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B-9

FILE:



Office: MIAMI DISTRICT OFFICE

Date: **AUG 02 2004**

IN RE:

Petitioner:



Beneficiary:

PETITION: 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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting District Director, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a native and citizen of Germany 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 district director denied the petition, finding that the petitioner failed to establish that she is a person of good moral character.

On appeal, counsel for the petitioner submits a brief and additional evidence.

Section 204(a)(1)(A)(iii) of the Act provides, in pertinent part, that an alien who is the spouse of a United States citizen, who is a person of good moral character, who is eligible to be classified as an immediate relative, and who has resided with his spouse, may self-petition for immigrant classification if the alien demonstrates to the Attorney General that—

(aa) the marriage or the intent to marry the United States citizen was entered into in good faith by the alien; and

(bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse.

The regulation at 8 C.F.R. § 204.2(c)(1)(i) states, in pertinent part, that:

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 . . . 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; [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 with advance parole on July 9, 1997. According to the evidence on the record, the petitioner wed United States citizen [REDACTED] on March 16, 1996 in North Miami Beach, Florida. The marriage was dissolved on December 19, 1997. On December 23, 1996, the petitioner filed a Form I-360 self-petition 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.

The regulation at 8 C.F.R. § 204.2(c)(i) requires the petitioner to show that she is a person of good moral character.

The alien, in any application where good moral character is a necessary element of eligibility, has the burden of establishing good moral character. See *Brownell v. Cohen*, 250 F.2d 770 (D.C. Cir. 1957); *Estrada-Oreja v. Del Guercio*, 252 F.2d 904 (9th Cir. 1958); *Matter of Turcotte*, 12 I&N Dec. 206 (BIA 1967).

The acting district director denied the petition, finding that the petitioner's conduct – as a dancer at Porky's Nude Review and as a self-employed self-styled "professional female dominant" – necessitate a finding that she lacks good moral character.

Section 101 of the Act, 8 U.S.C. § 1101, states, in part:

(f) For the purpose of this Act, 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 established, is, or was –

(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (9)(A) of section 212(a) of this Act . . . if the offense, described therein, for which such person was convicted or of which he admits the commission, was committed during such period.

Section 212(a) of the Act, 8 U.S.C. § 1181(a), provides, in part:

Classes of aliens ineligible for visas or admission. Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States.

(2)(D) *Prostitution and commercialized vice*. Any alien who:

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

* * *

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution.

In his Notice of Intent to Deny Petition, the acting district director informed the petitioner that:

Service records establish that you were reported to the Immigration and Naturalization Service on August 8, 2000 as part of an investigation being conducted by the West Palm Beach Police Department. The investigation included a search of your home which revealed numerous sexual devices, and numerous documentation listing men paying for sexual domination. In addition, it was established that you were utilizing an Internet site to promote a prostitution business, clearly establishing your lack of good moral character pursuant to Section 212(a)(2)(D) of the Act.

In response to the Notice of Intent to Deny the Petition, counsel for the petitioner asserted that the petitioner was never convicted or admitted to charges of prostitution.¹ Counsel for the petitioner further stated that the petitioner had "only admitted that she was involved in acts of domination." Counsel for the petitioner further asserted that *prostitution* as defined at the regulation at 22 C.F.R. § 40.24(b) means "engaging in promiscuous sexual intercourse for hire," and that the petitioner had not engaged in *prostitution*.

In review, the record does not establish that the petitioner has engaged in prostitution, as defined at 22 C.F.R. § 40.24(b).

Citing section 101 of the Act, 8 U.S.C. § 1101, the acting district director stated that even if the petitioner is not statutorily barred from establishing good moral character, as a matter of discretion, he could determine that she is lacking good moral character. Section 101(f)(8) of the Act, 8 U.S.C. § 1101(f)(8), provides: "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 AAO concurs with the acting district director's assertion that Citizenship and Immigration Services (CIS), as a matter of discretion, may determine that an alien lacks good moral character even if the alien does not fit one of the statutorily defined classes.

