



U.S. Citizenship
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FILE: [REDACTED]
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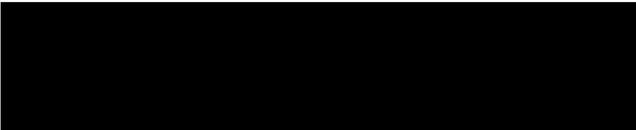
Date: FEB 26 2007

IN RE: Petitioner: [REDACTED]

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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 The decision of the director will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien battered or subjected to extreme cruelty by a United States citizen.

The director denied the petition finding that the petitioner failed to respond to the director's Notice of Intent to Deny (NOID) and to overcome the director's determination that the petitioner failed to establish that she had been battered by or subjected to extreme cruelty by her citizen spouse.

The petitioner, through counsel, submits a timely appeal.

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 or a child of 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).

According to the evidence contained in the record, the petitioner entered the United States on October 12, 1991 as a B-2 nonimmigrant visitor. The petitioner divorced her first spouse, Y-S-K* in the Superior Court of California, County of Los Angeles on February 23, 1999. On July 19, 1999, the petitioner married K-H-S-*, a citizen of the United States in Los Angeles, California. The petitioner's marriage to K-H-S- was terminated on August 13, 2004, in the Superior Court of California, County of Los Angeles. The petitioner filed the instant Form I-360 on November 12, 2004.¹

After conducting a preliminary review of the evidence submitted, the director found that the petitioner had failed to establish her prima facie eligibility² and on November 26, 2004, requested the petitioner to submit evidence of her good moral character. The petitioner responded on January 14, 2005.

On April 20, 2005, the director issued a Request for Evidence (RFE) of proof of the termination of the petitioner's prior marriages and evidence to establish that she had been battered by or subjected to extreme cruelty by K-H-S-. The petitioner responded to the RFE on June 20, 2005 and October 3, 2005, respectively.

* Name withheld to protect individual's identity.

* Name withheld to protect individual's identity.

¹ Although not at issue in this proceeding, the record also contains a Form I-130, Petition for Alien Relative, filed on the petitioner's behalf by K-H-S-.

² The determination of prima facie eligibility 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, 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 April 18, 2006, the director issued a NOID notifying the petitioner that she had failed to establish that she had been battered by or subjected to extreme cruelty by her citizen spouse.

The director denied the petition on August 17, 2006 noting that the petitioner failed to respond to the NOID and finding that the petitioner failed to establish the requisite battery or extreme cruelty.

The petitioner, through counsel, filed a timely appeal dated September 11, 2006. On appeal, counsel states that additional evidence was submitted in response to the director's NOID. Specifically, counsel contends that a doctor's report and an additional declaration from the petitioner were submitted prior to the director's final decision. To support his contention, counsel submits a FedEx receipt and airbill dated July 31, 2006. Based upon the tracking number contained on the airbill, the AAO was able to confirm that the director received evidence regarding the petitioner's case on August 1, 2006 at 11:06 a.m. Although the response was not received within the 60-day period indicated by the director in his NOID, the director did not deny the petition for an untimely response, but rather for failing to respond to the NOID. Given that the evidence submitted on appeal demonstrates that the director did receive a response to the NOID prior to denial, the director's decision must be withdrawn and the case remanded to the director for review of the evidence submitted in response to the director's NOID. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of her petition within a reasonable period of time.

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.