



U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



FILE: [REDACTED]
EAC 98 143 52122

Office: Vermont Service Center

Date: **Aug 21 2001**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

APPLICATION: 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)

IN BEHALF OF PETITIONER:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office



DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be dismissed.

The petitioner is a native and citizen of India who is seeking 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 the battered spouse of a United States citizen.

The director originally denied the petition on August 2, 1999, after determining that the petitioner failed to submit additional evidence as had been requested to establish that he: (1) is the spouse of a citizen or lawful permanent resident of the United States pursuant to 8 C.F.R. 204.2(c)(1)(i)(A); (2) is eligible for immigrant classification under section 201(b)(2)(A)(i) or 203(a)(2)(A), 8 U.S.C. 1151(b)(2)(A)(i) or 1153(a)(2)(A) based on that relationship pursuant to 8 C.F.R. 204.2(c)(1)(i)(B); (3) has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage; or is the parent of a child who has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage pursuant to 8 C.F.R. 204.2(c)(1)(i)(E); and (4) is a person whose deportation (removal) would result in extreme hardship to himself, or to his child pursuant to 8 C.F.R. 204.2(c)(1)(i)(G).

Because the director noted that the petitioner did send a response to his request for additional evidence, the director reopened the case. After reviewing the evidence furnished, however, the director determined that the record did not contain satisfactory evidence to demonstrate the petitioner's qualification for the benefit sought, although he had been given 30 days in which to submit additional evidence. He, therefore, denied the petition on August 30, 1999. On a motion to reopen the director's decision of August 2, 1999, received on August 30, 1999, the director granted the motion, made a complete review of the record of proceeding, including the motion, and again denied the petition on November 10, 1999, after determining that the grounds of his original denial had not been overcome.

On May 24, 2000, the Associate Commissioner summarily dismissed the appeal after determining that the petitioner had failed to identify specifically any erroneous conclusion of law or statement of fact for the appeal. Nor did he submit additional evidence, more than 5 months after counsel had indicated evidence would be forthcoming within 30 days of his appeal.

On motion, counsel asserts that the Associate Commissioner's "order dated May 24, 2000 is erroneous and illegal as it departs from prevailing practice and established norm of professional judgment."

Pursuant to 8 C.F.R. 103.5(a)(2), a motion to reopen must state the new facts to be proved at the reopened proceedings and be supported by affidavits or other documentary evidence. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. 103.5(a)(4).

Based on the plain meaning of "new," a new fact is held to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹

When used in the context of a motion to reopen in analogous legal disciplines, the terminology "new facts" or "new evidence" has been determined to be evidence that was previously unavailable during the prior proceedings. In removal hearings and other proceedings before the Board of Immigration Appeals, "[a] motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing...." 8 C.F.R. 3.2 (1999). In examining the authority of the Attorney General to deny a motion to reopen in deportation proceedings, the Supreme Court has found that the appropriate analogy in criminal procedure would be a motion for a new trial on the basis of newly discovered evidence. INS v. Doherty, 502 U.S. 314, 323 (1992); INS v. Abudu, 485 U.S. 94, 100 (1988). In federal criminal proceedings, a motion for a new trial based on newly discovered evidence "may not be granted unless....the facts discovered are of such nature that they will probably change the result if a new trial is granted,....they have been discovered since the trial and could not by the exercise of due diligence have been discovered earlier, and....they are not merely cumulative or impeaching." Matter of Coelho, 20 I&N Dec. 464, 472 n.4 (BIA 1992) (quoting Taylor v. Illinois, 484 U.S. 400, 414 n.18 (1988)).

On motion, counsel submits a copy of his previous motion for reconsideration dated August 26, 1999 (received by the Service on August 30, 1999). He asserts that the "time limitation of 30 days should not be applied when I could not supply the evidences which are otherwise subject matter of other pending cases in the Judicial court of competent jurisdiction, and those matter are subjudice."

¹ The word "new" is defined as "1. having existed or been made for only a short time.... 3. Just discovered, found, or learned <new evidence>" WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984) (emphasis in original).

