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U.S. Citizenship
and Immigration
Services

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FILE:

[Redacted]
EAC 03 092 53229

Office: VERMONT SERVICE CENTER

Date: MAY 31 2006

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:

SELF-REPRESENTED

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 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 The decision of the director will be withdrawn and the petition will be remanded for further action.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 is a native and citizen of Mexico who entered the United States without inspection in December 1996. On May 1, 1999, the petitioner married [REDACTED], a U.S. citizen, in Missouri. [REDACTED] filed a Form I-130 on the petitioner's behalf on April 30, 2001. [REDACTED] withdrew the petition on November 26, 2002 and the petition and the petitioner's concurrently filed Form I-485 were both denied on December 27, 2002. On January 3, 2003, the petitioner was served with a Notice to Appear (NTA) for removal proceedings, which charged the petitioner as an alien present in the United States without being admitted or paroled pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("the Act"). On January 27, 2003, the petitioner filed this petition seeking classification as a special immigrant pursuant to section 204(a)(1)(A)(iii) of the Act, as an alien subjected to battery or extreme cruelty by his U.S. citizen spouse. On November 25, 2003, the petitioner and [REDACTED] were divorced. The record indicates that the petitioner's NTA has not been filed with the Executive Office for Immigration Review pending the adjudication of this petition.

The director initially denied the Form I-360 petition on July 23, 2004 because the record did not establish that [REDACTED] battered or subjected the petitioner to extreme cruelty during their marriage. The petitioner filed an untimely appeal on September 13, 2004, which the director treated as a motion to reopen and denied on July 19, 2005. The petitioner timely appealed.

On appeal, the petitioner submits his third statement and three letters from his girlfriend and two friends. We concur with the director's determination that the petitioner did not establish the requisite battery or extreme cruelty and find that the testimonial evidence submitted on appeal does not overcome this ground for denial. Nonetheless, the petition will be remanded because the director did not issue a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii) prior to denying the petition on July 23, 2004.

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).

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

(ii) Legal status of the marriage. . . . After the self-petition has been properly filed, the legal termination of the marriage will have no effect on the decision made on the self-petition. . . .

* * *

(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 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.

* * *

(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.

As evidence of battery or extreme cruelty, the petitioner initially submitted his own statement dated January 20, 2003 and copies of his NTA and the denial of his Form I-485 application. Finding this evidence insufficient to establish the petitioner’s eligibility, the director issued a request for additional evidence on November 7, 2003. The petitioner, through former counsel, requested and was granted an additional 60 days to respond. On March 29, 2004, the petitioner submitted a letter from his divorce attorney, a copy of his answer to [REDACTED] Petition for an Order of Protection; and a “Psychosocial History” of the petitioner written by [REDACTED] a marriage and family therapist. The petitioner also submitted evidence that he pled guilty to and was convicted of misdemeanor domestic assault against [REDACTED] on January 14, 2002 and that [REDACTED] was granted a full order of protection after a

hearing attended by both the petitioner and [REDACTED] on February 14, 2003.¹ We concur with the director's determination that these documents fail to establish that [REDACTED] battered or subjected the petitioner to extreme cruelty during their marriage and we do not repeat the director's discussion here.

With his late appeal, which the director treated as a motion to reopen, the petitioner submitted his second statement dated August 18, 2004 and letters from his girlfriend, two friends and a second letter from his divorce attorney. We concur with the director's determination that this testimonial evidence does not overcome the grounds for denial of the petition and we do not repeat the director's discussion here. With the instant appeal, the petitioner submits his third statement dated August 19, 2005; a second letter from his girlfriend dated August 15, 2005; a second letter from his friend, [REDACTED] dated August 4, 2005; and a letter from his friend, [REDACTED]. This testimonial evidence also fails to establish that [REDACTED] subjected the petitioner to battery or extreme cruelty during their marriage for the reasons discussed below.

In his August 19, 2005 statement, the petitioner explains:

When we went in front of the judge [REDACTED] was with me. I plead [sic] guilty because [Ms. [REDACTED] told me it would be faster and I wouldn't go to jail I was afraid at that time I didn't understand much English or how the courts and police work. When we went to court, [Ms. [REDACTED] and I were back together, I believed her so I pled guilty. She did state in front of the judge that it was her fault. . . . My thinking at that time was if I plead innocent I would have to tell the truth about [REDACTED] and that would make her very mad. I thought she would change after that. I loved her. I wanted her to stop being violent.

