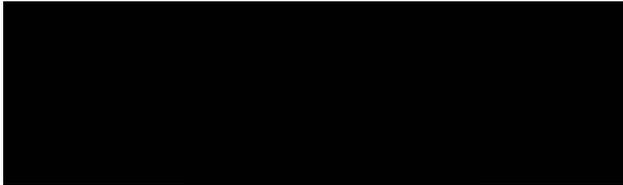


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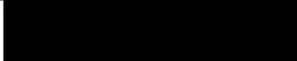


**U.S. Citizenship
and Immigration
Services**

B9



FILE:



Office: VERMONT SERVICE CENTER

Date: JUN 09 2006

EAC 05 017 52483

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.

Mari Johnson

W Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Vermont Service Center Director denied the preference visa petition and 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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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) 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, finding that the petitioner failed to establish that she has been battered or has been the subject of extreme cruelty perpetrated by her spouse, and entered into the marriage in good faith.

The petitioner submitted 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 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 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 entered the United States as a B-2 nonimmigrant visitor on August 29, 1999 at New York, New York. The petitioner married United

States citizen [REDACTED] on April 23, 2001 in Hempstead, New York. The petitioner's spouse filed a Form I-130 petition on the petitioner's behalf. The petitioner filed a Form I-485, Application to Adjust Status, concurrently with the Form I-130 on August 11, 2001. On August 10, 2004, the district director denied the Form I-130 petition and Form I-485 application because the petitioner and her spouse failed to appear for a *Stokes* interview in connection with the Form I-130 petition. On September 2, 2004, the petitioner was placed in removal proceedings. Her next immigration hearing is scheduled for June 20, 2006.

The petitioner filed the instant Form I-360 self-petition on October 21, 2004, 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 during their marriage. Finding the evidence insufficient to establish eligibility, on April 7, 2005, the director requested further evidence, to include evidence of the petitioner's good moral character, evidence that the petitioner had been battered by or subjected to extreme cruelty by her spouse, and evidence that the petitioner married her spouse in good faith.

The petitioner responded to the director's request on May 30, 2005 and requested an additional 30 days in which to respond to the request. The director granted the petitioner's request for an extension and on September 15, 2005, the petitioner submitted additional evidence.

After reviewing the evidence submitted by the petitioner, the director denied the petition on December 14, 2005, finding that the evidence was not sufficient to establish that the petitioner was battered or subjected to extreme cruelty by her spouse, and that she entered into the marriage in good faith.

Upon review of the record, including the petitioner's appellate submission, we find that the evidence contained in the record is not sufficient to establish eligibility.

The first issue to be addressed in this proceeding is whether the petitioner established that she was battered by, or subjected to extreme cruelty by, her spouse. The evidence relating to abuse consists of the following:

- The petitioner's affidavit dated September 9, 2004.
- The statement of [REDACTED]
- The statement of [REDACTED] the petitioner's husband's stepmother.
- The statement of [REDACTED]
- A letter from [REDACTED], Domestic Violence Coordinator, Caribbean Women's Health Association.

In her affidavit, the petitioner stated that around May 2003, her husband grabbed her at the neck and began to choke her. She said that he refused to have sexual relations with her and made her pay all the bills. She said that he made her give him \$1,200.00 and did not give her birthday presents. Withholding sexual relations and gifts are not necessarily tantamount to extreme cruelty as defined

in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). The petitioner's therapist, Ms. [REDACTED] wrote in generalities, e.g., "her husband emotionally, verbally, psychologically, sexually, financially and physically abused her." Similarly, friends of the petitioner submitted statements that included few details. Without any specificity or eyewitness accounts to the petitioner's claims of battery and extreme cruelty and without any corroborating evidence such as police reports or court documents, the petitioner's statement does not carry sufficient weight to establish that she has been battered by, or subjected to extreme cruelty by, her spouse. Accordingly, the petitioner has failed to establish her eligibility for the classification sought.

The next issue to be addressed in this proceeding is whether the petitioner established that she entered into the marriage in good faith. The director noted that while the petitioner submitted bank statements from Chase Bank showing she had a savings account in trust for her husband, the evidence was insufficient to establish that this was a joint account. The director further noted that one letter addressed to the petitioner and her spouse about an error in their 2002 Federal Income Tax return, which suggests that the parties filed a joint return, it is not sufficient evidence to establish that the petitioner entered into the marriage in good faith. The petitioner submitted photographs for the record. While the photographs are evidence that the petitioner and her spouse were together at a particular place and time, they do not establish the petitioner's intent at the time of her marriage or that she resided with his spouse. In the petitioner's statement, she failed to explain her reasons for marrying her spouse and to provide a statement regarding her intent at that time. The record is absent evidence of the commingling of funds and assets, or financial accounts or documentation, which demonstrate a good faith marriage.

Based upon the above discussion, we find the director properly considered the evidence submitted by the petitioner and that such evidence was afforded the proper weight. It should be noted that CIS has the sole discretion in determining what evidence is credible and the weight to be given the evidence.¹ Accordingly, we concur with the director's findings that the petitioner failed to establish that she has been battered by, or the subject of extreme cruelty perpetrated by, her citizen spouse, and that she entered into her marriage in good faith. The petitioner's appellate submission does not overcome the director's stated grounds for denial.

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 (NOID) 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.

¹ See 8 C.F.R. § 204.2(2)(i) which states that the determination of what evidence is credible and the weight to be given that evidence "shall be *within the sole discretion* of the Service." [Emphasis added.]

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.² On remand, the director should also address whether or not the petitioner established that she resided with her spouse during the marriage. The petitioner initially indicated that she lived at [REDACTED] New York, on her Form I-485 Application at her adjustment interview. In support of the instant petition, the petitioner submitted a lease dated October 1, 2003, indicating that the petitioner and her spouse rented apartment [REDACTED] on the second floor. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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 this decision.

² When issuing the notice of intent to deny, the director should consider all of the evidence contained in the record, including the evidence submitted by the petitioner on appeal.