

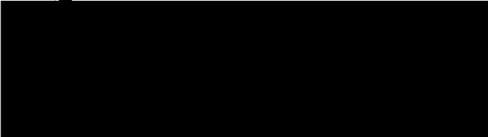


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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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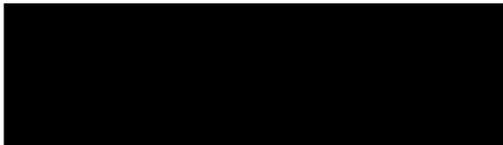


FILE: 
EAC 00 066 51298

Office: Vermont Service Center

Date: **AUG 21 2001**

IN RE: Petitioner:
Beneficiary:



APPLICATION: 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)

IN BEHALF OF PETITIONER:



Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained.

The petitioner is a native and citizen of Poland who is seeking classification as a special immigrant pursuant to section 204(a)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1154(a)(1)(A)(iii), as the battered spouse of a United States citizen.

The director determined that the petitioner failed to establish that she: (1) is a person whose deportation (removal) would result in extreme hardship to herself, or to her child; and (2) entered into the marriage to the citizen or lawful permanent resident in good faith. The director, therefore, denied the petition.

On appeal, counsel asserts that the petitioner has presented compelling evidence to show that she entered into the marriage in good faith and she would suffer extreme hardship if removed to Poland. Counsel submits additional evidence.

8 C.F.R. 204.2(c)(1), in effect at the time the self-petition was filed, states, in pertinent part, that:

(i) 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 in the United States 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;

(G) Is a person whose deportation (removal) would result in extreme hardship to himself, herself, or his or her child; and

(H) Entered into the marriage to the citizen or lawful permanent resident in good faith.

The petition, Form I-360, shows that the petitioner arrived in the United States in June 1987. On June 23, 1994, the applicant adjusted her status to that of a CR-6 based on a previous marriage to a United States citizen. On [REDACTED], the petitioner married her present United States citizen spouse. On December 20, 1999, a self-petition was filed by the petitioner 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.

8 C.F.R. 204.2(c)(1)(i)(G) requires the petitioner to establish that her removal would result in extreme hardship to herself or to her child.

On October 28, 2000, the President approved enactment of the Violence Against Women Act, 2000, Pub. L. No. 106-386, Division B, 114 Stat. 1464, 1491 (2000). Section 1503(b) amends section 204(a)(1)(A)(iii) of the Act so that an alien self-petitioner claiming to qualify for immigration as the battered spouse or child of a citizen or resident alien is no longer required to show that the self-petitioner's removal would impose extreme hardship on the self-petitioner or the self-petitioner's child. Id. section 1503(c), 114 Stat. at 1520-21. Pub. L. 106-386 does not specify an effective date for the amendments made by section 1503. This lack of an effective date strongly suggests that the amendments entered into force on the date of enactment. Johnson v. United States, 529 U.S. 694, 702 (2000); Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991).

As a general rule, an administrative agency must decide a case according to the law as it exists on the date of the decision. Bradley v. Richmond School Board, 416 U.S. 696, 710-11 (1974); United States v. The Schooner Peggy, 1 Cranch 103, 110 (1801); Matter of Soriano, 21 I & N Dec. 516 (BIA 1996, AG 1997); Matter of Alarcon, 20 I & N Dec. 557 (BIA 1992). For immigrant visa petitions, however, the Board has held that, to establish a priority date, the beneficiary must have been fully qualified for the visa classification on the date of filing. Matter of Atembe, 19 I & N Dec. 427 (BIA 1986); Matter of Drigo, 18 I & N Dec. 223 (BIA 1982); Matter of Bardouille, 18 I & N Dec. 114 (BIA 1981). Even if the law changes in a way that may benefit the beneficiary, the appeal must be denied, without prejudice to the filing of a new

petition, to ensure that the beneficiary does not gain an advantage over the beneficiaries of other petitions. Id.

