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B9

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: AUG 31 2005

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

APPLICATION: Petitioner 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 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 Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.

The petitioner is a native and citizen of Jamaica 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 is eligible for immigrant classification under section 201(b)(2)(A)(i) of the Act, 8 U.S.C. § 1151(b)(2)(A)(i). The director, therefore, denied the petition.

The petitioner, through counsel, files a timely appeal.

The regulation at 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 the petitioner had a Form I-130 petition filed in her behalf on June 30, 1995, by United States citizen [REDACTED]. The petition was based upon a claimed spousal relationship. In support of the petition, the record contained a marriage certificate showing the marriage between the petitioner and [REDACTED] on October 1,

1990, in Manhattan, New York. The petition and accompanying Form I-485, Application to Adjust Status, were denied on May 23, 1996 based upon the district director's finding that the [REDACTED] birth certificate and the petitioner's and [REDACTED] marriage certificate were fraudulent. The petitioner then married United States citizen [REDACTED] on March 24, 1997, in Palm Beach, Florida and the petitioner's spouse filed a Form I-130 in the petitioner's behalf on April 29, 1997. The district director terminated action on the Form I-130 petition on June 23, 1999. The petitioner was placed in removal proceedings on July 6, 2000. The Form I-130 petition was reopened on September 19, 2002, but counsel requested that it be held in abeyance until the adjudication of the instant Form I-360 petition which was filed by the petitioner on December 18, 2003, 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 director denied the Form I-360 petition on January 10, 2005, noting the evidence related to the marriage between the petitioner and [REDACTED] and finding that the petitioner failed to establish that her marriage to [REDACTED] was terminated prior to her marriage to [REDACTED].

On appeal, counsel for the petitioner requests additional time in order to receive a copy of the petitioner's Service file through a Freedom of Information Act (FOIA) request. Counsel states that the request for additional time:

[I]s a very reasonable request in light of the mysterious "marriage" shown in [the petitioner's] file, and the fact that CIS is insisting on a divorce decree between the applicant and one Mr. [REDACTED] whom she has never heard of, whom she does not know, and to whom she was never married.

Counsel claims that the petitioner's bag and passport were snatched by a mugger in 1995 in New York and that, perhaps, the mugger used the petitioner's identity. In the alternative, counsel states that the Service may have mistakenly consolidated the petitioner's file with the file of another applicant. Counsel provides no evidence, such as a police report to support her claim of the petitioner's incident with a mugger. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, it is clear upon review of the record, that the "mysterious" marriage is not a case of a mistaken consolidation of Service files. The documentation submitted in support of the Form I-130 petition filed by Lous Marti includes a copy of the petitioner's birth certificate which is identical to the birth certificate submitted in support of the instant petition.

Despite the fact that we are not persuaded by counsel's arguments on appeal, upon review, we find that the director's decision was in error and must be remanded for further consideration. Specifically, despite the denial notice contained in the file related to the Form I-130 filed by [REDACTED] which the director determined that the marriage certificate submitted in support of the petition was fraudulent, the director not only requested evidence of the termination of this marriage, but also denied the petition because of the petitioner's failure to submit such evidence. Clearly, as the marriage certificate was found to be fraudulent, the marriage between the petitioner and [REDACTED] could not be recognized as a bona fide, legal marriage. Accordingly, the request for a divorce decree and subsequent denial, based on the failure to submit evidence of the termination of a marriage that did not legally exist, was in error.

Rather, the issue to be determined in this case is whether the petitioner was subject to section 204(c) of the Act, which provides, in part:

[N]o petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws....

The regulation at 8 C.F.R. § 204.2(a)(1)(ii) provides, in part:

Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

Therefore, this matter will be remanded for the director to discuss the evidence contained in the record and determine whether the petitioner is subject to section 204(c) of the Act. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.