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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC 06 031 51374

Office: VERMONT SERVICE CENTER

Date: NOV 06 2006

IN RE: Petitioner:

PETITION: Petition for 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 The decision of the director will be withdrawn and the petition will be remanded for further action.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 because the petitioner did not establish that he had a qualifying relationship with his former wife.

On appeal, the petitioner 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 or a child of 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 a United States citizen may still self-petition under this provision of the Act if the alien 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)(ccc) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc).

Section 204(a)(1)(J) of the Act states, in pertinent part:

In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) . . . , or in making determinations under subparagraphs (C) and (D), the [Secretary of Homeland Security] shall consider 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 [Secretary of Homeland Security].

The eligibility requirements are further explicated in the regulation at 8 C.F.R. § 204.2(c)(1), which 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 guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are further explicated 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.

(ii) *Relationship.* A self-petition filed by a spouse must be accompanied by evidence of citizenship of the United States citizen or proof of the immigration status of the lawful permanent resident abuser. It must also be accompanied by evidence of the relationship. Primary evidence of a marital relationship is a marriage certificate issued by civil authorities, and proof of the termination of all prior marriages, if any, of . . . the self-petitioner

* * *

(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. Self-petitioners who lived outside the United States during this time should submit a police clearance, criminal background check, or similar report issued by the appropriate authority in each foreign

country in which he or she 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.

The petitioner in this case is a native and citizen of India who entered the United States on December 24, 1999 as a nonimmigrant visitor (B-1). On October 5, 2001, the petitioner married A-P-¹, a U.S. citizen, in New York. On October 28, 2003, the former couple was divorced by order of the Kings County, New York Supreme Court. The petitioner filed this Form I-360 on October 31, 2005. The director denied the petition because the record showed that the petitioner was divorced over two years before this petition was filed and the petitioner consequently did not have a qualifying relationship with his former wife. On appeal, the petitioner submits a U.S. Postal Service certified mail receipt, which shows that the petitioner mailed his Form I-360 on October 27, 2005. However, Citizenship and Immigration Services (CIS) did not receive the petition until October 31, 2005, just over two years after the petitioner's divorce. A petition is not properly filed until it is received by CIS. *See* 8 C.F.R. § 103.2(a)(7)(i). Accordingly, the evidence of the mailing date of the petition submitted on appeal does not overcome the director's ground for denial. Beyond the director's decision, the record also fails to establish that the petitioner's former wife battered or subjected him to extreme cruelty during their marriage, that the petitioner was eligible for immediate relative classification based on his former marriage and that the petitioner is a person of good moral character. Despite the petitioner's ineligibility on these four grounds, the petition will be remanded because the director denied the case without first issuing a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

Battery or Extreme Cruelty

Beyond the director's decision, the petitioner failed to establish the requisite battery or extreme cruelty. The petitioner submitted the following evidence relevant to his claim of battery or extreme cruelty: his own handwritten statement dated October 23, 2005; handwritten statements from his friends, [REDACTED] and [REDACTED] and a copy of his divorce judgment. In his statement, the petitioner explains that after their marriage, his former wife quit working, spent their money buying expensive things, complained that the petitioner did not make enough money, and began drinking and would not come home for one to three days at a time. The petitioner reports that although the former couple was trying to have a baby and went to see a doctor about their inability to conceive, he later found out that his former wife was taking birth control pills without telling him. In the summer of 2003, the petitioner reports that he came home unexpectedly and found his wife having intimate relations with her brother. The petitioner reports feeling depressed and states that he did not go to work

¹ Name withheld to protect individual's identity.

for three weeks. The petitioner explains that he stayed with his friend, Mr. [REDACTED] because he was afraid to stay in his apartment by himself.

Mr. [REDACTED] states that he witnessed one argument between the former couple when the petitioner's former wife "jumped on [the petitioner] like a crazy [sic]," called him derogatory names, and told the petitioner that it was his job to make money and her job to spend it. Mr. [REDACTED] also states that the petitioner called him after the petitioner found his former wife in bed with her brother and that the petitioner was very upset and crying. Ms. [REDACTED] states that the petitioner's former wife "wasn't there for him" and did not cook or do laundry for the petitioner. Mr. [REDACTED] states that the petitioner once called him when his wife had not come home at night and that the petitioner was crying and very worried. Mr. [REDACTED] reports that when he went to check on the petitioner the next day, the petitioner's former wife had returned home very drunk. Mr. [REDACTED] further states that the petitioner called him after he found his wife in bed with her brother and that the petitioner sounded hysterical. Mr. [REDACTED] confirms that the petitioner did not come to work for a long time after this incident and that the petitioner stayed with him for a couple of days because the petitioner could not stay in his apartment alone.

