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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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

FILE: [REDACTED]
EAC 97 236 50130

Office: Vermont Service Center

Date:

APR 15 2003

IN RE: Petitioner:
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)

ON BEHALF OF PETITIONER:

[REDACTED]

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 Bureau of Citizenship and Immigration Services (Bureau) 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a native and citizen of Colombia 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 acting 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 acting director erred in holding that the incident in which the petitioner was scratched in the neck and threatened with a knife by his citizen spouse, "alone, does not constitute battery or extreme cruelty as interpreted in the Crime Bill." He contends that regulations at 8 C.F.R. § 204.2(c)(vi) speak of any singular act of violence, as opposed to acts, which results in physical or mental injury, as being sufficient to show that a person "was battered by or was the subject of extreme cruelty." Counsel further asserts that the acting director erred by failing to consider the extreme cruelty perpetrated by the citizen spouse on the petitioner, and as the parent of two children who had been the subject of extreme cruelty perpetrated by the citizen during the marriage. He further asserts that the acting director abused his discretion in holding that the fact that the Domestic Violence Complaint was dismissed and the temporary restraining order was vacated leads to the conclusion that the abuse did not occur.

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:

(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 petition, Form I-360, shows that the petitioner arrived in the United States on June 28, 1994. However, his current immigration status or how he entered the United States was not shown. The petitioner married his United States citizen spouse on October 19, 1996 at Beverly City, New Jersey. On September 8, 1997, 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

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 114 Stat. 1464, 1491 (2000). Section 1503(b) amends section 204.2(c) (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 petitioner's removal would impose extreme hardship on the 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. § 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. § 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)(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 acting director reviewed and discussed the evidence furnished by the petitioner to establish that he qualifies for the benefit

sought. That discussion will not be repeated here. The acting director, however, determined that the letter from the school guidance counselor, a letter from a family services specialist, two Civil Order Actions for the Prevention of Domestic Violence, a Domestic Violence Complaint, a Consent Order, an Order of Dismissal, and a medical doctor's letter, including the petitioner's self-affidavit and affidavits from two individuals attesting to be witnesses of the abuse, were insufficient to establish extreme cruelty.

Counsel, on appeal, asserts that the evidence presented showed that the petitioner's child, [REDACTED] went to see the school guidance counselor because she was afraid that the citizen stepmother would kill her father. The guidance counselor found that the child was "so upset and frightened when she came in to see me that I called the Division of Youth and Family Services [DYFS] to ask for their help." The evidence shows that the DYFS worker, after speaking to the father and the children after school, believed that they needed court assistance and advised them to get a restraining order against the stepmother. Counsel further asserts that the evidence further shows that there was a pattern of abuse by the stepmother against the children. In his affidavit, the petitioner stated that his spouse had, one night, thrown the children's clothes on the floor and that he found the children on the street crying.

Counsel contends that the acting director abused his discretion in holding that the fact that the Domestic Violence Complaint was dismissed and the Temporary Restraining Order was vacated leads to the conclusion that the abuse did not occur. He further states that the evidence presented shows that a New Jersey Superior Court Judge granted the petitioner a Temporary Restraining Order after the petitioner had presented evidence "to believe that [his] life, health, and well-being are endangered by the defendant," and that on June 5, 1997 this order was continued in full force.

A further review of the restraining order shows that on July 23, 1997, the Domestic Violence Complaint was dismissed and the Final Restraining Order was vacated, with the following exception, that the complaint was to remain open until December 12, 1997. The New Jersey Superior Court, in a "Consent Order," ordered "that the Temporary Restraining Order in this matter remain in full force and effect until December 18, 1997. If there are no violations of the Temporary Restraining Order, it may be dismissed without the necessity of appearance on December 18, 1997. The parties acknowledge that there have been no further instances of domestic violence or violations of the Temporary Restraining Order since the original filing date of the Temporary Restraining Order."

As argued by counsel, the fact that the Temporary Restraining Order was dismissed is not evidence that the abuse did not occur. As noted in the court's Consent Order, there have been no further



instances of domestic violence or violations of the Temporary Restraining Order since the original filing date of the Temporary Restraining Order.

The director found that the letter from the school guidance counselor, the letter from a family services specialist, two Civil Order Actions for the Prevention of Domestic Violence, a Domestic Violence Complaint, a Consent Order, an Order of Dismissal, a medical doctor's letter, the petitioner's self-affidavit, and affidavits from two individuals attesting to be witnesses of the abuse, were insufficient to establish extreme cruelty. 8 C.F.R. § 204.2(c)(2), however, provides that the Service will consider any credible evidence relevant to the petition. Documentary proof of non-qualifying abuse may be used to establish a pattern of abuse and violence and to support a claim that qualifying abuse also occurred. Further, a self-petitioner who has suffered no physical abuse is not precluded from a finding of eligibility for the benefit sought. As defined in 8 C.F.R. § 204.2(c)(1)(vi), the 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.

Based on the evidence in the record, it is concluded that the petitioner has furnished sufficient and credible evidence that he has been battered by, or has been the subject of extreme cruelty perpetrated by the citizen spouse during the marriage; or is the parent of a child who has been the subject of extreme cruelty perpetrated by the citizen during the marriage, as defined in 8 C.F.R. § 204.2(c)(1)(vi). The petitioner has, therefore, overcome this portion of the director's finding, 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 met that burden and, therefore, is eligible for the benefit sought.

ORDER: The appeal is sustained. The petition is approved.