U.S. Department of Justice

Immigration and Naturalization Service

Public Copy

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

[redacted]

B9

FILE: [redacted] Office: Vermont Service Center Date: JUL 19 2001
EAC 00 154 50790

IN RE: Petitioner: [redacted]
Beneficiary:

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:

[redacted]

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

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 the Philippines 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 determined that the petitioner failed to establish that he: (1) 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; and (2) is a person whose deportation (removal) would result in extreme hardship to himself, or to his child. The director, therefore, denied the petition.

On appeal, counsel asserts that the petitioner and his spouse resided at her parents' house, which led to the downfall of the marriage as the petitioner's mother-in-law became overbearing and constantly interfered in their marriage. He further asserts that the evidence furnished shows that the petitioner has undergone tremendous and extreme emotional abuse as a result of his marriage to his U.S. citizen spouse, and that the abuse resulted in acute depression, vulnerability, feelings of entrapment, despair, demolished self-esteem and worth. Counsel states that the only outcome the U.S. citizen and her family seem to have wanted was to degrade the petitioner's spirit, and that his spouse and her family also used his vulnerable status as an alien to intimidate, threaten, and manipulate him. Counsel asserts that the petitioner has established extreme hardship if he were to be removed from the United States. He submits evidence previously furnished and addressed by the director.

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

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

(E) 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;

(F) Is a person of good moral character;

(G) Is a person whose deportation (removal) would result in extreme hardship to himself, herself, or his or her child; and

(H) Entered into the marriage to the citizen or lawful permanent resident in good faith.

The record reflects that the petitioner entered the United States with an H-1B nonimmigrant visa on March 15, 1995. The petitioner married his United States citizen spouse on September 19, 1998 at Brookfield, Illinois. On April 20, 2000, 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 spouse during their marriage.

PART I

8 C.F.R. 204.2(c)(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 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.

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

8 C.F.R. 204.2(c)(2) provides, in part:

> (i) 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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> (iv) 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 abuse may only be used to establish a pattern of abuse and

violence and to support a claim that qualifying abuse also occurred.

The director noted that evidence furnished to establish extreme cruelty consists of the petitioner's own affidavit detailing the treatment he received from his in-laws and a psychological report that echoed his affidavit. The director found the evidence insufficient. He informed the petitioner that his allegations of abuse appeared to be primarily toward his mother-in-law. Therefore, on June 6, 2000, the applicant was provided with a list of possible evidence he might submit to establish the criteria for extreme mental cruelty, and he was requested to submit additional evidence.

In response, the petitioner submitted another self-affidavit that discusses his wife's inability to live away from her parents and a copy of the psychological report. It is noted that the petitioner also submitted statements from Barrington Barnswell, a friend of the petitioner, and from the petitioner's mother who is residing in the Philippines. Mr. [redacted] and the petitioner's mother, however, failed to establish that they knew sufficient details regarding any incidents of abuse or extreme cruelty other than what was related to them by the petitioner. Nor did they establish that they are eye-witnesses to the claimed abuse and knew sufficient details regarding any incidents of abuse or extreme cruelty. Further, the psychological report from Dr. Neal Kirschenbaum, previously furnished and again furnished by counsel on appeal, failed to indicate that any objective evidence or criteria was utilized in determining the source or severity of the petitioner's emotional condition. Rather, the alleged abuse described by the psychologist and the affiants are based purely on the testimony of the petitioner, and failed to establish that their conclusions are based on anything other than statements made by the petitioner. Further, no evidence was furnished to establish that the petitioner availed himself of any further psychological or medical treatment.

The evidence provided in the present case does not suggest that the marital difficulties claimed by the petitioner were beyond those encountered in many marriages. Marital tensions and incompatibilities which serve to place severe strains on a marriage, and in fact may be the root of a marriage's disintegration, do not, by themselves, constitute the extreme cruelty which was contemplated by Congress in enacting the Violence Against Women Act. Further, the record contains no evidence that the marital difficulties were compounded by any effort on the part of the citizen spouse to control the petitioner with threats regarding his immigration status. Rather, it appears from the petitioner's statement that the threats were initiated by his in-laws.

It further appears from the petitioner's statement that his citizen spouse abandoned the marital relationship and returned to her family. "Abandonment" is not included in, nor does it meet, the definition of qualifying abuse as provided in 8 C.F.R. 204.2(c)(1)(vi). Additionally, it is noted in Mr. [redacted] statement that the marriage of the petitioner and his spouse "came to an end on Nov. 27, 1999." Pursuant to 8 C.F.R. 204.2(c)(1)(ii), in effect at the time the self-petition was filed, the self-petitioning spouse must be legally married to the alleged abuser when the petition is properly filed with the Service, and that a self-petition must be denied if the marriage legally ended through annulment, death, or divorce before that time. However, because no evidence was furnished to establish the status of the marriage, it will not be addressed at this time.

Pursuant to 8 C.F.R. 204.2(c)(1)(vi), the qualifying abuse must have been sufficiently aggravated to have reached the level of "battery or extreme cruelty." The claim of qualifying abuse, however, was evaluated by the director after a review of the evidence in this matter. He determined that the record did not contain satisfactory evidence to establish that the petitioner has been battered by, or has been the subject of extreme cruelty perpetrated by, his citizen spouse. No new evidence was furnished on appeal.

It is concluded that the evidence furnished is insufficient to establish that the claimed abuse perpetrated toward the petitioner by his spouse was "extreme." The petitioner has failed to establish that he was battered by or was the subject of "extreme cruelty" as contemplated by Congress, and to overcome the director's finding pursuant to 8 C.F.R. 204.2(c)(1)(i)(E).

PART II

The director determined that the petitioner failed to establish that his removal from the United States would result in extreme hardship to himself or to his child pursuant to 8 C.F.R. 204.2(c)(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 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)).

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.