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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

FILE: [redacted] EAC 99 148 52586

Office: Vermont Service Center

Date: FEB 28 2003

IN RE: Petitioner: [redacted]
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:

[redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision 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.

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 that 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Perry Rhew
for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. An appeal was dismissed by the Associate Commissioner for Examinations. A subsequent motion to reopen was dismissed by the Associate Commissioner. The matter is before the Administrative Appeals Office on another motion to reopen. The motion will be granted, and the previous decision of the Associate Commissioner will be affirmed.

The petitioner is a native and citizen of the Dominican Republic 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 denied the petition after determining that the petitioner failed to establish that she: (1) 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, pursuant to 8 C.F.R. § 204.2(c)(1)(i)(E); and (2) is a person whose deportation (removal) would result in extreme hardship to herself, or to her child, pursuant to 8 C.F.R. § 204.2(c)(1)(i)(G).

Upon review of the record of proceeding, the Associate Commissioner concurred with the director's conclusions and dismissed the appeal on March 22, 2000.

On August 13, 2001, counsel submits a motion to reopen the Associate Commissioner's decision. The Associate Commissioner dismissed the motion on August 12, 2002, after determining that the evidence submitted on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). He noted that the evidence submitted was previously available and could have been discovered or presented in the previous proceeding, and that the evidence, without supporting documentary evidence, was insufficient to establish that the petitioner had been battered by or was the subject of "extreme cruelty" as contemplated by Congress. The Associate Commissioner further noted that the motion to reopen was filed approximately 17 months after his decision on March 22, 2000, and the petitioner had not demonstrated that the delay was reasonable and beyond her control.

In his second motion to reopen, filed on September 5, 2002, counsel asserts that the petitioner's husband continued to harass the petitioner and made repeated telephone calls threatening the petitioner's safety. He submits additional evidence.

 [redacted]

PART I

At the time of the director's decision, 8 C.F.R. § 204.2(c)(1)(i)(G) required 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 U.S. citizen 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(b), 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.

[redacted] 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 U.S. citizen. INA section 204(a)(1)(A)(iii), 8 U.S.C. § 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. § 1151(b)(2)(A)(i). The purpose of the [redacted] and [redacted] 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, pursuant to 8 C.F.R. § 204.2(c)(1)(i)(G).

PART II

8 C.F.R. § 204.2(c)(1)(i)(E) requires the petitioner to establish that she 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.

In its decision dated March 22, 2000, the AAO noted that the director, in his decision, indicated that the hospital emergency report shows the petitioner claimed that while coming down the steps, she missed two steps and twisted her right foot, and that there was no indication that this injury was other than what the petitioner stated, nor was there mention of spousal abuse, suspected spousal abuse, or history of spousal abuse. The AAO further noted that while the petitioner, on appeal, claimed that she was pushed down the stairs by her husband, the medical report from the Palisades General Hospital did not contain evidence that the petitioner was in fact pushed down the stairs by her husband. Nor was her claim that she testified under a lie detector supported by any documentary evidence. Further, although the petitioner claims in a self-affidavit that she and her husband argued almost everyday and that he also hits her, no detailed information of the incidents of the abuse and the extent of the abuse inflicted on the petitioner was provided.

Counsel, in his second motion to reopen, now submits a copy of a restraining order, issued by the New Jersey Superior Court on September 3, 2002. The record reflects that the petitioner, on August 22, 2002, filed a petition for a restraining order with the court, claiming that on August 21, 2002, the petitioner's spouse [redacted] went to the petitioner's home and "banged on the door numerous times, harassed, yelled and threatened to do worst things now to her than before. Also for the past 3 months the deft has called the pltf home 2 or 3 times each." The petition for restraining order further shows that the petitioner claimed that in March 1996, "day saying hello then hang up the phone // 3/96 the deft grabbed and shook the pltf by the hair, threw her against the wall, threw the pltf down the stairs."

This information was previously found by the director and the Associate Commissioner to be adverse information and inconsistent with the hospital emergency report that the petitioner, while

coming down the steps, missed two steps and twisted her right foot, and that there was no mention of spousal abuse, suspected spousal abuse, or history of spousal abuse. In fact, the petitioner, in a sworn statement dated June 21, 1999, stated that her spouse "used to disappear for a [sic] least 2 nights in a row and then come back home like nothing have happened until on the first week of May 1996 when he left the house and never came back." No other information was furnished to establish that [redacted] had in fact returned, after over six years, to harass and threaten the petitioner.

As provided in 8 C.F.R. § 204.2(c)(2)(iv), 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. The petition for restraining order, in this case, is inconsistent with evidence contained in the record of proceeding. Further, no corroborating evidence was furnished with the court document to establish that the petitioner was in fact harassed and threatened by [redacted] as claimed. 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.

The petitioner, on motion, has failed to overcome the director's finding pursuant to 8 C.F.R. § 204.2(c)(1)(i)(E). Accordingly, the decision of the Associate Commissioner dated March 22, 2000, will be affirmed.

ORDER: The decision of the Associate Commissioner dated March 22, 2000, is affirmed.