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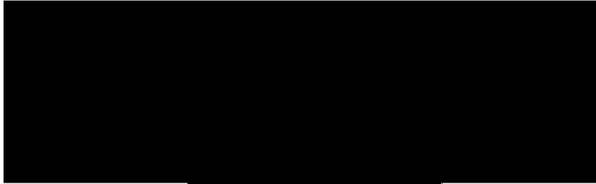
U.S. Department of Homeland Security
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Washington, DC 20529



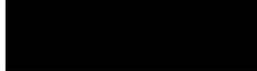
U.S. Citizenship and Immigration Services

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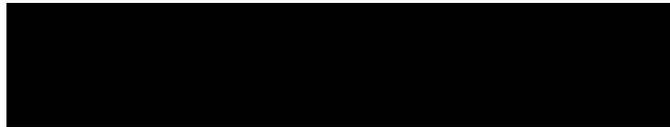
Office: VERMONT SERVICE CENTER

Date: AUG 09 2006

EAC 05 071 52169

IN RE:

Petitioner:



PETITION: Petition for Special Immigrant Battered Spouse Pursuant to Section 204(a)(1)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(B)(ii)

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

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DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The petitioner filed an untimely appeal on the director's decision. In accordance with the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2), the director treated the late appeal as a motion and reaffirmed his decision. 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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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)(B)(ii), 8 U.S.C. § 1154(a)(1)(B)(ii), as the battered spouse of a lawful permanent resident of the United States. The director denied the petition on September 6, 2005, finding that the petitioner failed to establish that she was battered by or subjected to extreme cruelty by her spouse and that she entered into her marriage in good faith. The petitioner filed an untimely appeal which the director treated as a motion and reaffirmed his prior decision on January 6, 2006. The petitioner filed a timely appeal on that decision on February 6, 2006.

Section 204(a)(1)(B)(ii) of the Act provides, in pertinent part, that an alien who is the spouse of a lawful permanent resident 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 lawful permanent resident 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.

The record reflects that petitioner married lawful permanent resident Jose Fraga on May 18, 2002 in Santa Ana, California. The petitioner filed the instant Form I-360 self-petition on January 10, 2005, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, her lawful permanent resident spouse during their marriage.

With her initial submission, the petitioner submitted a copy of her birth certificate and marriage certificate, and documents related to her divorce from her lawful permanent resident spouse. After conducting a preliminary review of this evidence, the director found that the petitioner had failed to establish her prima facie eligibility.¹ Accordingly, on January 19, 2005, the director requested the petitioner to submit evidence to establish that she is a person of good moral character.

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

The petitioner responded to the director's request on March 1, 2005 by submitting a police clearance.

On May 24, 2005, the director requested further evidence to establish the petitioner's eligibility. Specifically, the director requested further evidence regarding the petitioner's residence with her spouse, that she married her spouse in good faith, and evidence that she was battered by or subjected to extreme cruelty by her spouse.

The petitioner responded to the director's request on June 20, 2005 by submitting copies of three photographs, a lease, and one affidavit.

On September 6, 2005, after reviewing the evidence contained in the record, including the evidence submitted in response to the director's request, the director denied the petition without the issuance of a notice of intent to deny (NOID) in accordance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii),² finding that the petitioner had failed to establish that she was battered by or subjected to extreme cruelty by her spouse and that she entered into her marriage in good faith.

On November 14, 2005, the petitioner filed an appeal with a personal statement and copies of four pieces of mail addressed to her spouse at their claimed joint residence. As the appeal was not timely filed, the director treated the appeal as a motion and in a decision dated January 6, 2006, reaffirmed his prior decision.

The petitioner filed a timely appeal on February 6, 2006 with no additional documentation. As the reason for her appeal, the petitioner states:

I strongly believe the abandonment of my husband does constitute cruel and unusual hardship. My former spouse chooses to terminate our marriage, which was done in good faith. I presented as much documentary evidence to demonstrate that the marriage was entered in good faith.

The petitioner's appellate submission does not overcome the director's findings. First, the petitioner's claim that her spouse's treatment constitutes "cruel and unusual hardship" is based upon the fact that he abandoned her. This claim is not sufficient to establish that the petitioner has been battered or subjected to extreme cruelty as described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). The record does not contain any evidence and the petitioner makes no claim that she was battered, threatened, or the victim of any act of violence, forceful detention, psychological, sexual abuse or exploitation, or that her spouse's actions were part of an overall pattern of violence.

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.

² 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.

Second, as evidence to support her claim that she entered into the marriage in good faith, the record contains the petitioner's marriage certificate, three photographs, and an affidavit. While the petitioner's marriage certificate is evidence that a *legal* marriage took place, it is not considered evidence of the petitioner's good faith intent at the time of her marriage. Similarly, while the petitioner's photographs are evidence of her marriage, they do not establish that the petitioner intended her marriage to be a bona fide marriage. The affidavit provided on the petitioner's behalf [REDACTED] states that the petitioner and her spouse have:

. . . lived and shared a life together under a free union until being married on May 18, 2002. My husband and I attended and served as witnesses at the ceremony that took place at the court house.

While the affiants indicate that they were witnesses at the petitioner's marriage, they do not provide any statement regarding the petitioner's intent at the time of her marriage. We note that the petitioner fails to provide any statement regarding how she met her spouse, how long they dated, or the reasons why she decided to marry her spouse. We further note that the record remains absent any documentation, other than a lease, to demonstrate that the petitioner and her spouse intended to share a life together. Despite the petitioner's claim of a relationship of more than two years, the record remains absent tax documentation, bank statements, insurance documents, or other financial documents which show that the petitioner and her spouse had joint assets and liabilities and were trying to create a life together.

In accordance with the above discussion, we concur with the two previous determinations of the director that the record is insufficient to establish that the petitioner was battered by or subjected to extreme cruelty by her spouse and that she entered into her marriage in good faith. The petitioner has not overcome this finding on appeal. 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 denial was based upon the two issues discussed above, we find an additional issue that needs to be addressed on remand. Section 204(a)(1)(B)(ii)(II)(aa)(CC)(bbb) of the Act indicates that a self-petitioner who is not married at the time of filing may still qualify as a battered spouse if the petitioner "demonstrates a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the lawful permanent resident spouse." In this instance, the petitioner was divorced on December 3, 2004 and filed her Form I-360 on January 10, 2005. Although the petitioner's divorce was within the two year period prior to the filing of the petition, the record remains absent evidence to establish a connection between the termination of the petitioner's marriage and any battery or extreme cruelty on the part of the petitioner's spouse.

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.