



U.S. Citizenship  
and Immigration  
Services

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FILE:

EAC 04 031 52143

Office: VERMONT SERVICE CENTER

Date: **SEP 11 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:

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.

**7** Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Vermont Service Center Acting Director denied the preference 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 The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a native and citizen of the People's Republic of China who seeks 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 an alien battered or subjected to extreme cruelty by his United States citizen spouse.

The director denied the petition, finding that the petitioner failed to establish that he had been battered or subjected to extreme cruelty by his former spouse.

On appeal, the petitioner submitted his own statement and his former counsel submitted a brief and additional evidence.

**On appeal, the petitioner also submits a written request for oral argument.** Citizenship and Immigration Services (CIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, the petitioner identifies no unique factors or issues of law to be resolved and the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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 Attorney General 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.

An alien who has divorced a United States citizen may still self-petition for immigrant classification under section 204(a)(1)(A)(iii) of the Act if the alien demonstrates that he or she is a person

who was a bona fide spouse of a United States citizen within the past 2 years and –

\* \* \*

(ccc) who 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) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC).

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

(i) *Basic eligibility requirements.* A spouse may file a self-petition under section 204(a)(1)(A)(iii) . . . of the Act for his or her classification as an immediate relative . . . if he or she:

\* \* \*

(B) Is eligible for immigrant classification under section 201(b)(2)(A)(i) . . . of the Act based on that relationship [to the U.S. citizen 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 . . . 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.

(vii) *Good moral character.* A self-petitioner will be found to lack good moral character if he or she is a person described in section 101(f) of the Act. Extenuating circumstances may be taken into account if the person has not been convicted of an offense or offenses but admits to the commission of an act or acts that could show a lack of good moral character under section 101(f) of the Act. A person who was subjected to abuse in the form of forced prostitution or who can establish that he or she was forced to engage in other behavior that could render the person excludable under section 212(a) of the Act would not be precluded from being found to be a person of good moral character, provided the person has not been convicted for the commission of the offense or offenses in a court of law. A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she willfully failed or refused to support dependents; or committed unlawful acts that adversely reflect upon his or her moral character, or was convicted or imprisoned for such acts, although the acts do not require an automatic finding of lack of good moral character. 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. If the results of record checks conducted prior to the issuance of an immigrant visa or approval of an application for adjustment of status disclose that the self-petitioner is no longer a person of good moral character or that he or she has not been a person of good moral character in the past, a pending self-petition will be denied or the approval of a self-petition will be revoked.

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.

(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.

According to evidence on record, the petitioner entered the United States on May 11, 1997 on a K-1 fiancé visa pursuant to an approved Form I-129F petition filed by S- T-,<sup>1</sup> a U.S. citizen. On August 10, 1997 the petitioner married S-T- in Valparaiso, Indiana. On January 23, 2002, the petitioner's marriage

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<sup>1</sup> Name withheld to protect individual's identity.

to S- T- was legally terminated by dissolution. On January 17, 2003, the petitioner was placed in removal proceedings, which remain pending before the Detroit Immigration Court. The petitioner's next hearing is scheduled for May 25, 2007. On November 7, 2003, the petitioner filed this Form I-360 self-petition. On August 19, 2004, the director requested additional evidence of, *inter alia*, the petitioner's subjection to battery or extreme cruelty by his former spouse and his good moral character. The petitioner requested and was granted additional time to respond and on October 18, 2004 and January 18, 2005 submitted further evidence. On October 25, 2005, the director denied the petition because the record did not establish the requisite battery or extreme cruelty.

On appeal, the petitioner claims that the director misrepresented the facts and ignored critical evidence in his case. We concur with the director's determination that the evidence submitted below does not establish that the petitioner's former wife battered or subjected him to extreme cruelty during their marriage. The petitioner's claims and the evidence submitted on appeal do not overcome this ground for denial. Beyond the director's decision, the present record also fails to establish that the petitioner had a qualifying relationship with a U.S. citizen, was eligible for immediate relative classification based on that relationship, or that the petitioner is a person of good moral character.