In exercising its discretion, CIS must weigh both positive and negative factors. *See Torres v. Guzman v. INS*, 804 F.2d 531 (9th Cir. 1986).

The evidence on the record shows the following:

Negative Factors

The petitioner has disregarded U.S. immigration laws.

She entered the United States on December 27, 1991 as a B-2 nonimmigrant visitor and intentionally overstayed her visa.

¹ It is further noted that there is no evidence in the record indicating that the petitioner has ever been arrested on a prostitution charge.

She worked in the United States without employment authorization. (See Form I-213 dated June 12, 1992 in the record of proceeding).

The petitioner has a criminal record.

She was arrested on March 11, 1995 in Metro-Dade County and charged with a DUI (driving while under the influence of alcohol). She pled guilty to violating FS 316.193 on November 16, 1996 (Case [REDACTED], a misdemeanor offense. A charge of violating FS 316.1925 was dismissed (Case [REDACTED]).

She was arrested on July 27, 1999 in Metro-Dade County and charged with a DUI, a misdemeanor offense. She refused to take a Breathalyzer test and was convicted of violating FS 316.193(1).

The petitioner has no immediate family in the United States.

The petitioner stated in an affidavit that she has no immediate family in the United States. See petitioner's affidavit dated October 8, 1997 in the record of proceeding.

Positive factors:

She completed a DUI program on April 13, 1995 (See certificate in record of proceeding).

She attended Alcoholics Anonymous for three months.

She volunteered her services at CenterOne, Inc. as a student intern in the years 1994 and 1995 and as a full massage volunteer from 1995 through June 1997. CenterOne, Inc. is a non-profit organization dedicated to serving individuals infected by HIV disease. (See letter from an administrative assistant at CenterOne, Inc. in the record of proceeding.)

The petitioner has resided in the United States intermittently since January 1991.

The petitioner completed a massage therapy program in 1994 and an advanced sports massage program in 1995. She submitted a copy of her transcripts showing that she completed a degree program at a business school in 1997.

The record of proceeding contains eight letters of recommendation attesting to the petitioner's good moral character. The letters were written by [REDACTED] a friend and former instructor of the petitioner; [REDACTED] Campus Director, Florida Institute of Massage Therapy and Esthetics; [REDACTED] Administrative Assistant, CenterOne, Inc.; friends [REDACTED] and [REDACTED] former employer; and [REDACTED] the petitioner's former mother-in-law.

The petitioner has not had any arrests since 1997.²

² The petitioner submitted police clearances only in her married name. According to her divorce decree, her maiden name was restored to her. The director should have requested police clearances using all of the petitioner's names.

Nonfactors:

Allegations of prostitution.

While the petitioner admits that she is a “professional dominant” and accepts payment for acts of dominance, she does not admit that she engages in prostitution. The petitioner’s website both suggests and denies that she provides sexual services. (“Sexual contact is never a part of my sessions.”) (“My taboos are . . . sex.”) (“I enjoy subjecting my subs to spitting, light corporal, light bondage play, forced feminization, nipple torture.”) (“My private dungeon is equipped with a cross, a bondage table, horses, benches, whips, canes, chains and mirrors. I derive pleasure from my subs viewing themselves while they serve me.”) (“My philosophy is that the power exchange between myself and you is a fundamental source of erotic excitement, shared between equals. The essence of domination is to take another’s power and then use it for mutual pleasure.”)

The AAO is loath to expand the definition of prostitution to encompass all sexual activity for hire. Similarly, in the absence of strong evidence that the petitioner has engaged in prostitution, the AAO cannot consider allegations as a factor.

Nude dancing.

The acting district director determined that the petitioner could not be found to possess good moral character, in part, because she had worked as a dancer at Porky’s Nude Review. The AAO will not consider nude dancing as bad moral character unless the record shows that such conduct is illegal.

In weighing the positive and the negative factors, the AAO concludes that the negative factors outweigh the positive factors.

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.