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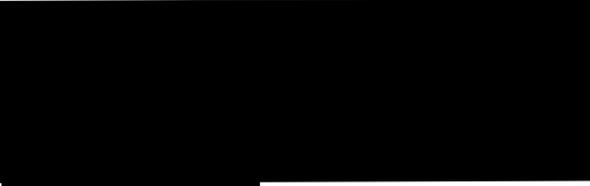


U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date:

JAN 22 2009

EAC 07 078 50813

IN RE:

Petitioner:



PETITION: Petition for Special 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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action.

The petitioner seeks immigrant classification under section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien battered or subjected to extreme cruelty by a United States citizen.

The director denied the petition because the petitioner did not establish that she had resided with her husband, that her husband had subjected her to battery or extreme cruelty during their marriage, and that she married him in good faith.

On appeal, the petitioner's new counsel asserts that the assistance from the petitioner's previous attorney was grossly ineffective. Counsel also asserts that the director denied the petition in error and that the inconsistencies found by the director are "simply a matter of trivial semantics."

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

On appeal, counsel does not provide any documentary evidence listed above to satisfy his ineffective assistance of counsel claim. Accordingly, counsel's assertions in this regard have no merit.

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).

Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J) 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].

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

(v) *Residence*. . . . The self-petitioner is not required to be living with the abuser when the petition is filed, but he or she must have resided with the abuser . . . in the past.

(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.

* * *

(ix) *Good faith marriage*. A spousal self-petition cannot be approved if the self-petitioner entered into the marriage to the abuser for the primary purpose of circumventing the immigration laws. A self-petition will not be denied, however, solely because the spouses are not living together and the marriage is no longer viable.

The evidentiary guidelines for a self-petition filed under section 204(a)(1)(A)(iii) 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.

* * *

(iii) *Residence*. One or more documents may be submitted showing that the self-petitioner and the abuser have resided together Employment records, utility receipts, school records, hospital or medical records, birth certificates of children . . . , deeds, mortgages, rental records, insurance policies, affidavits or any other type of relevant credible evidence of residency may be submitted.

(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.

* * *

(vii) *Good faith marriage*. Evidence of good faith at the time of marriage may include, but is not limited to, proof that one spouse has been listed as the other's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. Other types of readily available evidence might include the birth certificates of children born to the abuser and the spouse; police, medical, or court documents providing information about the relationship; and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered.

The record in this case provides the following pertinent facts and procedural history. The petitioner is a native and citizen of Guatemala who was admitted into the United States as a B-2 nonimmigrant visitor for pleasure on June 30, 2001. On February 22, 2006, the petitioner married [REDACTED], a U.S. citizen, in Rockville, Maryland.

The petitioner filed the instant Form I-360 on January 23, 2007. On August 6, 2007, the director issued a Request for Evidence (RFE) of, *inter alia*, the status of the marriage, and the requisite joint residency, battery or extreme cruelty, and good-faith entry into the marriage. On November 1, 2007, the petitioner through previous counsel timely responded to the RFE with additional evidence. The director denied the petition on December 11, 2007, finding that the petitioner did not establish that the petitioner had resided with her husband, that her husband had subjected her to battery or extreme cruelty during their marriage, and that she had married him in good faith. It is noted that the petitioner's Form I-485, Application to Register Permanent Residence or Adjust Status, was concurrently filed and denied with the instant petition. The petitioner, through previous counsel, timely appealed the denial of the instant I-360 petition.

On appeal, the petitioner's new counsel asserts that the director denied the petition in error and that the inconsistencies found by the director are "simply a matter of trivial semantics." As an example, counsel asserts that, contrary to the director's finding, the petitioner's husband's refusal to inform his mother of the existence of his marriage with the petitioner is not inconsistent with the statement that the petitioner and her husband resided together.

Joint Residence

The record contains the following evidence relevant to the petitioner's claim that she resided with her husband:

