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FILE:

EAC 05 239 52571

Office: VERMONT SERVICE CENTER

Date: JUN 23 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 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 The decision of the director will be withdrawn and the petition will be remanded for further action.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 had a qualifying relationship with a U.S. citizen at the time his petition was filed.

On appeal, counsel submits 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).

Pursuant to section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act, an alien who has divorced a 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.

The evidentiary standard and requirements 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.

\* \* \*

(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.

The petitioner in this case is a native and citizen of Mexico who states that he entered the United States without inspection on January 1, 1998. On April 27, 2001 the petitioner married [REDACTED], a U.S. citizen, in Chicago, Illinois. On August 29, 2003 the petitioner's marriage to Ms. [REDACTED] was dissolved by order of the Circuit Court of Cook County, Illinois. On August 30, 2005, the petitioner filed this Form I-360. On October 27, 2005, the director denied the petition because it was filed over two years after the petitioner's divorce and the petitioner consequently did not have a qualifying relationship with Ms. [REDACTED]

Counsel timely appealed. On appeal, counsel claims this petition was filed within two years of the petitioner's divorce because it was mailed on August 27, 2005. We concur with the director's determination that the petitioner did not have a qualifying relationship with Ms. [REDACTED] on the date his petition was filed. The evidence submitted on appeal fails to show that the petition was filed before the two-year anniversary of the petitioner's divorce. Beyond the director's decision, the present record also fails to establish that Ms. [REDACTED] **subjected the petitioner to battery or extreme cruelty during their marriage.** However, the case 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).

*Qualifying Relationship*

The petitioner submitted a copy of the judgment for dissolution of his marriage to Ms. [REDACTED] that was entered on August 29, 2003. On appeal, counsel claims that because this petition was mailed on August 27, 2005, it was filed within two years of the legal termination of his marriage. Counsel is mistaken. A petition is regarded as properly filed when, along with other requirements, it is received by a Citizenship and Immigration Services (CIS) office and stamped with the time and date of actual receipt. 8 C.F.R. § 103.2(a)(7). The so-called “mailbox rule” does not apply to the filing of CIS applications and petitions. Although the FedEx Express printout submitted by counsel on appeal indicates that the petition was shipped on August 27, 2005, it also shows that the petition was not delivered until August 30, 2005, the date it was received by CIS. Hence, the petition was filed on August 30, 2005, over two years after the legal termination of the petitioner’s marriage to Ms. [REDACTED]. The petitioner thus did not have a qualifying relationship with Ms. [REDACTED] on the date his petition was filed pursuant to section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act.

*Battery or Extreme Cruelty*

Beyond the director’s decision, the present record also fails to establish that Ms. [REDACTED] battered or subjected the petitioner to extreme cruelty during their marriage. In his August 24, 2005 affidavit, the petitioner states that during their marriage, Ms. [REDACTED] saw other men, including her former boyfriend. He reports that she was very demanding financially and if he hesitated to buy things for her, she would tell him that she would ask her former boyfriend to purchase the items for her. The petitioner states that when they argued about her former boyfriend, Ms. [REDACTED] insulted him and called him a derogatory name. The petitioner explains that one day a man called Ms. [REDACTED] and after speaking to him, she told the petitioner she wanted a divorce because she wanted to marry her former boyfriend. The petitioner reports feeling humiliated, depressed, hopeless, cheated and betrayed.

In his undated letter, [REDACTED] the petitioner’s friend, states that the petitioner often complained that Ms. [REDACTED] was disloyal and went out with other men. Mr. [REDACTED] states that as a result, the petitioner “was really down for a couple of years.” In her letter dated August 10, 2005, the petitioner’s sister, [REDACTED] states that the petitioner and Ms. [REDACTED] lived with her in 2001, that during that time Ms. [REDACTED] saw Ms. [REDACTED] go out with different men and that the petitioner suffered emotional distress from his marriage.

In the petitioner’s dissolution of marriage judgment, the court found that Ms. [REDACTED] was “guilty of extreme and repeated mental cruelty against the Petitioner without cause or provocation by Petitioner.” However, the record contains no documentation of the evidence or testimony upon which the court’s finding was made. In addition, counsel has submitted no evidence that the definition of “extreme and repeated mental cruelty” as used in Illinois domestic relations law is substantially similar to how the term extreme cruelty is described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi).

The present record does not demonstrate that Ms. [REDACTED] behavior rose to the level of extreme cruelty, as that term is described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). The testimony of the petitioner, Mr. [REDACTED] and Ms. [REDACTED] fail to establish that Ms. [REDACTED] ever physically assaulted the petitioner, threatened him with violence or subjected him to psychological or sexual abuse. The record also does not demonstrate that the non-violent behavior of Ms. [REDACTED] was part of an overall pattern of violence. Apart from the affidavits, the petitioner submitted no corroborative evidence of Ms. [REDACTED]'s alleged abuse of the types listed in the regulation at 8 C.F.R. § 204.2(c)(2)(iv). Although he 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 present record does not establish that Ms. [REDACTED] battered or subjected the petitioner to extreme cruelty, as required by section 204(a)(1)(A)(iii) of the Act.

The present record fails to establish the petitioner's eligibility for immigrant classification under section 204(a)(1)(A)(iii) of the Act. Nonetheless, the case will 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 overcome the deficiencies of his case.

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.