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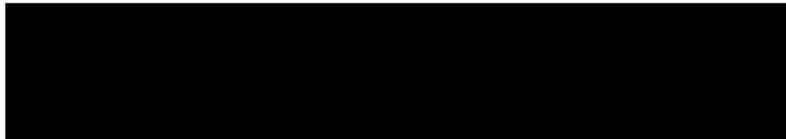
EAC 05 032 53113

Office: VERMONT SERVICE CENTER

Date: JUN 07 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 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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 September 29, 2005, finding that the petitioner failed to establish that he was battered by or subjected to extreme cruelty by his spouse and that he entered into his marriage in good faith.

The petitioner, through counsel, filed a timely appeal, dated October 24, 2005, with a brief.

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 June 23, 2003, in New Jersey. The petitioner's spouse filed a Form I-130 petition on the petitioner's behalf on September 3, 2003. The petitioner filed a Form I-485, Application for Adjustment of Status, on that same date. The petitioner was issued a Notice to Appear and placed in deportation proceedings on October 3, 2002. The proceedings were terminated by an immigration judge on November 4, 2003, in order to allow the petitioner's Form I-130 and Form I-485 to be adjudicated.¹ Both the Form I-130 and the Form I-485 remain unadjudicated.

The petitioner filed the instant Form I-360 self-petition on November 12, 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.

¹ The petitioner signed the immigration judge's order and agreed to waive his right to contest a motion to reopen the deportation proceedings in the event that the Form I-130 and Form I-485 are denied.

To support his eligibility, with his initial submission the petitioner submitted a personal statement, a psychological evaluation, his birth certificate with translation, his marriage certificate and divorce decree for his previous marriage, letters of good conduct from police departments in New Jersey, and documents related to the petitioner's spouse's arrests, his spouse's birth certificate, identification card, social security card, and divorce decree. Additionally, the petitioner submitted a copy of a Visa credit card in his spouse's name, one page of a lease, bills from PSEG and Cablevision, statements and letters from Provident Bank, and various other pieces of mail including collection letters.

The director found that the petitioner's initial submission was not sufficient to establish his eligibility and on April 20, 2005, requested the petitioner to submit further evidence to establish that he was battered by or subjected to extreme cruelty by his spouse and that he entered into the marriage in good faith.

The petitioner responded to the director's request on June 10, 2005 and submitted a second personal statement and additional copies of documents previously submitted including the petitioner's psychological assessment, his lease, and his spouse's arrest documentation, identification card and social security card. Additionally, the petitioner submitted two affidavits from acquaintances, copies of photographs, the petitioner's driver's license, and copies of documents from PSEG, Cablevision, Provident Bank, and Bank of America.

On September 29, 2005, after reviewing the evidence contained in the record, including the evidence submitted in response to the director's request, the director denied the petition without the issuance of a notice of intent to deny (NOID) in accordance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii),² finding that the petitioner had failed to establish that he was battered by or subjected to extreme cruelty by his and that he entered into his marriage in good faith.

The petitioner, through counsel, filed the instant appeal on October 24, 2005. In his brief, counsel alleges that the director's decision "erred in stating that no corroborating documentation was submitted to show that he entered into the marriage in good faith," that the director "failed to entertain all evidence or adequately explain why evidence is not credible or probative," and that the director failed to use the "any credible evidence standard." We are not persuaded by any of counsel's arguments.

First, counsel's argument that the director erred in stating that "no corroborating documentation was submitted" cannot be supported. This phrase is not contained in any part of the director's decision. While the director did note, on several occasions, that the petitioner's evidence was "insufficient," the director made no statement regarding "corroborating documentation."

