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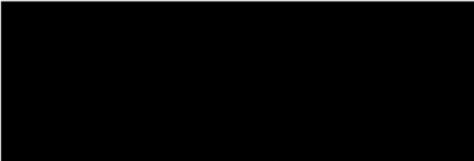


FILE: EAC 05 126 52804 Office: VERMONT SERVICE CENTER Date: AUG 4 2006

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:



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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director (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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 seeks 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 director denied the petition on November 16, 2005, finding that the evidence did not establish that the petitioner was battered by or subjected to extreme cruelty by his spouse.

The petitioner filed 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 contained in the record, the petitioner married [REDACTED] on July 30, 2003 in Woodbridge, New Jersey. The petitioner's spouse filed a Form I-130 on the petitioner's behalf on October 6, 2003. The petitioner concurrently filed a Form I-485 on that same date. Although the Form I-130 petition remains adjudicated, the Form I-485 was denied for abandonment on July 8, 2004.

The petitioner filed the instant Form I-360 self-petition on March 28, 2005, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, his spouse during their marriage. With the initial filing, the petitioner submitted copies of his spouse's birth certificate, his marriage certificate, a personal statement, parking tickets, and a letter from an acquaintance. In addition, the petitioner submitted evidence related to his residence with his spouse and his claim of a good faith marriage.

After conducting a preliminary review of the evidence submitted, the director found that the petitioner had failed to establish his prima facie eligibility¹ and on April 15, 2005, requested the petitioner to submit evidence of his good moral character. The petitioner responded to the request on May 23, 2005, by submitting a police clearance from the West Windsor Township Police Department.

On June 16, 2005, the director requested the petitioner to submit further evidence, inter alia, to establish that he had been battered by or subjected to extreme cruelty by his spouse. The petitioner responded to the director's request on August 19, 2005, by submitting copies of his medical prescriptions and an evaluation from a neuro-psychologist.

After reviewing the evidence contained in the record, the director denied the petition finding that the petitioner failed to establish that he was battered by or subjected to extreme cruelty by his spouse.

On appeal, the petitioner submits a letter from the medical doctor that provided his earlier evaluation. Upon review, we concur with the director's determination and further find that the petitioner's appellate submission is not sufficient to overcome the director's decision.

In his initial statement, the petitioner's claim of abuse was based on the claim that his spouse was unfaithful and left him. The petitioner states:

When we got married . . . [e]verything was fine and beautiful. But this happiness only lasted very little. After our marriage, we moved in together and immediately after, she started to go out often. She started lying and things were not the same. She would take advantage that I was away from home often because I am a trucker . . . for that reason I was not home that often. In March . . . she went to work that day and told me that she did not care about me any longer that she had stopped loving me.

* * *

Nothing has been the same for me since. This has affected me a lot. But I tried to save my marriage, I begged her a lot to give us another chance but she did not want this for us and just went to sleep. After a week long trip for work when I came home, she was not at home. She had left.

* * *

¹ The determination of prima facie eligibility is made for the purposes of 8 U.S.C. 1641, as amended by section 501 of Public Law 104-208. A finding of prima facie eligibility does not relieve the petitioner of the burden of providing additional evidence in support of the petition and does not establish eligibility for the underlying petition, is not considered evidence in support of the petition and is not construed to make a determination of the credibility or probative value of any evidence submitted along with that petition.

Even though she had hurt me deeply, I still lent her our car . . . Then three months later, I started to get parking tickets that she had received and not paid

* * *

And now I just found out that she is pregnant with her boyfriend's child.

The petitioner's statement did not describe any incident of battery or physical abuse. Moreover, the claim that his spouse went out while he was away, failed to pay parking tickets, got pregnant with someone else's child, and abandoned the petitioner is not sufficient to establish a claim of extreme cruelty as described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi).

The letter from the petitioner's friend, [REDACTED] confirms the petitioner's claims regarding his petitioner's unfaithfulness but provides no further details to establish a claim of battery or extreme cruelty.

The evaluation provided by [REDACTED] indicates that the petitioner's spouse had an extra-marital affair. Although the evaluation also indicates that the petitioner was abused verbally and mentally, [REDACTED] Rivera fails to provide any specific details or to describe any specific incidents to support the claim that the petitioner was verbally and mentally abused. We note that the petitioner's own statement and the statement provided by the petitioner's friend both fail to make any such claim.

Based upon the above discussion, we concur with the finding of the director that at the time of his decision, the record was not sufficient to establish that the petitioner had been battered or subjected to abuse by his spouse. The evidence did not demonstrate that the petitioner was threatened, forcefully detained, psychologically or sexually abused or exploited or that his spouse's actions were part of an overall pattern of violence.

On appeal, the petitioner submits a letter from [REDACTED] who states:

[The petitioner's] spouse began to commit flagrant adulteries and apprised him repeatedly of her affairs. She taunted him with vicious epithets throughout. For example, on several occasions, after returning home after several days of trysts, she would call [the petitioner] "impotent" or "homosexual." Playing on [the petitioner's] reaction, she taunted him by daring him to stop her, saying that he was incapable of acting like a man and therefore she had to go out to find real men.

[REDACTED] concludes his letter by stating that the petitioner was "abandoned, humiliated and threatened" by his spouse in "a vicious pattern." We do not find that this letter overcomes the director's findings. First, as previously noted, the fact that the petitioner had an affair, that he was "humiliated" because his spouse had an affair, and that he was ultimately "abandoned" by his spouse, is not sufficient to establish a claim of extreme cruelty. Moreover, [REDACTED] claims are not consistent with the other evidence contained in the record. As noted previously, neither the petitioner nor the petitioner's friend makes any claim regarding verbal or psychological abuse. Accordingly, [REDACTED] statements do not carry sufficient weight to establish that the petitioner was battered by or subjected to extreme cruelty by his spouse.

Despite our support of the director's findings, the director's decision cannot stand because of his failure to issue a Notice of Intent to Deny to the petitioner prior the issuance of the denial. 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.

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.

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.