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U.S. Department of Homeland Security
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Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**

B9

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FILE:

EAC 03 223 50419

Office: VERMONT SERVICE CENTER

Date: AUG 03 2006

IN RE:

Petitioner:



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:

SELF-REPRESENTED

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 Director, Vermont Service Center. The matter 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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 Canada who is seeking classification as a special immigrant pursuant to section 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii), as the battered spouse of a United States citizen. The petition was denied by the director on July 25, 2005.

The petitioner submits a timely appeal.

Section 204(a)(1)(A)(iii) of the Act provides, in pertinent part, that an alien who is the spouse of a citizen of the United States, who is a person of good moral character, who is eligible to be classified as an immediate relative, and who has resided with his or her 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 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 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 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.

According to the evidence in the record, the petitioner wed United States citizen [REDACTED] on November 6, 1993 in Colchester, Vermont. The petitioner and her spouse were divorced on August 7, 2001. The petitioner filed the instant petition on July 28, 2003. The director denied the petition on July 25, 2005, without the issuance of a notice of intent to deny,¹ finding that the petitioner failed to establish that she is a person of good moral character.

The petitioner, through counsel,² appealed the director's decision claiming that the director "did not adequately consider all the pertinent evidence," that the decision is "based on errors of law, as well as

¹ 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.

The petitioner was initially represented on appeal by [REDACTED]. However, in a letter dated November 4, 2005, Mr. [REDACTED] indicated that he no longer represents the petitioner. As the record does not any new Form G-28 indicating a new attorney's representation of the petitioner, the petitioner is considered to be self-represented.

possible errors of fact,” and that there are “issues involving ineffective assistance of counsel.” Mr. [REDACTED] did not point to specific evidence that purportedly was not “adequately consider[ed]” by the director, nor did he specifically identify the supposed “errors of law” on the part of the director. Moreover, regarding Mr. [REDACTED] allegation of ineffective assistance of counsel against the petitioner’s previous counsel of record,³ counsel fails to support his claim with (1) an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) evidence that counsel whose integrity or competence is being impugned was informed of the allegations leveled against him and given an opportunity to respond, and (3) evidence regarding whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel’s ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff’d*, 857 F.2d 10 (1st Cir. 1988). Despite Mr. [REDACTED] claim that a brief and/or further evidence would be submitted to the AAO within 120 days, no further evidence has been received on behalf of the petitioner from Mr. [REDACTED] any other representative. Accordingly, the record is considered to be complete as it now stands.

In his decision, the director noted that the petitioner had failed to submit police clearances for all the names that she had used, despite the director’s specific request for such evidence in the request for evidence issued by the director on October 26, 2004. In the request for evidence, the director stated:

Submit evidence of your good moral character. The following may be submitted:

1. Your own affidavit supported by police clearances . . . or records from each place you resided for at least 6 months during the 3-year period before filing this petition.

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Please note: if the police clearance is researched by name only, you must supply the law enforcement agency with all aliases you have used, *including maiden and/or married name(s)*, if applicable.

If your police clearance letter or your own statement indicates that you have been arrested or charged with any crime, please submit the following:

1. Copies of the arrest report.
2. Copies of court documents showing the final disposition of the charges.
3. Relevant excerpts of law for that jurisdiction showing the maximum penalty possible.

[Emphasis added.]

Although the record reflects that the petitioner has been married on three occasions, she submitted a single police clearance based upon the name [REDACTED] only. In the absence of a police clearance based upon the

³ From the time of filing the Form I-360 petition up to the filing of the appeal, the petitioner was represented by [REDACTED]

petitioner's fingerprints, the director found the single police clearance, based upon this name alone, was insufficient to establish the petitioner's good moral character.⁴ While the director acknowledged the petitioner's submission of articles and letters attesting to the petitioner's character and volunteer activities, the director found this evidence insufficient to establish the petitioner's good moral character. The regulation at 8 C.F.R. § 204.2(c)(i) indicates that primary evidence of the petitioner's good moral character is *an affidavit from the petitioner accompanied by a police clearance* from each place the petitioner has lived for at least six months during the 3-year period immediately preceding the filing of the self-petition. Despite the director's specific request for the petitioner's "own affidavit", the record contains no statement from petitioner regarding her good moral character.

The petitioner's failure to address her good moral character in a statement is important because Service records contain information indicating that the petitioner was arrested in Canada on two occasions. Regarding the petitioner's failure to address her arrests and convictions, the director stated:

It is noted that although on several occasions you had an opportunity to bring forth this information to the Service, your various submissions to this office did not include such documentation. It was not until this office received and reviewed your permanent alien registration file that this information was realized. Consequently, it is apparent that you are not a person of good moral character.

