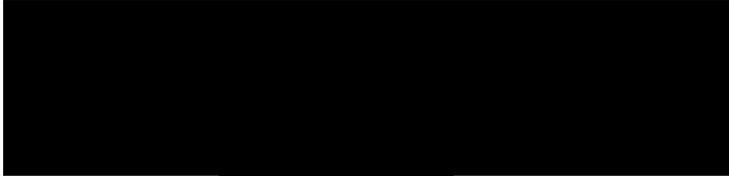




U.S. Citizenship
and Immigration
Services

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B9

FILE: [REDACTED]
EAC 04 198 52338

Office: VERMONT SERVICE CENTER

Date: FEB 12 2007

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 The decision of the director will be withdrawn and the petition will be remanded for further action.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 under section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien battered or subjected to extreme cruelty by a United States citizen.

The director denied the petition because the petitioner did not establish that his U.S. citizen wife battered or subjected him or either of his children to extreme cruelty, that he resided with his wife, entered into their marriage in good faith and that he was a person of good moral character.

On appeal, counsel submits a statement.

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 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.

(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.

* * *

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

The evidentiary guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are explicated in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

Evidence for a spousal self-petition –

(i) *General.* Self-petitioners are encouraged to submit primary evidence whenever possible. The Service will consider, however, any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service.

* * *

(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.

(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.

* * *

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

The record in this case provides the following facts and procedural history. The petitioner is a native and citizen of the Dominican Republic who entered the United States without inspection on January 1, 1989. On December 18, 1990 the petitioner was granted voluntary departure until December 18, 1991. On May 3, 1991, the petitioner entered the United States as an immigrant (CR-1), based on his first marriage to a U.S. citizen. The conditions on the petitioner's residence were removed on April 21, 1993. The petitioner divorced his first wife on December 3, 1993. On November 3, 1994 the petitioner was convicted of possessing a firearm without a license in violation of Article Six of the Weapons Act of Puerto Rico (General Court of Justice, Superior Court, Humacao, Puerto Rico Criminal Number [REDACTED]). On January 10, 1997, the petitioner was placed into removal proceedings due to his criminal conviction. On August 22, 1997, while his removal proceedings were pending, the petitioner married J-V-R-¹, a U.S. citizen, in Puerto Rico. The petitioner's wife filed a Form I-130, petition for alien relative, on the petitioner's behalf, which was approved on October 31, 1997. On January 13, 2000, the District Director revoked the approval of the Form I-130 petition. On August 1, 2006, the San Juan Immigration Court administratively closed the petitioner's removal proceedings pending the adjudication of this petition.

The petitioner filed this Form I-360 on June 21, 2004. The director subsequently issued a Request for Evidence (RFE) of, *inter alia*, the requisite battery or extreme cruelty, joint residence, good faith marriage and good moral character. The petitioner timely responded with additional evidence. On August 2, 2005, the director denied the petition. On appeal, counsel asserts that the petitioner submitted sufficient evidence to establish his eligibility. We concur with the director's determinations. Counsel's statements on appeal fail to overcome the grounds for denial. Beyond the director's decision, the present record also indicates that section 204(g) of the Act bars the approval of this petition. Nonetheless, 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).

Battery or Extreme Cruelty

The petitioner submitted two documents relevant to his claim of battery or extreme cruelty: The May 5, 2004 letter of [REDACTED], a psychologist, and the petitioner's April 14, 2004 Petition for an Order of Protection filed in Puerto Rico. [REDACTED] states that, according to the petitioner, his wife radically changed her behavior over the past four years and "has on various occasions, resorted to violence," has abandoned the petitioner for extended periods of time and has "intimidated him by threatening to not assist him in obtaining his legal immigration papers." [REDACTED] reports that as a result of his wife's behavior, the petitioner "has felt humiliated, manipulated and controlled [and] has experienced great distress." [REDACTED] does not describe any specific incidents of abuse in detail, as related to her by the petitioner. [REDACTED] also does not indicate the dates or duration of her counseling sessions with the petitioner. Consequently, her letter is of little probative value.

¹ Name withheld to protect individual's identity.

In the Petition for an Order of Protection, the petitioner claims that his wife intended to cause him physical harm, caused him to fear being physically harmed by her and deprived him of the “right of freedom of personal rest [sic].” The petitioner submitted no evidence that the court conducted a hearing on the petition or granted him an order of protection.

