U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

B9

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: APR 13 2007

EAC 06 140 51240

IN RE: Petitioner: [redacted]

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:

[redacted]

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 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 The decision of the director will be withdrawn and the petition will be remanded for further action.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 immigrant 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 demonstrate that she resided with her former husband.

On appeal, counsel claims that the petitioner established that she resided with her former husband and that the director erred by denying the petition on a ground not cited in the Notice of Intent to Deny (NOID). On appeal, counsel submits a brief and 11 additional documents, all but three of which were previously submitted below.

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).

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:

> (v) *Residence.* . . . The self-petitioner is not required to be living with the abuser when the petition is filed, but he or she must have resided with the abuser . . . in the past.
>
> (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 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.
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> * * *
>
> (iii) *Residence.* One or more documents may be submitted showing that the self-petitioner and the abuser have resided together . . . . Employment records, utility receipts, school records, hospital or medical records, birth certificates of children . . ., deeds, mortgages, rental records, insurance policies, affidavits or any other type of relevant credible evidence of residency may be submitted.
>
> (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.

The record in this case provides the following pertinent facts and procedural history. The petitioner is a citizen of Pakistan who was born in the United Arab Emirates. The petitioner entered the United States on September 10, 2002 as a nonimmigrant student (F-1). On December 18, 2004, the petitioner married N-G-,[1] a U.S. citizen, in Virginia. N-G- filed a Form I-130, petition for alien relative, on the

[1] Name withheld to protect individual's identity.

petitioner's behalf, which he withdrew on November 18, 2005. The petitioner filed this Form I-360 on March 28, 2006. The former couple was divorced on September 21, 2006.

On July 28, 2006, the director issued a Request for Evidence (RFE) of the petitioner's residence with her former husband, her good-faith entry into their marriage and the status of their marriage. In a letter dated September 20, 2006, counsel requested an additional 60 days to respond to the RFE. On October 25, 2006, the director issued a Notice of Intent to Deny (NOID), which states:

> This letter is being served upon you because the record does not contain sufficient evidence to demonstrate that you married your spouse in good faith. You were sent a detailed notice requesting this evidence on July 28, 2006. In response, you requested additional time to provide evidence. This letter shall serve as notice that you are granted an additional sixty (60) days to provide evidence. . . . Please show that you married your spouse in good faith.

On November 24, 2006, the petitioner, through counsel, responded to the NOID with additional evidence. On December 27, 2006, the director denied the petition for lack of the requisite joint residence. Counsel timely appealed.

On appeal, counsel claims that the director's failure to cite joint residence as a ground for intended denial in the NOID violated the petitioner's right to due process. In her appellate brief, counsel explains:

> Since the NOID was issued *subsequent* to the RFE and only requested . . . documents to establish the bona fides of the marriage, the undersigned counsel concluded that the Service was satisfied that the documentation already submitted had established, to the Service's satisfaction, that this couple had resided together[.] (emphasis in original)

Although we concur with the director's determination that the petitioner did not establish that she resided with her former husband, we agree that the NOID did not sufficiently apprise the petitioner of this ground for denial of the petition. 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.

If a NOID does not cite the specific, intended ground or grounds for denial, the regulation's mandate to provide a NOID would be rendered meaningless. By neglecting to cite in the NOID the ground on which the petition was ultimately denied in this case, the director did not fully comply with the regulation at 8 C.F.R. § 204.2(c)(3)(ii). Accordingly, the petition will be remanded for further, appropriate action.

Joint Residence

The record indicates that at the time she met her former husband and throughout the former couple's courtship and marriage, the petitioner lived and worked in New York City while her former husband lived and worked in Virginia. The evidence shows that the petitioner and her former husband frequently visited each other on weekends and that the petitioner intended to move into her former husband's home after completing her post-graduate training. The record does not demonstrate, however, that the petitioner resided with her former husband, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

On appeal, counsel asserts that the regulation at 8 C.F.R. § 204.2(c)(1)(i)(D)[2] does not require continuous residence or mandate a minimum amount of time that the self-petitioner must have resided with the abusive spouse. Although section 204(a)(1)(A)(iii) of the Act and the corresponding regulation at 8 C.F.R. § 204.2(c)(1)-(2) do not designate a period of time for which joint residence must be established, the Act defines "residence" as a person's principal dwelling place.

Section 101(a)(33) of the Act prescribes that, as used in the Act: "The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33) (2007). This definition represents a codification of the Supreme Court's holding in *Savorgnan v. United States,*[3] in which the Court determined that, in contrast to domicile or permanent residence, intent is not material to establish actual residence, principal dwelling place, or place of abode. *See* H.R.Rep. No. 1365, 82d Cong., 2d Sess. 33 (1952). The preamble to the interim rule regarding the self-petitioning provisions cited section 101(a)(33) of the Act as the binding definition of "residence" and further clarified that "[a] self-petitioner cannot meet the residency requirements by merely . . . visiting the abuser's home in the United States while continuing to maintain a general place of abode or principal dwelling place elsewhere." 61 Fed. Reg. 13061, 13065 (Mar. 26, 1996).

