

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



B9

FILE:



Office: VERMONT SERVICE CENTER

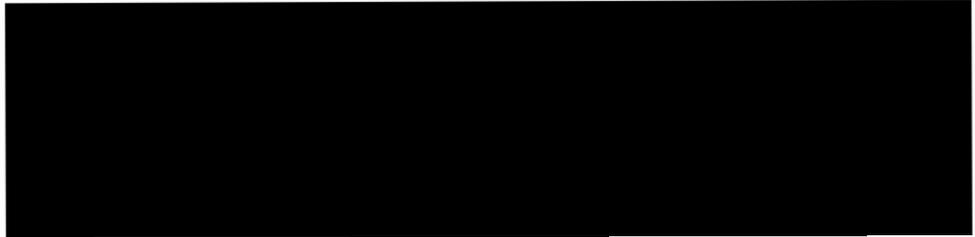
Date:

OCT 13 2006

EAC 04 154 54192

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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 an 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 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 she was battered by or subjected to extreme cruelty by her spouse and that she entered into the marriage in good faith.

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

* * *

(ix) Good faith marriage. A spousal self-petition cannot be approved if the self-petitioner entered into the marriage to the abuser for the primary purpose of circumventing the immigration laws. A self-petition will not be denied, however, solely because the spouses are not living together and the marriage is no longer viable.

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.

* * *

(vii) *Good faith marriage*. Evidence of good faith at the time of marriage may include, but is not limited to, proof that one spouse has been listed as the other's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. Other types of readily available evidence might include the birth certificates of children born to the abuser and the spouse; police, medical, or court documents providing information about the relationship; and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered.

The record reflects that the petitioner entered the United States on October 4, 2002, as a K-1 nonimmigrant. The petitioner married United States citizen, F-M-¹ on December 27, 2002, in Orange County, New York. The petitioner filed the instant Form I-360 self-petition on April 28, 2004, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, her United States citizen spouse during their marriage. The director found that the petitioner's initial submission did not establish her prima facie eligibility² and on May 5, 2004, requested the petitioner to submit additional evidence to establish that she is a person of good moral character. The petitioner responded with additional evidence on July 2, 2004. On September 8, 2004, the director issued a notice indicating that the petitioner had established a prima facie case for classification.

¹ Name withheld to protect identity.

² The determination of prima facie eligibility is made for the purposes of 8 U.S.C. § 1641, as amended by section 501 of Public Law 104-208, which governs aliens eligibility for public assistance and benefits. In accordance with 8 C.F.R. § 204.2(c)(6), a finding of prima facie eligibility does not relieve the petitioner of the burden of providing additional evidence in support of the petition, does not establish eligibility for the underlying petition, is not considered evidence in support of the petition, and is not construed as a determination of the credibility or probative value of any evidence submitted along with that petition.

On January 5, 2005, the director requested the petitioner to submit additional evidence to establish that she was battered by or subjected to extreme cruelty by her citizen spouse and that she entered into the marriage in good faith. The director also requested the petitioner to indicate whether she was still married and whether she had ever been placed in immigration proceedings. The petitioner's counsel³ responded to the director's request on March 2, 2005, and requested an additional 60 days in which to respond. The director granted the petitioner's request for additional time on April 6, 2005.

The petitioner failed to respond to the request for evidence and on August 24, 2005, the director denied the petition without the issuance of a notice of intent to deny in accordance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii),⁴ finding that the record did not establish that the petitioner had been battered by or subjected to extreme cruelty by her citizen spouse and that she entered into the marriage in good faith.