Despite the petitioner's ineligibility on these four grounds, the case will be remanded because the director denied the petition without first issuing a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

#### I. Battery and Extreme Cruelty

The petitioner submitted the following evidence relevant to his claims of battery and extreme cruelty:

- His written statements dated October 27, 2003 and January 1, 2005;
- An Indianapolis Police Department incident report dated August 4, 1997;
- A letter from Risk Management Alternatives, Inc. addressed to the petitioner regarding a delinquent Ameritech account;
- A banking account withdrawal slip signed by the petitioner's former wife and a related statement for the former couple's joint account;
- A copy of the front and back of the former couple's 1997 joint federal income tax return refund check;
- Documents filed in the legal proceedings to terminate the petitioner's marriage including the Petition for Annulment filed by the petitioner's former spouse, a Subpoena Duces Tecum directed to the former Immigration and Naturalization Service (INS) and the withdrawal of that subpoena by the petitioner's former spouse, the petitioner's Cross-Petition for Dissolution of Marriage; a court order dismissing the annulment petition and the Decree of Dissolution of the former couple's marriage;
- Support letters from the petitioner's former roommates and neighbors, [REDACTED] and [REDACTED];

- An Emergency Protective Order for the petitioner against his former spouse dated January 25, 2001;
- Copies of the November 7, 2000 Record of Deportable Alien for the petitioner; a Form I-851A Administrative Order of Removal issued on February 1, 2001 against the petitioner and an amended copy of this Form I-851A and a Memorandum dated March 12, 2003 stating that the Form I-851A had been cancelled and that the petitioner had been placed in removal proceedings under section 240 of the Act;
- A Marion County, Indiana Superior Court order dated August 30, 2002, which reversed the petitioner's prior conviction for criminal recklessness and granted a new trial, and a certified copy of his Marion County, Indiana criminal court record, which shows that he was found not guilty upon retrial by jury (submitted on appeal);
- A letter dated November 21, 2005 from Dr. [REDACTED] Associate Professor of Radiology at the Indiana University School of Medicine, regarding the age of a nondisplaced fracture of the ulna of an unnamed individual (submitted on appeal).

*Alleged Battery and Extreme Cruelty Observed by Others*

In his statements submitted below and on appeal, the petitioner describes five incidents of his wife's alleged battery and extreme cruelty that were observed by other individuals. First, the petitioner states that his former wife was violent and describes an incident which occurred on August 4, 1997, six days before their wedding. The petitioner explains that his former wife insisted that they go to the former INS office in Indianapolis to obtain certification of his employment authorization. The petitioner reports that his former wife "got physical confliction [sic] with INS top official . . . inside the office" while the petitioner was outside. The petitioner states that his former wife engaged in this behavior to show him that he had to depend on her for his legal status, employment authorization and that "she was the controller of [his] life here and should be the boss in [their] family life." The Indianapolis Police Department report for this incident indicates that both the petitioner and his former wife were in the building when a dispute arose between the petitioner's former wife and an INS official over the official's attempt to seize the petitioner's passport. The reporting officer states that he observed scratches on the INS official's hands, but saw no physical signs of injury on the petitioner's former wife. The report does not establish that this single instance of the petitioner's former wife's violence prior to their marriage was directed at the petitioner and the report does not otherwise corroborate the petitioner's claim that she used the incident to intimidate and control him.

The second incident occurred after their marriage, when the petitioner states that his former wife began to physically and mentally abuse him after he refused to say that she was a virgin before they were married. He recounts an incident when he came home from working a night shift and found evidence that his former wife had engaged in intimate relations with another man in their home. When he confronted her, the petitioner reports that his former wife told him, "This is America." In his affidavit, [REDACTED] states that he once visited the petitioner and his former wife in the evening when a male friend of the petitioner's former wife was present. Dr. [REDACTED] states that after the petitioner left for work, the petitioner's former wife and her other male friend were drinking and that

when he left, the male friend was still there and was a little drunk. Dr. [REDACTED] states that he does not know what happened after he left. Even if Dr. [REDACTED] confirmed the extramarital affair of the petitioner's former wife, the record does not demonstrate that her infidelity rose to the level of extreme cruelty.

