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U.S. Department of Justice

Immigration and Naturalization Service

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



FILE: [Redacted]
EAC 00 108 54005

Office: Vermont Service Center

Date: MAY 30 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:



REDACTED 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
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 appeal will be dismissed.

The petitioner is a native and citizen of Russia 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) 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; (2) is a person of good moral character; and (3) is a person whose deportation (removal) would result in extreme hardship to herself, or to her child. The director, therefore, denied the petition.

On appeal, counsel asserts that the decision is incorrect on the law and the facts; that the documentation shows that the petitioner is a battered spouse within the meaning of the law; and that the petitioner's spouse is a United States citizen. He subsequently 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 entered the United States as a visitor on November 3, 1992. The petitioner married her United States citizen spouse on September 22, 1998 at Manhattan, New York. On March 29, 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.

PART I

8 C.F.R. 204.2(c)(1)(i)(A) provides that the petitioner must be the spouse of a citizen or lawful permanent resident of the United States.

The director determined that the petitioner had not establish that her spouse is a U.S. citizen; therefore, he reserves the right to dismiss this conclusion if at any time additional evidence disproves the assumption that her spouse is a U.S. citizen.

On appeal, the petitioner submits her spouse's birth certificate indicating that he was born in New York. The petitioner has, therefore, overcome this finding of the director pursuant to 8 C.F.R. 204.2(c)(1)(i)(A).

PART II

8 C.F.R. 204.2(c)(1)(i)(E) requires the petitioner to establish that she 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.

* * *

(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 reviewed and discussed the evidence furnished by the petitioner, including evidence furnished in response to his request for additional evidence. The discussion will not be repeated here. He noted, however, that the letter from Golden Imaging, P.C., indicating a date of service on July 30, 1999, did not indicate the cause of the petitioner's injuries, and that although the petitioner was requested to obtain a letter from the medical office who treated her for these injuries indicating the cause of the injuries, none was received. The director stated that because the petitioner had not responded to all the questions asked in the notice dated September 27, 2000 relating to her medical treatment based on her claims of abuse, and because the petitioner's sworn testimonies regarding other aspects of the petition have been contradicted by evidence, the Service will not at this time accept her claim that her spouse was the cause of her broken nose without additional evidence of abuse.

On appeal, the petitioner submits evidence previously furnished, including (1) a police/domestic incident report, filed on May 16, 2000, in which the officer states that the petitioner filed a report against her husband, which happened 1 year and 3 months ago, indicating that on February 10, 1999, the petitioner awoke to her husband biting her on the left ear, right and left forearm, and various places on her legs; that she drove herself to Coney Island hospital where she was treated and released; (2) a psychological assessment dated January 16, 1999; (3) a psychosocial assessment by Nancy Kahn dated June 2, 2001; (4) a letter from the Kew Forest Medical dated May 15, 2001, signed by Lazar Sheras, Office Management, certifying that the petitioner was under their professional care for injuries sustained when she was assaulted and battered by her husband on March 31, 1999; and (5) affidavits from two friends of the petitioner claiming to be witnesses of the abuse.

The petitioner, however, did not address the director's concerns regarding the contradictory evidence furnished by the petitioner to establish extreme cruelty; therefore, as the evidence furnished on appeal did not overcome the director's concerns, they will not be evaluated. Further, while the petitioner on appeal submits another copy of the letter from Golden Imaging, P.C., the record reflects that imaging services were accorded the petitioner on July 30, 1999, as a result of a motor vehicle accident on July 4, 1999.

Pursuant to 8 C.F.R. 204.2(c)(2), the Service will consider any credible evidence relevant to the petition, and that the determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service.

As determined by the director, and based on the conflicting information furnished by the petitioner, the Service can not accept

the petitioner's claim that she 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 III

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 petitioner had not establish that she is a person of good moral character based on her violation of a protection order granted to her former mother-in-law against the petitioner. He noted that the police clearance indicates that the petitioner had pled guilty (on June 22, 2000) to aggravated harassment and harassment with physical contact in the second degree, and that charges for criminal contempt and previous aggravated harassment were consolidated with the charges to which she pled guilty.

On appeal, the petitioner submits another copy of the police clearance and her conviction record for harassment with physical contact.

Section 101(f) of the Act, 8 U.S.C. 1101(f), states, in pertinent part:

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be establish, is, or was--

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(3) a member of one or more of the classes of persons, whether inadmissible or not described in...or subparagraphs (A) and (B) of section 212(a)(2) and subparagraph (C) therefore of such section...if the

offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period.

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.

The petitioner has, therefore, failed to establish that she is a person of good moral character based on her arrests and conviction during the three-year period required to show good moral character. The petitioner has failed to overcome the director's findings pursuant to 8 C.F.R. 204.2(c) (1) (i) (F).

PART IV

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 United States 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, AC 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.

Atomba, 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 Atomba, Drigo and Bardouille decisions would not be served by dismissing the appeal in this case. For this reason, the appeal will be decided on the basis of section 204(a)(1)(A)(iii) as amended by section 1503.

Accordingly, as the law that exists at the time of this decision does not require the petitioner to show that her removal from the United States would result in extreme hardship to herself or to her child, the petitioner has, therefore, overcome this finding of the director pursuant to 8 C.F.R. 204.2(c)(1)(i)(G).

PART V

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

The director determined that although documentation furnished reflects that the petitioner appears there may be a bona fide marriage, the record, however, shows that the petitioner placed personal ads in a Russian newspaper seeking male companionship, only four months after her marriage.

On appeal, the petitioner neither addressed nor rebutted this finding of the director and to overcome his concern pursuant to 8 C.F.R. 204.2(c)(1)(i)(H).

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.