On appeal, counsel states, “Since her [sic] wife did not appeared to [sic] court the Judge did not make another written decision and instructed the petitioner to come again to Court if another incident occurred.” Counsel may be referring to two handwritten notations on the original document in Spanish. These notations are not included in the submitted English translation of the document. Any document containing a foreign language that is submitted to Citizenship and Immigration Services (CIS) must be accompanied by a full English translation, which the translator has certified as complete and accurate, and by the translator’s certification that he or she is competent to translate from the foreign language into English. 8 C.F.R. § 103.2(b)(3). Because the petitioner failed to submit a complete translation of the document, we cannot determine whether the evidence supports counsel’s statement. *Id.* Yet even if the untranslated notations contain the judge’s instructions as claimed by counsel, the petition itself does not establish that the petitioner’s wife subjected him or either of his children to battery or extreme cruelty. To the contrary, the judge’s instructions would indicate that the court found insufficient cause to issue an order of protection to the petitioner.

On appeal, counsel also claims that “[t]he affidavits provided in fact corroborated the allegations of the mistreatment against the Petitioner.” However, none of the three affidavits of the petitioner’s friends mention any incidents of abuse.

The petitioner did not submit any other evidence of the types listed in the RFE and the regulation at 8 C.F.R. § 204.2(c)(2)(iv). 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). Ms. Colon’s letter and the petition for an order of protection do not establish that the petitioner’s wife battered or subjected him or either of his children to extreme cruelty, as specified in the regulation at 8 C.F.R. § 204.2(c)(1)(vi) and as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Joint Residence

On the Form I-360, the petitioner states that he lived with his wife from 1997 until 2004 and that they last lived together at a residence in Canovanas, Puerto Rico. The petitioner submitted no evidence to support his claim. The affidavits from the petitioner’s friends, [REDACTED] and [REDACTED], attest to the petitioner’s purportedly good-faith marriage to his wife, but do not discuss the former couple’s allegedly joint residence. The petitioner submitted no evidence that he resided with his wife of the types listed in the regulation at 8 C.F.R. § 204.2(c)(2)(iii) and described in the RFE. 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).

Moreover, the record contains a Memorandum of Investigation dated August 15, 2003 which states that a visit to the address the petitioner listed as his marital residence on the Form I-130 petition filed by his wife, his corresponding Form I-485 (application to adjust status), Form I-601 (application for waiver of ground of excludability) and Form G-325A (biographic information) revealed that the petitioner was renting a room at the residence and that the owner of the house stated that the petitioner was single. The memorandum further states that visits to another address listed as the alleged couple's address on the Forms G-325A of both the petitioner and his wife discovered that another individual lived in the house, which she had purchased four years ago. Interviews with that resident and the residents of two neighboring houses revealed that the petitioner's wife was the granddaughter of one neighbor, that she had lived in the United States for several years and that she had a child with another man. None of the three individuals interviewed were able to identify the petitioner's name or photograph. This derogatory evidence, coupled with the petitioner's failure to provide any relevant testimony or documentation, indicates that the petitioner did not reside with his wife, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

Good Faith Entry into Marriage

To support his claim that he entered into marriage with his wife in good faith, the petitioner submitted the aforementioned affidavits from three friends. [REDACTED] and [REDACTED] all state that they have known the petitioner and his wife since, or before, their marriage; that they went out with the former couple on various occasions and that the former couple was happy and stable. None of the affiants describe the petitioner's marital relationship in any detail. In addition, the affidavits contain four sentences that are repeated nearly verbatim. This repetition indicates that the language of the affidavits is not the affiants' own and detracts from their probative value.

The petitioner submitted no other documentary or testimonial evidence of his allegedly good faith entry into marriage with his wife of the types listed in the regulation at 8 C.F.R. § 204.2(c)(2)(vii) and described in the RFE. 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 present record does not demonstrate that the petitioner entered into marriage with his wife in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Section 204(g) of the Act

Beyond the director's decision, the present record also indicates that section 204(g) of the Act bars the approval of this petition. The record shows that the petitioner married his wife while he was in removal proceedings. Consequently, the petitioner is subject to section 204(g) of the Act, which states:

Restriction on petitions based on marriages entered while in exclusion or deportation proceedings. – Notwithstanding subsection (a), except as provided in section 245(e)(3), a petition may not be approved to grant an alien immediate

relative status by reason of a marriage which was entered into during the period [in which administrative or judicial proceedings are pending], until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.