Counsel's second argument, that the director "failed to entertain all evidence" or explain why the petitioner's evidence "is not credible or probative" is equally unpersuasive. Counsel fails to include a reference to or a description of the particular evidence that the director allegedly failed to "entertain." Moreover, contrary to

² 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.



counsel's claim that the director failed to explain why the petitioner's evidence was not "credible or probative," the director addressed the evidence submitted and provided a detailed explanation in his decision as to why he found the petitioner's evidence to be "insufficient." Specifically, as it relates to the director's findings regarding the petitioner's claims that he was battered by or subjected to extreme cruelty and that he entered into his marriage in good faith, the director stated:

As proof to satisfy this requirement, you submitted an affidavit and a psychological evaluation. This information disclosed that you were feeling distress due to your spouse's addiction and her eventual abandonment of you. This was found to be insufficient and . . . the Service requested additional evidence In response, you submitted an additional psychological evaluation and additional affidavits. These documents merely reiterate the information previously provided. *While drug addiction can be stressful on a marriage, it in itself nor the embarrassment it causes to the family members . . . equate to extreme cruelty.* Therefore, the record does not contain satisfactory evidence to demonstrate your qualification under this requirement.

* * *

As proof to satisfy this requirement, you submitted bills, affidavits, tax forms, and bank statements. Many of the bills were in your spouse's name only or were for non-payment of previous usage of the services. The bank statements indicated minimal balances with no activity in the accounts. The tax forms in the record were for an individual with the last name Alsarawi and did not appear to relate to your case. The affidavits did not contain sufficient detail to determine whether you married your spouse in good faith. This evidence was found to be insufficient and . . . the Service requested additional evidence to demonstrate that you married your spouse in good faith. In response, you submitted copies of evidence already in the record, bank statements from the time period before and after your spouse left you and other affidavits. The affidavits again did not contain sufficient details to make a positive finding. The bills already in the record were previously determined to be insufficient. Those dated after your spouse left have a larger balance but do not represent a commingling of funds or joint assets because, as you stated in your petition, your spouse abandoned you in August 2004 and you have had no contact with her since that time. Therefore, the record does not contain satisfactory evidence to demonstrate your qualification under this requirement.

Finally, in regard to counsel's third argument that the director failed to use the "any credible evidence standard," we note that CIS has the sole discretion in determining what evidence is credible and the weight to be given the evidence.³ While it is true that the director must *consider* any credible evidence, the *mere submission* of credible evidence does not de facto establish eligibility. Although the director made no indication that the petitioner's evidence was not credible, the director did indicate that such evidence was "insufficient." Such a finding is tantamount to concluding that the evidence did not carry sufficient weight to

³ See 8 C.F.R. § 204.2(2)(i) which states that the he determination of what evidence is credible and the weight to be given that evidence "shall be *within the sole discretion* of the Service." [Emphasis added.]

establish the petitioner's claims. While counsel may not agree with the director's determination or conclusions regarding the petitioner's evidence, a review of the record does not support any of counsel's contentions on appeal. As will be discussed, we find that the director properly considered all of the evidence submitted by the petitioner and that such evidence was afforded the proper weight.

The first issue to be discussed is the petitioner's claim that he was battered by or subjected to extreme cruelty by his spouse. The evidence regarding the petitioner's claim of abuse consists of a psychological evaluation, the petitioner's statements, and affidavits from the petitioner's friends. The psychological evaluation, based upon statements made by the petitioner in a single interview, indicates that the petitioner suspected his wife of using drugs, that she frequented bars and clubs and stayed "out until early hours of the morning," that she would steal money from the petitioner, and would become "angry and hostile" when confronted, and that when the petitioner "came home from long days of strenuous work (e.g., two jobs), she had not done anything all day long and asked him to cook for the two of them." Additionally, the evaluation indicates that "after abusive episodes" the petitioner's spouse threatened to leave him, that the petitioner bailed his spouse out of jail after being arrested on several occasions, and ultimately, "[a]fter days of bitter fighting, lies, and abuse towards" the petitioner, his spouse left the home, "without warning or explanation."

