any erroneous conclusion of law or statement of fact, the AAO finds no reason to repeat the director's findings and determinations on each of these eligibility elements. As observed above, despite the petitioner's ineligibility based on the present record, this matter must be remanded to the director for issuance of a NOI in compliance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii) as in effect when the petition was filed. On remand, the director should address all grounds for the intended denial of the petition as cited in the foregoing discussion.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.

² The petitioner filed a subsequent Form I-360 [REDACTED] on or about March 24, 2008 and concurrently filed a Form I-485 [REDACTED] based on the Form I-360 petition. Both the subsequently filed Form I-360 and Form I-485 remain pending.