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U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy.

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



FILE: [Redacted]
EAC 00 127 52467

Office: Vermont Service Center

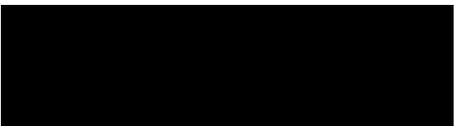
Date: 2 JUL 2002

IN RE: Petitioner:
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:



Public Copy

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
Robert P. Wiemann, 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 case will be remanded to the director for further action.

The petitioner is a native and citizen of New Zealand 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 she: (1) is a person of good moral character; and (2) entered into the marriage to the citizen or lawful permanent resident in good faith. The director, therefore, denied the petition.

On appeal, counsel asserts that the law regarding good moral character was misapplied, that the Service based its findings on bad faith interpretation of the submitted evidence, and that the petitioner submitted ample evidence to meet her burden pursuant to law. Counsel further asserts that the Service did not give notice of the fact that it was going to use antiquated evidence against the petitioner, nor was she given the opportunity to respond to the Service's findings; furthermore, the Service used the old evidence in a way that goes against its own regulations and procedures, and ignored more current evidence that the law requires before rendering a decision. Counsel submits additional evidence.

8 C.F.R. 204.2(c)(1) 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:

(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 last entered the United States as a visitor on August 31, 1996. The petitioner married her United States citizen spouse on November 11, 1996 at Vallejo, California. Based on that marriage, on April 6, 1998, the applicant's status was adjusted to that of a CR-6, conditional permanent resident of the United States. On March 21, 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, her U.S. citizen spouse during their marriage.

8 C.F.R. 204.2(c)(1)(i)(F) requires the petitioner to establish that she is a person of good moral character. Pursuant to 8 C.F.R. 204.2(c)(2)(v), 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 for each locality or state in the United States in which the self-petitioner has resided for six or more months during the three-year period immediately preceding the filing of the 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.

The director determined that the letter of clearance furnished by the petitioner was insufficient as it did not indicate that the investigation conducted includes other names used by the petitioner. On appeal, the petitioner submits a criminal record check by the State of California, Department of Justice, indicating that a search of the petitioner's fingerprints reveals no criminal history record in their files. The petitioner has, therefore, satisfied this finding of the director.

The director further determined that the petitioner is not of good moral character because documents contained in the record of proceeding reflects that the petitioner had been previously married to [REDACTED] and the termination of this marriage occurred on August 30, 1977, 20 months after her marriage to [REDACTED] (on January 26, 1976) and 14 months after she adjusted her status to permanent residence based on her marriage to [REDACTED]. Further, the petitioner failed to declare in any of the Service applications that she was previously married; therefore, it appears the petitioner was granted an immigration benefit based on her false testimony of not having a prior marriage. The director, therefore, statutorily denied the petition pursuant to section 101(f) of the Act and advised the petitioner that her request for an extension of time to submit additional documentation was also denied. The director further stated that the petitioner appears she may have been subject to the provisions of section 204(c) of the Act.

On appeal, counsel asserts that by not providing a notice of intent to deny the petitioner's self-petition on the basis of a lack of showing of good moral character, the Service denied the petitioner the opportunity to address the Service's concerns and, ultimately, denied her due process. Counsel states that it goes against the spirit and intent of the law to make a negative determination of moral character based solely on statements made 25 years ago when the petitioner was neither given the opportunity to address the evidence of bad conduct, nor to present evidence of rehabilitation, and that in summarily denying the petition without giving the petitioner the opportunity to prove this claim, the Service has denied her the right to address the charges against her.

8 C.F.R. 204.2(c) (3) (ii) provides:

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 the adverse preliminary decision is based on derogatory information of which the self-petitioner is unaware, the self-petitioner will also be offered an opportunity to rebut the derogatory information in accordance with the provisions of 8 CFR 103.2(b) (16).

Counsel asserts that the petitioner became aware of the irregularities in her 1976 application and in the marriage and divorce dates only when she received the denial of her petition; however, the Service did not give the petitioner notice of the fact that it was going to use antiquated evidence against the

petitioner, nor did it give her the opportunity to respond to the Service's evidence.

The record of proceeding is devoid of any evidence to establish that the petitioner was informed of the adverse information contained in the record and was offered an opportunity to present additional information or arguments before a final decision was rendered.

8 C.F.R. 204.2(c)(1)(i)(H) requires the petitioner to establish that she entered into the marriage to the citizen in good faith.

The director noted that the petitioner submitted documentary evidence that suggest [REDACTED] (the petitioner's spouse) was in financial trouble and therefore the petitioner did not wish to commingle her funds and assets, and that she also submitted affidavits from friends and photographs; the director, therefore, determined that the evidence furnished was found to be insufficient.

On appeal, counsel states that a piece of evidence located in the FOIA (Freedom of Information Act) is most persuasive; the Form I-468, filled out during the petitioner's adjustment interview (on July 29, 1997) states that the "marriage appears bonafide." Counsel asserts that the Service failed to mention in its denial the numerous other pieces of evidence that demonstrated the validity of the marriage between the petitioner and [REDACTED]. Counsel states that the petitioner submitted 18 different pieces of evidence to demonstrate the validity of her marriage, and one documented an observation by a Service official that the marriage appeared legitimate. He asserts that the denial letter is inaccurate in its description of the quality and type of evidence submitted, and its complete omission of consideration of the evidence borders on ludicrous.

The case will, therefore, be remanded so that the director may review the evidence furnished by the petitioner and to accord the petitioner an opportunity to submit additional evidence and/or rebut the director's findings as provided in 8 C.F.R. 204.2(c)(3)(ii). The director shall enter a new decision which, if adverse to the petitioner, is to be certified to the Associate Commissioner, Examinations, for review, and without fee.

ORDER: The director's decision is withdrawn. The case is remanded for appropriate action consistent with the above discussion and entry of a new decision.