U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

C. Paige Gardner, Esquire
One Broadway , Suite A-235
Denver, CO 80203-3987

Office of the District Counsel/DEN
4730 Paris St., Albrook Center
Denver, CO 80239

Name: HUCKFELDT, NVART *

A75-900-716

Date of this notice: 01/20/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

F.F.K.

Frank Krider
Chief Clerk

Enclosure

Panel Members:
FILPPU, LAURI S.

brne

File: A75 900 716 - Denver

Date: JAN 2 0 2006

In re: NVART IDINYAN a.k.a. Nvart Huckfeldt

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: C. Paige Gardner, Esquire

ON BEHALF OF DHS: Scott Johns
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] -
Inadmissible at time of entry or adjustment of status under section 212(a)(7)(A)(i)(I) of the Act[8 U.S.C. § 1182(a)(7)(A)(i)(I)] -
Immigrant - no valid immigrant visa or entry document

Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] -
Inadmissible at time of entry or adjustment of status under section 212(a)(6)(A)(i) of the Act [8 U.S.C. § 1182(a)(6)(C)(i)] -
Fraud or willful misrepresentation of a material fact

Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Cancellation of removal under section 240A(b)(2) of the Act

The Department of Homeland Security (the "DHS," formerly, the Immigration and Naturalization Service) appeals from a November 17, 2004, decision by an Immigration Judge granting the respondent's application for cancellation of removal under section 240A(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(2), which applies to aliens battered or subjected to extreme cruelty by a United States citizen spouse. The DHS raises a number of arguments in its appeal, namely (1) that the respondent, who divorced her alleged abuser 5 years before applying for cancellation of removal, is ineligible for relief under section 240A(b)(2); (2) that the respondent was not a credible witness; (3) that the respondent failed to show that she was subjected to battering or extreme cruelty as required by the statute; (4) that the respondent failed to

show the requisite level of hardship to herself or to her United States citizen son on account of her removal; and (5) that the Immigration Judge erred in accepting and adjudicating the respondent's application for relief under section 240A(b)(2) where the DHS had no more than 1 day to prepare to defend the case. On this last point, the DHS requests a remand of this matter. The appeal is dismissed.

The Immigration Judge found the following facts in the course of his order granting the respondent's application for relief. The respondent was, at the time of the hearing below, a 30-year-old female native and citizen of Armenia who entered the United States in June 1996 as a nonimmigrant visitor authorized to remain until September 1996 (I.J. at 1-2). At that time, she was recently married to a United States citizen, Vaughn Huckveldt, and she gave birth to a baby boy shortly after entry (I.J. at 2-4). Although the DHS argued some 4 years ago that the respondent entered into this marriage to perpetrate immigration fraud, the Immigration Judge rejected that argument in 2001 (Tr. at 178-80, 182) and again below at the hearing on November 17, 2004 (I.J. at 2). The Immigration Judge stated that "the marriage between the respondent and her first husband [Huckveldt] was not an immigration marriage. The parties had a child together. . . .The information . . .indicates quite clearly that these two people had a very intense relationship and were very seriously involved with one another" (I.J. at 2). Based upon the evidence of record, this factual finding is not clearly erroneous. *See United States v. National Assn. of Real Estate Boards*, 339 U.S. 485, 495 (1950) (a factual finding is not "clearly erroneous" merely because there are two permissible views of the evidence). The Immigration Judge therefore correctly refused to uphold the inadmissibility charges under section 237(a)(1)(A) of the Act, insofar as the DHS charged that the respondent's entry as a visitor and spouse of a United States citizen was related to a fraudulent marriage. Furthermore, we also find that the Immigration Judge's broader determination that the respondent credibly testified as to the physical and mental abuse she sustained during the marriage to Mr. Huckveldt to be not clearly erroneous. *United States v. National Assn. of Real Estate Boards*, *supra.* In challenging the Immigration Judge's findings in this regard, the DHS argues primarily that the findings conflict with the testimony of Mr. Huckveldt. *See* DHS's Brief at 46-47. However, it is clear from the record that the Immigration Judge found the respondent's testimony more credible than that of Mr. Huckveldt (I.J. at 3-6). Without demonstrating that this conclusion is in clear error, the DHS cannot show that the Immigration Judge erred in concluding that the parties had a bona fide (albeit ultimately unsuccessful) marriage and that the respondent's United States citizen husband, Mr. Huckveldt, subjected her to physical and psychological harm. We therefore dismiss the DHS's arguments that the charges under section 237(a)(1)(A) of the Act, 8 U.S.C. § 1227(a)(1)(A), should have been sustained and that the respondent's testimony regarding her abuse at the hands of Mr. Huckveldt lacked credibility.