The evidence in this case, as discussed in detail below, does not establish that the petitioner ever maintained a principal, actual dwelling place with her former husband. The record contains the following evidence relevant to the petitioner's claim that she resided with her former husband:

- The petitioner's affidavits dated February 1 and November 19, 2006 that were submitted below and her April 4, 2007 affidavit submitted on appeal;
- The petitioner's answers to her former husband's interrogatories filed in connection with his divorce action against her;
- The petitioner's former husband's Responses to Requests for Admissions filed by the petitioner in connection with her former husband's divorce action;

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[2] On page six of her appellate brief, counsel mistakenly cites to "8 CFR § 204.2(c)(D)."
[3] *Savorgnan v. United States,* 338 U.S. 491, 504-06 (1950).

- The December 5, 2005 psychiatric evaluation of the petitioner by Dr. [redacted]
- Affidavits of the petitioner's friends and former colleagues, [redacted]
- Internal Revenue Service tax return transcript for the former couple's 2004 joint tax return;
- Copies of the petitioner's signed 2004 individual New York state income tax return and her unsigned 2004 individual Connecticut and Virginia state income tax returns;
- Printout of an electronic mail message dated March 8, 2005 from the petitioner to her tax preparer, which states that she lived in Connecticut and New York in 2004;
- The petitioner's 2004 W-2 Wage and Tax Statement;
- Printouts of electronic mail messages and an Amtrak Guest Rewards account activity statement, which show that the petitioner made four trips to Washington, D.C. between October 1, 2004 and May 1, 2005;
- Printout of the "Update My Profile" portion of the Amtrak Guest Rewards website, listing the petitioner's addresses (submitted on appeal);
- Printout of electronic mail message dated November 18, 2004 responding to the petitioner's inquiry regarding dental employment with Virginia Public Health;
- Printout of electronic mail messages from the petitioner's former husband dated June 6 and July 6, 2005;
- November 18, 2005 order of the Circuit Court of Prince William County, Virginia finding *in rem* jurisdiction over the petitioner in her former husband's divorce case (submitted on appeal);
- The former couple's marriage certificate;
- The petitioner's Form G-325A, biographic information, dated April 4, 2005; and
- The Form G-325A of the petitioner's former husband, dated April 5, 2005.

On the Form I-360, the petitioner states that she resided with her former husband from December 2004 until June 2005 and lists two addresses, one in New York City and one in Fairfax, Virginia, as the former couple's last joint residences. In her February 1, 2006 affidavit, the petitioner states that her former husband visited her in New York on the first weekend in July 2004, that she went to Virginia with him to meet his family in August 2004, that he proposed in September 2004 and that they were married on December 18, 2004. The petitioner explains, "we decided I would move to Virginia in June after I completed my post graduate training at Columbia Medical Center." The petitioner reports that her former husband was building a mansion in Fairfax, Virginia and told her that he wanted her to move in with him when the new house was ready in the Spring or Summer of 2005. The petitioner states that in May 2005, "I asked him if he still wanted me to move to Washington, DC. He told me to do whatever I needed to do in New York."

In her November 19, 2006 affidavit, the petitioner explains that during the former couple's courtship, she and her former husband "would commute either to New York or go home to Virginia on weekends depending on who was 'on call' for the weekend at the hospital." The petitioner states that by the time of the former couple's wedding in December 2004, she was already looking for a job in Virginia. The petitioner explains that her former husband had bought a cardiology practice in Virginia in 2003, began building his mansion in Virginia in 2004 and was very close to his family, all of whom worked in

Virginia and for these reasons, moving to New York to be with the petitioner "was not even an option to consider." The petitioner further states that prior to the completion of his mansion, the petitioner's former husband was living in a small, two-bedroom condominium with his mother and sister and so the former couple decided that she would continue living in New York until the completion of her contract and the construction of her former husband's new house.

The petitioner states, "we did consummate our marriage and lived as husband and wife when possible." The petitioner reports that on the weekends that she traveled to Virginia or her former husband traveled to New York, she would cook and do other domestic tasks. The petitioner states that her former husband's mansion was completed in March 2005 and that after an argument in the first week of May 2005, her former husband refused to speak with her for some time and in September 2005 told her that he wanted a divorce.