The third incident occurred in November 1997, when the petitioner states that his former wife hid his shoes to prevent him from leaving. In his October 27, 2003 statement, the petitioner further explains:

Later she used my shoes to beat my head and face very hard no matter how I tried to escape, and she kicked my groin so hard that I got suffocated with excruciatingly [sic] pain, I had to self-defense [sic] to protect myself from her further beating, otherwise she would kick my groin to death. But after I fought back to self-defense [sic] to protect myself, she called the police and lied that I abused her and hit her. Because of my poor English and her deceivable [sic] lying and womanhood, I got arrested and wrongful charged [sic] based on her lying.

The petitioner states that his former roommate, [REDACTED], witnessed this incident. However, the petitioner submits no supporting statement from Mr. [REDACTED]. Although he is not required to do so, the petitioner does not explain why such evidence does not exist or is unobtainable. See 8 C.F.R. §§ 204.1(f)(1), 204.2(c)(2)(i). Evidence submitted by the petitioner shows that, based on this incident, he pled guilty to and was convicted of misdemeanor criminal recklessness against his former wife by the Marion County, Indiana Superior Court on March 2, 1998. The petitioner filed a petition for post-conviction relief, which was granted and the court reversed his conviction on August 30, 2002. On appeal, the petitioner submits a certified copy of his Marion County, Indiana criminal court record, which shows that he was found not guilty of the offense upon retrial by jury on January 24, 2006. While these documents show that the petitioner was not convicted of criminal recklessness arising from the November 1997 incident, they do not establish – and the petitioner submits no other corroborative evidence that – his former wife assaulted him on that occasion.

In these proceedings, the petitioner states that during the November 1997 incident he fought back against his wife in self-defense. On appeal, he submits a letter from Dr. [REDACTED] a radiologist who, according to the petitioner's former counsel, "writes that the fracture occurred approximately one week before November 1, 1997. This means that the fracture could not have occurred when Petitioner's ex-wife claims that it happened." However, the petitioner's former wife is not identified in Dr. [REDACTED]'s letter. Rather, he refers to "a patient with hospital [REDACTED]". The petitioner submits no evidence that his former wife is this patient. Accordingly, Dr. [REDACTED]'s letter is of no probative value.

The fourth incident occurred sometime after the petitioner and his former wife moved into an apartment with [REDACTED] in July 1998. The petitioner reports that one day when he asked the petitioner to try and find a job to help support them, she got mad, cursed, yelled and tried to stab him with a kitchen knife. The petitioner states that Mr. [REDACTED] held her arm, the petitioner ran to the door, and his former wife threw the knife at him, but missed and the knife hit the wall beside him. The

petitioner explains that Mr. [REDACTED] later moved out of state and he could not obtain an affidavit from Mr. [REDACTED].

The fifth incident occurred in February 19[REDACTED] after the petitioner moved into an apartment with [REDACTED]. In his April 24, 2001 affidavit, Dr. [REDACTED] states that one day in late February, he was awoken around 3:00 in the morning by noise and screaming. He reports that when he went to the living room, he saw the petitioner's former wife kicking the petitioner, cursing and screaming. Dr. [REDACTED] indicates that the petitioner's former wife was yelling that she hated the petitioner and wanted to charge him with domestic violence and send him to jail. Dr. [REDACTED] reports that after she rushed outside screaming for help, the petitioner pulled her back into the apartment and "[w]hen they tangled together [she] attacked [the petitioner] again and I saw there were bruise and bleeding [sic] scratches in his neck . . . ." According to his testimony, Dr. [REDACTED] was not present at the beginning of this incident. On appeal, the petitioner quotes Dr. [REDACTED]'s statement that the incident arose from a disagreement about the former couple's study plans, but the petitioner himself does not explain in probative detail how the physical conflict began.

