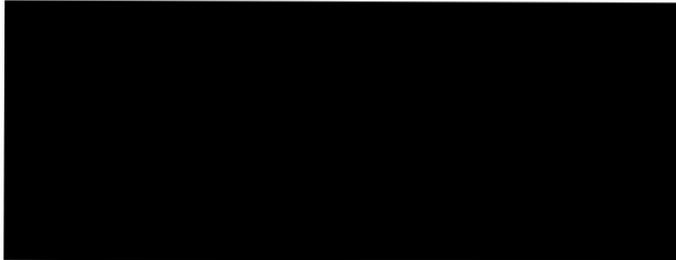


identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



B9

FILE:



EAC 01 214 52675

Office: VERMONT SERVICE CENTER

Date: MAY 18 2006

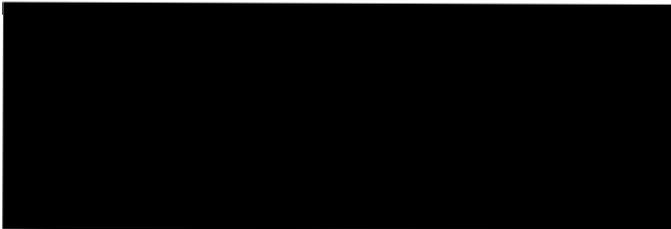
IN RE:

Petitioner:



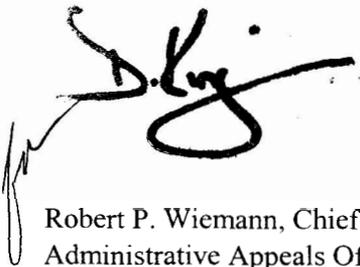
PETITION: Petition for Special Immigrant Battered Spouse Pursuant to Section 204(a)(1)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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.

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 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 the petitioner entered the United States on or about July 24, 1992, as a nonimmigrant visitor, with permission to remain in the United States until October 23, 1992. The petitioner married United States citizen [REDACTED] on December 29, 1995, in Georgia. The petitioner's citizen spouse filed a Form I-130 on the petitioner's behalf on February 14, 1996. On that same date, the petitioner concurrently filed a Form I-485. The Form I-130 was denied on November 26, 1997 and the petitioner and [REDACTED] were divorced on February 4, 1998. The Form I-485 was denied and the petitioner was issued a Notice to Appear and placed into deportation proceedings on May 1, 1998.

The record further reflects that the petitioner married United States citizen, [REDACTED] on July 7, 2000, in Dekalb, Georgia. The petitioner's spouse filed a Form I-130 on the petitioner's behalf which was approved on July 9, 2002. The petitioner filed the instant Form I-360 self-petition on August 27, 2004, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, his citizen spouse during their marriage.

As it relates to her claim of abuse, with the initial filing, the petitioner submitted a personal statement, evidence related to her claim of abuse against [REDACTED], the father of her daughter, and [REDACTED] her former husband. The director found this evidence was not sufficient to establish eligibility and on August 22, 2001, requested the petitioner to submit further evidence to establish that she had battered by or subjected to extreme cruelty by her citizen spouse [REDACTED]

The petitioner responded to the director's request on October 27, 2001, by submitting a police report and a second statement from the petitioner.

On September 16, 2005, after reviewing the evidence submitted by the petitioner, including the evidence submitted after the director's request for evidence, the director denied the petition based upon the determination that the petitioner failed to establish that she had been battered by or subjected to extreme cruelty by her citizen spouse. In his decision, the director correctly noted that the petitioner's claims of abuse in her prior relationships "have no bearing on this current instant petition" and that it is only the petitioner's relationship with her current spouse that will be considered.

The petitioner through counsel files a timely appeal, dated October 19, 2005, with copies of documents previously submitted. Counsel argues that the circumstances described by the petitioner make clear that she has fallen into a cycle of abuse. Counsel relies on the petitioner's affidavit and the police report documenting [REDACTED]'s arrests to support the assertion that the petitioner has established her claim of abuse.

Upon review of the record, we concur with the director's decision and find that the evidence contained in the record is not sufficient to establish that the petitioner was battered by or subjected to extreme cruelty by her citizen spouse.

In her initial statement, the petitioner indicated that her spouse had a drug problem, that he stopped working, and would come home high. The petitioner states that her spouse was "very mean when he wants drugs" and that although he never hit her, he would become "verbally abusive when he couldn't have drugs." The petitioner does not provide any specific information regarding the alleged verbal abuse.