The testimonial evidence fails to establish that the petitioner's former wife battered or subjected him to extreme cruelty, as that term is defined in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). The evidence does not indicate that the petitioner's former wife ever physically assaulted him, threatened him with violence or that her nonviolent actions were otherwise part of an overall pattern of violence. The evidence also fails to establish that the petitioner's former wife's mistreatment and infidelity constituted psychological abuse.

The judgment of divorce states that the petitioner's marriage was dissolved on the ground of cruel and inhuman treatment of the petitioner's former wife against him pursuant to section 170(1) of the New York Domestic Relations Law. However, the judgment contains no findings of fact to establish what specific actions of the petitioner's former wife constituted "cruel and inhuman treatment" and the judgment states that the petitioner's former wife appeared in court, but waived her right to answer the petitioner's summons. Section 170(1) of the NYDRL defines cruel and inhuman treatment as follows:

The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.

Not all behavior encompassed by this definition necessarily constitutes battery or extreme cruelty under section 204(a)(1)(A)(iii)(I)(bb) of the Act. Conduct which renders cohabitation of the spouses improper could suffice to grant a divorce on the ground of cruel and inhuman treatment in New York. In addition, the petitioning spouse's allegations of cruel and inhuman treatment need not be corroborated. *See e.g. Pascarella v. Pascarella*, 210 A.D.2d 915, 621 N.Y.S.2d 821 (4th Dept. 1994); *D'Amato v. D'Amato*, 96 A.D.2d 849, 466 N.Y.S.2d 23 (2nd Dept. 1983). New York law also provides no defenses to an action for divorce based on cruel and inhuman treatment. *Pajak v. Pajak*, 56 N.Y.2d

394, 452 N.Y.S.2d 381, 437 N.E.2d 1138 (1982). Accordingly, without evidence of the court's specific findings of fact regarding the petitioner's former wife's conduct, the divorce judgment alone does not establish that the petitioner's former wife battered or subjected him to extreme cruelty, as that term is defined in the regulation at 8 C.F.R. § 204.2(c)(1)(vi).

The present record fails to demonstrate that the petitioner's former wife battered or subjected him to extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Qualifying Relationship and Eligibility for Immediate Relative Classification

Pursuant to section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act, the petitioner would still be eligible for immigrant classification despite his divorce, if he demonstrated that the divorce occurred within two years of the filing of his petition and was connected to his former wife's battery or extreme cruelty. The petitioner fails to meet both of these criteria. First, as previously discussed, the petitioner filed this Form I-360 over two years after his divorce. Second, as discussed in the preceding section, the petitioner failed to establish that his wife battered or subjected him to extreme cruelty. Consequently, he also has not demonstrated that their divorce was connected to such abuse. Accordingly, the petitioner failed to establish a qualifying relationship with his former wife pursuant to section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act.

Beyond the director's decision, the petitioner also failed to establish his eligibility for immediate relative classification based on his relationship with his former wife. The regulation at 8 C.F.R. § 204.2(c)(1)(B) requires that a self-petitioner be eligible for immediate relative classification under section 201(b)(2)(A)(i) of the Act based on his or her relationship to the abusive spouse. Because the petitioner was divorced from his wife over two years before this petition was filed and the record does not establish that she battered or subjected the petitioner to extreme cruelty, the petitioner did not have a qualifying relationship with his former wife and was ineligible for immediate relative classification based on such a relationship, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act.

Good Moral Character

Beyond the director's decision, the record also fails to establish the petitioner's good moral character. The petitioner submitted no local police clearances, state criminal background checks or similar documentation of his good moral character. The petitioner also did not explain that local police clearances or state-issued criminal background checks were not available to him and present other evidence of his good moral character, as specified in the regulation at 8 C.F.R. § 204.2(c)(2)(v). Accordingly, the present record fails to establish the petitioner's good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

The petitioner failed to demonstrate his eligibility for immigrant classification under section 204(a)(1)(A)(iii) of the Act. Nonetheless, the case will be remanded because the director denied the petition without first issuing a NOID. The regulation at 8 C.F.R. § 204.2(c)(3)(ii) directs that CIS must

provide a self-petitioner with a NOID and an opportunity to present additional information and arguments before a final adverse decision is made. 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.