Counsel further asserts that the "administrative agency should not attempt to decide any issues which are otherwise pending in other judicial matters, in relation to the same parties and same subject matter. In this case the appeal is pending on the orders of the Immigration Judge as well. The same subject matter and evidence of parental rights consisting of extreme and repeated acts of cruelty are involved and are pending determination in these cases. Therefore the administrative agency MUST STAY all proceeding when judicial matters are pending as per prevailing practice in order to avoid any conflict of decision."

Counsel's argument, on motion, reveals no fact that could be considered "new" under 8 C.F.R. 103.5(a)(2). This argument is an excerpt to his argument on motion dated August 26, 1999. While counsel argues that the evidence required to establish eligibility for the relief and benefit sought as a battered spouse cannot be produced because such evidences are the subject matter of the pending divorce petition and deportation hearing against the applicant, the petitioner is seeking benefits under section 204(a)(1)(A)(iii) of the Act. The pending divorce petition and deportation hearing is separate and apart from the petitioner's application for benefits under this Act as a battered spouse. The petitioner has not furnished evidence to establish eligibility pursuant to 8 C.F.R. 204.2(c)(1)(i)(A), (B), and (E). For these reasons, the motion may not be granted.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. INS v. Doherty, supra, at 323 (citing INS v. Abudu, 485 U.S. at 107-108). A party seeking to reopen a proceeding bears a "heavy burden." INS v. Abudu, supra, at 110.

At the time of the director's decision, 8 C.F.R. 204.2(c)(1)(i)(G) required the petitioner to establish that his removal would result in extreme hardship to himself or to his child. On October 28, 2000, the President approved enactment of the Violence Against Women Act, 2000, Pub. L. No. 106-386, Division B, 114 Stat. 1464, 1491 (2000). Section 1503(b) amends section 204(a)(1)(A)(iii) of the Act so that an alien self-petitioner claiming to qualify for immigration as the battered spouse or child of a citizen or resident alien is no longer required to show that the self-petitioner's removal would impose extreme hardship on the self-petitioner or the self-petitioner's child. Id. section 1503(c), 114 Stat. at 1520-21. Pub. L. 106-386 does not specify an effective date for the amendments made by section 1503. This lack of an effective date strongly suggests that the amendments entered into force on the date of enactment. Johnson v. United States, 529 U.S. 694, 702 (2000); Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991).



As a general rule, an administrative agency must decide a case according to the law as it exists on the date of the decision. Bradley v. Richmond School Board, 416 U.S. 696, 710-11 (1974); United States v. The Schooner Peggy, 1 Cranch 103, 110 (1801); Matter of Soriano, 21 I & N Dec. 516 (BIA 1996, AG 1997); Matter of Alarcon, 20 I & N Dec. 557 (BIA 1992). For immigrant visa petitions, however, the Board has held that, to establish a priority date, the beneficiary must have been fully qualified for the visa classification on the date of filing. Matter of Atembe, 19 I & N Dec. 427 (BIA 1986); Matter of Drigo, 18 I & N Dec. 223 (BIA 1982); Matter of Bardouille, 18 I & N Dec. 114 (BIA 1981). Even if the law changes in a way that may benefit the beneficiary, the appeal must be denied, without prejudice to the filing of a new petition, to ensure that the beneficiary does not gain an advantage over the beneficiaries of other petitions. Id.

Atembe, Drigo, and Bardouille each involved petitions under the family-based preference categories in section 203(a) of the Act. In this case, however, the beneficiary seeks classification as the spouse of a citizen. INA section 204(a)(1)(A)(iii), 8 U.S.C. section 1154(a)(1)(A)(iii), as amended by Pub. L. No. 106-386, section 1503, supra. As immediate relatives, the spouses and children of citizens are not subject to the numerical limits on immigration, and do not need priority dates. INA section 201(b)(2)(A)(i), 8 U.S.C. section 1151(b)(2)(A)(i). The purpose of the Atembe, Drigo and Bardouille decisions would not be served by affirming the director's decision on this particular basis of the director's denial. For this reason, the director's objections have been overcome on this one issue (8 C.F.R. 204.2(c)(1)(i)(G)).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The motion is dismissed.