*Incidents of Alleged Battery and Extreme Cruelty Unobserved by Others*

The petitioner recounts other incidents of his former wife's abuse that he explains were not observed by other individuals because they were living by themselves. The petitioner states that after he asked his wife why she had lied to a pastor they had just seen for marital counseling, she got mad, would not let him into the car and almost ran him over. The petitioner states that the pastor did not observe this incident, but drove him home afterwards. The petitioner does not submit a corroborative statement from the pastor regarding the former couple's marital conflict. Although he is not required to do so, the petitioner does not explain why such evidence does not exist or is unobtainable. *See* 8 C.F.R. §§ 204.1(f)(1), 204.2(c)(2)(i).

The petitioner also states that he often left their home when his former wife started abusing him and stayed on the campus of a local university. He explains that university officers caught him at least three times when he was sleeping on campus and that he is trying to get copies of the corresponding reports. On appeal, the petitioner does not submit such reports. Moreover, the petitioner does not describe in detail any of the particular incidents of purported abuse that caused him to leave the former couple's home and sleep on campus.

The petitioner recounts several other incidents where his former wife allegedly abused him due to disputes over money that were not observed by others. He states that she once threw a frame at him because he could not afford to buy her certain clothing, poured boiling water on him while he was cooking and burned his lower body and foot because he told her he did not have enough money to go to a restaurant, and once threw a hardcover book at him that hit his head and that she jumped on him, scratched his body and tore his clothes because he could not give her \$100. The petitioner fails to describe these incidents in probative detail. In addition the petitioner does not, for example, discuss the physical or emotional affects of his wife's behavior, state that he sought medical treatment or counseling for the effects of her alleged abuse, or explain why he did not seek such treatment. The

petitioner also reports that as soon as they were married, his former wife took his passport and hid it for a long time and stole his personal letters and legal documents. Again, the petitioner provides no detailed description of these actions and their effect on him.

*Purported Economic Abuse*

The petitioner states that during their marriage, his former wife did not work and he worked to pay all of their bills. The petitioner explains that because she incurred a telephone bill of \$577.58, their telephone service was disconnected. The petitioner submitted a letter addressed to the petitioner from a bill collection agency, which is dated August 17, 2000 and references a \$577.85 balance due to Ameritech on June 16, 1998. The letter is addressed to the petitioner individually and does not indicate that his former wife is responsible for the unpaid balance. The petitioner reports that his wife incurred other, unspecified debts as soon as they were married, which prevented him from applying for a credit card. Yet the petitioner does not identify or document these debts or his resultant inability to obtain a credit card. Although he is not required to do so, the petitioner does not explain why such evidence does not exist or is unobtainable. *See* 8 C.F.R. §§ 204.1(f)(1), 204.2(c)(2)(i).

The petitioner also states that his former wife forged his signature on their joint 1997 income tax return refund check and took his name off of their joint NBD Bank account in 1998 without his permission. The petitioner states that when he asked her about her actions, his former wife threatened to withdraw her support and prevent him from adjusting his status. In response to the director's August 19, 2004 request for additional evidence (RFE), the petitioner submitted a copy of the former couple's federal income tax return refund check dated May 22, 1998, the back of which contains their signatures and a stamp indicating that the check was processed on July 10 and 15, 1998. The petitioner also submitted a copy of his signed Indiana identification card to support his assertion that the signature on the tax refund check is not his own. The evidence is equivocal. In response to the director's RFE, the petitioner also submitted evidence of his and his former spouse's joint NBD bank accounts in 1997, but submitted no documentation that she withdrew his name from either of their NBD accounts in 1998. Although he is not required to do so, the petitioner does not explain why such evidence does not exist or is unobtainable. *See* 8 C.F.R. §§ 204.1(f)(1), 204.2(c)(2)(i).