The relevant documents from the petitioner's former husband's divorce case confirm that the former couple spent weekends together at one another's homes in New York and Virginia during their courtship and marriage. The documents do not, however, establish that the petitioner resided with her former husband. In her answers to her former husband's interrogatories, the petitioner states that the former couple "would meet up every weekend after our marriage in December, depending on our schedules either in New York or Virginia." The petitioner states that she stayed with her former husband and his family at their home on New Year's Eve in 2004 and that her former husband visited her in New York "almost every weekend" in January and February 2005. The petitioner also states that she went with her former husband to a conference in Florida in March 2005 for four days and that in April 2005, the former couple visited the petitioner's brother in North Carolina "for the weekend, where [they] slept together in the same room." The petitioner further states, "In April, I told [my former husband] I would start bringing my belongings to Virginia. This way my final move would be very easy. I was only planning on moving my clothes and books to Virginia." The petitioner also discusses her efforts to secure employment in Virginia and the cancellation of her lease in New York in anticipation of her move to her former husband's home in Virginia in July 2005.

In his responses to the petitioner's requests for admissions in his divorce case, the petitioner's former husband admits that the former couple spent time together in New York City, Virginia, North Carolina and Florida and had intimate relations after their marriage in December 2004. The statements of the petitioner and her former husband in these documents confirm that the former couple spent weekends and one four-day trip together during their marriage. The documents do not establish, however, that the petitioner resided with her former husband. To the contrary, they indicate that the petitioner and her former husband maintained separate residences during their marriage. Although the documents confirm that the petitioner intended to move to Virginia to reside with her former husband in July 2005, her intent is irrelevant to her actual residence. An alien's residence is his or her "principal, actual dwelling place in fact, without regard to intent." Section 101(a)(33) of the Act, 8 U.S.C. § 1101(a)(33) (2007).

Dr. [redacted] evaluation and the affidavits of the petitioner's friends and former colleagues also fail to support her claim. The relevant portions of Dr. [redacted] evaluation simply discuss the petitioner's living arrangements as described to him by the petitioner. Specifically, Dr. [redacted] quotes the petitioner as saying, "I told him that I would move in June." The petitioner's friends, [redacted] simply state that they can attest to the fact that the petitioner and her former husband lived together from December 18, 2004 until June 18, 2005. However, the petitioner's own testimony indicates that the former couple separated in May 2005. The affidavits of the petitioner's former colleagues, Dr. [redacted] Pruss and Dr. [redacted] also fail to provide probative information to support the petitioner's claim. Dr. [redacted] and Dr. [redacted] simply state that the former couple commuted to spend their weekends together and that they lived together as husband and wife from December 2004 until June 2005. Mr. [redacted], Ms. [redacted], Dr. [redacted] and Dr. [redacted] provide no further details and do not explain the basis of their knowledge. Their brief statements are consequently of little probative value.

The 2004 tax documents are equivocal. The former couple filed a joint federal income tax return for 2004 that lists the petitioner's former husband's home in Virginia as their address, however, the petitioner also filed income tax returns as a part-time resident in three different states, New York, Connecticut and Virginia, for 2004. In an electronic mail message addressed to her tax preparer that is dated March 8, 2005, the petitioner states, "Are you also filing my state tax? I lived in Ct [sic] and partly NY." In addition, the petitioner's 2004 W-2 Wage and Tax Statement lists her New York City residence as her address.

The Amtrak Guest Rewards account activity statement confirms that the petitioner made four trips to Washington, D.C. between October 2004 and May 2005, but does not establish that she resided with her former husband in Virginia. The "Update My Profile" printout submitted on appeal lists the residence of the petitioner's former husband as the petitioner's "primary address" and her New York City residence as her "secondary address." However, the printout is dated April 3, 2007 and does not indicate that the addresses were entered into the petitioner's account prior to that date.

The remaining electronic mail messages also fail to support the petitioner's claim. The message regarding the petitioner's inquiry about dental employment with Virginia Public Health confirms her intention to move to Virginia and reside with her former husband, an intention that is also reflected by the July 2005 messages from the petitioner's former husband asking for the petitioner's new address because she had received some mail at his home. However, the petitioner's intent to reside with her former husband at a future date does not establish her residence with him in the past. Again, an alien's residence is defined as his or her "principal, actual dwelling place in fact, without regard to intent." Section 101(a)(33) of the Act, 8 U.S.C. § 1101(a)(33) (2007).

