



U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: MAY 17 2006

EAC 04 241 53055

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, and 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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 filed the instant Form I-360 petition on August 20, 2004, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, her U.S. citizen spouse during their marriage. The director requested further evidence of the petitioner's spouse's U.S. citizenship on February 24, 2005. The petitioner failed to respond to the director's request and in a decision dated August 4, 2005, the director denied the petition noting that the petitioner failed to respond to the request for evidence and that the record contained insufficient evidence to establish eligibility.

On August 22, 2005, the petitioner, through counsel, submitted a timely appeal

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 United States 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)(1)(iii) states, “[t]he abusive spouse must be a citizen of the United States . . . when the petition is filed and when it is approved.” Further, the regulation at 8 C.F.R. § 204.2(c)(2) states:

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.

(ii) Relationship. A self-petition filed by a spouse *must* be accompanied by evidence of citizenship of the United States citizen

The regulation at 8 C.F.R. § 103.2(b)(17) states:

Verifying claimed citizenship or permanent resident status. The status of an applicant or petitioner who claims that he or she is a permanent resident of the United States will be verified from official records of the Service. The term official records, as used herein, includes Service files, arrival manifests, arrival records, Service index cards, Immigrant Identification Cards, Certificates of Registry, Declarations of Intention issued after July 1, 1929, Permanent Resident Cards (Forms AR-3, AR-103, I-151 or I-551), passports, and reentry permits. To constitute an official record a Service index card must bear a designated immigrant visa symbol and must have been prepared by an authorized official of the Service in the course of processing immigrant admissions or adjustments to permanent resident status. Other cards, certificates, declarations, permits, and passports must have been issued or endorsed by the Service to show admission for permanent residence. Except as otherwise provided in 8 CFR part 101, and in the absence of countervailing evidence, such official records shall be regarded as establishing lawful admission for permanent residence. If a self-petitioner filing under section 204(a)(1)(A)(iii), 204(a)(1)(A)(iv), 204(a)(1)(B)(ii), or 204(a)(1)(B)(iii) of the Act is unable to present primary or secondary evidence of the abuser's status, the Service will attempt to electronically verify the abuser's citizenship or immigration status from information contained in Service computerized records. Other Service records may also be reviewed at the discretion of the adjudicating officer. *If the Service is unable to*

identify a record as relating to the abuser, or the record does not establish the abuser's immigration or citizenship status, the self-petition will be adjudicated based on the information submitted by the self-petitioner.

[Emphasis added.]

On appeal, counsel claims that because the petitioner is estranged from her spouse, she “does not have the authority to obtain vital records from the state” in which her spouse was born. Counsel further states that the petitioner “does not have the biographical information required to obtain the certificate . . . and [her spouse] is unlikely to provide it to her.” Finally, counsel states that “[d]espite her best efforts she was only able to obtain a faded and unreadable copy of [her spouse’s] birth certificate and only after great effort which required more time than that allowed by the RFE.” Counsel then argues:

[T]he Service is charged with attempting to determine the immigration status of an abuser when that information is not readily available to the self petitioner as in the present case. The Respondent provided all the evidence of U.S. citizenship she had available which was a date of birth and social security number. The Service has a responsibility to use this information to determine [REDACTED] citizenship.

We are not persuaded by counsel’s argument. While it is true that the Service *will attempt* to verify the immigration status of an abuser, the *burden* of establishing the citizenship of the abuser remains with the petitioner, not the Service. In this instance, the director indicated that he was unable to determine the petitioner’s spouse’s immigration status. Specifically, in the request for evidence, the director stated, “This office has been unable to determine the United States citizenship of [REDACTED].” It is noted that Service records are compiled on individuals who emigrate temporarily (nonimmigrants) or permanently (immigrants) to the United States. The petitioner’s spouse, however, did not emigrate to the United States, but rather was born here.

Although the petitioner submitted what is purported to be a copy of her spouse’s birth certificate, the certificate is not legible. Accordingly, the certificate is not considered primary evidence which supports her claim that she is a spouse of a United States citizen. The remaining evidence regarding the petitioner’s spouse’s purported U.S. citizenship consists of the spouse’s social security number, date of birth, and place of birth. While the petitioner is free to submit other kinds of documentation, such documentation may only be submitted *in addition to*, rather than *in place of*, the types of documentation required by the regulation. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. The regulation at 8 C.F.R. § 103.2(b)(2) provides:

Submitting secondary evidence and affidavits. (i) General. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required

document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

Although counsel states that it is “unlikely” that the petitioner’s spouse will provide his birth certificate to the petitioner, such a claim does not demonstrate that the required evidence is unavailable or cannot be obtained. We note that there is no corroborating statement from the petitioner or other evidence to indicate that she even attempted to obtain such evidence from her spouse. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

In this instance, the petitioner has failed to submit primary evidence of her spouse’s U.S. citizenship. The petitioner has also failed to demonstrate that the certificate does not exist or cannot be obtained and to submit secondary evidence, such as church or school records. Finally, in the alternative, the petitioner has failed to demonstrate the unavailability of both the required document and relevant secondary evidence, and to submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Accordingly, we concur with the determination of the director that the record lacked sufficient evidence to establish eligibility. Despite our support of the director’s findings, however, the director’s decision cannot stand because of the director’s failure to issue a Notice of Intent to Deny (NOID) 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.

In addition to the issue discussed above, on remand, the director should also request additional evidence of the petitioner’s good faith marriage, including requesting information regarding the paternity of the petitioner’s daughter, [REDACTED]. Further, the director should request the petitioner to indicate whether she is still married, and, if not, to request a copy of the petitioner’s divorce decree.

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.