

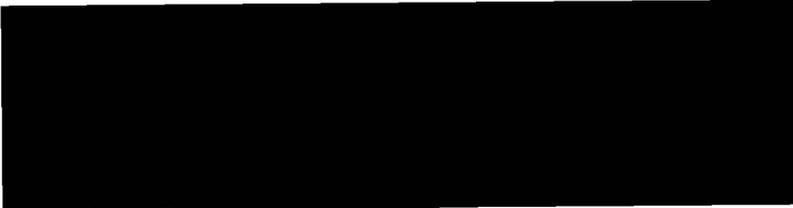


U.S. Citizenship
and Immigration
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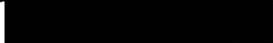
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FILE:



Office: VERMONT SERVICE CENTER

Date: MAR 10 2006

EAC 04 247 52427

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, Director
Administrative Appeals Office

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DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action.

The petitioner is a native and citizen of Colombia 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 director denied the petition, finding that the petitioner failed to establish that she was battered or subjected to extreme cruelty by her United States citizen spouse during their marriage. On appeal, counsel submits copies of documents previously submitted and two documents concerning the petitioner's divorce. For the reasons discussed below, we concur with the director's determination that the petitioner did not establish the requisite battery or extreme cruelty and find that counsel's claims and the evidence submitted on appeal do not overcome this basis for denial. However, the case will be remanded for issuance of a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

Section 204(a)(1)(A)(iii) of the Act provides that an alien who is the spouse of a United States citizen may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the United States citizen spouse in good faith and that during the marriage, the alien was battered or subjected to extreme cruelty perpetrated by the alien's spouse. In addition, the alien must show that he or she is eligible to be classified as an immediate relative under section 201(b)(2)(A)(i) of the Act, resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(A)(iii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II).

The corresponding 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, including rape, molestation, incest (if the victim is a minor), or forced prostitution 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 . . . , must have been perpetrated against the self-petitioner . . . and must have taken place during the self-petitioner's marriage to the abuser.

The evidentiary standard and guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are contained in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

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.

(iv) *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 abuse 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.

In this case, the record shows that the petitioner married [REDACTED] a United States citizen, on February 14, 1997 in Decatur, Georgia. As evidence that she was battered or subjected to extreme cruelty by Mr. [REDACTED] during their marriage, the petitioner initially submitted written statements by herself and Mr. [REDACTED] and a psychological evaluation of the petitioner by Dr. [REDACTED]. The director found this evidence insufficient to establish the requisite battery or extreme cruelty and on March 15, 2005, issued a notice requesting the petitioner to submit additional documentation to support her claim. In response, the petitioner submitted her second written statement and support letters from two of her friends.

The director correctly determined that this evidence does not demonstrate that Mr. [REDACTED] battered or subjected the petitioner to extreme cruelty during their marriage. In her statement dated April 20, 2005, the petitioner states, "I was constantly mistreated psychologically for [Mr. [REDACTED] rudeness and aggressively [sic] not to mention his alcoholism and weird sexual behaviors including his confessed homosexuality. Furthermore, he lately told me he was afraid he had caught AIDS [Acquired Immunodeficiency Syndrome]." In her statement dated June 28, 2004, the petitioner reports that her husband confessed to her that he has AIDS. In her April 20, 2005 statement, the petitioner adds that Mr. [REDACTED] frequently became intoxicated and would force her to listen to him for many hours during the night even though she had to work the next day. She states that she did all the housekeeping because Mr. [REDACTED] never contributed. The petitioner further states:

[Mr. [REDACTED] was always taking advantage of me taking my money to support his bad habits, always threatening me. He used to offend me calling me names, yelling at me, and telling me how stupid women are, specially [sic] me, so that I wouldn't be able to learn English and never allowed me to try it using the force if it would have been necessary [sic].

The petitioner explains that when she lived with her husband, she was "in constant danger and under permanent fear." She reports contemplating suicide on more than one occasion.

The petitioner's statements do not establish that Mr. [REDACTED] subjected her to battery or extreme cruelty. The petitioner provides no specific examples of Mr. [REDACTED] threats and does not explain why she found those threats credible. She does not describe in any detail his "weird sexual behaviors" or state that Mr. [REDACTED] maliciously, intentionally or recklessly transmitted HIV [Human Immunodeficiency Virus] to her during their marriage, or that she has contracted AIDS. The petitioner indicates that her husband would have used force to prevent her from learning English, but she provides no further details. In addition, the record does not indicate that Mr. [REDACTED] speaks Spanish and the petitioner does not state that her English language capabilities prevented the couple from communicating. Finally, the petitioner does not explain in any detail why she felt she was always fearful and in constant danger while living with Mr. [REDACTED].

