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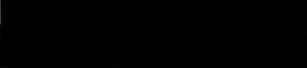
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FILE:



Office: VERMONT SERVICE CENTER

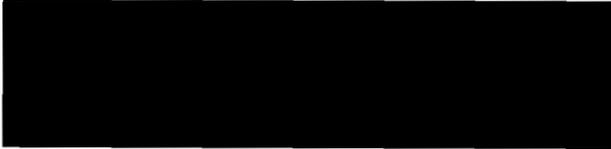
Date:

DEC 13 2006

EAC 05 163 52853

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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien battered or subjected to extreme cruelty by her United States citizen spouse.

The director denied the petition noting that the petitioner had failed to respond to the director's request for evidence and finding that the record did not contain sufficient evidence to establish the petitioner's eligibility.

The petitioner, through counsel, timely appealed.

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 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 explicated 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 . . . , must have been perpetrated against the self-petitioner . . . and must have taken place during the self-petitioner's marriage to the abuser.

\* \* \*

(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 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.

\* \* \*

(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 petitioner in this case is a native and citizen of India. The record reflects that on June 4, 2003 the petitioner married K-S-,\* a United States citizen, in India. The petitioner entered the United States on June 16, 2004 as a K-3 nonimmigrant.<sup>1</sup> On May 3, 2005, the petitioner filed the instant Form I-360 with supporting documentation. The director subsequently issued a Request for Evidence (RFE) for further evidence regarding the petitioner's claim of a joint residence with her spouse, battery and/or extreme cruelty inflicted upon the petitioner by her husband, the petitioner's good faith entry into her marriage, and the petitioner's good moral character. The petitioner failed to respond to the director's request for evidence and the director denied the petition on February 13, 2006, finding that the petitioner failed to establish her eligibility.

On appeal, the petitioner resubmits copies of the documents submitted at the time of filing. While the petitioner also submitted evidence described as "articles on abuse of women in India," the petitioner did not submit any further evidence related to the director's previous request for additional evidence. Upon review, we concur with the director's determination that the present record fails to establish the petitioner's eligibility. Specifically, the petitioner has failed to establish that she resided with her spouse, that she entered into the marriage in good faith, that she was battered by or subjected to extreme cruelty by her spouse, and that she is a person of good moral character. Nonetheless, the petition will be remanded because the director denied the petition without first issuing a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii).<sup>2</sup>

#### *Joint Residence*

On the Form I-360, the petitioner indicates that she resided with her spouse from June 2004 until August 2004 and that they last resided together at [REDACTED]. The record, however, contains no documentary evidence such as rental or mortgage statements, financial or tax

\* Name withheld to protect individual's identity.

<sup>1</sup> The record contains a Form I-129 and a Form I-130. The Form I-130 was initially approved on January 22, 2004 but was subsequently revoked on June 29, 2005. The Form I-129 was approved by the Service on March 18, 2004.

<sup>2</sup> We also note that the director's decision failed to provide a discussion of the evidence contained in the record and an analysis of why that evidence was not sufficient to support eligibility. See 8 C.F.R. § 204.1(h).

documents, utility bills, or other correspondence to establish that the petitioner and her spouse resided together as claimed. The record also lacks a statement by the petitioner which would provide probative details regarding this claimed joint residence. Although she is not required to do so, the petitioner does not explain why such evidence does not exist or is unobtainable. See 8 C.F.R. §§ 204.1(f)(1), 204.2(c)(2)(i). Accordingly, the petitioner has failed to establish that she petitioner resided with her husband, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

#### *Battery or Extreme Cruelty*

To establish her claim of abuse, the petitioner submitted a police report and a temporary restraining order. The police report does not describe any incident of abuse but rather documents the police's assistance in allowing the petitioner to retrieve her belongings. The petitioner provides no evidence that the temporary order of protection was extended or became final. Further, the petitioner provides no statement describing the alleged abuse perpetrated by her spouse against her. Without a statement from the petitioner describing specific incidents of abuse or other documentation, the petitioner has failed to establish that she was battered by or subjected to extreme cruelty by her spouse.

#### *Good Moral Character*

The regulation at 8 C.F.R. § 204.2(c)(i) indicates that primary evidence of the petitioner's good moral character is *an affidavit from the petitioner accompanied by a police clearance* from each place the petitioner has lived for at least six months during the 3-year period immediately preceding the filing of the self-petition. The petitioner has failed to submit her own affidavit addressing her good moral character and has not submitted police clearances regarding her good moral character from India<sup>3</sup>, New York and New Jersey. Accordingly, the petitioner has failed to establish that she is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

#### *Entry into the Marriage in Good Faith*

As evidence to establish that she entered into the marriage in good faith the petitioner submitted a copy of her marriage certificate, a receipt for the rental of a hall in India for their marriage ceremony, a copy of the petitioner's boarding pass for a flight to Dallas/Ft.Worth, and affidavits from the petitioner, her family, and acquaintances who were present at the time of the petitioner's marriage. This evidence is not sufficient to establish the petitioner's intent at the time of her marriage. The record contains no statement from the petitioner or any other witness describing the petitioner's relationship with her spouse, how they met, their courtship or any other details of their life together. Further, the record contains no documentary evidence of joint assets and liabilities which would establish that the petitioner intended to establish a life with her spouse at the time they entered into the marriage. Accordingly, the petitioner has failed to establish the petitioner's good faith entry into marriage with her husband, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Despite the above discussion and our concurrence with the director's findings, the director's decision cannot stand because of her failure to issue a notice of intent to deny to the petitioner prior the issuance of the denial.

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<sup>3</sup> The Department of State's reciprocity schedule indicates that Indian passport holders may apply obtain police clearances from their local embassy or consulate confirming they have no criminal record. See <http://www.travel.state.gov/visa/reciprocity/Country%20Folder/I/India.htm> (October 19, 2006).

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.