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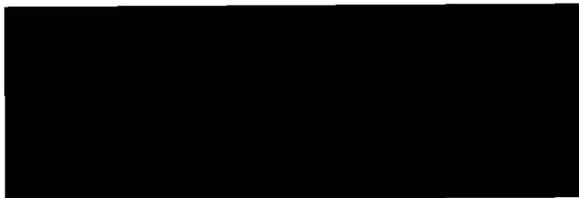
Office: VERMONT SERVICE CENTER

Date: **APR 11 2006**

EAC 05 198 52410

IN RE:

Petitioner:



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:

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action.

The petitioner is a native and citizen of Colombia who is seeking classification as a special 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 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 wed his United States citizen spouse, [REDACTED] on January 24, 1997, in Queens, New York. The petitioner's spouse filed a Form I-130 on the petitioner's behalf on July 1, 1997. The petitioner concurrently filed a Form I-485, Application to Adjust Status, on that same date. The Form I-485 was denied on April 27, 2001.

The record further indicates that the petitioner and his spouse were divorced on March 18, 2002. The petitioner filed a Form I-360 on November 20, 2003, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, his citizen spouse during their marriage. The director denied the petition on January 31, 2005, finding that the petitioner failed to establish that he was battered by or subjected to extreme cruelty by his citizen spouse.

The petitioner filed the instant Form I-360 petition on July 5, 2005. The director denied the petition on October 3, 2005, determining that because the petitioner was divorced from his citizen spouse for more than two years prior to the filing of the petition, he did not have a qualifying relationship within two years of the filing of the petition.<sup>1</sup>

On appeal, the petitioner does not dispute the fact that his divorce from his citizen spouse occurred more than two years prior to the time of the filing of the instant petition. Instead, the petitioner refers to his previously filed Form I-360 and argues that the director "failed to incorporate the documents provided in the first I-360 case . . . which [was] within the legally required period of two (2) years from the dissolution of the marriage."

We are not persuaded by the petitioner's statement. Although the petitioner correctly indicates that a Form I-360 was filed within in the two-year period following his divorce, that petition was denied by the Service. The Service's decision on that petition became final when the petitioner failed to file a motion to reopen or reconsider or to appeal the director's decision. Accordingly, that decision is not under review in this proceeding.

Turning to the director's October 3, 2005 decision, the decision at issue on appeal, upon review, we concur with the findings of the director that the petitioner has failed to establish that he had a qualifying relationship within the two-year period prior to filing his petition.

However, although the petitioner's appeal does not overcome his statutory ineligibility, we find the case must be remanded to the director for further consideration. The regulation at 8 C.F.R. § 204.2(c)(3)(ii) requires the director to issue a Notice of Intent to Deny (NOID) in all cases where "the preliminary decision on a properly filed self-petition is adverse to the self-petitioner . . ." The regulation does not distinguish between cases where there is statutory ineligibility and those cases in which the evidence simply appears to be deficient. Accordingly, the case must be remanded to the director for issuance of an NOID pursuant to the regulation.

Despite the fact that the director's decision rested on the single issue discussed above, we find two additional issues that should be addressed on remand. First, section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act indicates that a petitioner who is no longer married to his or her spouse at the time of filing but who was a bona fide spouse of a United States citizen within the past 2 years, must also demonstrate "a connection between the legal termination

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<sup>1</sup> Section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act indicates that a self-petitioner must have been a bona fide spouse of a United States citizen "within the past 2 years" and must also demonstrate "a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the citizen spouse."

of the marriage within the past 2 years and battering or extreme cruelty by the citizen spouse.” The record contains no evidence to establish a connection between the petitioner’s divorce and the purported abuse.<sup>2</sup>

Second, the record contains both insufficient and contradictory evidence regarding the petitioner’s claim of abuse. The petitioner’s original statement, which was submitted in support of his first Form I-360, consisted of the claim that his spouse was unfaithful, that she contracted a sexually transmitted disease (STD), and gave the petitioner a STD. The petitioner does not submit any additional statement in support of the instant petition. The fact that the petitioner’s spouse had an extramarital affair is not sufficient to support a claim of battery or extreme cruelty. Moreover, as it relates to the petitioner’s claim regarding the STD, the record contains no evidence that the petitioner’s spouse contracted a STD or that the petitioner was ever tested or treated for a STD himself.

The affidavits submitted in the petitioner’s behalf by his family and friends make various claims regarding physical and verbal abuse perpetrated against the petitioner by his spouse. It is important to note, however, that in his statement, the petitioner makes no claim of either physical or verbal abuse. It is also important to note that the psychological report makes no reference to any of the above stated claims regarding the petitioner’s spouse’s purported affair, STD, or physical or verbal abuse. 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).

Accordingly, the case must be remanded for issuance of a NOID pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii), which will give the petitioner a final opportunity to establish his eligibility.

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.

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<sup>2</sup> It is noted that it was the petitioner’s spouse who sought the divorce, not the petitioner. However, the record does not contain a copy of the complaint for divorce in order to determine the petitioner’s spouse’s actual grounds for filing for divorce.