The petitioner further states that his former wife and father-in-law caused him to owe over \$806 dollars to the IRS for his 1998 income tax. The petitioner states that in April 1999 he asked his former spouse to fill out a joint 1998 tax return with him, but she refused and said that her father had forced her to fill out a tax return with her parents and she was too scared to disobey her father. The petitioner states that, as a result, he filed his own tax return and had to pay over \$806, including interest and penalties. The petitioner submitted a copy of his 1998 Form 1040NR tax return, which he signed and dated on April 13, 1999 and which shows that he owed \$725.37. The petitioner states that he was still supporting his wife as late as May 1998 and submits a copy of their joint "First Savings" account statement and a copy of a withdrawal slip for the account signed by his former wife, which show that on May 24, 1999, she withdrew \$100.83 from the account leaving a zero

balance. These documents do not demonstrate a history of use of the account by both the petitioner and his wife, but rather indicate that the former couple was estranged by 1998 and did not file joint income tax returns after 1997. Accordingly, the evidence does not support the petitioner's claim that his former wife's refusal to file a joint 1998 tax return with him constituted extreme cruelty.

*Alleged Extreme Cruelty During Annulment and Dissolution Proceedings*

The petitioner discusses at length his former wife's allegedly abusive behavior during the legal proceedings to terminate their marriage. The petitioner submitted his former wife's Petition for Annulment which states that under Indiana law, their marriage was void and subject to annulment because the petitioner committed fraud by marrying for the purpose of evading the U.S. immigration laws. The petitioner submitted a copy of the court's order dismissing his former wife's annulment petition on July 2, 2001. The petitioner claims that during these proceedings, his wife also attempted to make him responsible for her student loan debt and tried to obtain his parents' house in China. However, the document cited by the petitioner to support his statement does not corroborate his claim. The Verified Financial Declaration of the petitioner's former wife simply lists her student loan balance. The petitioner further states that his former wife misrepresented his address to the court so that he would not receive legal documents and she could obtain the annulment without his knowledge. In support of this claim, the petitioner submitted a copy of his former wife's "Withdrawal of Subpoena Duces Tecum Directed to Immigration and Naturalization Service" with an attached Certificate of Service, which lists the purportedly wrong address for the petitioner. This document is not a notice of a hearing or a court order and it does not support the petitioner's statement regarding the impact of his former wife's alleged misrepresentation of his address in the annulment proceeding.

The petitioner further states that after his former wife filed her annulment petition, the judge ordered them to separate, but that she later chased after him, forced herself into his apartment and threatened his safety and life if he did not sign the annulment agreement. The petitioner reports that he then went to court and obtained a restraining order against her. The petitioner submitted a copy of an Emergency Protective Order (EPO) for the petitioner against his former wife, which was issued on January 25, 2001 and was set to expire on March 19, 2001, the date of the hearing for a permanent protective order. In the RFE, the director asked the petitioner to submit all documentation related to the final hearing on March 19, 2001; all police reports associated with his claim of abuse; and any additional corroborative documentation. In his January 1, 2005 statement submitted in response, the petitioner explains that he could not attend the March 19, 2001 protective order hearing because he was being detained by immigration authorities. The petitioner states that after his release from detention in 2003, he called the Indiana court and a clerk told him that it was too late to proceed with the case and that his former spouse also did not attend the March 19, 2001 hearing. The record confirms that the petitioner was detained on March 19, 2001. However, although the petitioner states that he spoke with the court clerk regarding his protective order case, he did not submit a copy of his verified petition, application or request for the EPO or documentation of the outcome of the March 19, 2001 hearing. Although he is not required to do so, the petitioner does not explain why such evidence does not exist or is unobtainable. See 8 C.F.R. §§ 204.1(f)(1), 204.2(c)(2)(i).

The petitioner also claims that during the course of their annulment/dissolution proceedings, his former wife asked immigration authorities to deport him; informed them that he would be present at a court hearing for the former couple's dissolution of marriage case on January 29, 2001; and that as a result of her actions, he was illegally detained by the former INS for two years. The petitioner submitted a copy of a Form I-213, Record of Deportable Alien, dated November 7, 2000, which states that the petitioner's former wife met with the reporting agent on November 6, 2000 and claimed that the petitioner broke her arm during a fight. The Form I-213 also states that the petitioner was convicted of criminal recklessness arising from this incident and was detained by the former INS on January 29, 2001. The record shows that the subsequent Administrative Order of Removal against the petitioner issued on February 1, 2001 pursuant to section 238 of the Act was cancelled on March 12, 2003; that the petitioner was placed in removal proceedings under section 240 of the Act; and that he was released from INS custody on February 27, 2003. The evidence regarding the petitioner's former wife's involvement in his detention and placement in removal proceedings is equivocal and we lack the authority to determine the legality of the petitioner's detention by the former INS.