On appeal, counsel claims that the November 18, 2005 order of the Circuit Court of Prince William County, Virginia shows that the petitioner resided with her former husband because the court found that the petitioner's former husband had *in rem* jurisdiction over the petitioner "presumably on a finding that the parties resided together in Virginia." Yet, counsel does not submit the transcript of the

corresponding hearing, other documentation that the former couple's joint residence was the basis for the court's decision or evidence that joint residence in general is a basis for *in rem* jurisdiction under Virginia law. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The final, relevant documents show that the petitioner's principal dwelling place during her courtship and marriage was in New York City, not at her former husband's home in Virginia. The former couple's marriage certificate states an address in Virginia as the "usual residence" of the petitioner's former husband and states the petitioner's address in New York City as her "usual residence." The Forms G-325A, Biographic Information,[4] filed by the petitioner and her former husband in April 2005 also contradict her claim. The petitioner's Form G-325A states her address in New York City as her residence from July 2004 to the date the form was signed, April 4, 2005. The Form G-325A of the petitioner's former husband states an address in Vienna, Virginia as his residence from February 2004 until February 2005 and an address in Fairfax, Virginia as his residence from February 2005 to the date the form was signed, April 5, 2005.

In sum, the relevant evidence shows that during their marriage, the petitioner and her former husband stayed with each other on weekends and one four-day trip to Florida, but that the former couple maintained separate residences in New York City and Virginia. Although the petitioner has demonstrated that the former couple's employment and personal obligations prevented their joint residence during the first six months of their marriage and that she intended to move to Virginia to reside with her former husband in July 2005, the petitioner has not demonstrated that she resided with her former husband, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

On appeal, counsel claims that "the circumstances of the abuse" limited the evidence that could be submitted to establish joint residence. Counsel states, "There are many additional documents that the beneficiary left in the marital home in Virginia but her abusive spouse has not allowed the self-petitioner access to them." The record does not corroborate counsel's assertion. In her affidavit submitted on appeal, the petitioner lists items that she "had to leave behind in [her] marital home in Virginia." The petitioner states that "due to the abusive relationship and my divorce, which was not amicable, I am no longer in touch with my former husband. He would not cooperate with me in terms of providing me with the items and evidence that would have demonstrated that we had resided together at the marital home in Virginia."

The petitioner does not specify how her former husband prevented her from retrieving her belongings from his home. In addition, the record shows that the petitioner and her former husband remained in

[4] The former couple submitted these forms in April 2005 in connection with the Form I-130 petition filed by the petitioner's former husband on her behalf and the petitioner's corresponding Form I-485, application to adjust status.

amiable contact after their separation, at least until early July 2005. In an electronic mail message dated June 6, 2005, the petitioner's former husband explains his reasons for wanting a divorce and apologizes for responding negatively to her telephone call. The petitioner's former husband closes the message with "Love always" and states, "OF COURSE we can be friends – we were always friends, and we are now and always WILL BE even while we are going through all this!!!!!!!! Hugs and Kisses" (emphasis in original). In addition, on July 6, 2005, the petitioner's former husband sent a message to the petitioner asking for her new address so he could send her mail that had been sent to his home. The record contains no documentation of unsuccessful requests or other attempts by the petitioner to retrieve her belongings from her former husband's home.

Even if the record established that the petitioner's former husband prevented her from retrieving her possessions, the items she states she left at her former husband's home would not establish that the former couple resided together. The petitioner states that she left jewelry, clothing, books, pictures, mail and other personal items at her former husband's home. However, in her answer's to her former husband's interrogatories in his divorce case, the petitioner states, "In April, I told [my former husband] that I would start bring [sic] my belongings to Virginia. This way my final move would be very easy. I was only planning on moving my clothes and books to Virginia." In her February 1, 2006 affidavit, the petitioner states that after an argument in May 2005, her former husband refused to communicate with her for several months and then told her he wanted a divorce on September 2, 2005. In her answers to her former husband's interrogatories, the petitioner further explains that during their separation, she had "no other choice but to find a new position and to make living arrangements." Accordingly, the record indicates that although the petitioner may have occasionally stayed at and taken some of her belongings to her former husband's home, she never actually moved to her former husband's home in Virginia due to the unforeseen breakdown of their marriage in May 2005.

The record thus fails to demonstrate that the alleged abuse of the petitioner's former husband prevented her from residing with him or documenting their joint residence. To the contrary, the record shows that the petitioner maintained her residence in New York because she understandably felt committed to complete her employment contract. In addition, the petitioner repeatedly explains that the former couple made a mutual decision that she would remain in New York for the duration of her contract and her former husband would remain in Virginia due to his own employment situation, the construction of his new home and his familial ties. Accordingly, the petitioner's own testimony contradicts counsel's claim that the "circumstances of the abuse" prevented the petitioner from fully documenting her joint residence claim.

