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FILE: [Redacted]
EAC 05 189 51495

Office: VERMONT SERVICE CENTER

Date: MAR 20 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:



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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and 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 The decision of the director will be withdrawn and the petition will be remanded for further action.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 Guinea who is seeking classification as a special immigrant pursuant to section 204(a)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(A)(iii), as the battered spouse of a United States citizen.

Section 204(a)(1)(A)(iii) of the Act provides, in pertinent part, that an alien who is the spouse of a citizen of the United States, 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 United States 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.

According to the evidence in the record, the petitioner wed his citizen spouse, [REDACTED], on March 21, 1997 in Oakland, California. The record also indicates that the petitioner and his spouse were divorced on September 27, 1999. The instant petition was filed on June 20, 2005. The director denied the petition because more than two years had lapsed since the petitioner was the spouse of a citizen of the United States; hence, the petitioner did not have a qualifying relationship as the spouse of a United States citizen.

On appeal, counsel for the petitioner does not dispute that the petitioner was divorced for more than two years at the time of filing. Instead, counsel alleges a claim of ineffective assistance of counsel against the petitioner's former counsel. Counsel claims that the petitioner had previously filed a Form I-360 petition within the two-year period following the petitioner's divorce but that previous counsel did not adequately respond to the director's request for evidence and did not inform the petitioner of the need to do so. Despite indicating that she would be sending a brief and/or evidence to the AAO to support the claims she makes on appeal, to date, no further submission has been received from counsel.

We note that any appeal 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). In this instance, counsel does not submit any evidence to support the ineffective assistance of counsel claim. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Turning to the director's decision, counsel does not dispute that the self-petitioner was divorced from his spouse for more than two years at the time of filing. Section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act indicates that a self-petitioner must have been a bona fide spouse of a United States citizen "within the past 2 years" and must also demonstrate "a connection between the legal termination of the marriage with the past 2 years and battering or extreme cruelty by the lawful permanent resident spouse." The statute contains no provision which would allow for a waiver of these two requirements. Accordingly, we concur with the finding of the director that the petitioner is ineligible for classification because he does not have a qualifying relationship as the spouse of a United States citizen.

However, although the petitioner's appeal does not overcome his statutory ineligibility, we find the case must be remanded to the director for further consideration. The regulation at 8 C.F.R. § 204.2(c)(3)(ii) requires the director to issue a Notice of Intent to Deny (NOID) in all cases where "the preliminary decision on a properly filed self-petition is adverse to the self-petitioner" The regulation does not distinguish between cases where there is statutory ineligibility and those cases in which the evidence simply appears to be deficient. Accordingly, the case must be remanded to the director for issuance of an NOID pursuant to the regulation.

On remand, the director should also reconsider his determination regarding the petitioner's good moral character. In the brief submitted by counsel with the original filing, counsel states:

[The petitioner] was arrested three times. Two of the three charges were dismissed. The certificates are attached. He was arrested and convicted of disorderly conduct (a misdemeanor) on January 14, 1999.

However, contrary to counsel's statement, the certificates submitted by the petitioner do not show that two of the three charges were dismissed. Instead, the certificates indicate that, in fact, the petitioner was convicted on two occasions. Specifically, on January 6, 1999, the petitioner was arrested and on February 23, 1999, the petitioner pled guilty before Judge [REDACTED] and was given a one-year conditional discharge.¹ The petitioner was also arrested on January 13, 1999 and on January 14, 1999, the petitioner pled guilty before Judge [REDACTED] with execution of the sentence imposed on April 2, 1999.²

The regulation at 8 C.F.R. § 204.2(c)(1)(vii) states:

. . . A self-petitioner's claim of good moral character will be evaluated on a case-by-case basis, taking into account the provisions of section 101(f) of the Act and the standards of the average citizen in the community.

The 8 C.F.R. § 204.2(c)(2) details the evidence that should be submitted to accompany a self-petition based upon battery and/or extreme cruelty. As it relates to evidence of a petitioner's good moral character, the regulation states:

(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 three-year period immediately preceding the filing of the self-petition.

In this instance, the evidence shows that the petitioner has been arrested on at least three occasions, and convicted on at least two occasions. However, the petitioner has provided no affidavit regarding his good moral character with details regarding these arrests and any extenuating circumstances, evidence that he has been reformed or rehabilitated or that these acts were an aberration of his normal character. Without such details, we do not find that an affirmative finding of the petitioner's good moral character can be made.

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 this decision.

¹ Criminal Court of the City of New York, County of Queens, Docket Number [REDACTED] Disposition Number [REDACTED]

² Criminal Court of the City of New York, County of Queens, Docket Number [REDACTED] Disposition Number [REDACTED]