Based upon the above discussion, given the petitioner's failure to obtain police clearances for all aliases used, as well as her failure to address her character and prior arrests in a personal statement, we concur with director's finding that the petitioner has failed to establish that she is a person of good moral character. 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. Although the director's decision rested on the single issue discussed above, we find additional issues that need to be addressed on remand. Specifically, the record does not sufficiently establish that the petitioner is eligible for classification as the spouse of a United States citizen.

First, the record reflects that the petitioner was married on two occasions prior to her marriage to Mr. [REDACTED] and that [REDACTED] was married on one occasion prior to his marriage to the petitioner. The regulation at 8 C.F.R. § 204.2(c)(2)(ii) requires the petitioner to submit "proof of the termination of all prior marriages, if any, of both the self-petitioner and the abuser." The record does not contain proof of the termination of the petitioner's two previous marriages and her spouse's previous marriage.

Second, section 204 of the Act indicates that a petitioner who is no longer married to his or her spouse at the time of filing but who was the bona fide spouse of a United States citizen within the past two years must demonstrate "a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse."⁵ Although the record contains a copy of the petitioner's divorce decree evidencing the fact that her divorce from [REDACTED] took place within 2 years of

⁴ Although the director noted the petitioner's failure to submit a police name clearance based upon the names, [REDACTED] and [REDACTED], we additionally find that the petitioner failed to obtain a clearance based upon the name [REDACTED] her first married name.

⁵ See section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act.

the filing of the petition, the record contains no evidence, which establishes a connection between the divorce and the battering or extreme cruelty of the petitioner's spouse.

Third, the regulation at 8 C.F.R. § 204.2(c)(1)(iii) states, "[t]he abusive spouse must be a citizen of the United States . . . when the petition is filed and when it is approved." The regulation at 8 C.F.R. § 204.2(c)(2) states:

Evidence for a spousal self-petition – (i) General. 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.

(ii) *Relationship.* A self-petition filed by a spouse *must* be accompanied by evidence of citizenship of the United States citizen

Further, the regulation at 8 C.F.R. § 103.2(b)(17) states:

Verifying claimed citizenship or permanent resident status. The status of an applicant or petitioner who claims that he or she is a permanent resident of the United States will be verified from official records of the Service. The term official records, as used herein, includes Service files, arrival manifests, arrival records, Service index cards, Immigrant Identification Cards, Certificates of Registry, Declarations of Intention issued after July 1, 1929, Permanent Resident Cards (Forms AR-3, AR-103, I-151 or I-551), passports, and reentry permits. To constitute an official record a Service index card must bear a designated immigrant visa symbol and must have been prepared by an authorized official of the Service in the course of processing immigrant admissions or adjustments to permanent resident status. Other cards, certificates, declarations, permits, and passports must have been issued or endorsed by the Service to show admission for permanent residence. Except as otherwise provided in 8 CFR part 101, and in the absence of countervailing evidence, such official records shall be regarded as establishing lawful admission for permanent residence. If a self-petitioner filing under section 204(a)(1)(A)(iii), 204(a)(1)(A)(iv), 204(a)(1)(B)(ii), or 204(a)(1)(B)(iii) of the Act is unable to present primary or secondary evidence of the abuser's status, the Service will attempt to electronically verify the abuser's citizenship or immigration status from information contained in Service computerized records. Other Service records may also be reviewed at the discretion of the adjudicating officer. *If the Service is unable to identify a record as relating to the abuser, or the record does not establish the abuser's immigration or citizenship status, the self-petition will be adjudicated based on the information submitted by the self-petitioner.*

[Emphasis added.]

While the Service *will attempt* to verify the immigration status of an abuser, the *burden* of establishing the citizenship of the abuser remains with the petitioner, not the Service. It is noted that Service records are

compiled on individuals who emigrate temporarily (nonimmigrants) or permanently (immigrants) to the United States. In this instance, the petitioner claims that her spouse was born in the United States. Rather than submitting primary evidence of his U.S. citizenship, such as a birth certificate or a U.S. passport, the petitioner submitted a copy of her marriage certificate, which indicates that her spouse was born in New York.

While the petitioner is free to submit other kinds of documentation, such documentation may only be submitted *in addition to*, rather than *in place of*, the types of documentation required by the regulation. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. The regulation at 8 C.F.R. § 103.2(b)(2) provides:

Submitting secondary evidence and affidavits. (i) General. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

In this instance, the petitioner has failed to submit primary evidence of Mr. [REDACTED] United States citizenship. The petitioner has also failed to demonstrate that the certificate does not exist or cannot be obtained and to submit secondary evidence, such as church or school records. Finally, in the alternative, the petitioner has failed to demonstrate the unavailability of both the required document and relevant secondary evidence, and to submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances.

Accordingly, on remand, the petitioner should be afforded the opportunity to establish her good moral character and that she is eligible for classification under section 204(a)(1)(A)(iii) of the Act as the battered spouse of a United States citizen.

As always, the burden of proof in visa petition proceedings remains entirely 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, which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.