The court documents submitted by the petitioner do not show that [REDACTED] admitted her own guilt to the judge. The documents do indicate that the petitioner appeared on the date of his conviction with an interpreter and that the petitioner voluntarily and willingly waived his right to the assistance of counsel. Although the petitioner now asserts his innocence, the record establishes that he was convicted of domestic assault against [REDACTED] during their marriage. The record contains no evidence that linguistic or cultural barriers prevented the petitioner from asserting his innocence in court or that, for example, [REDACTED] threatened the petitioner with harm if he did not plead guilty.

In her first letter dated August 18, 2004, the petitioner's girlfriend, [REDACTED] states that on November 30, 2002, she and the petitioner went to a club to go dancing and that [REDACTED] told a security guard that the petitioner could not be at the club because he was "illegal" and [REDACTED] had an

¹ The record shows that the petitioner was convicted in the Circuit Court of Greene County, Missouri, of third degree domestic assault in violation of section 565.074 of the Missouri Revised Statutes, a class A misdemeanor, and was sentenced to two years of probation and ordered to attend a domestic violence and anger management class. The petitioner attended the class and successfully completed probation.

order of protection against him.² In her second letter submitted with this appeal, [REDACTED] offers a detailed explanation of why she correctly remembers the date of the incident as November 30, 2002. [REDACTED] also states that the petitioner has never been violent or verbally abusive to her or her children during the more than two years in which they have lived together and that his behavior makes her believe that [REDACTED] was the aggressor in their former relationship. However, in her previous letter dated August 18, 2004, [REDACTED] states that she did not know the petitioner or [REDACTED] until after the petitioner had filed for divorce and that she only witnessed the single incident at the club on November 30, 2002. The petitioner does not discuss this incident in any of his three statements and [REDACTED] description alone does not establish that [REDACTED] battered or subjected the petitioner to extreme cruelty.

In her second letter dated August 4, 2005 and submitted on appeal, the petitioner's friend, [REDACTED] confirms that during the last six months of the petitioner's marriage to [REDACTED] witnessed many occasions where [REDACTED] would yell at the petitioner and threaten to call the police and get him imprisoned. [REDACTED] states that [REDACTED] who weighed over 300 pounds, would block the door to prevent the petitioner from leaving. [REDACTED] further confirms her previous statement that [REDACTED] would put prescription medications in beverages that she or someone else would give to the petitioner. [REDACTED] also states that [REDACTED] belittled the petitioner in front of her and others. The petitioner does not discuss these incidents in any of his three statements and the behavior of [REDACTED] as described by [REDACTED] is not otherwise corroborated in the record.

[REDACTED] another friend of the petitioner, states that on one occasion shortly before Halloween in 2001, the petitioner came to [REDACTED] house to spend the night because [REDACTED] was fighting with him. [REDACTED] states that later that night [REDACTED] came to his house and threw all of the petitioner's clothes into [REDACTED] yard. [REDACTED] explains that after about a week, the couple reconciled. Mr. [REDACTED] reports that about a month later, the petitioner stayed with him again because [REDACTED] had threatened him. [REDACTED] states that [REDACTED] came to his house at about 4:00 in the morning. When [REDACTED] declined to let her in, he states that [REDACTED] became very angry and accused the petitioner of sleeping with another woman. [REDACTED] does not state that he ever witnessed [REDACTED] physically assault the petitioner or threaten him with violence. The two incidents discussed by Mr. [REDACTED] are consistent with serious marital conflict, but do not establish extreme cruelty.

² The director found [REDACTED] August 18, 2004 letter unreliable because she stated the incident at the club occurred on November 30, 2002, but the petitioner claimed, in his answer to [REDACTED] Petition for an Order of Protection, that this incident occurred on December 21, 2002. The petitioner's answer actually states, "On the date claimed by [REDACTED] for this event, 12-21-02, [the petitioner] was accompanied by a friend while going to the tavern/restaurant where he encountered [REDACTED] The wording of this statement does not establish that the petitioner conceded that December 21, 2002 was the correct date of the encounter. Accordingly, unlike the director, we do not find a discrepancy in the record concerning the date of this incident.

The testimonial evidence submitted on appeal fails to establish that [REDACTED] battered or subjected the petitioner to extreme cruelty, as that term is described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi), and does not discredit the primary evidence that the petitioner was convicted of domestic assault against [REDACTED] and that [REDACTED] was granted a full order of protection against the petitioner. The present record thus fails to establish the petitioner's eligibility for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

However, the case will be remanded because the director failed to issue a NOID prior to his initial denial of the petition on July 23, 2004. 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 case will be remanded for issuance of a NOID, 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.