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U.S. Citizenship
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: AUG 09 2005
EAC 01 197 52044

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 Director (Director), Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The AAO reopened the matter on its own motion and afforded the petitioner 30 days in which to respond to the motion. The matter has now been reopened, the previous decision of the AAO has been vacated and a new decision entered. The appeal will be dismissed and the petition will be denied.

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.

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;

* * *

(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 wed United States citizen [REDACTED] in El Paso, Texas on January 21, 1994. On April 23, 2003, the instant 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.

Concurrent with the filing of the instant petition, the petitioner submitted the following documents:

- A statement from the petitioner.
- The petitioner's birth certificate and translation.
- The petitioner's spouse's birth certificate.
- The petitioner's marriage certificate.
- The birth certificates for the petitioner's two children with her spouse.
- Witness letters from the petitioner's grandmother, aunt, and two acquaintances.
- Photographs of the petitioner with her spouse and children.
- A letter to the petitioner and her spouse from the U.S. Department of Agriculture.
- Letters to the petitioner and her spouse from Allstate.
- Copies of the petitioner's spouse's health insurance documents.
- A copy of the petitioner's complaint for divorce and other documents related to the divorce proceedings.
- A copy of the petitioner's temporary restraining order against her spouse.

The director determined that these documents were insufficient to establish eligibility and on May 22, 2003, the director requested the petitioner to submit further evidence. The director specifically requested evidence of the petitioner's good moral character, to include:

- An affidavit from the petitioner supported by police clearances or records from each place the petitioner resided for at least 6 months during the 3-year period prior to filing the Form I-360 petition.

The director afforded the petitioner 60 days in which to respond to the request for evidence.

The petitioner did not respond to the director's request and the director denied the petition, finding that there was insufficient evidence to support eligibility. *See* 8 C.F.R. § 204.1(h).

The petitioner, through counsel, filed a timely appeal. On appeal, counsel claimed that he did not receive the director's request for evidence and requested "another chance to provide the additional documents requested on May 22, 2003." In its decision, the AAO stated that petitioner's failure to respond to the director's request was tantamount to abandonment and rejected the appeal referencing 8 C.F.R. § 103.2(b)(15) which indicates that there is no appeal to a denial based upon abandonment.

In reviewing the decision subsequent to the issuance of its denial, the AAO determined its findings in regard to abandonment and rejection based upon 8 C.F.R. § 103.2(b)(15) were in error. The AAO reopened the matter and afforded the petitioner 30 days in which to submit a brief.

In the brief submitted by counsel in response to the motion to reopen, counsel asserts that the director "violate[d] the Due Process Clause of the United States Constitution and the Separation of Powers Doctrine under Article III of the United States Constitution." Based on this argument, counsel concludes that the petition should be granted. Although counsel does not elaborate on his argument, we assume his argument is based upon the fact that he claims he did not receive the director's request for denial. Regardless, although counsel argues the petitioner's right to procedural due process was violated, he has not shown that any violation of the regulations resulted in "substantial prejudice" to the petitioner. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). Counsel has fallen far short of meeting this standard.

A review of the record reflects that the Form I-360, prepared and submitted by counsel's firm, indicates counsel's address as [REDACTED], TX [REDACTED]. The record did not contain any indication that counsel had changed his address and the director issued the request for evidence to counsel's address of record.¹ Accordingly, we find that the director properly issued the request for evidence to petitioner's counsel, at counsel's address of record.² It is noted that the record does not contain any evidence that the director's request for evidence was returned as undeliverable or for any other reason.

As such, we find insufficient evidence to establish that the director committed any procedural error, or any error of fact or law, in denying the petition based on the petitioner's failure to establish eligibility. Given the fact that the director properly applied the statute and regulatory procedures to the petitioner's case, counsel's claim regarding a violation of the due process clause and separation of powers is without merit.

Moreover, despite the fact that the AAO's motion to reopen granted counsel's original appeal request to "be given another chance to provide the additional documents," counsel fails to submit any additional documentation in response to the AAO's motion. Accordingly, we consider the record to be both complete as it now stands, and insufficient to establish the petitioner's eligibility.

Specifically, the record lacks evidence of the petitioner's good moral character.

Beyond the evidence noted as lacking in the director's request for evidence, we find the record does not contain sufficient documentation of the petitioner's divorce. In the brief counsel submitted on motion, counsel states that the petitioner's marriage ended on April 26, 2001, but provides no evidence to establish this fact.

¹ On the Form I-290B, counsel lists his address as [REDACTED] but fails to highlight the change or provide any other notice to the Service of his change of address, such as an updated Form G-28. Nevertheless, the AAO issued its original decision as well as the motion to reopen to counsel's new address of record. Furthermore, in response to the AAO's motion to reopen, counsel's address appears to have changed for a second time and is listed counsel's brief as [REDACTED], Texas [REDACTED]. Again, counsel fails to highlight the fact that this is a new address.

² The director's denial of the petition was mailed to and received by counsel at this same address.

The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The date of the petitioner's divorce is a significant issue because although the Violence Against Women Act, 2000, Pub. L. No. 106-386, Division B, 114 Stat. 1464, 1491 (2000) amended 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 be married to the alleged abuser at the time the petition is filed, the petitioner must show that there is a connection between the legal termination of the marriage and the battering or extreme cruelty by the United States citizen spouse. More importantly, a petitioner who is no longer married to her qualifying spouse at the time of filing must establish that the termination of the marriage occurred within the two-year period prior to the filing of the petition. Without documentary evidence of the petitioner's divorce, we are unable to confirm that her divorce took place within the required two-year period to establish eligibility.

Finally, although the director failed to request further evidence to establish the petitioner's claim of abuse, we find insufficient evidence to establish that she was battered or subjected to extreme cruelty.

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

Battery or extreme cruelty. For the purpose of this chapter, 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. Psychological or sexual abuse or exploitation . . . 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 . . . and must have taken place during the self-petitioner's marriage to the abuser.

Further, the regulation at 8 C.F.R. § 204.2(c)(2)(iv) states:

Abuse. 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 abused 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 abuses may only be used to establish a pattern of abuse and violence and to support a claim that qualifying abuse also occurred.

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).

In the statement submitted to support her petition, the petitioner provided a lengthy description of her marriage to her spouse. The petitioner's basic claim is that her spouse did not provide very well for his family and that he had an affair with another woman. The petitioner states that her husband would yell at her, call her names such as "pig," "hag," and "fat," and ultimately tried to take their shared home from the petitioner and her children. While we do not dispute that the petitioner was called these names and was devastated to find about her spouse's infidelity, we do not find that this treatment rose to the level of extreme cruelty.

Further, the record lacks documentary evidence such as police reports or affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, or other social service agency personnel. Although the record contains a copy of a temporary restraining order, there is no evidence that the petitioner received a final order against her spouse. We also note that although the petitioner describes an incident in which her father called the police "and made a report because he was afraid Gabriel would come to the house and do something," the record contains no such report.

The witness letters provided in support of the petition provide no eyewitness account to any abuse. In fact, the letters describe the marriage as "very happy," "filled with love and joy," and indicate that it seemed that the petitioner's spouse considered "his family as the most important thing in his life." The letters further state that they "never had any conflicts between them or never had any arguments," and that they "always treated each other with love and respect."

Accordingly, we find the evidence contained in the record and the circumstances described by the petitioner, are insufficient to establish that the mistreatment received by the petitioner rose to the level of battery or extreme cruelty.

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.