The petitioner's initial statement describes similar claims to those made in the psychological evaluation, including his spouse's drug use and stealing money from the petitioner. In his second statement, in addition to the claims previously asserted, the petitioner claims that he was socially isolated from his friends because he was embarrassed about his spouse's drug use. We do not find this claim sufficient to establish that the petitioner was subjected to extreme cruelty. Specifically, it appears that the petitioner hid from his friends and did not return telephone calls because he was embarrassed about his wife's drug addiction, not as some pattern of abuse on the part of his spouse's to maintain control over the petitioner.

In his second statement, the petitioner also argues that his spouse was possessive and "took charge of all our finances." This argument is reiterated by counsel on appeal, who states that the petitioner's wife's "control of all their money is typical 'economic abuse': lack of access to economic resources is the single largest barrier to leaving an abusive relationship."⁴ The claims of economic control on the part of the petitioner's spouse offered in the petitioner's second statement and on appeal are in direct conflict with the petitioner's initial statement and the claims made in his psychological evaluation which both indicate that the petitioner earned his own money, that he had access to his own money, and appeared to be the one to disperse the money in the relationship. Specifically, the petitioner indicated that he worked two jobs to support he and his spouse and that she spent the money *given to her* by the petitioner in a very short period. In the evaluation, the psychologist indicated that the petitioner "could not understand why his own wife would steal money from him because *he always gave her money, bought her presents, and provided for her and her two sons.*" [Emphasis added.] Such facts do not establish that the petitioner's spouse had economic control over the petitioner.

It is noted that the affidavits from the petitioner's friends also do not support a finding of extreme cruelty. The first affidavit, provided by [REDACTED] indicates that most of the petitioner's friends "envied" him, that the

⁴ Counsel attributes his cite to Mary Ann Dutton, *et al.*, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 Geo. J. Pov. L. & Pol'y 245, 295-96 (2000).

petitioner and his spouse “seemed happy together,” and that when he was told that “their marriage was in trouble [he] could not believe it.” Similarly, the second affidavit, provided by [REDACTED] indicates that the petitioner and his spouse “seemed very happy and most of us . . . thought that they both had made the right choice and their marriage seemed very strong. When [the petitioner] told me that [they] were getting separated, I was very surprised.”

The petitioner’s claim of extreme cruelty is based upon his allegation that his spouse was a drug addict who lied to the petitioner, stole his money and eventually abandoned him. While we do not dispute the petitioner’s claims that he was ashamed of his wife’s drug problems, that he went into a deep depression over his failed marriage, suffered chest pains and loss of appetite, the petitioner has not shown that such ailments were *caused* by being subjected to extreme cruelty by his spouse. The petitioner’s claims do not sufficiently demonstrate that he was the victim of any act or threat of violence, that he was forcefully detained by his spouse, that he was psychologically or sexually abused or exploited, or that his spouse’s actions were a part of an overall pattern of violence. Accordingly, we concur with the finding of the director that the record is insufficient to establish that the petitioner was subjected to extreme cruelty by his spouse.

Regarding the petitioner’s claim of physical abuse, on appeal, counsel states:

In addressing the issues about physical abuse, the adjudicator erroneously rejects the evidence solely based on the fact that the Petitioner did not states [sic] all incidents regarding the physical abuse in the initial affidavit submitted with his petition, rather, he itemized all those incidences of abuse through the psychologist report. The Adjudicator fails to recognize that the Petitioner is a male individual who tried to work out the marital problems. The Adjudicator also failed to recognize that abused individuals tend to easily open up to psychologists about intimate details regarding their problems in life, than they would to friends and relatives fearing ridicule or intimidation by others.

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Even if the Adjudicator were correct that Petitioner failed to mention the physical abuses and aggressive behavior, this is not an adequate basis for finding Petitioner’s testimony incredible. Omissions filled in by responding to RFEs do not mean the applicant was lying, they mean he did not include them until the adjudicator asked for them. Most survivors of domestic violence are understandably uncomfortable to discuss their abuse in great detail, and will not know what level of specificity is necessary to satisfy adjudicators. It is not inconsistent or incredible to comply with an adjudicator’s request for more information in successive affidavits.