Counsel's Claims Regarding Congressional Intent

On appeal, counsel further claims that by finding that the petitioner had established her good-faith entry into the marriage, but determining that she did not reside with him, the director "undermine[d] the Congressional intent of the residence requirement as a way to establish the bona fides of a marriage." Counsel further asserts, "The Director's denial is in essence requiring that the beneficiary in this case reside with the man who abused her. Such a requirement violates the Congressional intent to protect

abused women." Counsel cites no portions of the pertinent legislative history or other authority to support her claims. A brief examination of the legislative history demonstrates that, contrary to counsel's assertions, joint residence and good-faith entry into the marriage (or qualifying relationship) have been separate and distinct requirements since Congress first amended section 204(a)(1) of the Act to enable aliens who had been abused by their U.S. citizen or lawful permanent resident spouses to self-petition for immigrant classification.

The self-petitioning provisions were initially proposed as an amendment to the "Violence Against Women Act of 1993." H.R. Rpt. 103-395 (Nov. 20, 1993). The amended bill allowed aliens abused by their U.S. citizen or lawful permanent resident spouses to self-petition for immigrant classification if they demonstrated, *inter alia*, that they entered into the marriage in good faith and resided with the abusive spouse. *Id.* The bill also allowed aliens who had been married to and resided with their abusive spouse in the United States for at least three years, but whose spouses had not filed a petition on their behalf, to self-petition without demonstrating that they entered into the marriage in good faith. *Id.*

In the "Section-By-Section Analysis," of the amendments, the House Report explains, in pertinent part:

> The purpose of permitting self-petitioning is to prevent the citizen or resident from using the petitioning process as a means to control or abuse an alien spouse.
>
> Under this section, alien spouses may self-petition for themselves and their children in two situations. First, if the alien spouse or the alien spouse's child has been battered or subject to extreme cruelty perpetrated by the citizen or resident spouse during the marriage, the alien spouse may self-petition if: (1) he or she entered into the marriage in good faith, (2) he or she currently resides in the United States, (3) he or she at one time resided in the United States with the citizen or resident spouse, and (4) he or she is still married to the citizen or resident spouse on the date that the self-petition is filed. . . . Second, if the alien spouse has been married to and residing with the citizen or resident spouse in the United States for at least three years, he or she may file a petition, if (1) she is currently residing in the United States with the alien spouse and (2) the citizen or resident spouse has failed to file a petition on behalf of the alien spouse.

H.R. Rpt. 103-395 (Nov. 20, 1993), (available at 1993 WL 484760 (Leg. Hist.), 41-42).

After subsequent consideration and amendment in both the House and the Senate, the second option was eliminated and self-petitioning spouses were required to demonstrate, *inter alia*, both residence with the abusive spouse and entry into the marriage in good faith. *See* H.R. Conf. Rep. 103-694 at 187-88 (Aug. 10, 1994).

The self-petitioning provisions were first enacted into law as part of the Violent Crime Control and Law Enforcement Act of 1994. Pub. L. No. 103-322, § 40701 (1994). The law amended section 204(a)(1)(A) of the Act as follows, in pertinent part:

> (iii) 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 under section 201(b)(2)(A)(i), and *who has resided in the United States with the alien's spouse* may file a petition with the Attorney General under this subparagraph for classification of the alien (and any child of the alien if such a child has not been classified under clause (iv)) under such section if the alien demonstrates to the Attorney General that—
>
> > (I) the alien is residing in the United States, *the marriage between the alien and the spouse was entered into in good faith by the alien*, and during the marriage the alien or a child of the alien has been battered by or has been the subject of extreme cruelty perpetrated by the alien's spouse; and
> >
> > (II) the alien is a person whose deportation, in the opinion of the Attorney General, would result in extreme hardship to the alien or a child of the alien.

Pub. L. No. 103-322, § 40701 (1994) (emphasis added).

Accordingly, the pertinent legislative history shows that residence with the abusive spouse and good-faith entry into the marriage were two separate requirements since the inception of the self-petitioning provisions in 1994. Since 1994, Congress has amended the self-petitioning provisions three times, in 2000, 2005 and 2006. None of the subsequent amendments altered the distinct requirements that self-petitioning aliens demonstrate that they resided with their abusive spouses and entered into their marriages in good-faith.

In the Victims of Trafficking and Violence Protection Act of 2000, Congress made several significant amendments to section 204(a)(1) of the Act. P.L. No. 106-386, §§ 1503, 1507 (2000). The change most pertinent to this case is the elimination of the reference to the United States as the location of the alien's requisite residence with his or her spouse. *Id.* at § 1503(b)(1)(A). Congress amended section 204(a)(1)(A)(iii) to require that the self-petitioner demonstrate that he or she "has resided with the alien's spouse or intended spouse." *Id.* However, the amended section 204(a)(1)(A)(iii) still requires that the alien demonstrate that he or she entered into the marriage or the qualifying relationship in good faith and that he or she resided with the abusive spouse. *Id.* at § 1503(b)(1), as codified at section 204(a)(1)(A)(iii)(I)(aa), (II)(dd) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(I)(aa), (II)(dd) (2007).