The petitioner, through her current counsel of record, filed a timely appeal with additional evidence. To support the submission of the additional evidence on appeal,⁵ counsel alleges ineffective assistance of counsel against the petitioner's former counsel. 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). Counsel has failed to provide any evidence to satisfy the *Lozada* requirements. The record is absent a detailed affidavit from the petitioner describing her agreement with former counsel, evidence that prior counsel was notified of the allegations and given an opportunity to respond, and evidence that a disciplinary complaint had been filed against prior counsel. Counsel's unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Although counsel has failed to adequately establish a claim of ineffective assistance of counsel against the petitioner's former counsel, because the petitioner was not provided with a notice of intent to deny as required by regulation, we must review the petitioner's appellate submission in order to determine whether such evidence overcomes the director's stated grounds for denial and could be sustained without remanding to the

³ Prior to appeal, the petitioner was represented by [REDACTED]

⁴ 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.

⁵ In cases where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO does not usually accept evidence offered for the first time on appeal. If the petitioner had wanted the submitted evidence to be considered, she should have submitted the documents in response to the director's request for evidence. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

director for further action. As will be discussed, we concur with the director's determination and find that the petitioner's appellate submission does not overcome this determination.

The petitioner's claim that she was battered by or subjected to extreme cruelty by her spouse.

In the statement submitted by the petitioner in support of the initial filing, the petitioner claims that upon entering the home of her new husband, the "refrigerator was empty, the house was dirty, smoke filled and full of pet smells and urine soaked carpets." The petitioner then states that her spouse did not have a steady job, that her spouse made "indecent propositions" to her daughter, and asked the petitioner to "start dancing in strip bars" Finally, the petitioner indicates that her spouse threatened her with divorce and deportation, that she had to seek medical treatment and that "numerous reports were filed."

The "numerous reports" referenced by the petitioner indicate that the petitioner and her spouse were both the victims and aggressors in their disputes. In the first report, dated August 27, 2003, the responding officer described the incident as a "verbal argument only" between the petitioner's daughter and the petitioner's spouse. The officer further indicated that no offense was committed by the petitioner's spouse, that there were no charges being brought against him, and that there was no reasonable cause to believe that the petitioner's daughter was the victim of abuse. A second report, dated November 5, 2003 indicates that during a dispute over money the petitioner and her spouse were involved in a "struggle." The officer noted that the petitioner was not injured, and that no charges were filed against the spouse. In a third report, dated February 24, 2004, the officer indicated that the petitioner and her spouse were involved in a "verbal argument." Again, however, the officer indicated that the petitioner's spouse was not charged or arrested, the petitioner was not injured, and no domestic violence notice was issued to the petitioner. A fourth report, dated March 19, 2003, describes a verbal argument over money in which the petitioner attempted "to grab [a] tape recorder from [her] husband." The officer indicated that while there was a "verbal dispute," there was "no actual physical altercation," and that there was "no offense committed."

The remaining three reports submitted by the petitioner indicate that she was the aggressor against her spouse, not the victim. In the report dated March 10, 2003, the petitioner's spouse claimed that during an argument over money the petitioner pushed him. In the report dated July 16, 2003, the petitioner's spouse reported that the petitioner spit in his face, grabbed him, and kicked him. The final report, dated April 3, 2004, alleges that the petitioner jumped on her spouse, that he ended up with scratches on his hands, that the petitioner was charged with harassment in the second degree, and that a domestic violence notice was issued to the petitioner's spouse.

The petitioner also submitted an undated medical report which indicates that she was treated for an injury to her forearm. The remainder of the handwritten notes on this medical report are indecipherable and do not indicate the cause of the injury or provide any other information to establish that the petitioner's injuries resulted from abuse by her spouse.

On appeal, the petitioner submits copies of previously submitted medical reports as well as new medical reports. The majority of the new reports consist of records regarding the petitioner's yearly check-ups and doctor visits related to a mass that was found in the petitioner's breast. The remaining reports describe

treatment for a “small pimple” on the petitioner’s left hand near her wrist and treatment for poison oak contracted from working on the lawn. Although one of the medical reports indicates that the petitioner’s spouse had shouted at her, the same report and the remaining others indicate “no bruises, wounds or fractures” and that the petitioner “feels safe at home.” Another report dated December 2003 indicates that due to a “very complicated family situation,” the petitioner is “in a lot of stress.” In the same report, however, under the heading “psychiatric,” the doctor has indicated that there is “no evidence of depression or anxiety.”⁶

