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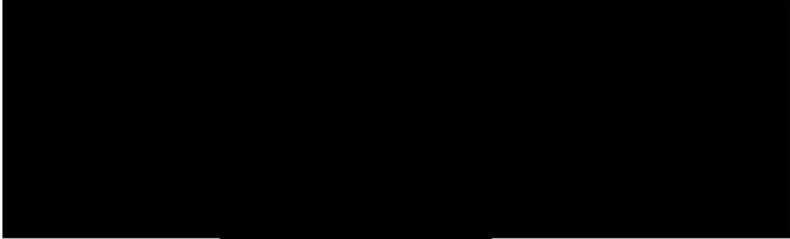
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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Services

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FILE: [Redacted]
EAC 03 018 51560

Office: VERMONT SERVICE CENTER

Date: OCT 04 2008

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. 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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 is a native and citizen of Colombia who is seeking classification as a special immigrant pursuant to section 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii), as the battered spouse of a United States citizen. The director denied the petition on October 20, 2005, finding that the petitioner failed to establish that she entered into the marriage in good faith.

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 United States 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 in the record, the petitioner arrived at a port-of-entry in Miami, Florida on January 16, 2001, as a nonimmigrant for pleasure with authorization to remain until July 15, 2001. On July 26, 2001, the Service issued a Notice to Appear (NTA), alleging that the petitioner had remained in the United States beyond the period authorized.¹ The petitioner was ordered removed on October 9, 2001. The record contains no evidence that the petitioner left the United States after being ordered removed. Instead, the record reflects that the petitioner married, [REDACTED] a United States citizen, on November 2, 2001 in Kings Mountain, North Carolina. On December 14, 2001, the petitioner's spouse filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf. The petitioner filed a Form I-485, Application to Adjust Status, on that same date.²

The petitioner filed the instant Form I-360 on August 31, 2002, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, her U.S. citizen spouse during their marriage. On September 22, 2003, the director requested the petitioner to submit further evidence to establish that she had been battered by or subjected to abuse by her citizen spouse. The petitioner responded to that request on November 24, 2003. On January 7, 2004, the director issued a second notice indicating that as the petitioner had married while she was in proceedings, she must request a "bona fide marriage exemption" and provide "clear and convincing evidence" that the petitioner entered into her marriage in good faith. The petitioner responded to the director's request on March 8, 2004, and claimed that she did not marry her spouse while she was in proceedings, that she never received and has no knowledge of such proceedings.

After reviewing the evidence contained in the record, including the evidence submitted in response to the director's requests for evidence, the director denied the petition on October 20, 2005, finding that the petitioner failed to establish that she entered into the marriage in good faith.

The petitioner, through counsel, submits a timely appeal dated November 14, 2005. Although counsel indicated on the Form I-290B, Notice of Appeal to the Administrative Appeals Office (AAO), that she would be sending a brief and/or additional evidence to the AAO within 90 days, counsel failed to provide any further submission. We, therefore, consider the record to be complete as it now stands.

In this instance, as correctly noted by the director, because the petitioner entered into the qualifying relationship while she was in removal proceedings, under section 204(g) of the Act, the petitioner has the increased burden of demonstrating, by clear and convincing evidence, that she entered into the marriage in good faith.

Section 204(g) of the Act states:

Notwithstanding subsection (a), except as provided in section 245(e)(3), a petition may not be approved to grant an alien immediate relative status by reason of a marriage which was entered into during the period [in which administrative or judicial proceedings are

¹ The Certificate of Service indicates that the NTA was served, by regular mail, on August 7, 2001.

² The record reflects that the Form I-130 petition was denied on January 27, 2003 for abandonment. However, the record does not contain written denial for the Form I-485 application.

pending], until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.

Section 245(e) of the Act states:

- (1) Except as provided in paragraph (3), an alien who is seeking to receive an immigrant visa on the basis of a marriage which was entered into during the period described in paragraph (2) may not have the alien's status adjusted under subsection (a).
- (2) The period described in this paragraph is the period during which administrative or judicial proceedings are pending regarding the alien's right to be admitted or remain in the United States.
- (3) Paragraph(1) and section 204(g) shall not apply with respect to a marriage if the alien establishes by clear and convincing evidence to the satisfaction of the [Secretary of Homeland Security] that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition under section 204(a) . . . with respect to the alien spouse or alien son or daughter. In accordance with the regulations, there shall be only one level of administrative appellate review for each alien under the previous sentence.

The regulation at 8 C.F.R. § 245.1(c)(9)(v) states, in pertinent part:

Evidence to establish eligibility for the bona fide marriage exemption. Section 204(g) of the Act provides that certain visa petitions based upon marriages entered into during deportation, exclusion or related judicial proceedings may be approved only if the petitioner provides clear and convincing evidence that the marriage is bona fide . . .

While counsel claims that the petitioner was unaware that she was in proceedings, such a fact, even if true, does not relieve her of the burden of establishing by clear and convincing evidence that she entered into her marriage in good faith. The documentary evidence submitted by the petitioner to support her claim of a good faith marriage consists of several photographs and cards from the petitioner's spouse to the petitioner, such evidence is not clear and convincing evidence of the petitioner's good faith marriage. While the photographs demonstrate that the petitioner and her spouse were together at a particular place and time, they are not evidence that the petitioner intended her marriage to be bona fide. Similarly, while the cards from the petitioner's spouse provide insight as to the petitioner's spouse's emotions and feelings, they do not establish that the petitioner's feelings or reasons for marrying her spouse.

While the record also contains utility bills and statements, these documents are in the petitioner's spouse's name or the petitioner's name only. The documents do not reflect any joint assets or liabilities. We note that

although the petitioner claims that she pays half of the bills and submitted one check that she wrote to her citizen spouse, the record contains no evidence that this check was actually cashed or that the petitioner did pay for other bills as claimed.

Accordingly, we concur with the director's findings that the evidence contained in the record is not sufficient to establish, by clear and convincing evidence, that the petitioner entered into her marriage in good faith. This finding has not been overcome on appeal. 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 to 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. In addition to the issue of the petitioner's good faith marriage, the record suggests an additional issue that must also be addressed on remand. On the petitioner's Form I-360, the petitioner indicated that she is married. However, in the documents submitted in support of her petition, the petitioner refers to her citizen spouse as her "ex-husband" and also indicates that her spouse gave her a "divorce decree" on July 1, 2002, nearly two months prior to the filing of the Form I-360. On remand, the director should request the petitioner to provide evidence to establish the date in which she and her citizen spouse were divorced. Further, if the petitioner was divorced from her citizen spouse prior to the filing of the Form I-360, the director should request the petitioner to submit evidence which demonstrates "a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse." See section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act.

In accordance with the above discussion, the decision of the director is withdrawn. The case must be remanded to the director for the purpose of the issuance of a new 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 this decision.