In the Violence Against Women and Department of Justice Reauthorization Act of 2005, Congress further amended the self-petitioning provisions of section 204(a)(1) of the Act, but once again, did not alter the requirements of joint residence and good-faith entry into the marriage for self-petitioning spouses. P.L. No. 109-162, §§ 805, 814, 816 (2006). Finally, in 2006, Congress amended the self-

petitioning provisions of section 204(a)(1) of the Act to make technical corrections to the Violence Against Women and Department of Justice Reauthorization Act of 2005, but Congress did not change the enduring requirements for joint residence and good-faith entry into the marriage for self-petitioning spouses. P.L. No. 109-271, 120 Stat. 750, 762 (2006).

The relevant legislative history shows that residence with the abusive spouse and good-faith entry into the marriage were two distinct eligibility requirements since the enactment of the spousal self-petitioning provisions in 1994. In the following 12 years, Congress amended the self-petitioning provisions of section 204(a)(1) of the Act on three occasions, but never altered the requirement that self-petitioning spouses demonstrate both their residence with the abusive spouse and their good-faith entry into the marriage (or qualifying relationship). Accordingly, counsel's claim that the director "undermined" Congressional intent by determining that the petitioner entered her marriage in good faith, but did not reside with her former husband, is unfounded.

Counsel's assertion that the director's decision "in essence" required the petitioner to reside with her abusive former husband and thus "violat[ed] the Congressional intent to protect abused women" is similarly misguided. There is no question that the self-petitioning provisions were enacted to prevent U.S. citizens and lawful permanent residents from using the immigration process as a means to control or abuse their alien spouses and children. *See* H.R. Rpt. 103-395 (Nov. 20, 1993), (available at 1993 WL 484760 (Leg. Hist.) at 41). That protective purpose is not violated by the residence requirement. Section 204(a)(1)(A)(iii)(II)(dd) of the Act requires the self-petitioner to demonstrate that he or she "has resided with the alien's spouse or intended spouse." The statute does not require that the alien reside with his or her spouse during periods of abuse, but the unfortunate fact that such residence often occurs neither supports the petitioner's claim nor violates Congressional intent.

Battery or Extreme Cruelty

Upon remand, the director should reassess the evidence regarding battery or extreme cruelty. The record contains the following evidence relevant to the petitioner's claim that her former husband subjected her to battery or extreme cruelty during their marriage:

- The petitioner's affidavits dated February 1 and November 19, 2006 that were submitted below and her April 4, 2007 affidavit submitted on appeal;
- Affidavits of the petitioner's friends and former colleagues, [redacted]
- The December 5, 2005 psychiatric evaluation of the petitioner by Dr. [redacted]
- March 8, 2006 letter from Steps to End Family Violence;
- The petitioner's September 16, 2005 Verified Complaint in her Action for Annulment against her former husband filed with the Supreme Court of New York, New York County;
- The Petitioner's Amended Summons with Notice dated October 21, 2005;
- The Judgment of Divorce of the New York Supreme Court, New York County, dated September 14, 2006 and filed on September 21, 2006;

- The petitioner's answers to her former husband's interrogatories filed in connection with his divorce action against her;
- The November 31, 2004 Circuit Court of Prince William County, Virginia Order of Dismissal of the divorce complaint of the petitioner's former husband; and
- Printout of the petitioner's July 30, 2005 electronic mail message to her former husband.

In her February 1, 2006 affidavit, the petitioner states that in December 2004 her former husband's mother told her that she was lucky that her former husband chose to marry her because he had many options. When the petitioner later told her former husband that his mother's comment was not welcoming to her as a new bride, she states that her former husband told her she was evil, a home breaker and hated his family. In January 2005, the petitioner states that while having lunch, her former husband put a spoonful of his dessert in his sister's mouth, but did not offer any to her. When the petitioner commented on the incident to her former husband, he accused her of breaking the brother-sister bond and the next month ridiculed her in front of his family by saying that he had better offer some of his food to the petitioner before he gave any to his mother because she would get "very emotional."

That same month, when the petitioner asked her former husband's sister why he was so sensitive about his relationship with her and his mother, she told the petitioner it was probably because he was out of his antidepressant medication. The petitioner explains that her former husband never told her he was taking medication and previously denied having any emotional or mental health problems.

In February 2005, the petitioner reports that her former husband told her that they could not hold hands or touch in front of his mother or sister because it would be disrespectful and that on one occasion when the petitioner had put her head on his shoulder, he pulled himself away from her when his mother and sister entered the room. The petitioner states that around this time she and her former husband argued about his desire to give his sister $20,000 and that her former husband accused her of trying to create a dispute in the family and told her that his mother and sister were number one in his life. The next day the petitioner states that her former husband called to apologize and told her that he was suffering from manic depression and needed to be on medication.

