

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B9

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **JUL 10 2006**
EAC 05 050 52810

IN RE: Petitioner: [REDACTED]

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 Director, Vermont Service Center, denied the immigrant visa petition and the matter 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 The decision of the director will be withdrawn and the petition will be remanded for further action.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 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 a United States citizen.

The director denied the petition, finding that the petitioner failed to establish that he resided with his U.S. citizen ex-wife, entered into their marriage in good faith, that his ex-wife battered or subjected him to extreme cruelty during their marriage, and that he was a person of good moral character.

On appeal, counsel submits a brief and additional evidence.

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).

An alien who has divorced an abusive United States citizen may still self-petition for immigrant classification under section 204(a)(1)(A)(iii) of the Act if the alien demonstrates that he or she is a person

who was a bona fide spouse of a United States citizen within the past 2 years and –

* * *

(ccc) who demonstrates a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse.

Section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC).

The corresponding regulation at 8 C.F.R. § 204.2(c)(1) states, in pertinent part:

(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 contained 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 in the United States. One or more documents may also be submitted showing that the self-petitioner is residing in the United States when the self-petition is filed. Employment records, utility receipts, school records, hospital or medical records, birth certificates of children born in the United States, 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. . . . 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 Venezuela who entered the United States on September 22, 2000 as a nonimmigrant visitor (B-2). On November 6, 2000, he married [REDACTED] a U.S. citizen, in Florida. On August 23, 2004, the couple's marriage was dissolved by order of the Lee County, Florida Circuit Court. On December 9, 2004, the petitioner filed this Form I-360. The petitioner's Form I-360 was prepared and signed by [REDACTED] an attorney, but was not accompanied by a Form G-28 signed by the petitioner and Mr. [REDACTED]. On June 21, 2005, the director issued a notice advising the petitioner that the evidence submitted with the petition did not establish his eligibility and requesting the petitioner to submit evidence that he resided with Ms. [REDACTED] that she battered or subjected him to extreme cruelty, that he married Ms. [REDACTED] in good faith and that he was a person of good moral character. The director's notice was mailed to Mr. [REDACTED]. Having received no response from Mr. [REDACTED] or the petitioner, the director denied the petition on November 8, 2005 pursuant to the regulation at 8 C.F.R. 204.1(h) because the evidence previously submitted did not establish the petitioner's eligibility. The petitioner, through present counsel, timely appealed.

On appeal, counsel asserts that the petitioner was prejudiced by Mr. [REDACTED] ineffective assistance. Counsel states that Mr. [REDACTED] did not respond to the director's request for evidence because he was suspended by the Florida Bar, but did not inform the petitioner of his suspension and resultant inability to continue representing the petitioner. On appeal, counsel submits evidence of Mr. [REDACTED] 30-day suspension from the practice of law in Florida as well as evidence in support of the petition that counsel asserts would have been submitted in response to the director's request were it not for Mr. [REDACTED] ineffective assistance. Although the evidence submitted on appeal does not indicate that Mr. [REDACTED] Florida suspension was still in effect when the director requested additional evidence on June 21, 2005, we take administrative notice of the fact that on November 8, 2005, Mr. [REDACTED] was suspended from the practice of law before the Executive Office for Immigration Review (EOIR) and the Department of Homeland Security (DHS), effective April 25, 2005, for five years due to Mr. [REDACTED] s disbarment from

the practice of law in Georgia on April 26, 2005. EOIR, *List of Disciplined Practitioners*, <http://www.usdoj.gov/eoir/profcond/chart.htm> (Jun. 14, 2006).

The petitioner presents a valid claim of ineffective assistance of counsel. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

The petitioner has complied with the *Lozada* requirements. On appeal, the petitioner submits an affidavit in which he states that it was his understanding that Mr. [REDACTED] would timely submit the requested documents. The petitioner states that he called Mr. [REDACTED] several times to inquire about the status of his case, but that Mr. [REDACTED] never returned his calls and that he was later informed of Mr. [REDACTED] suspension and the denial of his petition by Mr. [REDACTED]'s employees. On appeal, counsel submits a copy of counsel's letter to Mr. [REDACTED] dated April 13, 2006, informing Mr. [REDACTED] of the petitioner's allegations and providing him with an opportunity to respond. Counsel also submits a copy of the petitioner's formal complaint to the Florida Bar dated March 17, 2006 regarding Mr. [REDACTED] ineffective assistance and the Florida Bar's acknowledgment of the complaint dated April 19, 2006.

Given Mr. [REDACTED] documented ineffective assistance, the case will be remanded for consideration of the evidence submitted on appeal. The case must also 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), which 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 case will be remanded for consideration of the evidence submitted on appeal and, if necessary, issuance of a NOID. In our following discussion, we review the relevant evidence submitted on appeal and the issues to be determined on remand.

Joint Residence

On his Form I-360, the petitioner stated that he last lived with Ms. [REDACTED] at [REDACTED] Apartment Number [REDACTED] in Orlando, Florida on December 21, 2003, but the petitioner submitted no supporting evidence of their joint residence at this or any other address. In his affidavit

submitted on appeal, the petitioner states that he lived with Ms. [REDACTED] on [REDACTED] but that he had to lie to the apartment complex management and say that she did not live with him because she could not pass a background check. The petitioner states that Ms. [REDACTED] later moved in with him to an apartment on [REDACTED] but that she did not want to be on the lease or appear married to him because she would lose her public benefits. On appeal, the petitioner also submits a police report dated December 21, 2003, which states that the petitioner and Ms. [REDACTED] were married and lived together for about 3 years. The police report lists the [REDACTED] address as the former couple's joint residence. On appeal, the petitioner also submits a letter from [REDACTED], which is dated August 10, 2005 and jointly addressed to the petitioner and Ms. [REDACTED] at the [REDACTED] address. The letter states that the former couple had gas service with the company from October 29, 2001 to June 1, 2004. On remand, the director should determine whether this evidence establishes the petitioner's joint residence with Ms. [REDACTED]

