



U.S. Citizenship
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FILE: [Redacted]
EAC 05 055 52020

Office: VERMONT SERVICE CENTER

Date: JUN 21 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 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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 Mexico 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 Form I-360 self-petition was filed by the petitioner on December 10, 2004, based upon the claim that the petitioner is a special immigrant alien who has been battered by, or has the subject of extreme cruelty perpetrated by, her citizen spouse during their marriage.

The director initially denied the petition on May 24, 2005, noting that the petitioner had failed to respond to the director's request for evidence and finding that the record contained insufficient evidence to establish eligibility. The director denied the petitioner without first issuing a notice of intent to deny in accordance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii), which states:

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.

Additionally, although the record did contain some evidence to support the petition, the director failed to specifically discuss this evidence in his decision as is required by the regulation at 8 C.F.R. § 204.1(h).¹

On June 9, 2005, the petitioner filed a timely appeal of the director's May 24, 2005 decision claiming that she did respond to the director's request for evidence. A review of the record confirms the fact that the petitioner responded to the director's request for evidence on May 23, 2005, one day prior to the director's decision. Despite the submission of this evidence, the director treated the petitioner's appeal as a motion to reopen and affirmed his previous decision finding that the petitioner had failed to respond to the request for evidence. The director offered no authority for treating the petitioner's appeal as a motion and *denying* it. The regulation at 8 C.F.R. § 103.3(a)(2)(iii) permits the director to treat the appeal as a motion *only if he intends to take favorable action*.

On September 19, 2005, the petitioner filed the instant appeal. The appeal, however, was not timely filed. In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the appeal within 30 days after the service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b).

In this instance, although the appeal was filed more than 33 days after issuance of the director's decision, because of the errors on the part of the director regarding his failure to consider all of the evidence submitted by the

¹ The regulation states: "Failure to respond to a request for additional evidence will result in a decision based on the evidence previously submitted."

petitioner and the fact that the director's decision, upon which the instant appeal is based, was not within the director's authority, we find the appropriate remedy in this proceeding is to consider the petitioner's initial appeal in this proceeding.

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.

According to the evidence contained in the record, the petitioner first wed United States citizen [REDACTED] in Utah on September 24, 2002. At that time, however, Mr. [REDACTED] was still married to his former spouse. After Mr. [REDACTED] obtained a divorce from his former spouse, the petitioner and Mr. [REDACTED] married

for a second time on May 19, 2003. On July 8, 2003, the petitioner's spouse filed a Form I-130 petition in the petitioner's behalf. The Form I-130 petition was denied for abandonment on December 17, 2004.

The petitioner filed the instant Form I-360 self-petition on December 10, 2004.

On December 28, 2004, the director issued a notice to the petitioner indicating that she had established prima facie eligibility. The prima facie determination 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.

On May 2, 2005, the director requested the petitioner to submit further evidence of her spouse's United States citizenship and the petitioner's good moral character. The director also requested the petitioner to submit evidence of the legal termination of the petitioner's first marriage to her citizen spouse² and an explanation of her seemingly inconsistent statements indicating that she met her spouse in October 2002 and that she married him September 2002.

The petitioner responded to the director's request on May 23, 2005 by submitting evidence related to her good moral character and her claim of abuse. The petitioner also provided an explanation for the discrepancies between the dates she claimed to have met her spouse and the date she married her spouse. Although the petitioner also submitted information related to her spouse's United States citizenship, she did not submit any primary evidence of his citizenship.

Despite the submission of this evidence, the director denied the petition on May 24, 2005, finding that the petitioner failed to respond to the request for evidence. The petitioner appealed the decision on June 9, 2005 and indicated that she had responded to the director's request. The director erroneously treated the appeal as a motion to reopen and affirmed his initial denial of the Form I-360 petition. The petitioner filed the instant appeal on September 19, 2005, reasserting the fact that she had responded to the director's request for evidence.

Upon review, we find the petitioner has failed to establish that she is the spouse of a United States citizen, that she is eligible for classification based upon that relationship, that she resided with her spouse, that she entered into the marriage in good faith, and that she is a person of good moral character.

First, the petitioner has failed to provide evidence that she is the spouse of a citizen of the United States and that she is eligible for classification based on that relationship. 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." Further, the regulation at 8 C.F.R. § 204.2(c)(2) states:

² It is not clear why the director would make such a request given the petitioner's explanation that her first marriage to her citizen spouse was not recognized because he failed to obtain a divorce from his prior spouse before marrying the petitioner.

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

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.]

The petitioner indicates that her spouse was born in the United States. Because Service records are compiled on individuals who emigrate temporarily (nonimmigrants) or permanently (immigrants) to the United States, there is no record available on the petitioner's spouse. While the petitioner is free to submit other information, such as her spouse's social security number, date of birth, or place of birth, 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 her spouse's U.S. citizenship.³ 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, the record does not establish that the petitioner is the spouse of a United States citizen and that she is eligible for classification based upon that relationship.

Second, the record does not establish that the petitioner resided with her spouse. On the Form I-360, the petitioner indicates that she resided with her spouse from May 2001 until October 2003 at [REDACTED] Wendover, Nevada. The record contains evidence of the petitioner's residence at this address but no documentary evidence that her spouse also resided at this address. Although some of the affidavits submitted on the petitioner's behalf briefly reference the petitioner's spouse's residence at the [REDACTED] address, we do not find such statements carry sufficient weight to establish the petitioner's joint residence with her spouse. The record remains absent documentary evidence such as bank statements, car insurance or registration, paystubs, tax documentation, or other evidence which demonstrates that the petitioner resided with her spouse as claimed.

Third, as it relates to the petitioner's claim that she entered into her marriage in good faith, the record contains the petitioner's statement and affidavits from the petitioner's acquaintances. The affidavits contain general statements which indicate that the affiants were aware of the petitioner's marriage but do not provide any specific details related to the petitioner's intent at the time of her marriage. Although the petitioner submits a statement detailing her relationship with her spouse both prior to and after their marriage, we do not find this single statement carries sufficient weight to establish that the petitioner entered into her marriage in good faith.⁴ The

³ It is noted that the petitioner's spouse failed to submit a copy of his birth certificate in support of the Form I-130 he submitted on the petitioner's behalf. See the Service's request for evidence, dated September 16, 2004, in which the petitioner's spouse was requested to submit his birth certificate or passport.

⁴ It is noted that pursuant to the regulation at 8 C.F.R. § 204.2(2)(i), the determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service.

record remains void of documentary evidence such as joint finances, leases, insurance, or taxes to show that the petitioner intended to share a life with her spouse.

Finally, the record does not establish that the petitioner is a person of 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. The petitioner has failed to submit an affidavit regarding her good moral character. Additionally, although the petitioner submitted a police clearance from the sheriff's department in Elko County, the record also contains a letter from the Justice Court, Wendover precinct which states that the petitioner has "completed all requirements and has no outstanding cases in this Court." The language indicating that the petitioner has "completed all requirements" implies that the petitioner previously had some matter pending before the Court. In light of this language, and the absence of any statement from the petitioner regarding her arrest history, we cannot find that the petitioner has established that she is a person of good moral character.

Although we find the record does not sufficiently establish the petitioner's eligibility, because of the errors made on the part of the director, the case must be remanded to the director for further consideration and 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.
