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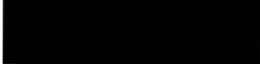
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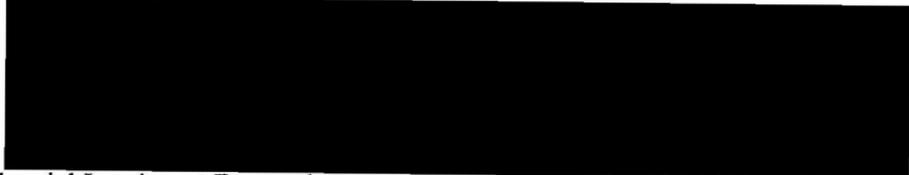
Office: VERMONT SERVICE CENTER

Date: **JUL 12 2006**

EAC 04 248 53352

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 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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 petition on August 1, 2005, finding that the petitioner failed to establish that she has a qualifying relationship as the spouse of a lawful permanent resident of the United States, that she is eligible for classification based upon that relationship, that she has resided with her spouse, and that she was battered by or subjected to extreme cruelty by her spouse.

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.

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.

According to the evidence contained in the record, the petitioner married lawful permanent resident [REDACTED] [REDACTED] in December 4, 1991 in Miami, Florida. On September 2, 1997 the petitioner's spouse filed a Form I-130 petition in the petitioner's behalf. The Form I-130 petition was approved on July 30, 1998. On April 11, 2003, the petitioner filed a Form I-485, Application to Adjust Status based upon the approved Form I-130. The Form I-485 was denied on June 3, 2004 and the Form I-130 petition was revoked on August 11, 2004.

The petitioner filed the instant Form I-360 self-petition on August 31, 2004, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, her spouse during their marriage. With the initial filing, the petitioner submitted copies of her employment authorization, her marriage certificate, her children's birth certificates, her birth certificate and divorce decree from her former spouse with translation, a copy of her spouse's alien registration card, affidavits, a doctor letter and medical records, letters from the petitioner's children's school counselor, teachers, and principal,

and copies of certificates from the Ayuda Family Empowerment Program. It is noted that although petitioner's counsel indicated the submission of car insurance policies, a medical insurance card, and copies of joint utility bills and installment loans, the record does not contain any such evidence.

After conducting a preliminary review of the evidence submitted, the director found that the petitioner had failed to establish her prima facie eligibility¹ and on September 9, 2004, requested the petitioner to submit evidence of her good moral character. The petitioner responded to the request on October 4, 2004 by submitting an affidavit, copies of her staff identification card, and a police clearance from the Metro-Dade Police Department.

On March 17, 2005, the director issued a request for additional evidence to include, evidence that the petitioner resided with her spouse and evidence that the petitioner had been battered by or subjected to extreme cruelty by her spouse. Additionally, the director noted that the petitioner had failed to indicate on the Form I-360 whether she was married or divorced and requested the petitioner to indicate whether she was still married or to provide evidence of her divorce.

The petitioner failed to respond to the request and the director denied the petition on August 1, 2005, finding that the evidence did not establish that the petitioner has a qualifying relationship as the spouse of a lawful permanent resident of the United States, that she is eligible for classification based upon that relationship, that she has resided with her spouse, and that she was battered by or subjected to extreme cruelty by her spouse.

On appeal, counsel for the petitioner states that the petitioner presented "clear and convincing evidence qualifying her for relief" and that "all requirements have been met." Counsel does not address the lack of evidence noted by the director or submit any further documents to fill the evidentiary gaps found by the director. Upon review of the record, we concur with the director's findings.

Evidence regarding whether the petitioner is the spouse of a citizen of the United States and is eligible for immigrant classification based on that relationship.

As noted by the director, the record lacks evidence which establishes that the petitioner is still married, or in the alternative, that she was divorced within the two-year period prior to filing. Specifically, the petitioner failed to properly fill "Part 3" of the Form I-360 and to indicate her marital status. It is noted that the record contains copies of the petitioner's spouse's 1999 and 2000 federal income tax returns which indicate his filing status as single. If those returns are accurate, and the petitioner was divorced from her spouse in 1999, then at the time of filing in 2004, the petitioner would have been divorced from her spouse for more than two years. Section 204(a)(1)(B)(ii)(II)(aa)(CC) of the Act indicates that a self-petitioner who is no longer married at the time of filing is still eligible for approval if he or she was the bona fide spouse of a lawful permanent resident of the United States "within the past 2 years." Without any further evidence regarding the petitioner's marital status, we

¹ 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 and 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.

cannot find that the record establishes that the petitioner is the spouse of a lawful permanent resident of the United States and that she is eligible for classification based upon that relationship.

Evidence that the petitioner has resided with his citizen spouse.

In his request for evidence and his final decision, the director found that evidence submitted regarding the petitioner's claimed residence with her spouse was both insufficient and unreliable. The director noted inconsistencies between the information provided by the petitioner on the Form I-360 and the statements provided in the affidavits of the petitioner's friends. The director stated:

As proof to satisfy this requirement, you submitted four identically worded affidavits. Since the affidavits are identical, they lack sufficient credibility. Furthermore, all four of the affidavits indicate that you and your spouse lived together from 1990 to 2001 at [REDACTED] in Bay Harbor Isle, Fl. This contradicts what you claimed on this petition. You claimed that you resided with [REDACTED] from December 1991 until February 2001 and that you last resided with him at [REDACTED] in Miami.

Despite being given the opportunity to provide further evidence and to explain these inconsistencies, the petitioner failed to resolve this issue. In addition to the discrepancies noted by the director, we note that the affidavits also incorrectly indicate that the petitioner and her spouse had been married "since 1990."

Upon review, we concur with the finding of the director that the identically worded affidavits have little evidentiary value as it is not clear who actually authored the common passages and as such that the authors had any firsthand knowledge of the details attested to. We further concur that the inconsistencies between the affidavits and the petitioner's Form I-360 undermine the reliability of the affidavits. These facts, as well as the lack of documentary evidence such as a lease, rent receipts, utility bills, or other documents which establish that the petitioner and her spouse shared a residence, do not establish that the petitioner resided with her spouse.

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

The petitioner provides no statement to describe the type or abuse purportedly suffered, the frequency of such occurrences, the location, or any details regarding specific incidents. The evidence contained in the record related to a claim of abuse consists of a doctor's letter, letters from her children's teachers, counselor and principal.

In his decision, the director found that the doctor's letter did not indicate that the petitioner's ailments were the result of the petitioner being abused by her spouse. The director noted that although one of the medical records indicated that the petitioner reported marital problems including "verbal abuse," no further details were provided to establish that the petitioner was battered or subjected to extreme cruelty. As it relates to the letters from the teachers, principal, and counselor, the director stated that no specific information was provided regarding the claimed abuse and that the letters were "too general" to support a claim.

Upon review, we concur with the findings of the director. Although the doctor's letter indicates that the petitioner "was treated for her depression," the doctor makes no statement regarding abuse or that the petitioner's depression was the result of the claimed abuse. The majority of the petitioner's medical documents indicate that she was suffering from lower back pain, knee pain, and hemorrhoids. The petitioner provides no evidence and makes no claim that these problems were the result of being battered or treated with extreme cruelty. Although one report does contain the term "verbal abuse," the report does not contain any description of any specific incident or details to establish that the "verbal abuse" reported is tantamount to a claim of extreme cruelty as described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). Accordingly, the record does not establish that the petitioner was battered by or subjected to extreme cruelty by her spouse.

Despite our support of the director's findings, the director's decision cannot stand because of his failure to issue a Notice of Intent to Deny to the petitioner prior 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. 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.