Entry Into the Marriage in Good Faith

The petitioner initially submitted no evidence of his good faith marriage to Ms. [REDACTED]. On appeal, the petitioner submits a psychological evaluation written by Dr. [REDACTED] in which she states that the petitioner told her that he met Ms. [REDACTED] over the Internet and communicated with her frequently by electronic mail prior to meeting her in the United States. The petitioner related to Dr. [REDACTED] that he thought Ms. [REDACTED] was "an exquisite woman," that they had things in common, that he was attracted to how open and outgoing she was, and that he thought she was more experienced and that he could learn from her. However, in his own affidavit, the petitioner does not state how he met Ms. [REDACTED] and does not discuss their courtship, marriage, or any of their shared experiences, apart from Ms. [REDACTED] alleged abuse.

On appeal, the petitioner also submits affidavits from seven individuals who indicate that they have known the petitioner and Ms. [REDACTED] for two to six years. These affidavits are prepared forms with blanks that have been filled in by the affiants. Apart from their length of acquaintance with the petitioner and Ms. [REDACTED] none of the affiants provide any detailed information about the former couple's marriage or the petitioner's alleged good faith in marrying Ms. [REDACTED]

The only evidence of the former couple's joint assets or liabilities is the above-mentioned letter from [REDACTED]. The petitioner submits no other evidence of his good faith marriage of the types listed in the regulation at 8 C.F.R. § 204.2(c)(2)(vii). However, in his affidavit, the petitioner states that his wife used his money and her own to buy controlled substances and that he could not put her name on any residential lease because she could not pass a background check. On remand, the director should determine whether the petitioner's statements combined with the relevant evidence submitted on appeal are sufficient to establish his good faith entry into marriage with Ms. [REDACTED]

Battery or Extreme Cruelty

The petitioner initially submitted correspondence from a Victim Witness Liaison from the Office of the Florida State Attorney requesting the petitioner's assistance in prosecuting a domestic violence case against Ms. [REDACTED] for an offense committed on December 21, 2003. In his notice, the director informed the petitioner that the letter was insufficient to establish Ms. [REDACTED] battery or extreme cruelty.

In his affidavit submitted on appeal, the petitioner states that Ms. [REDACTED] had a substance abuse problem and would hit and scratch him and threaten suicide if he did not give her money to buy drugs. On September 5, 2003, he states that Ms. [REDACTED] hit and cut him, cut his clothes and told him that if he called the police they would deport him. The petitioner explains that he did not call the police because he was afraid and embarrassed. The petitioner reports that his wife was then imprisoned for violating her parole by testing positive for drugs. The petitioner bailed her out and reconciled with her, but he states that she continued to get violent with him after she used drugs. The petitioner reports feeling depressed and suicidal at that time. On November 14, 2003, the petitioner states that he returned home and found that Ms. [REDACTED] had sold his computer and was using drugs with two other women. When he asked her questions, she and the other women began biting him. The petitioner describes a subsequent incident when Ms. [REDACTED] began hitting him, got on top of him and slapped him when he said that he was calling the police. The petitioner states that Ms. [REDACTED] then scratched his arms, yelled profanities at him as he walked to the telephone, and left ten minutes before the police arrived.

On appeal, the petitioner also submits the previously mentioned police report, evaluation by Dr. [REDACTED] and additional supporting affidavits. The police report for the December 21, 2003 incident states that the petitioner had scratches and bruising on his left forearm, which he stated were inflicted by Ms. [REDACTED] when he tried to walk away from her. In her psychological evaluation of the petitioner, Dr. [REDACTED] states:

After interviewing [the petitioner], considering the results of his psychological testing and other information, it is my clinical opinion, that [the petitioner] meets the diagnostic criteria for Post-traumatic Stress Disorder [PTSD] and that it is likely that the origin of this disorder may be due to the alleged events that he underwent while married to his former wife. In addition to Post-traumatic Stress Disorder, [the petitioner] also appears to be suffering from dysthymia, a type of depression. It is not uncommon for individuals with PTSD to also be depressed.

The six supporting affidavits indicate that the affiants were aware of physical or mental abuse by Ms. [REDACTED] against the petitioner. However, their indication was made by checking "Yes" to a pre-printed question on their affidavits. None of the affiants provide any detailed, substantive description of any abuse that they witnessed. On remand, the director should determine whether the police report, Dr. [REDACTED] evaluation and the testimonial evidence submitted on appeal establish that Ms. [REDACTED] battered or subjected the petitioner to extreme cruelty during their marriage.

Good Moral Character

The petitioner initially submitted no evidence of his good moral character. On appeal, the petitioner submits a letter dated August 27, 2005 from the Florida Department of Law Enforcement, which states that the petitioner has no criminal record in the Department's files and complies with the regulation at 8 C.F.R. § 204.2(c)(2)(v). On remand, the director should determine whether the Florida state criminal background check establishes the petitioner's good moral character.

The director denied the petition because the evidence submitted below did not establish the petitioner's residence with Ms. [REDACTED] his good faith entry into marriage with Ms. [REDACTED] his subjection to battery or extreme cruelty by Ms. [REDACTED] and his good moral character. On appeal, the petitioner submits evidence relevant to each of these eligibility criteria. Former counsel's ineffective assistance warrants remand of the petition for consideration of the evidence submitted on appeal. If the director determines that the relevant evidence submitted on appeal does not establish the petitioner's eligibility, he must issue a NOID pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

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 that, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.