

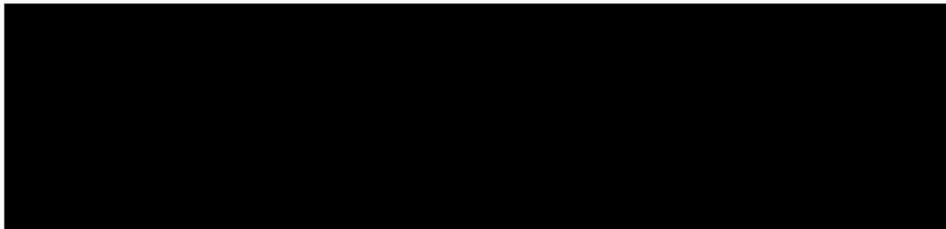
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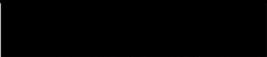
U.S. Citizenship
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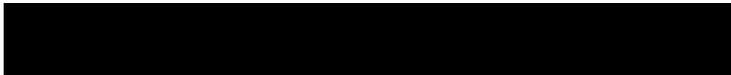


EAC 05 131 50785

Office: VERMONT SERVICE CENTER

Date: AUG 03 2006

IN RE:



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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director (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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 Vietnam 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 denied the petition on November 16, 2005, finding that the record was insufficient to establish the petitioner's eligibility.

The petitioner, through her representative, files a timely appeal from the director's decision.

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 [Secretary of Homeland Security] 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 regulation at 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 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).

The record reflects that the petitioner entered the United States on December 22, 2004 as a K-1 nonimmigrant.¹ According to the paperwork submitted in order for the petitioner to obtain her K-1 nonimmigrant visa, the petitioner indicated that she was coming to the United States in order to marry [REDACTED]. The petitioner indicated that she was not currently married and had not been previously married. These claims were signed by the petitioner under penalty of perjury on June 2, 2004,² September 10, 2004,³ and in an interview before a consular officer on September 13, 2004.⁴ The record also contains a "Request for Certification of Engagement Ceremony," indicating that on July 5, 2003, the petitioner and [REDACTED] "decided to organize an engagement ceremony."

¹ Section 101(a)(15)(K) of the Act defines a K-1 nonimmigrant, in pertinent part, as an alien who "is the fiancée . . . of a citizen of the United States and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission."

² See Form DS-156, Nonimmigrant Visa Application.

³ See Form DS-230, Application for Immigrant Visa and Alien Registration.

⁴ See Form DS-156K, Nonimmigrant Fiance(e) Visa Application.

On April 4, 2005, the petitioner submitted the instant 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 United States citizen spouse. On the Form I-360, the petitioner claimed that she married [REDACTED] on July 5, 2003. With the filing of the petition the petitioner submitted copies of her passport, photographs, airline tickets, the petitioner's Form I-94, Arrival and Departure Record, statements from the petitioner and her cousin, without certified translations,⁵ a letter from the Crisis Center for Women, and evidence of the petitioner's good moral character.

The director found this evidence was not sufficient to establish the petitioner's eligibility and requested the petitioner to submit additional evidence. In his request, the director noted the contradictions between the claims made in support of the petitioner's nonimmigrant visa that she was not married prior to her entry into the United States and her claims on the Form I-360 and in her personal statement that she married [REDACTED] July 5, 2003. Accordingly, the director requested the petitioner to submit her marriage certificate and evidence that she married [REDACTED] in good faith.

The petitioner failed to respond to the director's request and the director denied the petition on November 16, 2005. However, the director failed to issue a notice of intent to deny prior to the denial in accordance with the regulation at 8 C.F.R. § 103.2(a)(2)(iii).⁶

On appeal, counsel argues that the petitioner "*assumed*" from the ceremony performed in Vietnam that she was married and that she "*believed*" she was in a bona fide marriage and requests the AAO to "exercise positive discretion" in approving the petition. Counsel's request cannot be accommodated.

The statute and the regulations are clear in their requirement that the petitioner be married to the abusive spouse or, if not married at the time of filing, have been married to the spouse within the two-year period prior to filing the Form I-360 petition. Although the statute does contain a provision which allows for approval for a petitioner who believed that he or she had married a United States citizen, the provision applies to petitioners in a bigamous relationship for whom "a marriage ceremony was actually performed."⁷ This provision does not apply to the instant case, as a marriage ceremony was not actually performed. There are no provisions or discretionary waivers which allow for approval in instances where the petitioner "assumed" or "believed" she was married but where no marriage ceremony was ever performed.

⁵ The regulation at 8 C.F.R. § 103.2(a)(2)(iii) indicates that any document containing foreign language submitted to the Service shall be accompanied by a full English translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

⁶ The regulation at 8 C.F.R. § 204.2(c)(3)(ii) states, in pertinent part:

Notice of intent to deny. If the preliminary decision on a properly filed self-petition is adverse to the self-petitioner, the self-petitioner will be provided with written notice of this fact and offered an opportunity to present additional information or arguments before a final decision is rendered.

⁷ See section 204(a)(1)(A)(iii)(II)(aa)(BB) of the Act.

Based upon the above discussion, we concur with the finding of the director that the record is not sufficient to establish the petitioner's eligibility. Specifically, the record does not establish that the petitioner is the spouse of a citizen of the United States and that she is eligible for immigrant classification based on that relationship.

Despite our support of the director's findings however, the director's decision cannot stand because of the director's failure to issue a Notice of Intent to Deny to the petitioner prior the issuance of the denial. Accordingly, the decision of the director must be withdrawn and the case remanded for the purpose of the issuance of a notice of intent to deny as well as a new final decision. The new decision, if adverse to the petitioner, shall be certified to this office for review.

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 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 which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.