



U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: JUN 21 2006

EAC 99 071 51839

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 Director, Vermont Service Center, denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decisions of the director and the AAO will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 Venezuela who 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 an alien subjected to battery or extreme cruelty by her United States citizen spouse. The petitioner filed her Form I-360 on August 17, 1999. The director denied the petition on August 17, 1999, finding that the petitioner failed to establish that she resided with her citizen spouse, that her deportation would result in extreme hardship to the petitioner or his or her child, and that she entered into the marriage in good faith. The petitioner appealed the director's decision to the AAO on September 17, 1999. The AAO summarily dismissed the petitioner's appeal on October 12, 2001. The petitioner filed the instant motion to reopen on April 11, 2005.

In his motion, counsel claims that the AAO's summary dismissal was erroneous because the Service received a brief in support of the appeal prior to the issuance of the AAO's decision. Counsel also claims that because the AAO did not send its decision to counsel's address of record, counsel was not notified of the AAO's decision in a timely manner and therefore could not file a motion to reopen in a timely manner.

Upon review, we find that the record supports counsel's claims and that he has acted with due diligence. Accordingly, the petitioner's failure to file the instant motion within 30 days of the AAO's decision is excused as we find that the delay was both reasonable and beyond the control of the petitioner. Specifically, the AAO's decision was not mailed to counsel's address of record despite counsel's notification of his change of address. Further, despite numerous inquiries, which are documented in the record, counsel was unable to obtain the status of his case and ultimately filed a Freedom of Information Act request.

The issues, as identified by the director, are whether the petitioner has established that she resided with her citizen spouse, that her deportation would result in extreme hardship to the petitioner or his or her child, and that she entered into the marriage in good faith.

As it relates to whether the petitioner has established extreme hardship, we note that on October 28, 2000, the President approved enactment of the Violence Against Women Act, 2000, Pub. L. No. 106-386, Division B, 114 Stat. 1464, 1491 (2000). Section 1503(b) amends section 204(a)(1)(A)(iii) of the Act so that an alien self-petitioner claiming to qualify for immigration as the battered spouse or child of a U.S. citizen is no longer required to show that the self-petitioner's removal would impose extreme hardship on the self-petitioner or the self-petitioner's child. *Id.* section 1503(b), 114 Stat. at 1520-21. Although this law was not in effect at the time of the filing of the petition, "if the amendment makes the statute more generous, the application must be considered by more generous terms. *Matter of George and Lopez-Alvarez*, 11 I&N Dec. 419 (BIA 1965); *Matter of Levegue*, 12 I&N Dec. 633 (BIA 1968). As the provision requiring a petitioner to establish that he or she or his or her children would be subjected to extreme hardship if deported is no longer in effect, we withdraw the director's finding in this regard.

The remaining issues are whether the petitioner has established that she resided with her spouse and that she entered into the marriage in good faith. As will be discussed, upon review of the record we find the evidence regarding the petitioner's residence and good faith marriage is not only insufficient but also inconsistent.

In her personal statement, dated May 31, 1999, the petitioner indicates that she has lived at [REDACTED] Marina Del Ray, California, "for over 5 years." The Form G-325A submitted by the petitioner in support of her Form I-360 also indicates that the petitioner has continuously resided at this address from January 1994 until the filing of the petition in December 1998.

As it relates to her joint residence with her spouse, on the Form I-360, the petitioner indicates that she resided with her spouse from March 1997 until March 1998 at the [REDACTED] address. Although the petitioner submits a copy of a lease showing her residence at this address, the lease covers the period from February 1994 to January 1995 and is in the petitioner's name only. The record does not contain a lease for the [REDACTED] address for the time period the petitioner claims to have resided with her spouse. Counsel asserts that the original rental agreement was not amended because she and her spouse planned to re-locate. We are not persuaded by this assertion. We note that the lease contained in the record indicates that the "apartment shall be used for living quarters for [the petitioner] and that said premises shall be occupied by no more than one adult..." Given the specificity of this particular provision in the lease we do not find it plausible that the petitioner's spouse was permitted to live in the apartment in direct contravention of the terms of the lease. Although the petitioner states that the letter from the [REDACTED] the management company for the petitioner's apartment at [REDACTED] indicates that they were aware that she was living there with her spouse and were looking for a bigger apartment, we do not agree. While the letter acknowledges that the petitioner is married, the letter does not indicate that the petitioner's spouse resides with her. More importantly, the letter is undated and unsigned.

In response to the director's finding regarding the fact that the petitioner's 1997 joint federal income tax documents listed an address for the petitioner at [REDACTED], Venice, California, the petitioner claims that the [REDACTED] address was used as her spouse's "regular and permanent office" and that her spouse "would pay for the office [and the petitioner] would pay the home bill." In a separate statement, the petitioner describes this address as an "office-residence" to be used while they were waiting to move into a bigger house. [Emphasis added.] We do not find the petitioner's explanation sufficient to establish their joint residence. If the property was rented in the petitioner's spouse's name only, the issue of an "office-residence" casts further doubt on the petitioner's claims of a joint residence at [REDACTED]. If, on the other hand, the petitioner and her spouse jointly rented this space, the record contains no evidence of this joint holding.

Counsel also asserts that the director "ignored" letters submitted by the petitioner from people "who knew [the petitioner] and her husband." The letters referred to by counsel do not address the petitioner's joint residence with her spouse. While the letters mention the petitioner's marriage, they do not provide information regarding a joint residence such as a shared address or dates of the joint residence. Counsel cannot fault the director for failing to consider evidence that is not present in the record.

The evidence in the record regarding the petitioner's claim that she entered into the marriage in good faith is similarly lacking. The record does not contain bank statements or other joint financial accounts, joint insurance, or other documentation which indicate the petitioner's intent to share a life with her spouse. As previously noted, the cancelled check submitted by the petitioner does not reflect a joint account with her spouse. Moreover, although the petitioner did submit a copy of the filing of joint taxes with her spouse, given the discrepancies noted regarding the address provided on these taxes, we do not find the taxes to be sufficient to establish a good faith marriage.

The affidavits submitted by the petitioner in support of her petition provide no support of the petitioner's claims. Specifically, the affidavits focus on the petitioner's claim of abuse and provide no details regarding the petitioner's courtship and details regarding the petitioner's intent at the time of her marriage. Although the petitioner indicates that she married her spouse because she loved him, the petitioner's statements do not carry sufficient weight to establish that she entered into her marriage in good faith.

Although we concur with the finding of the director that the petitioner has not established her eligibility for the classification, 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.

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.