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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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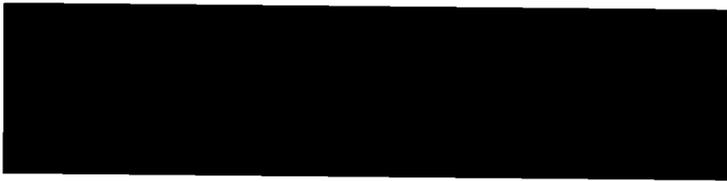
Office: VERMONT SERVICE CENTER

Date: MAY 17 2010

IN RE: Petitioner: [REDACTED]

PETITION: Petition for 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
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 AAO will withdraw the director's decision; however, because the petition is not approvable, it will be remanded for further action and consideration.

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.

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).

The Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, was filed November 15, 2006. The director issued a request for further evidence (RFE) on November 30, 2006, as the record did not provide any evidence establishing the petitioner's eligibility for this benefit. The director denied the petition on August 6, 2009 because the petitioner had failed to establish: that she is eligible for immigrant classification under section 201(b)(2)(A)(i) of the Act based on a qualifying relationship with a United States citizen or lawful permanent resident of the United States; that she had resided with the claimed abusive spouse; that she had been subjected to battery or extreme cruelty perpetrated by the United States citizen spouse or lawful permanent resident; that she is a person of good moral character; and that she had married the claimed abusive spouse in good faith. The AAO concurs with the director's determination that the petitioner has not established that she had resided with the claimed abusive spouse; that she had been subjected to battery or extreme cruelty perpetrated by the United States citizen spouse or lawful permanent resident; that she is a person of good moral character; and that she had married the claimed abusive spouse in good faith. Upon review of the record on appeal, the petitioner submitted the claimed abusive spouse's birth certificate establishing that he is a United States citizen and a marriage certificate showing the petitioner and the claimed abusive spouse married on July 22, 2002 in New York. Accordingly, the AAO withdraws the director's decision on the issue of the petitioner's qualifying relationship with a United States citizen.

Although the AAO concurs with the director's decision on the remaining issues in the decision, the matter must be remanded because the director denied the petition without first issuing a Notice of Intent to Deny (NOID) the petition pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii) in effect when the petition was filed.

In addition to the submission of the petitioner's spouse's birth certificate and her marriage certificate, the petitioner avers on appeal that her attorney never did what he was supposed to do and that she has all the papers requested and will provide them without the assistance of her attorney. The AAO

notes that if the petitioner is claiming that she had ineffective assistance of counsel, the petitioner must provide the following: (1) the claim supported by an affidavit of the allegedly aggrieved petitioner 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 petitioner 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). The AAO finds that the petitioner has not presented evidence on any of these elements and thus has not established that she experienced ineffective assistance of counsel.

Although the petitioner has failed to provide evidence that she was ineffectively assisted by counsel and has failed to provide any probative evidence establishing that she had resided with the claimed abusive spouse; that she had been subjected to battery or extreme cruelty perpetrated by the United States citizen spouse; that she is a person of good moral character; and that she had married the claimed abusive spouse in good faith, this matter must be remanded to the director for issuance of a NOID in compliance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii) in effect when the petition was filed. On remand, the director should address all grounds for the intended denial of the petition as cited in the foregoing discussion.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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