The affidavits of Mr. [REDACTED] and the petitioner's friends similarly fail to corroborate the petitioner's claim of battery or extreme cruelty. Mr. [REDACTED] states that their marriage ended because of his "alcoholic problems and also because a [sic] got infected by HIV during our relationship." Mr. [REDACTED] does not state that he maliciously, intentionally or recklessly transmitted HIV to the petitioner during their marriage or that his alcoholism caused him to abuse the petitioner. [REDACTED] a friend of the petitioner, states that he has witnessed how much the petitioner suffers because of Mr. [REDACTED] behavior, but he provides no further details regarding the petitioner's physical and mental health. Mr. [REDACTED] describes actions of Mr. [REDACTED] as related to him by the petitioner, but he does not state that he personally witnessed Mr. [REDACTED] abusing the petitioner. [REDACTED] also a friend of the petitioner, states that when Mr. [REDACTED] told the petitioner that he had contracted AIDS and threatened her to try and get her money, the petitioner told Ms. [REDACTED] that she was thinking of going to the railroad tracks to commit suicide. Ms. [REDACTED] explains that she was very scared and took care of the petitioner for several days and did not leave her alone until Ms. [REDACTED] was certain that she was in a stable condition. While Ms. [REDACTED] witnessed the effects of Mr. [REDACTED] purported actions on the petitioner's mental health, her letter alone does not establish that the petitioner's condition was caused by Mr. [REDACTED] battery or extreme cruelty.

In his letter dated May 22, 2004, Dr. [REDACTED] states that he met the petitioner for the first time on that date. Dr. [REDACTED]'s four-paragraph letter describes the petitioner's background and marital problems as described to him by the petitioner. Dr. [REDACTED] writes that he advised the petitioner of "the benefits of a short psychotherapy (mostly supportive) treatment at this time of severe crisis in her life." Although his letter is captioned as a "psychiatric evaluation," Dr. [REDACTED] does not diagnose the petitioner with any mental health disorder and includes no professional evaluation of her self-reported symptoms. The only professional observation made by Dr. [REDACTED] is as follows: "She appears to be free from other psychopathology and is sound of mind and judgment, having gained insight from her mistake." In addition, [REDACTED] does not state how long he met with the petitioner or provide any documentation of his professional credentials that would indicate his qualifications and experience in diagnosing and treating survivors of domestic violence. For these reasons, Dr. [REDACTED]'s letter is of little probative value.

The written statements and Dr. [REDACTED] letter fail to establish that Mr. [REDACTED] battered or subjected the petitioner to extreme cruelty as that term is described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). The petitioner describes no specific acts of violence that Mr. [REDACTED] inflicted upon her during their marriage. While the petitioner was understandably upset by Mr. [REDACTED]'s confession that he had contracted AIDS, neither she nor Mr. [REDACTED] state that he forced her to have intimate relations, or otherwise transmitted or threatened to transmit HIV to her. The petitioner also does not state that she fears she may have contracted HIV from her husband because they continued to have intimate relations throughout their marriage. The petitioner reports that her husband had "weird sexual behaviors," but provides no description of those behaviors or how they physically or psychologically harmed her. The petitioner describes other unkind actions made by Mr. [REDACTED] but neither she, her friends nor Dr. [REDACTED] describe a cycle of violence or threatened violence by Mr. [REDACTED] inflicted upon the petitioner in the form of physical, psychological or sexual abuse. While Ms. [REDACTED] confirms that Mr. [REDACTED] behavior caused the petitioner to contemplate suicide, the record does not establish that the petitioner's depression was a result of Mr. [REDACTED] battery or extreme cruelty, rather than his mistreatment, her fear of contracting AIDS and the resultant breakdown of their marriage.

The petitioner also failed to submit corroborative documentation of the alleged battery or extreme cruelty of the types described in the regulation at 8 C.F.R. § 204.2(c)(2)(iv). The petitioner did not submit evidence that she ever called the police, sought an order of protection against her husband, or took refuge from his alleged abuse

in a domestic violence shelter or similar facility. The petitioner submits no evidence that she received medical or mental health treatment for the effects of Mr. [REDACTED]'s alleged abuse. Dr. [REDACTED]'s "psychiatric evaluation" does not state that the petitioner saw him or any other medical or mental health professional for treatment and therapy.

The petitioner submitted a copy of her divorce complaint in which she requested that a divorce be granted to her, in part, because Mr. [REDACTED] committed "cruel treatment" pursuant to section 19-5-3(10) of the Georgia Code. Yet the petitioner's complaint included no detailed allegations or statement of facts regarding Mr. [REDACTED]'s allegedly cruel treatment. On appeal, counsel submits a copy of the petitioner's divorce decree entered on January 26, 2005 by the Superior Court of Fulton County, Georgia. We cannot consider this evidence because it arose after the petition was filed. The petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(12), *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).¹

The evidence submitted does not establish that Mr. [REDACTED] battered or subjected the petitioner to extreme cruelty during their marriage pursuant to the regulation at 8 C.F.R. §§ 204.2(c)(1)(vi), 204.2(c)(2)(iv). Based on the present record, the petitioner is thus ineligible for classification under section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii).

However, the case will be remanded because the director failed to issue a NOID pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii), which 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.

The director denied the petition without first issuing a NOID. Consequently, the case must be remanded for issuance of a NOID pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii), which will give the petitioner a final opportunity to overcome the deficiencies of her case.

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.

¹ Even if this judgment had been entered before the petition was filed, it would not support the petitioner's claim. The judgment states that the divorce was granted on grounds of adultery, habitual intoxication and "Irretrievably Broken with no hope of reconciliation, pursuant to O.C.G.A. § 19-5-3(10)." Counsel submits a copy of this section of the Georgia Code which states that section 19-5-3(10) is "cruel treatment." However, the statutory citation in the court order appears to be a typographical error because it is referenced as "Irretrievably Broken with no hope of reconciliation" which corresponds to section 19-5-3(13) of the Georgia Code. Regardless of the statutory citation, the judgment includes no findings of fact concerning "cruel treatment" and does not incorporate by reference any such factual findings.

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 that, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.