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FILE:

EAC 05 131 50845

Office: VERMONT SERVICE CENTER

Date:

JUN 29 2006

IN RE:

Petitioner:



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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii), as the battered spouse of a United States citizen.

The director denied the petition on November 3, 2005, finding that the petitioner failed to establish that she resided with her spouse, that she was battered by or subjected to extreme cruelty by her spouse, and that she entered into her marriage in good faith.

The petitioner, through counsel, filed a timely appeal on December 5, 2005.

Section 204(a)(1)(A)(iii) of the Act provides, in pertinent part, that an alien who is the spouse of a United States citizen, 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 citizen 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.

The record reflects that petitioner married United States citizen _____ on October 1, 2004, in Harris County, Texas. The petitioner's spouse filed a Form I-130 petition on the petitioner's behalf on November 17, 2004. The Form I-130 was denied on June 23, 2005, after the petitioner failed to respond to the Service's request for evidence.

The petitioner filed the instant Form I-360 self-petition on April 4, 2005, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, her United States citizen spouse during their marriage.

With her initial submission, the petitioner submitted copies of her passport and birth certificate with translation, her marriage certificate, and a "Citizen's Information Card" from the Harris County Sheriff's Office referencing a report for assault.

The director found that the petitioner's initial submission was not sufficient to establish her prima facie eligibility and on April 13, 2005, requested the petitioner to submit further evidence to establish that she is a person of good moral character and that she married her spouse in good faith. The petitioner responded to the director's request on May 26, 2005 by submitting a police clearance, four affidavits, and a letter from the property manager of the petitioner's apartment complex.

On July 20, 2005, the director requested the petitioner to submit, inter alia, evidence that she resided with her spouse, that she was battered by or subjected to extreme cruelty by her spouse, and that she entered into her marriage in good faith. The petitioner responded to the request by submitting her spouse's birth certificate and second copy of her marriage certificate. The petitioner submitted no evidence related to her residence with her spouse, her claim of abuse, or to establish that she entered into the marriage in good faith. The director denied the petition on November 3, 2005 without the issuance of a notice of intent to deny in accordance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii).¹

On appeal, the petitioner, through counsel, apologizes for failing to respond to the request for evidence and claims that the petitioner was "in bad health condition and could not get out of bed." The petitioner submits no evidence to support her excuse or the submission of additional evidence on appeal. It is noted 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, he 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 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 overcome the director's findings. Therefore, the case must be remanded for further review.

The petitioner's claim of residence with her spouse.

On the Form I-360, the petitioner indicates that she resided with her spouse from October 1, 2004 until February 5, 2005. The petitioner indicates that she last resided with her spouse at [REDACTED]. The record does not contain a copy of leases or mortgage statements showing the petitioner and her spouse's residence at this address. The record also does not contain utility bills, tax documents, financial statements or other documentary evidence to establish the petitioner's residence with her spouse. Although the record contains several affidavits from friends of the petitioner, none of the affidavits provide any information regarding the petitioner's residence with her spouse. It is noted that the letter from the petitioner's property manager relates to her current address, not the address she claims to have resided with her spouse.

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.

Accordingly, we concur with the decision of the director that the record is not sufficient to establish that the petitioner resided with her spouse.

The petitioner's claim that she was battered by or subjected to extreme cruelty by her spouse.

In her statement, the petitioner claims that after four months of marriage, her spouse "started to change." The petitioner claims that her spouse would go out at night, get "drunk hitting at the dogs . . . and also making a lot of noise." The petitioner further claims that her spouse told her son that her spouse "found another girlfriend" and told the petitioner to find another place to live. We do not find such claims rise to the level of extreme cruelty as contained in the regulation at 8 C.F.R. § 204.2(c)(1)(vi).

As it relates to a claim of battery, the petitioner indicates that on one evening, while she and her spouse were working together, she and her spouse started to argue and her spouse hit her "many times and some one intervene [sic] and he stop hitting me." The petitioner claims that after work that evening, she reported the incident to the police. The petitioner also submits an affidavit from a witness who claims that she was present at the time of the incident and says that she heard the petitioner's screams and saw the petitioner's spouse hitting the petitioner and scratching her arms. The police report submitted by the petitioner contains no specific details other than the petitioner's allegations. The report states only that the petitioner "stated she was assaulted by her husband." The "Citizen's Information Card" also contains no details.

On remand, the director should request the petitioner to submit further evidence related to this incident. The petitioner should be asked to submit any other police reports or descriptions of the incident, as well as any court documents which demonstrate what actions were taken as a result of the petitioner's report, to include whether the petitioner's spouse was ever arrested, whether he went to court, and any outcome of the court proceeding.

The petitioner's claim that she entered into the marriage in good faith.

The record lacks any documentary evidence which demonstrates that the petitioner intended to establish a life with her spouse. The petitioner has failed to submit any joint financial documents, bank accounts, tax documents, joint ownership or leases, insurance documents or other evidence to establish that she entered into her marriage in good faith.

In her personal statement, the petitioner fails to describe her relationship and courtship with her spouse prior to their marriage, such as where they met or how long they dated, and fails to provide any insight as to her intent at the time of her marriage. Although the record contains several affidavits from the petitioner's friends who state that they were witnesses at the petitioner's marriage, none of the affidavits contain any information regarding whether the petitioner entered into her marriage in good faith. The fact that a legal marriage took place is not evidence that the petitioner intended to share a life with her spouse.

Accordingly, we concur with the decision of the director that the evidence is insufficient to establish that the petitioner entered into the marriage in good faith.

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 and must be 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.