In her second statement, the petitioner claims that her spouse sold their car and stole money from her daughter's piggy bank in order to buy drugs. In addition, the petitioner states:

Sammie comes home high all the time now. It is out of control. I ask him to leave the house and he becomes belligerent. He only leaves when I tell him that I will call the police or pick up the phone to make a call. The police came one time this year and told him to leave; they did not arrest him because I had no marks . . . They police told they [sic] would not file a report because he did not have drugs on him and I had no marks on me.

\* \* \*

Once he accused me of using him so that I can get a visa. He raised his hand at me while shouting to me that I can't be trusted and that I have men calling me.

Despite counsel's claim that the petitioner's affidavit is "complete, written simply, as [the petitioner] is not an educated woman, but certainly sincerely and consistently," it is important to note that the petitioner failed to mention any of the incidents detailed above in her first statement. It may be, as counsel argues, that these inconsistencies are attributable to the petitioner's lack of education, but we are not compelled to interpret it that way. 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).

Even if consistently made, the petitioner's claims are not sufficient to establish a claim of extreme cruelty as described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). The remaining evidence, the police report for the petitioner's spouse's arrest for drug possession provides, does not establish that the petitioner has been battered or that she has been subjected to extreme cruelty. The petitioner's claims regarding her spouse's drug abuse do not establish that she was victim of any act or threatened act of violence, any forceful detention, psychological, sexual abuse or exploitation.

Based upon the above discussion, we find the director properly considered the evidence submitted by the petitioner and that such evidence was afforded the proper weight. It should be noted that CIS has the sole discretion in determining what evidence is credible and the weight to be given the evidence.<sup>1</sup> Accordingly, we concur with the director's findings that the petitioner failed to establish that she has been battered by or subjected to extreme cruelty perpetrated by her citizen spouse.

Despite our support of the director's findings, however, the director's decision cannot stand because of the director's failure to issue a Notice of Intent to Deny (NOID) to the petitioner prior the issuance of the denial. 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 . . . ." Accordingly, the case must be remanded to the director for issuance of an NOID pursuant to the regulation.

Despite the fact that the director's decision rested on the single issue discussed above, we find additional issues that must be addressed on remand. Specifically, the director should consider whether the petitioner is subject to section 204(g) of the Act which states:

Notwithstanding subsection (a), except as provided in section 245(e)(3), a petition may not be approved to grant an alien immediate relative status by reason of a marriage which was entered into during the period [in which administrative or judicial proceedings are pending], until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.

Section 245(e) of the Act states:

- (1) Except as provided in paragraph (3), an alien who is seeking to receive an immigrant visa on the basis of a marriage which was entered into during the period described in paragraph (2) may not have the alien's status adjusted under subsection (a).

---

<sup>1</sup> See 8 C.F.R. § 204.2(2)(i) which states that the 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.]

- (2) The period described in this paragraph is the period during which administrative or judicial proceedings are pending regarding the alien's right to be admitted or remain in the United States.
- (3) Paragraph(1) and section 204(g) shall not apply with respect to a marriage if the alien establishes by clear and convincing evidence to the satisfaction of the [Secretary of Homeland Security] that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition under section 204(a) . . . with respect to the alien spouse or alien son or daughter. In accordance with the regulations, there shall be only one level of administrative appellate review for each alien under the previous sentence.

The regulation at 8 C.F.R. § 245.1(c)(9)(v) states, in pertinent part:

*Evidence to establish eligibility for the bona fide marriage exemption.* Section 204(g) of the Act provides that certain visa petitions based upon marriages entered into during deportation, exclusion or related judicial proceedings may be approved only if the petitioner provides clear and convincing evidence that the marriage is bona fide . . . .

Because the petitioner entered into the qualifying relationship while she was in removal proceedings, under section 204(g) of the Act, the petitioner has the increased burden of demonstrating, by clear and convincing evidence, that she entered into the marriage in good faith. From the record, it does not appear that the director considered whether the petitioner had established by clear and convincing evidence that the petitioner entered into the marriage in good faith.

Second, the record does not contain any evidence which establishes the petitioner's good moral character in accordance with the regulation the regulation at 8 C.F.R. § 204.2(c)(2)(v), which states:

*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.*

[Emphasis added.]

While the record does contain a fingerprint clearance from Georgia and from Canada, both documents are dated in 1997. Accordingly, the director should request the petitioner to submit clearances from each place she has resided for more than six months during the three-year period prior to filing the instant petition, from June 25, 1998 through June 25, 2001.

In accordance with the above discussion, the decision of the director is withdrawn. The case will be remanded for the purpose of the issuance of a new notice of intent to deny as well as a new final decision to both the applicant and counsel. The new decision, if adverse to the petitioner, shall be certified to this office for review.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**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.