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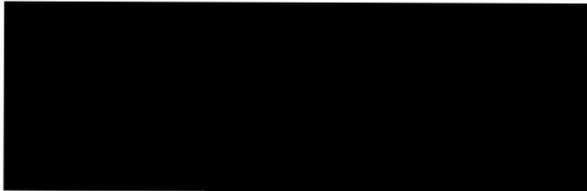
U.S. Department of Homeland Security  
20 Mass Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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Services

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FILE: [REDACTED]  
EAC 05 006 51886

Office: VERMONT SERVICE CENTER

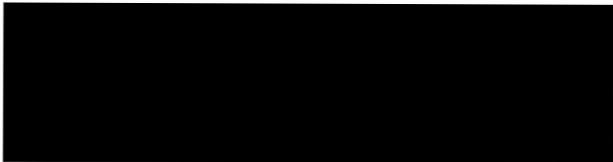
Date: AUG 09 2006

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:



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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 November 21, 2005, finding that the petitioner failed to establish that he was battered by or subjected to extreme cruelty by his spouse.

The petitioner filed a timely appeal on December 9, 2005.

Section 204(a)(1)(A)(iii) of the Act provides, in pertinent part, that an alien who is the spouse of a United States citizen, 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.

The record reflects that petitioner married United States citizen [REDACTED] on May 30, 2003 in Newark, New Jersey. The petitioner's spouse filed a Form I-130 petition on the petitioner's behalf on September 26, 2003. The Form I-130 was approved on December 12, 2003. The petitioner filed a Form I-485, Application to Adjust Status, on January 22, 2004. The Form I-485 remains adjudicated.

The petitioner filed his Form I-360 self-petition on October 6, 2004, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, his United States citizen spouse during their marriage. On June 16, 2005, the director requested, inter alia, additional evidence to establish that the petitioner was battered by or subjected to extreme cruelty by his spouse. The petitioner responded to the director's request on August 15, 2005. On November 21, 2005, after reviewing the evidence contained in the record, the director denied the petition without the issuance of a

notice of intent to deny in accordance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii),<sup>1</sup> finding that the petitioner had failed to establish that he was battered by or subjected to extreme cruelty by his spouse.

On appeal, the petitioner submits evidence related to his divorce from his citizen spouse as well as additional evidence related to his claim of abuse. The petitioner does not provide any explanation or excuse for his failure to submit evidence related to his claim of abuse when requested to by the director. 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 notice of intent to deny as 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. As will be discussed, the petitioner's appellate submission does not overcome the director's findings. Therefore, the case must be remanded for further review.

As it relates to the petitioner's claim of abuse, the record contains a personal statement from the petitioner and affidavits from the petitioner's friends. In his statement the petitioner claims that his spouse was unfaithful and gave him an infection. The petitioner also describes one incident where he offered to buy his step-daughter a used car rather than a new car and his spouse "got pissed off and started screaming yelling [sic]," "throwing objects," and calling the petitioner names. Finally, the petitioner claimed that his spouse "put like a machete in our room and threatened to kill me if I bothered her."

The petitioner also submits affidavits from six acquaintances to support his claim of abuse. The first affidavit, submitted by the petitioner's neighbors, [REDACTED] indicates that the affiants "would hear screams, and insults" and threats against the petitioner. The second affidavit, from [REDACTED] indicates that the petitioner's spouse "simply didn't care at one point or another," that she "didn't care the fact that it was him the one that took care of her, the daughter and her son." The third affidavit, submitted by [REDACTED] states that the petitioner's spouse was unfaithful, "treat[ed] him wrong," and "used to threaten him of deportation." The fourth affidavit, from [REDACTED] indicates that the petitioner's spouse cheated on him and was "mean, rude, disrespectful and even physically harming to him." The remaining affidavits, from [REDACTED] while discussing the petitioner's relationship, do not contain any reference related to the petitioner's claim of battery or extreme cruelty.

We concur with the finding of the director that this evidence is not sufficient to establish a claim of extreme cruelty. The petitioner's claim that his spouse was unfaithful is not sufficient to support a claim of battery or extreme cruelty as described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). Further, the petitioner's description

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<sup>1</sup> 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.

of one incident in which his spouse became “pissed off,” does 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.

The affidavits submitted in support of the petitioner provide no further evidence to establish the petitioner’s claims. Rather, the statements contain general descriptions regarding the petitioner’s spouse’s treatment of the petitioner, such as that the petitioner’s spouse treated him “wrong,” was “mean” and “rude,” and “simply didn’t care.” While some of the affiants claim that the petitioner was insulted, threatened and physically harmed, they provide no specific details or descriptions of the alleged incidents. It is noted that petitioner’s claim that his spouse kept a machete in their room is not discussed in any of the affidavits submitted on the petitioner’s behalf.

On appeal, the petitioner submits a new personal statement, photographs, and additional affidavits. In his personal statement the petitioner describes additional incidents of verbal and physical abuse that were not previously claimed. The petitioner also submits photographs of alleged injuries which resulted from being stuck with a nail file, stabbed with scissors, and cut with a machete. The additional claims made by the petitioner on appeal cause us to question the veracity of his statements and whether his claims on appeal might be exaggerated. The same is true for the affidavits submitted on appeal from [REDACTED]. While their previous statement indicated that they only heard incidents between the petitioner and his spouse, on appeal they now claim that they were actual eyewitnesses to an incident in which the petitioner was hit in the head with a “lock wheel.” This incident was not described by the petitioner or any of his affiants previously. 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). Although the petitioner submits a third affidavit on appeal which also describes the “lock wheel” incident, because we question the fact that this incident was not previously mentioned, we find that the statements made on appeal lack credibility and do not carry sufficient weight to establish that the petitioner was battered by or subjected to extreme cruelty. Pursuant to the regulation at 8 C.F.R. § 204.2(2)(i), the determination of what evidence is credible *and the weight to be given that evidence* shall be within the sole discretion of the Service.

The petitioner also submits copies of documents related to his divorce, to include a copy of his “Dual Judgment of Divorce” and the “Answer and Counterclaim” as evidence that his spouse verbally abused him. We note that although the petitioner’s “Answer and Counterclaim” indicates that the petitioner’s spouse “refused to communicate with the petitioner,” that she “regularly stayed out late,” “refused to engage in marital relations,” and has been “verbally abusive,” the petitioner failed to provide the complaint for divorce which would include his spouse’s allegations against him for divorce. Regardless, we note that in the petitioner’s “Dual Judgment of Divorce,” the judge made no affirmative finding regarding the petitioner’s counterclaims against his spouse.

Based upon the above discussion we concur with the findings of the director that the record is insufficient to establish that the petitioner was battered by or subjected to extreme cruelty by his spouse. The findings have not been overcome on appeal. 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 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 notice of intent to deny 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.