In March 2005, the petitioner states that after returning from an outing, her former husband asked her to get him a glass of water and that when she offered her own drink instead, he said, "I should think it a sin if you don't get up and get water for your husband." That same month, the petitioner reports that her former husband told her that he wanted to raise their children in his mother's faith, Ismaili. The petitioner explains that she told her former husband such a plan was unacceptable because "Isamaili's [sic] are very conservative and if someone is not born into their faith they cannot enter the Ismaili Mosque. It really bothered me to think my children would be able to go somewhere their mother could not."

In April 2005, the petitioner states that when she found out that her former husband's sister was co-owner of the house that he had built and claimed as his, her former husband told her she was "the

outsider" and accused her of trying to put a wedge between his bond with his sister. The petitioner reports, "During the conversation he kept pointing his finger towards me in an aggressive manner."

In the first week of May 2005, the petitioner states that she and her former husband argued and he called her a "family breaker" and "disrespectful" when she suggested that his mother and sister not live in their home, but in a condominium next door. The petitioner reports, "Later that same night he called me on the telephone saying he would kill himself, his sister, and his mother. He was talking complete nonsense and constantly calling me names. I got really scared and called his sister in case he needed help as I could not be there."

The petitioner further states that during her marriage, her former husband told her she was very "Americanized," should not seek advice from her "white friends," and said "Wives come and go but my mother and sister will be there for me all my life." The petitioner reports that her former husband asked her not to wear any clothing that revealed her arms or legs in front of his mother and told her that they could not sleep in the same room in Virginia until they had their religious wedding ceremony because it would insult his mother. The petitioner states that on one occasion, her former husband threatened to call Citizenship and Immigration Services to withdraw his sponsorship of her. The petitioner reports that as a result of her former husband's behavior, she felt angry, upset and that she lost 15 pounds over the course of her marriage.

In her November 19, 2006 affidavit, the petitioner states that her former husband financially abused her by filing for divorce based on a false claim that she had deserted him and that she owes $28,000 in attorney's fees, which she incurred in responding to his allegations. The petitioner further states that her former husband's abandonment left her, in effect, "homeless and broke" because she had not renewed her lease or employment contract in New York.

In her Verified Complaint filed with her Action for Annulment, the petitioner claims that her consent to the marriage was obtained by her former husband's fraud. The petitioner relates the former couple's disputes regarding his relationship with his mother and sister and also states that after the marriage, she discovered that her former husband was impotent and relied on medication in order to have successful intimate relations.

In her April 4, 2007 affidavit submitted on appeal, the petitioner states that her former husband would not cooperate with her by providing evidence that would have established their joint residence. However, the petitioner does not specify or document how her former husband prevented her from retrieving her belongings from his home in an abusive manner and the petitioner does not state that any such abuse occurred prior to their divorce.

The petitioner's testimony fails to establish that her former husband's behavior during their marriage constituted battery or extreme cruelty, as that term is defined in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). Although she states in her November 19, 2006 affidavit that her former husband "physically caused her harm," the petitioner describes no specific incidents of battery or threatened

physical violence. In her February 1, 2006 affidavit, the petitioner states that during an argument in April 2005, her former husband pointed his finger towards her "in an aggressive manner." However, in her Verified Complaint, the petitioner states, "After our marriage, [my husband] began a practice of waving his finger in my face as we talk as if I were a child to be constantly scolded." The latter statement indicates that the petitioner found her former husband's action insulting, but was not frightened or intimidated by his behavior. When her former husband called her after an argument in May 2005 and said he would kill himself, his sister and his mother, the petitioner states (in her February 1, 2006 affidavit) that she "got really scared." However, the petitioner indicates that the basis of her fear was not her former husband's threatened injury of herself, but his indication that he would hurt himself and his family. Indeed, the petitioner states that she called his sister "in case *he* needed help" (emphasis added).

The petitioner's testimony also fails to establish that her former husband's nonviolent behavior constituted extreme cruelty. The petitioner states that prior to their marriage, her former husband did not tell her he was impotent and suffered from manic depression. However, her testimony does not demonstrate that her former husband's resultant behavior involved psychological or sexual abuse or was part of an overall pattern of violence directed against her. The petitioner's testimony regarding the former couple's ongoing arguments over the petitioner's former husband's relationship with his mother and sister indicates that the former couple had divergent views about the primacy of their marital relationship. The petitioner's testimony does not establish, however, that the related aspects of her former husband's treatment of her during their marriage was abusive. For example, in her February 1, 2006 affidavit and in her Verified Complaint, the petitioner states that she was "really bothered" and defrauded by her former husband's profession that he intended to raise their children in his mother's Ismaili faith. However, in her July 30, 2005 electronic mail message to her former husband, the petitioner states, "yes i never thought that my kids would be ismail esp if you suddenly informed me of that, but when i thought about it now i said to myself i would rather have them be ismaili instead of hindu/anything else. After all they are still muslims" (missing capitalization, abbreviation and misspelling in original). This statement indicates that the petitioner was not as offended by her former husband's comments as she states in her February 1, 2006 affidavit and her Verified Complaint.

