

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

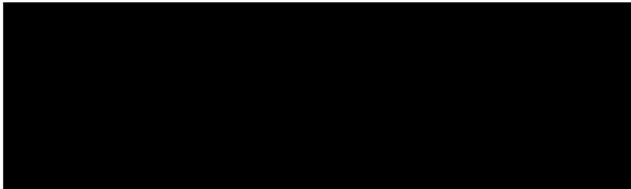


U.S. Citizenship
and Immigration
Services

PUBLIC COPY

Ba

JUN 27 2007



FILE:

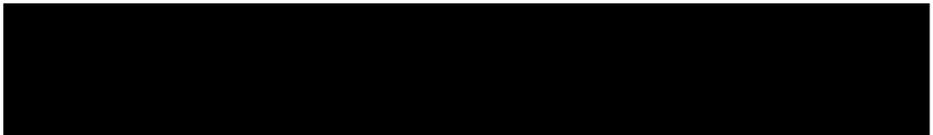
EAC 04 248 53352

Office: VERMONT SERVICE CENTER

Date:

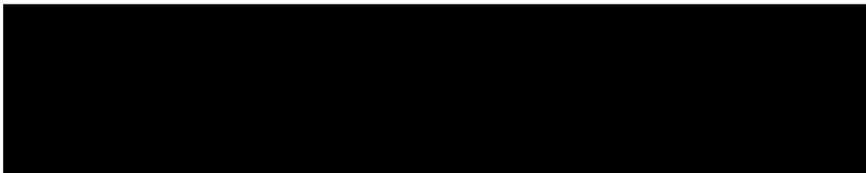
IN RE:

Petitioner:



PETITION: Petition for 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
Robert P. Wiemann, Chief
Administrative Appeals Office

fu

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition. On appeal, the Administrative Appeals Office (AAO) remanded the petition for further action by the director. The matter is now before the AAO upon certification of the director's subsequent, adverse decision. The December 19, 2006 decision of the director will be withdrawn and the matter will be remanded for further action.

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 may self-petition for preference immigrant classification if the alien demonstrates that he or she entered into the marriage with the lawful permanent resident spouse in good faith and that during the marriage, the alien or a child of the alien was battered by or was the subject of extreme cruelty perpetrated by the alien's spouse. In addition, the alien must show that he or she is eligible to be classified as a preference immigrant under section 203(a)(2)(A) of the Act, resided with the spouse, and is a person of good moral character. Section 204(a)(1)(B)(ii)(II), 8 U.S.C. § 1154(a)(1)(B)(ii)(II).

Section 204(a)(1)(J) of the Act states, in pertinent part:

In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) or clause (ii) or (iii) of subparagraph (B), or in making determinations under subparagraphs (C) and (D), the [Secretary of Homeland Security] shall consider 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 [Secretary of Homeland Security].

The eligibility requirements are further explicated in the regulation at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part:

(vi) *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 . . . spouse, must have been perpetrated against the self-petitioner . . . and must have taken place during the self-petitioner's marriage to the abuser.

* * *

The evidentiary guidelines for a self-petition under section 204(a)(1)(B)(ii) of the Act are further explicated 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.

* * *

The record in this case provides the following pertinent facts and procedural history. The petitioner is a native and citizen of Peru who states in these proceedings that she entered the United States on March 24, 1989. On December 4, 1991, the petitioner married, F-C-¹, a lawful permanent resident of the United States, in Florida. The petitioner filed this Form I-360 on August 31, 2004. The petitioner's marriage to F-C- was dissolved on February 16, 2006. The director initially denied the petition on August 1, 2005 for lack of a qualifying relationship with a U.S. lawful permanent resident and eligibility for preference immigrant classification based on such a relationship; battery or extreme cruelty and joint residence. On appeal, the AAO concurred with the director's determinations but remanded the case because the director failed to issue a Notice of Intent to Deny (NOID) before denying the petition, as required by the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

Upon remand, the director issued a NOID, to which counsel timely responded with further evidence. On December 19, 2006, the director denied the petition for lack of the requisite battery or extreme cruelty and certified the decision to the AAO for review. On certification, neither counsel nor the petitioner submits a brief or additional evidence. We note, however, that the petitioner filed a second Form I-360 (Receipt Number EAC 06 099 50010) on February 15, 2006 that contains additional evidence relevant to the issue of battery or extreme cruelty. Although we concur with the director's determination that the relevant evidence submitted with the instant petition does not establish that the petitioner's former husband subjected her or any of her children to battery or extreme cruelty during their marriage, the petition must be remanded a second time because the director's NOID failed to cite battery or extreme cruelty as a ground for intended denial.

¹ Name withheld to protect individual's identity.

On August 22, 2006, the director issued a NOID requesting: proof of the legal termination of the petitioner's marriage, an explanation by the petitioner of the discrepancies in the record regarding her residency with her husband, updated evidence of the petitioner's good moral character and the birth certificate of the petitioner's daughter, [REDACTED], if the petitioner wished for [REDACTED] to be included as a derivative beneficiary of her petition. Counsel timely responded to the NOID with evidence of the legal termination of the petitioner's marriage, the petitioner's affidavit explaining the discrepancies in the record regarding her residence with her husband, updated evidence of the petitioner's good moral character and a copy of [REDACTED] birth certificate.

Counsel's response provided evidence for each issue cited in the NOID, but did not provide additional evidence of battery or extreme cruelty. Counsel's failure to do so is understandable for two reasons. First, the director did not cite battery or extreme cruelty as a ground for intended denial in the NOID. 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 regulatory mandate to provide a NOID before denial of the petition would be rendered meaningless if the NOID did not cite all intended grounds for denial.

Second, the director stated in the NOID, "The Service notes that on February 15, 2006, you filed a second Petition . . . (Form I-360). The Service will consider the evidence provided with that petition and that petition will remain pending." As previously stated, the petitioner submitted further evidence relevant to battery or extreme cruelty with her second Form I-360 (EAC 06 099 50010). Counsel could easily have interpreted the director's statement regarding the second petition and the director's failure to cite battery or extreme cruelty as an intended ground for denial in the NOID to mean that the director had determined that sufficient evidence of battery or extreme cruelty was provided with the second Form I-360.

The NOID did not notify the petitioner of all the intended grounds for denial of the petition and included a vague and potentially misleading statement regarding the consideration of evidence submitted with the second Form I-360. Consequently, the director's December 19, 2006 decision denying the petition will be withdrawn and the instant petition will be remanded to the director for further, appropriate action in accordance with this decision.

As always in visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The December 19, 2006 decision of the director is withdrawn and the petition is remanded to the director for further action in accordance with the foregoing decision and entry of a new decision by the director, which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.