Atembe, Drigo, and Bardouille each involved petitions under the family-based preference categories in section 203(a) of the Act. In this case, however, the beneficiary seeks classification as the spouse of a citizen. INA section 204(a)(1)(A)(iii), 8 U.S.C. section 1154(a)(1)(A)(iii), as amended by Pub. L. No. 106-386, section 1503, supra. As immediate relatives, the spouses and children of citizens are not subject to the numerical limits on immigration, and do not need priority dates. INA section 201(b)(2)(A)(i), 8 U.S.C. section 1151(b)(2)(A)(i). The purpose of the Atembe, Drigo and Bardouille decisions would not be served by affirming the director's decision on this particular basis of the director's denial. For this reason, the director's objections have been overcome on this one issue (8 C.F.R. 204.2(c)(1)(i)(G)).

8 C.F.R. 204.2(c)(1)(i)(H) requires the petitioner to establish that she entered into the marriage to the citizen in good faith.

The director reviewed and discussed the evidence furnished by the petitioner, including evidence furnished in response to his requests for additional evidence. The discussion will not be repeated here. The director, however, denied the petition after determining that the record did not sufficiently establish that the petitioner's marriage was entered into in good faith.

On appeal, counsel asserts that the Service failed to apply the "any credible evidence" standard to the insurance policy; the joint bank account; joint utility bills; beautiful photos of the lavish wedding in Hawaii and description of the expensive gifts, such as mink coat and engagement ring; and several affidavits of persons with personal knowledge of the relationship which were not even discussed in the denial although the regulations clearly establish such affidavits to be evidence in determining validity of marriage. Counsel submits a copy of the petitioner and her spouse's travel itinerary from Chicago to Hawaii on April 5, 1999, and return to Chicago on April 17, 1999; a receipt for a black mink coat; more photographs of the petitioner and her spouse; and affidavits from [REDACTED] and [REDACTED] attesting to their personal knowledge of the relationship.

In a self-affidavit, the petitioner, on appeal, states that she married her husband out of love and affection and not for any immigration purposes; they had a short but very romantic courtship, he bought her expensive gifts and planned a lavish honeymoon in Hawaii; they spent a lot of money on their wedding and honeymoon trip; they went to Hawaii because they had a romantic relationship and they wanted their wedding day to be special; he bought her an engagement ring before the wedding; he paid for her wedding gown and his wedding tuxedo; they made all these purchases because they

wanted their wedding to be special, elegant, and with style and did not want to cut any corners; they did not want to settle for a regular civil ceremony in Chicago or for a borrowed wedding gown and tuxedo; it was not a hasty wedding in order to get a green card; it was a romantic, carefully planned, joyous occasion marking the beginning of their lives together.

The petitioner further states that she and her spouse had a joint bank account and a joint phone account; her spouse added her to his medical insurance policy as soon as he could, and that the policy was paid through completely at least until they separated; and the letter she furnished is the only proof she has of the joint policy, and that all receipts and policy information are still at her husband's house.

The petitioner states that unfortunately, both of her marriages ended in difficult circumstances. Her first marriage ended because of her first husband's addiction and her second because of her second husband's abuse. She adds that she was terribly unlucky in love and she has suffered extreme anguish and sorrow, but that should not be a reason for the denial of the petition. The petitioner states that despite the director's conclusion, she had not been physically abused by her first husband, but rather, he was an addict and abused his body, and that was why living with him was difficult.

Pursuant to 8 C.F.R. 204.2(c)(2)(i), the determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service. It is, therefore, concluded that the evidence furnished by the petitioner, including her explanation or response to the director's findings, appear credible. Accordingly, the petitioner has established that she entered into the marriage to the citizen in good faith and has, therefore, overcome this finding of the director pursuant to 8 C.F.R. 204.2(c)(1)(i)(H).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained, and the petition is approved.