Before addressing the evidence, we must first address the erroneous statements made in counsel’s appellate brief. First, although counsel indicates that the director rejected the petitioner’s evidence because the petitioner did not describe “all incidents regarding the physical abuse in the initial affidavit submitted with his petition,” we note that the director did not make any mention of what was contained in the petitioner’s original statement versus what was contained in the assessment. Second, the director did not find the

petitioner's testimony regarding physical abuse to be "incredible," rather; the director indicated that insufficient evidence was submitted to establish that the petitioner had been battered by his spouse.

Regarding the evidence of physical abuse, although the petitioner's initial statement indicates that when his spouse got any she would "start screaming and yelling becoming very abusive, both verbally and physically," the petitioner does not describe any specific physical incident in detail. If, as counsel claims, "abused individuals tend to easily open up to psychologists about intimate details regarding their problems," we would expect to see physical abuse documented in the petitioner's psychological evaluation. However, not one incident of physical abuse is mentioned in the psychological evaluation. Moreover, if, as counsel further claims, "survivors of domestic violence are understandably uncomfortable to discuss their abuse in great detail" and will "comply with an adjudicator's request for more information in successive affidavits," we would expect the petitioner to have elaborated on his physical abuse claim in his second statement or even on appeal. However, the petitioner's second statement does not make any reference to physical abuse, much less provide greater details related to the claim in the first statement and no further evidence was submitted on appeal. Further, neither of the affidavits provided by the petitioner's friends allege physical abuse.

Finally, it is noted that although the petitioner has submitted evidence of his spouse's arrest history, the arrests appear to be drug-related and do not involve the petitioner or abuse. Accordingly, we concur with the director and find that the petitioner's single statement which briefly references the term "physical abuse" is not sufficient to establish that he was battered by his spouse.

The remaining issue to be discussed is the petitioner's claim that he entered into his marriage in good faith. As evidence to establish this claim, the petitioner submitted bank statements, utility bills and notices from creditors. The petitioner also submitted a piece of "junk" mail addressed to the petitioner's spouse, coupons from Bally's and a letter from AT&T, dated December 5, 2003, in which the petitioner is notified that AT&T is unable to provide service.

The statements from PSEG, dated from August 2003 through June 2004, all indicate that the petitioner's account was not current and was, in fact, shut off in April 2004 and turned over to creditors. Similarly, the statements from Cablevision, dated January 2004 through March 2004, indicate that the account was in arrears and ultimately disconnected in February 2004 and turned over to creditors.

The evidence submitted related to the Provident bank account indicates that an account was opened in March 2004, nearly a year after the petitioner's marriage and one month prior to the petitioner's interview to adjust status in April 2004. The bank statements, dated from May 2004 through September 2004 indicate an account balance from ranging from \$1.01 to \$58.10. Although the petitioner submitted several checks written by the petitioner's spouse for minimal amounts, the record does not contain any evidence which demonstrates the petitioner's use of the account. Although the record also contains evidence of a bank account with Bank of America, the account appears to be in the petitioner's spouse's name only. There is no evidence that this account was a joint account with the petitioner. While the record also contains numerous bank statements dated *after* the petitioner claims he no longer resided with his spouse, such information cannot be used to support the petitioner's claims. A petitioner must establish eligibility at the time of filing; a petition cannot be

approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Additionally, while the petitioner submitted document showing a parking ticket in his spouse's name, a document showing that a car had been towed, and a copy of his spouse's Visa credit card, the petitioner submitted no evidence of joint car insurance or joint ownership of this vehicle and no evidence of activity on the credit card account or evidence that the petitioner was a joint holder of this account.

