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U.S. Department of Justice
Immigration and Naturalization Service

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



FILE: [Redacted]
EAC 99 131 53473

Office: Vermont Service Center

Date: 23 MAY 2002

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:



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DISCUSSION: The preference visa petition was revoked by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal.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 Nigeria 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 district director revoked the approval of the visa petition after determining that the petitioner failed to establish that he: (1) is a person of good moral character; and (2) is a person whose deportation (removal) would result in extreme hardship to himself, or to his child.

On appeal, counsel asserts that a decision was made by the Service without consideration of his response to the notice of intent to revoke. He submits correspondence including evidence he claims were sent to the Service in response to the notice of intent. Counsel indicates that he needs 60 days in which to submit a brief and/or evidence. However, it has been approximately two years 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.

Section 205 of the Act, 8 U.S.C. 1155, states, in pertinent part, that:

The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204. Such revocation shall be effective as of the date of approval of any such petition.

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 entered the United States on January 26, 1986. The petitioner married his United States citizen spouse on March 17, 1994, at Minneapolis, Minnesota. On April 8, 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 spouse during their marriage. The petition was approved by the Vermont Service Center on October 25, 1999. It is noted for the record that the self-petitioner was deported from the United States on November 29, 1999.

On February 28, 2000, the director issued a notice of intent to revoke the petition. He stated that it has come to the attention of the Service that not all of the petitioner's Service records were reviewed at the time the petition was approved, and that had the Service Center obtained the complete record, the petition may not have been approved. The director noted that after reviewing the complete Service record, the issues of the petitioner's good moral character and whether his deportation from the United States would result in extreme hardship were questioned. The petitioner was, therefore, accorded 30 days in which to submit additional evidence to overcome the reasons for revocation. Because the record of proceeding did not include a response to the Service's notice, on May 9, 2000, the director revoked the approval of the petition.

On appeal, counsel asserts that a decision was made by the Service without consideration of his response to the notice of intent to revoke. He submits a copy of his letter dated March 16, 2000, requesting for an additional 30 day in which to present additional

evidence in light of the director's intent to revoke the self-petition. While the record of proceeding does not contain this request for extension, the record contains the applicant's response to the February 28, 2000 notice of intent to revoke the approved Form I-360 petition, received by the Service on May 2, 2000. Counsel's response to the notice of intent to revoke will, therefore, be addressed in this proceeding.

PART I

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 U.S. citizen 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(b), 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 U.S. 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 pursuant to 8 C.F.R. 204.2(c)(1)(i)(G).

PART II

8 C.F.R. 204.2(c)(1)(i)(F) requires the petitioner to establish that he is a person of good moral character.

After reviewing the petitioner's complete Service record, the director questioned the issue of the petitioner's good moral character. The petitioner was, therefore, furnished a copy of the investigative report or memorandum with the director's letter of intent dated February 28, 2000, and was accorded 30 days in which to submit any evidence he feels will overcome the reasons for revocation.

Counsel, in response to the notice of intent, asserts that this issue had been addressed exhaustively in numerous forums during the pendency of the case. He states, "I will not go through and respond to each single item raised by you in the Notice of Intent to Revoke, but with respect to his good moral character, I only point out that this man is a God-fearing person who has never lifted a hand to hit any person, man or woman in his life." No additional evidence was furnished to overcome the director's finding. Again, on appeal, the petitioner has failed to overcome this finding of the director pursuant to 8 C.F.R. 204.2(c)(1)(i)(F).

PART III

It is noted for the record that the petitioner may not have met the criteria provided in 8 C.F.R. 204.2(c)(1)(i)(E) which 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.

On September 8, 1999, the Board of Immigration Appeals (BIA), based on the applicant's appeal regarding suspension of deportation

application, found that the description of events which occurred after the hearing do not establish that the respondent (petitioner) was battered or subjected to extreme cruelty.

Additionally, based on the petitioner's Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, the United States District Court, District of Minnesota, on November 23, 1999, states:

The INS has legitimate reasons for deporting [REDACTED] whether or not he qualifies for protection under VAWA. The BIA in its final order of deportation issued September 8, 1999 noted that, regardless of Nwankwo's status under VAWA, [REDACTED] failed to meet the INS's continuous physical presence rule, a prerequisite for a suspension of deportation. Furthermore, the BIA found that [REDACTED] evidence did not establish that he was battered or subjected to extreme cruelty. Since the evidence [REDACTED] provided to the Vermont INS center was no different than the evidence presented to the IJ and BIA in earlier petitions, it is likely that the BIA would overturn the granting of the self-petition or disregard it when considering yet another plea to suspend deportation.

Accordingly, it is concluded that the petitioner has not established that he had been battered by, or had been the subject of extreme cruelty perpetrated by, the citizen spouse during the marriage pursuant to 8 C.F.R. 204.2(c)(1)(i)(E).

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.