The affidavits of the petitioner's friends and former colleagues fail to support her claim. Mr. [redacted] simply states that he knew the former couple "had some problems in their marriage and have separated." Ms. [redacted] also states that the former couple had marital problems and separated, but neither she nor Mr. Agrawal specifies the nature of the former couple's problems. Dr. [redacted] states that from overhearing the petitioner's telephone conversations, he knew that she had marital problems and separated from her former husband. Dr. [redacted] further reports that on various occasions, the petitioner "would be very depressed at work due to the emotional trauma from her marriage." Dr. [redacted] provides no further, probative information.

Dr. [redacted] states that the former couple had marital problems and separated and that the petitioner would "breakdown and cry at several times because of the verbal/emotional abuse by her husband." Dr. [redacted] also states that "in May 2004 she told me she was scared of [her former husband], as he might want to

hurt her. I offered her to come and stay with me during that time." However, the petitioner states in her February 1, 2006 affidavit that she did not meet her former husband in person until June 2004. In addition to this temporal discrepancy, Dr. [redacted] does not explain the cause of the petitioner's distress in detail and the record contains no evidence that the petitioner stayed with Dr. [redacted] at any time during her marriage to escape her former husband's alleged abuse. The brief statements of the petitioner's friends and colleagues thus provide no probative details sufficient to establish that the petitioner's former husband battered or subjected her to extreme cruelty during their marriage.

Dr. [redacted] report also fails to fully support the petitioner's claim. Dr. [redacted] describes the petitioner's background and marital relationship as described to him by the petitioner at a single meeting. Dr. [redacted] diagnoses the petitioner with "Major Depressive Disorder, single episode, secondary to extended major life stressor, in partial remission [and] Posttraumatic Stress Disorder, in Partial Remission, with Anxiety." Dr. [redacted] opines that the petitioner's marital problems were especially devastating to the petitioner because they "reraised the significant unresolved emotional residue from the sexual harassment and abuse trauma she experienced in Pakistan." However, the petitioner herself does not discuss her experiences in Pakistan in any of her affidavits and although the record shows that her former husband was born in Pakistan, the petitioner's testimony does not indicate that he ever subjected her to sexual harassment or sexual abuse.

The March 8, 2006 letter from Steps to End Family Violence states that the petitioner first contacted the agency on February 6, 2006 and as of March 8, 2006, had attended two counseling sessions.[5] The letter further states, "It is clear that [the petitioner] is a victim of domestic violence not only by her husband but also by her in-laws (sister and mother)." However, the petitioner herself does not indicate that her former mother-in-law or sister-in-law ever subjected her to battery or extreme cruelty. To the contrary, in her July 30, 2005 electronic mail message to her former husband, the petitioner states, "As far as [your sister] is concerned I am very fond of her. If anything she has only helped me iunderstand [sic] a lot of things about you."

The petitioner's Amended Summons with Notice and the ensuing Judgment of Divorce show that the petitioner was granted a divorce from her former husband based on his "cruel and inhuman treatment" of her "pursuant to DRL Section 170 subd. (1)." However, the judgment states, "The Defendant [the petitioner's former husband] has not appeared in this matter and is in default." Accordingly, the divorce was granted based on the petitioner's affidavit, which the court describes as "constituting the facts of the matter." Yet the petitioner did not submit a copy of the affidavit cited by the court.

The November 31, 2004 order of the Circuit Court of Prince William County, Virginia shows that the court dismissed the petitioner's former husband's divorce complaint on the ground of the petitioner's

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[5] Although she was not requested to submit additional evidence of battery or extreme cruelty below, we note that the record contains no evidence of the petitioner's attendance at any further counseling sessions or the content of those sessions.

desertion. While this order supports the petitioner's claim that her former husband abandoned her, such abandonment alone does not constitute extreme cruelty.

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

We note that a petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petitioner has failed to demonstrate her eligibility for immigrant classification under section 204(a)(1)(A)(iii) of the Act. Nonetheless, the case will be remanded because the director did not specify the specific ground for denial in the NOID. Upon remand, the director should also reassess the evidence relevant to the petitioner's claim that her former husband battered or subjected her to extreme cruelty during their marriage.

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 decision.