While counsel states that “full police reports” have been submitted on appeal, we note that the reports submitted are merely the original copy of copies previously received. As noted by the director when discussing the pictures, “the pictures are not clear enough to really tell if there are bruises or not” and come “with no explanation or narrative as to what they are about.” While the record does contain a photograph of a pile of furniture in which a chair and folding table appear to be broken, the photograph does not contain a caption indicating how this damage occurred, much less that it was caused by the petitioner’s spouse. Further, while counsel asserts that former counsel “randomly attached photographs,” and “failed to provide any clarification as to the relevance” of the evidence, counsel’s appellate submission includes the same picture submitted by previous counsel and adds no caption or explanation to explain the relevance of the photograph.⁷

On appeal, the petitioner also submits a “note” from a police officer which counsel indicates was given to the petitioner “to give to other offices in case [the petitioner’s spouse] ever attacked [her] again.” The note, which is undated and written on a scrap of paper, not official police letterhead, indicates that there has been “extensive domestic history between parties.” The note does not mention the petitioner’s name or the name of her spouse. Although the petitioner’s statement indicates that this officer “saw her neck” after being choked by her spouse, the record does not contain any police report which makes any mention of such an injury.

In her new statement on appeal, the petitioner makes claims that were not contained in her previous statement and which contradict her previous claims and other evidence in the record. For instance, in her first statement, the petitioner claimed that her spouse “did not have a steady job, in fact he had no job at all and could not support a family. Yet in the statement submitted on appeal, the petitioner indicates that her spouse “had three jobs” and was “tired,” but that they’d both agreed “that it would be hard and that we both would have to make sacrifices.” The petitioner now also indicates that her spouse videotaped and audio recorded⁸ the petitioner and her daughter, that he destroyed their friendships with others, that he was a liar, that he had a

⁶ It is noted that the record also contains a police report and medical record dated June 6, 2004, more than two months after the filing of the petition. However, such evidence cannot be considered in support of this petition as the petitioner must establish eligibility *at the time of filing*. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

⁷ Upon review of the record, we could not find copies of the photographs that were previously submitted. Although the petitioner submits a photograph of the broken furniture on appeal that was described in the director’s decision, the record does not contain the photograph of the broken windshield described by the director.

⁸ The petitioner acknowledges that she also taped conversations and incidents that she had with her spouse. However, although the record does contain video and cassette tapes, we are unable to verify or authenticate the voices and images contained on the tapes.

relationship with a 17-year old girl, hid his finances and attempted to defraud the government, and refused to pay for the petitioner's daughter's schooling.

As it relates to her claims of physical abuse, in her appellate statement the petitioner claims that she was "often hit and choked [sic]," slapped in the face and that her spouse would throw things. The petitioner also states that "another time he dislocated my arm and I had to wear an elastic bandage for a month." However, not one of the police reports or nearly a dozen of the medical records dated between January 2003 and January 2004, contain descriptions of injuries which substantiate the petitioner's claim that she was choked, hit, slapped in the face, or that she injured her leg or arm. Although the petitioner claims that during a visit to the gynecologist's office the doctor "saw scratches and bruises" and brought her to another doctor, the record does not contain any such report.

On appeal, the petitioner also claims that her spouse is an "extremely reckless driver," and "sometimes would intentionally cause accidents." To support this claim, the petitioner describes the following incident:

As we were driving along, a car pulled up on my passenger side. Suddenly [redacted] began to driving very aggressively, swerving and trying to run the other driver off of the road. [redacted] starting cursing as if the other driver was in our way, but I saw that the other driver did not do anything wrong. Instead, he was a young terrified kid [redacted] began to follow him. I was really scared and begged [redacted] to stop . . . [redacted] managed to position our car in such a way that the other driver had no choice and hit [redacted] car.