- An undated statement from the petitioner, stating that, during their courtship, her husband kept their relationship secret from his mother with whom he lived, that after marrying, “[h]e insisted on not letting me move in with him at his mother’s house with his family” and that her husband “did not want to move in with [the petitioner] because he needed to save money, plus he did not want to tell his family about our marriage” and that “we had our marriage relationship by spending our time together at either my place, or at various hotels/motels that he would rent”;
- A provisional driver’s license issued to the petitioner on June 16, 2006 by the State of Maryland, reflecting the petitioner’s address as: [REDACTED], Greenbelt, Maryland 20770;
- A statement from SunTrust Bank, dated July 13, 2006, addressed to [REDACTED] or [REDACTED] at the address: [REDACTED], Maryland 20904-1753;
- A Personal Account Signature Card from SunTrust with the account title as [REDACTED] Or [REDACTED] signed by [REDACTED] on March 10, 2006;
- An invoice dated February 13, 2007, issued by the Greater Capital Area Association of Realtors in Silver Spring, Maryland, addressed to the petitioner at the following address: [REDACTED] Maryland 20904;
- A copy of the Complaint for Limited Divorce and Other Relief, filed in the Circuit Court for Montgomery County, Maryland on July 31, 2007, reflecting the petitioner’s husband, [REDACTED] at the following address: [REDACTED] Maryland 20904 as the plaintiff, and the petitioner at the following address: [REDACTED] Maryland 20903, as the defendant, and that “since the date of separation, July 13, 2006, the parties have lived separate and apart, uninterrupted, without any cohabitation, in separate abodes”;
- A corresponding copy of the Answer to Complaint for Limited Divorce, received on September 22, 2006, by the Clerk of the Circuit Court, Montgomery County, Maryland, reflecting that the petitioner had “moved to a new residence that functions as a temporary safe haven” and that “[s]he is reluctant to publicly publish this address”;
- A corresponding copy of the Civil – Domestic Case Information Report filed by the petitioner on September 22, 2006, listing the petitioner’s address as: [REDACTED]

Silver Spring, Maryland 20903;

- A corresponding copy of the Judgment of Limited Divorce, entered on February 15, 2007, and a copy of an Amended Judgment of Limited Divorce, entered on March 7, 2007, whereby the petitioner's husband, [REDACTED], was granted a limited divorce from the petitioner;
- A copy of the petitioner's 2006 federal individual income tax return, reflecting her address as: [REDACTED], Silver Spring, Maryland 20903;
- An affidavit from the petitioner, dated October 29, 2007, certifying that, prior to her marriage, she maintained her own apartment and frequently stayed with [REDACTED] at the home he shared with his mother, and after she gave up her apartment, she and her husband "were left with spending some nights at hotels and other places" because her husband didn't want to tell his mother he was married;
- Affidavits from the petitioner's friend, [REDACTED] dated October 14, 2006 and October 2007, respectively, stating that the petitioner "has lived with us for some time" and that she visited the petitioner and her husband "in the home the[y] shared with [REDACTED] mother twice immediately after they were married, likely in late February and early March, 2006" and that the petitioner "came to live with my family in their home, as a haven for protection . . . the middle of July, 2006, where she has remained";
- Affidavits from [REDACTED]s father, [REDACTED] dated October 10, 2006 and October 29, 2007, respectively, of Beltsville, Maryland, stating that the petitioner moved into his home when she separated from her husband in July 2006;
- Affidavits from [REDACTED] brother, [REDACTED] dated October 13, 2006 and October 29, 2007, respectively, stating that the petitioner "has been living with us for some time" and that she moved in with his family around July 15 or 16, 2006; and
- Affidavits from [REDACTED]s brother, [REDACTED] dated October 10, 2006 and October 29, 2007, respectively, stating that the petitioner "has been renting a room 'for' my dad for some time" and that she has rented a room from his father since around July 15, 2006.

In her undated statement, the petitioner specifically stated that her husband lived with his mother, that, upon marrying, he insisted on not letting the petitioner move in with him at his mother's house, as he wanted to keep the marriage secret, that her husband did not want to move in with her because he needed to save money, and that she and her husband spent their marital relationship by spending time together at either her place or at various hotels and motels. In addition, the address on the petitioner's provisional driver's license that was issued on June 16, 2006 by the State of Maryland,

reflects the petitioner's address as: [REDACTED], Greenbelt, Maryland 20770, which is not the address of her husband and his mother. While the petitioner is not required to have lived with her husband for any specific amount of time, the petitioner has not established that she ever shared a residence with her husband. Counsel's assertion on appeal that the inconsistencies found by the director pertaining to the issue of joint residence are "simply a matter of trivial semantics" is equivocal and does not explain the discrepancies in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591 (BIA 1988).

In sum, the relevant evidence contains unresolved discrepancies regarding the petitioner's alleged residence with her husband. Consequently, the petitioner has not established by a preponderance of the evidence that she resided with her husband, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

Counsel for the petitioner does not address the director's additional findings that the petitioner did not establish that her husband had subjected her to battery or extreme cruelty during their marriage and that she married him in good faith. For these additional reasons, the petition may not be approved.

The present record fails to demonstrate the petitioner's eligibility for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act. Nonetheless, the case will be remanded because the director denied the petition without first issuing a NOID. The regulation at 8 C.F.R. § 204.2(c)(3)(ii) directs that U.S. Citizenship and Immigration Services (USCIS) must provide a self-petitioner with a NOID and an opportunity to present additional information and arguments before a final adverse decision is made. Accordingly, the case will be remanded for issuance of a NOID, which will give the petitioner a final opportunity to overcome the deficiencies of her case.

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 that, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.