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U.S. Department of Homeland Security
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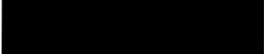
U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: **SEP 27 2006**

EAC 05 179 52483

IN RE:

Petitioner:



PETITION: Petition for Special Immigrant Battered Spouse Pursuant to Section 204(a)(1)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(B)(ii)

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 Acting Director (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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 seeks classification as a special immigrant pursuant to section 204(a)(1)(B)(ii), 8 U.S.C. § 1154(a)(1)(B)(ii), as the battered spouse of a lawful permanent resident of the United States. The director denied the petitioner noting that the petitioner had failed to respond to the director's request for evidence and finding that the record did not contain sufficient evidence to establish the petitioner's eligibility.

The petitioner, through counsel, submits a timely appeal, with additional evidence.

Section 204(a)(1)(B)(ii) of the Act provides, in pertinent part, that an alien who is the spouse of a lawful permanent resident 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 lawful permanent resident 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 married [REDACTED], a lawful permanent resident, on April 6, 2001 in Houston, Texas. The petitioner and [REDACTED] were divorced on August 23, 2004. The petitioner filed the instant Form I-360 self-petition on June 6, 2005, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, her lawful permanent resident spouse during their marriage.

With the initial filing, the petitioner submitted copies of her driver's license, visa and passport, birth certificate with translation, marriage certificate, child's birth certificate, photographs, and lease. The petitioner also submitted a copy of her spouse's birth certificate, evidence of his lawful permanent residence, and evidence from Family Time, a domestic violence shelter.

On September 13, 2005, the director requested further evidence to establish that the petitioner had been battered by or subjected to extreme cruelty by her spouse and that she is a person of good moral character. The petitioner failed to respond to the director's request and the director denied the petition on January 24, 2006, without the issuance of a Notice of Intent to Deny (NOID) in accordance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii),¹ finding that the evidence did not establish the petitioner's eligibility for classification as the battered spouse of a lawful permanent resident of the United States.

On appeal, the petitioner submitted evidence related to the director's previous request for additional evidence. Specifically, the petitioner submitted a personal statement regarding her good moral character and claimed abuse, a letter from the Harris County District Court, her divorce decree, three affidavits, and evidence of the petitioner's spouse's non-payment of child support and paternity of a child with another woman. The petitioner does not provide any explanation or excuse for her failure to submit such evidence when previously requested to by the director prior to the denial. We note that in instances where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO does not usually accept evidence offered for the first time on appeal. If the petitioner had wanted the submitted evidence to be considered, she should have submitted the documents in response to the director's request for evidence. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988).

In this instance, however, because the petitioner was not provided with the NOID required by regulation, we have reviewed the petitioner's appellate submission in order to determine whether such evidence overcomes

¹ 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.

the director's stated grounds for denial and could be sustained without remanding to the director for further action. As will be discussed, the petitioner's appellate submission does not establish her eligibility for the classification sought. Specifically, the record does not establish that the petitioner was battered or subjected to extreme cruelty by her spouse and that she is a person of good moral character. Therefore, the case must be remanded for further review.

Evidence that the petitioner has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen during the marriage.

As evidence to support a claim of abuse, 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.

In this instance, although the record contains a letter and report indicating that the petitioner was a resident and received counseling at a domestic violence shelter, and statements from the petitioner's friends and relatives, the record does not contain a statement from the petitioner regarding the claimed abuse. The statement submitted by the petitioner on appeal discusses events that took place *after* the petitioner's divorce, rather than during her marriage. Without a statement from the petitioner describing specific incidents and the alleged abuse that occurred during her marriage, we find the evidence from the shelter and the statements from the petitioner's friends and relatives do not carry sufficient weight as we are unable to compare their claims with those of the petitioner.

The petitioner's claim that she 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 evidence in the record which the director found was insufficient to establish the petitioner's claim of being a person of good moral character consisted of the petitioner's driver's license, visa, passport and birth certificate. On appeal, the petitioner submitted a statement regarding her good moral character and a letter from the Harris County District Court. Although the letter indicates that there is no record relating to the petitioner, the letter cannot be substituted for a police clearance. Specifically, the letter indicates that the search was performed only on records on file with the "District Clerk of Harris County, Texas" and "does **NOT** include names of defendants, indicted directly by the grand jury, unless the defendant is in custody or under bond" Accordingly, the letter is not sufficient to establish that the petitioner has not been arrested or charged in any criminal proceeding and that she is a person of good moral character.

Despite the above discussion and our concurrence with the director's findings, the director's decision cannot stand because of her failure to issue a NOID to the petitioner prior the issuance of the denial. 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.