However, contrary to the petitioner's characterization of her spouse's actions and her claim that her spouse was following the other driver and was driving aggressively, the accident report indicates that the petitioner's spouse and the driver of the other vehicle were traveling in opposite directions and that the other driver attempted to make a turn in front of the petitioner's spouse but failed to "yield the right of way," thereby causing the accident.

Additionally, the petitioner claims that she believes her spouse suffered from schizophrenia and that she was finally able to "insist and persuade" her spouse to see a specialist. However, the only evidence referenced by the petitioner to support this claim is a report from a doctor dated May 11, 2004, after the filing of the petition. Moreover, the report was previously submitted and relates to the petitioner, not her spouse or his alleged schizophrenia.

The petitioner also submits a statement from her daughter and two acquaintances. In her statement, the petitioner's daughter generally describes incidents referred to in the petitioner's appellate statement. The letter from the petitioner's acquaintance, [redacted] indicates that she stayed with the petitioner because the petitioner "was abused by her husband" and "scared to stay by herself." [redacted] does not indicate that she was a witness to the purported abuse and does not provide any details about the alleged abuse, such as whether it was physical or verbal or when or where it occurred. The letter from [redacted] [redacted] also an acquaintance of the petitioner, indicates that on one occasion the petitioner "was all bruised on her upper thigh and arm" and that she transported the petitioner to the police station where she was questioned. [redacted] does not provide the date that the alleged incident occurred or indicate that the

petitioner's spouse was responsible for the bruising. As previously noted, all of the reports indicate that the petitioner was "not injured." Additionally, although the petitioner's appellate statement contains numerous references to friends of the petitioner, her spouse, and her daughter, as well as neighbors and co-workers, as being eye-witnesses to the purported abuse, the record remains absent statements from any of these people.

The petitioner's claim that she entered into the marriage in good faith.

In her initial statement, the petitioner provided no indication as to her intent for marrying her citizen spouse. She states only that when she met her spouse over the Internet, she was "impressed," and that when her spouse proposed, she accepted. In the statement submitted on appeal, the petitioner provides more details regarding meeting her spouse and his visits to the Ukraine prior to their marriage. After coming to the United States, the petitioner indicates that she "finally agreed to get married" but provides no statement regarding her feelings or intent at that time.

As evidence of joint documentation, the petitioner submitted a lease for an apartment from October 2003 until September 2004. Given that the petitioner and her spouse were married in December 2002 and resided together for nearly two years, the lack of a prior lease or other documentary evidence which shows joint assets and liabilities does not support a finding that the petitioner's entered into her marriage in good faith.

While the petitioner also submits photographs of the petitioner and her spouse, as well as of her spouse with various friends and family members, these photographs do not independently establish that the petitioner married her spouse in good faith. Similarly, the letters and emails submitted by the petitioner evidencing correspondence from her spouse are written from her spouse's perspective and have no bearing on the petitioner's intent at the time of the marriage. The letters written by the petitioner do not discuss their courtship or her feelings, but rather the documentation and immigration process for the petitioner and her daughter. The letter to the petitioner and her spouse at the time of their marriage ceremony indicates that a legal marriage took place, but does not establish that the petitioner intended it to be a good faith marriage. Finally, the letter from the petitioner's brother dated February 2005, nearly three years after the petitioner's marriage, verifies only that the petitioner's spouse's visited the Ukraine prior to the marriage. His letter does not provide any insight on the petitioner's feelings or intent in marrying her spouse. The "key factor in determining whether a person entered into a marriage in good faith is whether he or she intended to establish a life together with the spouse at the time of marriage." *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975). The petitioner has failed to submit sufficient evidence to establish that she intended to establish a life with her spouse at the time she entered into the marriage.

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 to the petitioner prior the issuance of the denial. Accordingly, the decision of the director must be withdrawn and the case remanded for the purpose of the issuance of a notice of intent to deny as well as a new final decision. The new decision, if adverse to the petitioner, shall be certified to this office for review.

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 which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.