Although the marriage certificate submitted by the petitioner is evidence of a legal marriage, the fact that a legal marriage took place does not establish that the marriage was entered into in good faith or that the petitioner resided with her spouse after the marriage ceremony. Similarly, while the petitioner's photographs are evidence that the petitioner and her spouse were together at a particular place and time, they do not establish that they were engaged in a bona fide marriage.

On appeal, counsel states that the director "erroneously [used] the co-sponsorship of a friend against the petitioner." Again, counsel misconstrues the director's findings. In the single reference to taxes in the director's decision, the director indicated only that the tax documents contained in the record "did not appear to relate to your case." Counsel argues that the reason the petitioner failed to submit evidence of joint taxes with his spouse was that "before the petitioner had the opportunity to file for the joint tax returns with his spouse, the relationship had deteriorated and the U.S.C. spouse had abandoned the residence." This argument is not convincing. After his marriage in June 2003, the first opportunity the petitioner would have had to file his taxes as married would have been in April 2004, more than four months prior to the date the petitioner claims he stopped residing with his spouse.

More importantly, although not noted by the director, we find discrepancies in the petitioner's claimed joint residence at [REDACTED]. Such discrepancies cast doubt on the evidence submitted to support the petitioner's claim of a good faith marriage. On the Form I-360, the petitioner indicates that he resided with his spouse from June 2003 until August 2004. On the Form G-325A, signed by the petitioner on September 10, 2004, the petitioner indicated that from June 2003 through August 2004, the petitioner resided at [REDACTED]. However, this information is contradicted by evidence previously submitted by the petitioner and his spouse in support of the Form I-130 filed in the petitioner's behalf. Specifically, on the Form I-130 and the Form G-325A, signed by the petitioner on July 29, 2003, the petitioner indicated that from May 2003 through July 2003 he resided at [REDACTED].

Moreover, on the petitioner's application for a marriage license, dated June 19, 2003, the petitioner listed his address as [REDACTED] and his spouse's address at [REDACTED].

As it relates to the petitioner's claim in support of the I-360 that he resided with his spouse at [REDACTED], it is noted that the New Jersey Judicial Bail Recognizance documents dated July 23, 2003 and February 17, 2004, list the petitioner's spouse's address as [REDACTED] and [REDACTED], respectively.

Additionally, although the petitioner submitted a copy of a lease at the [REDACTED] address containing the petitioner and his spouse's names, the lease did not begin until October 2003, four months after the petitioner claims he began residing at this address with his spouse. It is further noted that neither the petitioner nor his

spouse actually signed the lease. Similarly, although the petitioner submitted a copy of his driver's license and his spouse's identification card listing the [REDACTED] address, the cards were issued in February and March 2004, more than nearly a year after the petitioner claims they began residing together.⁵ 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).

The lack of evidence to demonstrate the commingling of assets or financial liabilities, combined with the discrepancies noted, do not lead to a finding that the petitioner entered his marriage in good faith. Accordingly, we concur with the director's finding in this regard.

Despite our support of the director's findings, however, the director's decision cannot stand because of the director's failure to issue a NOID to the petitioner prior the issuance of the denial.

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.

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. Although the director's determination was based upon the two grounds discussed above, on remand, the petitioner should be afforded an opportunity to explain or reconcile the inconsistencies noted regarding his joint residence with his spouse and to submit further evidence which establishes that he and his spouse jointly resided together. Second, the petitioner's marriage certificate does not appear to have been registered with the state of New Jersey. Specifically, the signature of the local registrar and the date received by the registrar remain blank. The lack of such signature and date appears to indicate that the petitioner's marriage was not recorded after the marriage to place. On remand, the petitioner should be afforded the opportunity to demonstrate that a legal marriage took place and that the marriage was duly recorded in New Jersey.

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.

⁵ It should also be noted that these documents were issued approximately one month prior to the petitioner's interview with the Service for the adjudication of his Form I-130 and Form I-485.