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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3F
425 I Street, N.W.
Washington, D.C. 20536

BA

[REDACTED]

FILE: [REDACTED]

Office: Vermont Service Center

Date: **DEC 10 2003**

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)

ON BEHALF OF PETITIONER:
[REDACTED]

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 Citizenship and Immigration Services (CIS) 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the District Director, Denver, Colorado, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

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

On appeal, counsel asserts that the district director required that the petitioner meet a burden beyond that required in 8 C.F.R. § 204.2(c)(2), by requiring corroborative evidence for statements made to law enforcement agencies, social workers, physicians, and third parties. He further asserts that the district director imposed a requirement for physical evidence of abuse, which is beyond the requirements contained in the Act or the regulations. He states that the regulations do not require "hard" evidence, but do require the Service to consider any credible evidence relevant to the petition; this was not done in this case. Counsel argues that the district director also based his denial on a lack of evidence when the evidence in question had not been the subject of a previous request.

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 January 13, 1994. However, her current immigration status or how she entered the United States was not shown. The petitioner entered into a common-law marriage with her United States citizen spouse on February 5, 1994 in Colorado. On March 5, 1996, 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)(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 district director reviewed and discussed the evidence furnished by the petitioner. That discussion will not be repeated here. He noted, however, that the police report and the physician's medical report at the emergency clinic indicated that there were no physical signs or evidence of injury to the petitioner during the alleged domestic violence of December 2, 1995, and that the social worker also stated she had seen no physical evidence of the abuse. He also noted that the statements made by the petitioner's U.S. citizen spouse on a transcript of a recording of a conversation between the petitioner and her spouse on November 19, 1996¹, appear to be bragging. The district director further noted that the only hard evidence submitted with respect to abuse was the petitioner's arrest for harassment and criminal mischief as a result of which

¹ The translation and transcript of the taped conversation was dated February 12, 1996; therefore, it appears that the date the conversation was recorded was November 19, 1995, rather than November 19, 1996.

she was taken to a clinic. No medical evidence of any physical abuse to the petitioner was found by the physician at the clinic. As a result of the arrest, the petitioner pled guilty to the criminal mischief charge and was ordered by the court to pay restitution to her spouse and obtain counseling through "A Woman's Place". The district director maintained that it appeared Mr. [REDACTED] is the victim in this matter, and the petitioner was the abuser.

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.

The petitioner was seen in the emergency room of the North Colorado Medical Center on December 3, 1995. She reported that she was kicked (by her spouse) in the left buttocks and flank and had her head hit against a wall. She was complaining of pain in these areas and headache on the left side of her head. While the attending physician noted that there was no external evidence of injury with bruising, he noted during examination that palpation revealed tenderness in the left scalp area, and tenderness in the left flank area. The physician also noted that the patient had a history of assault. She was diagnosed with scalp and flank contusions.

The Evans Police Department report, dated December 3, 1995, reflects that Mr. [REDACTED] related to the officers that the petitioner was upset with him, they got into a verbal argument, and the petitioner hit Mr. [REDACTED] with a closed fist on the outside corner of his left eye. The petitioner, in turn, related to the officers that she and Mr. [REDACTED] got into an argument, Mr. [REDACTED] grabbed her by the hair and dragged her through the trailer, he punched her all over her body and kicked her in the back. She was transported to the medical center emergency room where she was seen by a physician, and after being medically released, was transported to Weld County Jail where she was booked on the charges of harassment and criminal mischief (for breaking the windows of the vehicle belonging to Mr. [REDACTED]). The police officer added on the report that Mr. [REDACTED] and the petitioner both stated that "they have been assaulted by each other in the past, but never have reported it."

The district director maintained that, based on the transcript of a recording of a conversation between the petitioner and Mr. [REDACTED] on November 19, 1995, Mr. [REDACTED] was bragging when he stated that he "already slapped her and gave her f*** kicks and told her to behave..." Mr. [REDACTED] also stated during the taped conversation that he was "tired of fighting and tired of watching my son cry

when I scream." It appears from this transcript that there were many fights between the couple, both verbally and physically, and as reported by the petitioner and Mr. [REDACTED] to the police officer. There is no indication that Mr. [REDACTED] statements were "bragging." On the contrary, evidence in the record indicates that these statements were verbal confirmation of the applicant's assertions of abuse.

As provided in 8 C.F.R. § 204.2(c)(2), the Service will consider any credible evidence relevant to the petition. Based on the evidence in the record, it is concluded that the petitioner has furnished sufficient evidence to establish that she was the subject of extreme cruelty as defined in 8 C.F.R. § 204.2(c)(1)(vi). The petitioner has overcome this portion of the district director's finding pursuant to 8 C.F.R. § 204.2(c)(1)(i)(E).

PART II

At the time of the district director's decision, 8 C.F.R. § 204.2(c)(1)(i)(G) required the petitioner to establish that her removal would result in extreme hardship to herself or to her 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 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, 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 district director's decision on this particular basis of the district director's denial. For this reason, the district director's objections have been overcome on this issue, pursuant to 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 met that burden. The appeal will be sustained.

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