

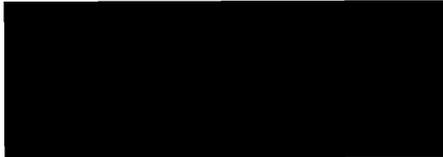


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U.S. Department of Justice

Immigration and Naturalization Service

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



Public Copy

JUL 5 2001

FILE: [Redacted]
EAC 99 114 52244

Office: Vermont Service Center

Date:

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 appeal will be dismissed.

The petitioner is a native and citizen of Jamaica who is seeking classification as a special immigrant pursuant to section 204(a)(1)(A)(iv) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1154(a)(1)(A)(iv), as the battered child of a citizen of the United States.

The director determined that the petitioner failed to establish that he: (1) is the child of a citizen or lawful permanent resident of the United States; (2) is eligible for immigrant classification under section 201(b)(2)(A)(i) or 203(a)(2)(A) of the Act based on that relationship; (3) is residing in the United States; (4) has resided in the United States with the citizen or lawful permanent resident parent; (5) has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident parent while residing with that parent; and (6) is a person whose deportation (removal) would result in extreme hardship to himself. The director, therefore, denied the petition.

On appeal, counsel asserts that the denial of the petition is wrong and not supported by the evidence submitted in this case. She further asserts that the petitioner has submitted all of the documents requested by the Service; however, the Service did not review any of the documents before denying the petition. Counsel submits additional evidence. She further states that she needs 30 days in which to submit a brief and/or evidence. However, it has been approximately eighteen months since the filing of the appeal in this matter, and neither a brief nor additional evidence has been received in the record of proceeding. Therefore, the record is considered complete.

8 C.F.R. 204.2(e)(1), in effect at the time the self-petition was filed, states, in pertinent part, that:

(i) A child may file a self-petition under section 204(a)(1)(A)(iv) or 204(a)(1)(B)(iii) of the Act for his or her classification as an immigrant relative or as a preference immigrant if he or she:

(A) Is the child of a citizen or lawful permanent resident of the United States;

(B) Is eligible for immigrant classification under section 201(b)(2)(A)(i) or 203(a)(2)(A) of the Act based on that relationship;

- (C) Is residing in the United States;
- (D) Has resided in the United States with the citizen or lawful permanent resident parent;
- (E) Has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident parent while residing with that parent;
- (F) Is a person of good moral character; and
- (G) Is a person whose deportation (removal) would result in extreme hardship to himself or herself.

The petition, Form I-360, shows that the petitioner arrived in the United States on April 19, 1991. However, his current immigration status or how he entered the United States was not shown. The petitioner's mother married her United States citizen spouse on March 29, [REDACTED]. On February 16, 1999, a self-petition was filed by the petitioner claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, his U.S. citizen parent while residing with that parent.

Because the record of proceeding contains insufficient evidence to establish eligibility for the benefit sought, the applicant was requested on March 29, 1999 to submit evidence to establish that he has met the requirements of 8 C.F.R. 204.2(e)(1)(i)(A), (B), (C), (D), (E), and (G). The director listed examples of evidence he may submit to establish eligibility. Based on counsel's request for additional time to comply, on June 7, 1999, the applicant was accorded an additional 60 days in which to submit evidence as had been requested. Because no evidence was furnished, the director denied the petition.

PART I

8 C.F.R. 204.2(e)(1)(i)(A) requires that the self-petitioner must establish that he is the child of a citizen or lawful permanent resident of the United States. 8 C.F.R. 204.2(e)(1)(i)(B) requires that the self-petitioning child must establish that he is eligible for immigrant classification under section 201(b)(2)(A)(i) or 203(a)(2)(A) of the Act based on that relationship.

The director determined that the petitioner failed to submit evidence of the legal termination of the prior marriage of his mother and the legal termination of the prior marriage of his

mother's U.S. citizen spouse ([REDACTED]) as had been requested to establish that his mother and [REDACTED] was free to marry on March 29, 1997. On appeal, counsel submits a copy of a judgment of divorce as proof that the prior marriage of his mother was terminated on February 16, 1994 in New York. However, no evidence of the legal termination of Winston's prior marriage was furnished.

The petitioner has failed to overcome these findings of the director pursuant to 8 C.F.R. 204.2(e)(1)(i)(A) and (B).

PART II

8 C.F.R. 204.2(e)(1)(i)(C) requires that the self-petitioner must establish that he is residing in the United States when the petition is filed. 8 C.F.R. 204.2(e)(1)(i)(D) requires the petitioner to establish that he has resided in the United States with the citizen or lawful permanent resident parent.

The director determined that the petitioner failed to submit evidence as had been requested to establish that he was residing in the United States when the petition was filed, and that he has resided in the United States with his U.S. citizen parent. However, based on evidence furnished on appeal, including affidavits from several individuals, it is concluded that the applicant has overcome these findings of the director pursuant to 8 C.F.R. 204.2(e)(1)(i)(C) and (D).

PART III

8 C.F.R. 204.2(e)(1)(i)(E) requires the petitioner to establish that he has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen parent while residing with that parent.

The qualifying abuse must have been sufficiently aggravated to have reached the level of "battery or extreme cruelty." 8 C.F.R. 204.2(e)(1)(vi) provides:

[T]he 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 or lawful permanent resident spouse, must have been perpetrated against the self-petitioner or the self-petitioner's child, and must have taken place during the self-petitioner's marriage to the abuser.

The director determined that the petitioner failed to submit evidence as had been requested to establish that he has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen parent while residing with that parent. On appeal, counsel submits the petitioner's statement, his mother's statement, and statements from individuals claiming to be eye-witnesses of the abuse suffered by the petitioner and his mother.

The petitioner has, therefore, overcome this finding of the director pursuant to 8 C.F.R. 204.2(e)(1)(i)(E).

PART IV

The director determined that the petitioner failed to submit evidence as had been requested to establish that his removal from the United States would result in extreme hardship to himself pursuant to 8 C.F.R. 204.2(e)(1)(i)(G).

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. 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 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 child 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(e)(1)(i)(G)).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.