We concur with the director's determination that the evidence submitted below does not establish that the petitioner's former wife battered or subjected him to extreme cruelty during their marriage and we do not repeat the director's discussion here. On appeal, the petitioner reiterates nine examples of his former wife's alleged battery and extreme cruelty and asserts that the director ignored his emergency protective order and distorted, garbled and misrepresented his own statements and those of [REDACTED] and Mr. [REDACTED].

After full review of the record and consideration of the petitioner's claims, we conclude that the present record fails to demonstrate the requisite battery or extreme cruelty pursuant to the regulation at 8 C.F.R. § 204.2(c)(1)(vi). In our preceding discussion, we have addressed all instances of alleged abuse stated by the petitioner. In review, we discuss two pertinent incidents of purported battery. First, the petitioner states that his wife attacked and beat him in February 1999. Dr. [REDACTED] confirms that he saw the petitioner's former wife kicking him and later saw bruises and bloody scratches on the petitioner's neck, but also states that the petitioner was holding his former wife's hands, pulled her inside and that they "tangled together." Dr. [REDACTED] indicates that he was not present at the beginning of the conflict. In his statements submitted below and on appeal, the petitioner does not describe in any probative detail how the argument and the physical conflict began. Consequently, the present record fails to establish that the petitioner's former wife was the aggressor and that the physical conflict was not mutually combative.

Second, the petitioner states that the November 1997 incident was witnessed by Mr. [REDACTED]. The petitioner submitted no statement from Mr. [REDACTED]. Although he is not required to do so, the petitioner does not explain why Mr. [REDACTED] testimony does not exist or is unobtainable. See 8 C.F.R. §§ 204.1(f)(1), 204.2(c)(2)(i). We have noted that the petitioner's conviction related to this incident was reversed and that he was found not guilty of the offense upon retrial. While these facts

show that the petitioner was not convicted of criminal recklessness against his former wife, the evidence does not establish that his former wife battered him during the November 1997 incident.

Moreover, on page 10 of his January 1, 2005 statement, the petitioner asserts that the Indiana Police had many reports about his former wife's violent activities, "such as the police report No. [REDACTED]. [REDACTED] However, the petitioner submitted only one report from the Indianapolis Police Department regarding the incident at the local office of the former INS on August 7, 1997 (discussed *infra*, page 6). This report does not correspond to the numbered report cited in the petitioner's January 1, 2005 statement and it does not document violence or threatened violence of the petitioner's former wife directed at him. The petitioner submitted no other police reports documenting his former wife's violence or threatened violence against him directly or against other individuals with significant and documented repercussions on the petitioner himself. Accordingly, the present record fails to establish that the petitioner's former wife battered him during their marriage.

The evidence also does not demonstrate that the petitioner's former wife subjected him to extreme cruelty during their marriage. The petitioner claims his former wife subjected him to extreme cruelty through her extramarital affair, hiding his passport and stealing his personal letters and legal documents, deposit of their joint tax return refund check and removal of his name from their joint NBD bank account without his permission, her dispute with a former INS officer shortly before their marriage, debts which she incurred and made the petitioner responsible for, her refusal to file a 1998 joint tax return with the petitioner, and her actions during their annulment and dissolution proceedings. As discussed above in our review of the relevant evidence, the documentation cited by the petitioner is either equivocal or fails to corroborate the petitioner's statements regarding these actions, thus detracting from the credibility of his testimony. The petitioner also fails to describe in sufficient, probative detail the other actions of his former spouse for which he does not cite supporting documentation. Accordingly, the present record fails to establish that any of these actions by the petitioner's former spouse constituted extreme cruelty by involving threatened violence, psychological abuse or by being part of an overall pattern of domestic violence. *See* 8 C.F.R. § 204.2(c)(1)(vi).