Moreover, we also agree with the Immigration Judge's conclusion that the treatment of the respondent by Mr. Huckveldt constitutes "battering" or extreme cruelty" under the Act. Although "battering" and "extreme cruelty" are not defined for purposes of section 240A(b)(2) special rule cancellation, there is some regulatory authority defining appropriate standards. Specifically,

8 C.F.R. § 204.2(e)(1)(vi) defines battering for purposes of adjudicating visa petitions filed by an alien (i.e., a "self-petition") who is battered by a United States citizen parent or spouse. Section 204.2(e)(1)(vi) states that "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...which results or threatens to result in physical or mental injury [and] psychological or sexual abuse." Given that section 204 of the Act (governing self-petitions for victims of battering) and section 240A(b)(2) contain virtually identical statutory language and were enacted pursuant to the same Act of Congress, i.e., the Violence Against Women Act of 1994, we find that the above regulatory definition of "battering" is instructive for purposes of this case, as we believe it is unlikely that Congress would intend different definitions of "battering" or "extreme cruelty" to apply to these related sections of the Act. *See Matter of Puente-Salazar*, 22 I&N Dec 1006 (BIA 1999) (overruled on other grounds by *Matter of Ramos*, 23 I&N Dec. 336 (BIA 2002)) *citing United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). The court's findings that Mr. Huckveldt used the couple's child "as a wedge and a tool" and its acceptance of the conclusions of the treating psychologist (based upon the statements of the respondent that alleged sexual abuse and mental cruelty) are enough to support his finding that Mr. Huckveldt inflicted "extreme cruelty" on the respondent, i.e., treatment that caused mental injury by virtue of the finding that the respondent suffered a "nervous breakdown." *See* I.J. at 4-5. Given the Immigration Judge's factual finding in this regard, which is not clearly erroneous, we find no error in his related finding that the respondent qualifies as one who has been battered or subjected to extreme cruelty for purposes of section 240A(b)(2) of the Act. *See Perales-Crumpean v. Gonzalez*, 429 F.3d 977, 982 (10th Cir. 2005) (agency determination on extreme cruelty is a matter of discretion).

Similarly, we also find no error in the determination that the respondent's removal would result in extreme hardship to her and her United States citizen son. Both the respondent and her son have at this point lived in the United States for almost 10 years. At the time of the hearing below, both the respondent and her son had found a stable home through her marriage to a second United States citizen, Max Noland.[1] *See* I.J. at 3, 5-6. In assessing extreme hardship, we are guided by the elements set forth in 8 C.F.R. § 1240.58 with regard to self-petitions under section 204 of the Act, 8 U.S.C. § 1154. Among the factors to be considered are the respondent's length of residence in this country, the existence of family members who are legal residents or citizens of the United States, the ability of the respondent to obtain employment in her native country, the ability of her son to speak the native language in Armenia, the psychological impact of removal, and, for cases involving battering or extreme cruelty, *inter alia*, the nature and extent of past abuse and psychological harm and the social, medical, mental health, and other needs of the alien and her children. 8 C.F.R. § 1240.58. Given all of these factors, we affirm the Immigration Judge's determination that the

[1] Although the DHS informs us in its brief that Mr. Noland died in March 2005, after the end of proceedings below, we still consider the impact of the respondent's home with him in our assessment of whether the Immigration Judge properly found that the requisite showing of extreme hardship had been made. *See* DHS Brief at 42.

respondent's removal would result in extreme hardship to her and to her United States citizen son, based upon the total disruption to her son's home and way of life that could be expected to result from the respondent's removal (I.J. at 3-6).

We also reject the DHS's argument that it was given inadequate time to prepare a defense to the respondent's cancellation of removal application. First, it is simply untrue to imply that the Immigration Judge improperly accepted the cancellation application after only setting a filing date for the asylum application. As the record clearly shows, at the master calendar appearance before the merits hearing, the parties all contemplated that the cancellation application would also be filed if, after review, counsel for the respondent determined that the respondent was eligible to pursue this relief. *See* Tr. at 208-209. Furthermore, the DHS was on notice that the respondent intended to pursue relief under section 240A(b)(2) of the Act as early as August 2000, less than a year after her divorce from Mr. Huckveldt. Tr. at 9. Thereafter, in March 2002, the Immigration Judge advised the parties that "[t]he respondent also. . .appears eligible for the three-year cancellation." Tr. at 188. Second, even we accepted the DHS's factual premise, there was no objection made to the respondent's pursuit of this relief on the grounds of inadequate notice or preparation time. Having failed to object below to the cancellation of removal application on these grounds, the DHS cannot raise this argument now. *See Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003) (arguments not raised below are considered waived).