The record does not indicate that the petitioner resided outside of the United States for two years after his marriage. The record also does not indicate that the petitioner has satisfied the bona fide marriage exception to section 204(g) of the Act, pursuant to section 245(e) of the Act, which states:

Restriction on adjustment of status based on marriages entered while in admissibility or deportation proceedings; bona fide marriage exception. –

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

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

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

While identical or similar evidence may be submitted to establish a good faith marriage pursuant to section 204(a)(1)(A)(iii)(I)(aa) of the Act and the bona fide marriage exemption at section 245(e)(3) of the Act, the latter provision imposes a heightened burden of proof. *Matter of Arthur*, 20 I&N Dec. 475, 478 (BIA 1992). See also *Pritchett v. I.N.S.*, 993 F.2d 80, 85 (5th Cir. 1993) (acknowledging “clear and convincing evidence” as an “exacting standard.”) To demonstrate good faith entry into the qualifying relationship for a self-petition under section 204(a)(1)(A)(iii)(I)(aa) of the Act, the petitioner must establish his or her good faith entry into the qualifying relationship by a preponderance of the evidence and any credible evidence shall be considered. 8 C.F.R. § 204.2(c)(2)(i); *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774, 782-83 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965). However, to be eligible for the bona fide marriage exception under section 245(e)(3) of the Act, the petitioner must establish his or her good faith entry into marriage by clear and convincing evidence. Section 245(e)(3) of the Act, 8 U.S.C. § 1255(e)(3); 8 C.F.R. § 245.1(c)(9)(v). “Clear and convincing evidence” is a more stringent standard. *Arthur*, 20 I&N Dec. at 478.

As the petitioner has failed to establish that he entered into marriage with his wife in good faith by a preponderance of the evidence, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act, he has also failed to demonstrate that he qualifies for the bona fide marriage exemption under the heightened standard of proof required by section 245(e) of the Act. Section 204(g) of the Act would consequently bar the approval of this petition based on the present record.

Good Moral Character

As evidence of his good moral character, the petitioner submitted a Certificate of No Penal Record from the Police of Puerto Rico dated April 20, 2004. However, the certificate states the petitioner’s last name as ‘[REDACTED]’ rather than [REDACTED]’ as petitioner’s name is spelled on his passport and other documents. In the RFE, the director requested the petitioner to submit a certificate with the correct spelling of his last name as well as an indication that a search was conducted under all of the petitioner’s aliases. In response, the petitioner submitted a second Certificate of No Penal Record dated February 15, 2005, which again states the petitioner’s last name as “[REDACTED]” and does not indicate that a search was conducted under the correct spelling of the petitioner’s last name and all of his aliases. The petitioner did not provide any explanation of his failure to comply with the director’s request. He did not state that local police clearances or a state-issued criminal background check under the correct spelling of his name and all his aliases were not available to him, as specified in the regulation at 8 C.F.R. § 204.2(c)(2)(v).

[REDACTED] and [REDACTED] all state that the petitioner is a responsible person with “good conduct” who is well liked in their community, but they provide no probative details regarding the petitioner’s character and the record contains no evidence that they are responsible persons who can knowledgeably attest to the self-petitioner’s good moral character pursuant to the regulation at 8 C.F.R. § 204.2(c)(2)(v).

The petitioner also failed to provide evidence that his firearm conviction did not detract from his good moral character. On appeal, counsel claims that the petitioner's conviction should not bar a finding of his good moral character because "this crime under the Immigration Laws provides [sic] for a waiver and this crime was more than five years ago, and [the petitioner] has admitted in Immigration Court that he committed the crime. Since that time he has been rehabilitated and al [sic] the evidence in record [sic] sustain [sic] this allegation." Although the petitioner's conviction occurred nearly ten years before he filed the Form I-360, his offense may still be taken into account when determining his moral character. The regulation's designation of the three-year period preceding the filing of the petition does not limit the temporal scope of CIS's inquiry into the petitioner's moral character. The agency may investigate the self-petitioner's character beyond the three-year period when there is reason to believe that the self-petitioner lacked good moral character during that time. *See* Preamble to Interim Regulations, 61 Fed. Reg. 13061, 13066 (Mar. 26, 1996).

Counsel provides no evidence to support his remaining claims as to why the petitioner's conviction should not preclude a finding of his good moral character. Counsel did not submit evidence that the petitioner's conviction falls within the petty offense exception at section 212(a)(2)(A)(ii)(II) of the Act, that the petitioner's offense was not a crime involving moral turpitude, or that the petitioner would warrant a discretionary finding of good moral character despite his conviction pursuant to section 204(a)(1)(C) of the Act. Accordingly, the present record fails to establish the petitioner's good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

The petitioner has failed to demonstrate his eligibility for immigrant classification under section 204(a)(1)(A)(iii) of the Act. The petitioner has also failed to establish his eligibility for the bona fide marriage exemption from the bar of the approval of immediate relative petitions based on marriages entered into during proceedings at section 204(g) of the Act. Nonetheless, the case will be remanded because the director denied the petition without first issuing a NOID. The regulation at 8 C.F.R. § 204.2(c)(3)(ii) directs that CIS must provide a self-petitioner with a NOID and an opportunity to present additional information and arguments before a final adverse decision is made. Accordingly, the case will be remanded for issuance of a NOID, which will give the petitioner a final opportunity to overcome the deficiencies of his case.

As always, the burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision that, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.