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

## II. Qualifying Relationship and Eligibility for Immediate Relative Classification

Beyond the director's decision, the present record fails to establish that the petitioner had a qualifying relationship with a U.S. citizen under section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act and that he was eligible for immediate relative classification under section 201(b)(2)(A)(i) of the Act based on such a relationship. The petitioner's marriage was legally terminated on January 23, 2002. This petition was filed on November 7, 2003. As concluded in the previous section, the present record does not demonstrate that the petitioner's former wife battered or subjected him to extreme cruelty during their marriage. Consequently, the petitioner has not established that the legal

termination of their marriage was connected to his former wife's battering or extreme cruelty, as required by section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act. Because the petitioner thus did not have a qualifying relationship with his former wife under section 204(a)(1)(A)(iii)(II) of the Act, he has also not established that he is eligible for immediate relative classification based on such a relationship, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act. For these two additional reasons, the petitioner is ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

### III. Good Moral Character

Beyond the director's decision, the petitioner has also failed to demonstrate his good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act. According to an Indianapolis Police Department criminal history record in the petitioner's CIS file, the petitioner was arrested on May 18, 2005 and charged with the following offenses on May 19, 2005:

- Felony Battery
- Felony Resisting Law Enforcement
- Misdemeanor Criminal Trespassing
- Misdemeanor Resisting Law Enforcement
- Misdemeanor Disorderly Conduct.

The petitioner's May 18, 2005 arrest and resultant criminal charges occurred before the director issued her decision denying the petition on October 25, 2005. However, the petitioner did not acknowledge his arrest or submit evidence of the disposition of these criminal charges before the director's decision was issued or in either of his appellate submissions.

As evidence of his good moral character, the petitioner submitted his own attestations in his October 27, 2003 and January 1, 2005 statements that he has good moral character and has no criminal record in China or the United States. In response to the RFE, the petitioner submitted a letter from the Indiana State Police dated November 4, 2004, which states that the petitioner had no criminal history record in their files; and a letter from the State of Michigan Department of State Police dated December 8, 2004, which states that their department had no criminal history information about the petitioner on file. Both of these letters are dated before the petitioner's May 18, 2005 arrest in Indianapolis. The petitioner submitted support letters attesting to his character from his former roommates and neighbors,

██████████, ██████████ and ██████████. However, all of these letters are also dated prior to the petitioner's May 18, 2005 arrest.

The present record shows that the petitioner was charged with two felony and three misdemeanor criminal offenses on May 19, 2005. Without evidence of the final disposition of these charges, we cannot determine whether the petitioner is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act. We note that the regulation at 8 C.F.R. § 204.2(c)(1)(vii) states, in pertinent part:

If the results of record checks conducted prior to the issuance of an immigrant visa or approval of an application for adjustment of status disclose that a self-petitioner is no longer a person of good moral character or that he or she has not been a person of good moral character in the past, a pending self-petition will be denied or the approval of a self-petition will be revoked.

#### IV. Notice of Intent to Deny (NOID) and Procedural Due Process

On appeal, the petitioner claims that the director's failure to issue a NOID violated his right to procedural due process. While the petition will be remanded for issuance of a NOID pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii), the petitioner has not established that the director's procedural error caused him to suffer substantial prejudice. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The director's August 19, 2004 RFE asked the petitioner to submit additional evidence of, *inter alia*, battery or extreme cruelty and his good moral character. The petitioner requested and was granted an additional 60 days to respond to the RFE. On appeal, the petitioner has twice availed himself of the opportunity to submit additional evidence and rebut the director's conclusions. A review of the record and the adverse decision indicates that the director properly applied the statute and regulations in determining that the petitioner was ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

The present record does not demonstrate that the petitioner's former wife battered or subjected him to extreme cruelty during their marriage, that he had a qualifying relationship with his former wife, that he was eligible for immediate relative classification based on such a relationship and that he is a person of good moral character. Despite the petitioner's consequent ineligibility for immigrant classification under section 204(a)(1)(A)(iii) of the Act on these four grounds, 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 pursuant to this decision, 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.