

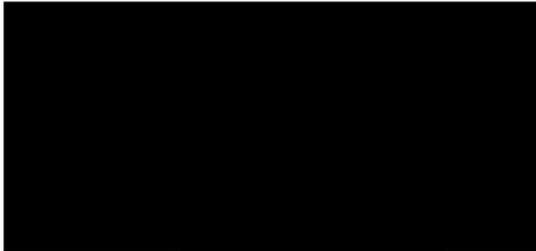
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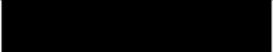
U.S. Citizenship
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Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: JAN 23 2008

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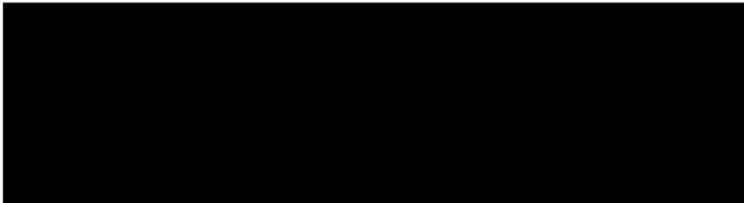
IN RE:

Petitioner:



PETITION: Petition for Immigrant Abused 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.

Maura De adrick
f Robert P. Wiemann, Chief
f Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition. On appeal, the Administrative Appeals Office (AAO) remanded the matter for further action. The matter is now before the AAO upon certification of the director's subsequent, adverse decision. The AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

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).

An alien who has divorced a United States citizen may still self-petition under this provision of the Act if the alien 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." Section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc).

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 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].

In this case, the director initially denied the petition on October 18, 2005 for failure to establish a qualifying spousal relationship with a U.S. citizen. In its March 8, 2006 decision on appeal, the AAO concurred with the director's determination but remanded the petition for issuance of a Notice of Intent to Deny (NOID) in compliance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

Upon remand, the director issued a NOID on November 13, 2006 which informed the petitioner that she had not established a qualifying relationship because her petition was filed one day after the two-year anniversary of her divorce from her U.S. citizen husband. The petitioner, through present counsel, timely responded to the NOID with evidence that her petition was delivered to and received by the Vermont Service Center on October 18, 2004, the second anniversary of her divorce. Nonetheless, the director determined that the petition was not filed until the following day. On May 23, 2007, the director denied the petition for failure to establish a qualifying relationship and certified his decision to the AAO for review.

Qualifying Relationship

In his May 23, 2007 decision, the director reasoned that pursuant to the regulation at 8 C.F.R. § 103.2(a)(7)(i), a petition is not properly filed until the date Citizenship and Immigration Services (CIS) imprints the petition with a receipt stamp. The director has misread the plain language of the regulation, which states, in pertinent part: “An application or petition received in a Service office shall be stamped to show the time and date of actual receipt and . . . shall be regarded as properly filed when so stamped, if it is signed and executed and the required filing fee is attached or a waiver of the filing fee is granted.” 8 C.F.R. § 103.2(a)(7)(i). The record contains the original Fed Ex Airbill, with which the petition was sent to the Vermont Service Center. In response to the NOID, the petitioner submitted a printout from the FedEx website, which shows that a shipment with the same tracking number as the airbill in the record was delivered to the Vermont Service Center on October 18, 2004. The printout also shows the signature of the individual who received the package. The record thus shows that the petition was received by CIS on October 18, 2004. Because the petition was properly filed in all other respects, CIS’s failure to imprint the petition with a receipt stamp until the following day does not change the fact that the petition was filed on October 18, 2004, the date of actual receipt. Accordingly, the petitioner has overcome the director’s ground for denial and established that her petition was filed within two years of the legal termination of her marriage, as required by section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act.

Joint Residence

Nonetheless, we find that the petitioner has not demonstrated that she resided with her former husband. As neither the director nor the AAO (in its prior decision) addressed this issue, the petition will be remanded to the director for reconsideration of this eligibility criterion.

On the Form I-360, the petitioner stated that she lived with her former husband from January 1992 until December 1995 and that they last resided together at [REDACTED] in the Bronx, New York. However, the record contains numerous listings of the former couple’s address that conflict with the petitioner’s statement. On the certificate of the former couple’s daughter’s birth on March 15, 1993, the petitioner’s address is stated as [REDACTED] in the Bronx. On the Form I-130, Petition for Alien Relative, and Form I-134, Affidavit of Support, filed by the petitioner’s former husband on her behalf in July and August 1995, the former couple’s address is listed as [REDACTED] in the Bronx. On the petitioner’s Form I-485, Application to Adjust Status, concurrently filed with the Form I-130 on July 19, 1995, the petitioner also listed her address as the [REDACTED] residence. On the petitioner’s Form G-325A, Biographic Information, dated July 19, 1995, the petitioner states that she lived at [REDACTED] in the Bronx from January 1992 until the date she signed the Form G-325A, but also states that she lived at the [REDACTED] residence from August 1993 to an unspecified date. On the Form G-325A of the petitioner’s former spouse dated December 28, 1994, he states that he lived at the [REDACTED] residence from August 13, 1994 until the date he signed the form and that he previously lived in Connecticut from August 13, 1991 until an unspecified date. His Form G-325A thus contradicts the petitioner’s claim that the former couple

began residing together in January 1993. More importantly, none of the addresses listed on the above-cited documents match that which the petitioner states as the former couple's last shared residence on the Form I-360.

In her affidavit, the petitioner explains that she met her husband in Connecticut where he continued to work and reside after their marriage until the former couple moved into an apartment together in the Bronx in January 1992. The petitioner does not state the former couple's address or otherwise describe their purportedly shared residence. The petitioner does not submit a lease or other documentation of the former couple's shared residence of the types listed in the regulation at 8 C.F.R. § 204.2(c)(2)(iii). Although she is not required to do so, the petitioner does not explain why such evidence does not exist or is unobtainable. See 8 C.F.R. §§ 103.2(b)(2)(iii), 204.1(f)(1), 204.2(c)(2)(i). We note that in her affidavit, the petitioner indicates that several individuals were aware of her residence with her former husband: her landlord, [REDACTED] her friend, [REDACTED], and many of her neighbors who were aware of her marital situation. In addition, the petitioner states that as a result of one incident of her former husband's abuse during their marriage and purportedly joint residency, she was treated at Lady of Mercy hospital. The record contains no hospital records listing her address or statements from Mr. [REDACTED] or any neighbors who could provide probative information regarding the petitioner's residence with her former husband. In her affidavit, [REDACTED] provides probative information about the abuse, but does not discuss the petitioner's residence with her former husband in any detail.

The record contains no testimonial or documentary evidence of the petitioner's residence with her husband, apart from the petitioner's statement that she moved into an unidentified apartment in the Bronx with her former husband in January 1992. The record contains six statements of the addresses of the petitioner and her former husband that are different from the former couple's last joint residence, as stated on the Form I-360. These unresolved discrepancies greatly detract from the credibility of the petitioner's brief statement regarding the former couple's shared residence. Accordingly, based on the present record, the petitioner has not demonstrated that she resided with her former husband, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

Therefore, this matter will be remanded. The director must issue a new denial notice, containing specific findings that will afford the petitioner the opportunity to present a meaningful appeal. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.