Finally, we turn now to the DHS's argument that the respondent is not within the class of aliens eligible to apply for cancellation of removal under section 240A(b)(2) of the Act given her divorce from her husband before this claim was filed. The DHS's primary argument is that the cancellation of removal statute is written in terms of a "spouse's" ability to apply for relief, and that, therefore, the statute excludes *former* spouses. Furthermore, the DHS argues that the fact that Congress amended section 204 (regarding self-petitions) to allow aliens whose marriages to abusive spouses are terminated to pursue adjustment of status indicates that Congress considered, but rejected, amending the cancellation statute to similarly include former spouses in the class of eligible recipients for relief. *See* DHS's Brief at 29-34. The DHS further argues that both the cancellation and adjustment provisions were intended to allow the immigrant women to "escape" or "flee" abusive relationships, and that the respondent, as someone who had been divorced from her United States citizen spouse, did not need the Act's protection to "flee" her relationship. *Id.* at 30-31 (noting that cancellation application was filed in November 2004, whereas divorce from Mr. Huckveldt was obtained in December 1999).

We are unpersuaded by the DHS's arguments. As to issues involving statutory construction, we start with the plain meaning of the statute. *INS v. Cardozo-Fonseca*, 480 U.S. 421, 431 (1987). We note initially that the DHS is correct in pointing out that the self-petition provisions of the Act have been amended to specifically provide for relief where the alien has divorced an abusive spouse. *See* sections 204(a)(1)(A)(iii)(II)(CC) of the Act. In contrast, the cancellation of removal statute does not expressly address the issue of divorced spouses, providing instead that cancellation may

be afforded an alien who "*has been* battered or subjected to extreme cruelty *by a spouse*. . .who is or was a United States citizen. . . ." *See* section 240A(b)(2) of the Act (emphasis added). The cancellation statute therefore does not expressly address former spouses; instead, it contemplates relief for victims of past abuse that occurred within the context of an alien's marriage to a United States citizen. The statue is silent on the issue of whether the alien had to remain married to the abuser in order to qualify for relief. But the literal language does not suggest that the marriage must exist when relief is sought or granted. Indeed, the respondent satisfies the literal requirements because she " has been" subjected to abuse "by a spouse who is or was a United States citizen."

While the cancellation of removal provisions do speak in terms of a spouse and not a former spouse, the preceding language (i.e., "*has been* battered or subjected to extreme cruelty"), implies that aliens who are the victims of past abuse that occurred during the time they were married to a United States citizen are eligible for relief. The literal language also would allow relief if the spouse "was" a citizen, which could be the case by virtue of either denaturalization or death. In the latter event, death of the abusive spouse, the marriage would obviously no longer exist. In the adjustment of status provisions, the termination of the marriage between a United States citizen abusive spouse and an alien does not end eligibility for relief, so long as the marriage was terminated pursuant to the abuse and the self-petition is filed within 2 years of the termination of the marriage. *See* sections 204(a)(1)(A)(iii)(I) and (II) of the Act. While both forms of relief were intended to address the same problem, i.e., abuse of undocumented aliens by United States citizens, *see* H. Rep. 106-939, October 5, 2000, the DHS's proposed interpretation has the potential to produce absurd results in certain cases, such as this one. As other courts have found, "the notion that Congress would require women to remain with their batterers in order to be eligible for. . .relief. . .is flatly contrary to Congress's articulated purpose in enacting" the cancellation of removal provisions at issue here. *See Hernandez v. Ashcroft*, 345 F.3d 824, 841 (9th Cir. 2003) (discussing predecessor relief of suspension of deportation for battered spouses under former section 244(a)(3) of the Act). In sum, although there may be some reasonable basis on which to distinguish the two forms of relief and in limiting only one to former spouses, the DHS does not offer any. We should avoid interpretations of statutes that would produce absurd or incongruous results. *Chapman v. United States*, 500 U.S. 453, 463 (1991).

We also are not persuaded that the legislative history compels the conclusion that a former spouse is ineligible for relief under section 240A(b)(2) of the Act. The DHS argues that the "purpose" of the Violence Against Women Act ("VAWA") of 1994 (which spurred the suspension of deportation, cancellation of removal, and self-petition forms of relief discussed herein) was to permit "battered immigrant women *to leave* their batterers without fearing deportation." DHS Brief at 30. According to the DHS, this expressly limits the relief to those fleeing abusive relationships. But DHS does not address the major inconsistency in its argument, namely that notwithstanding this alleged "purpose," Congress amended the VAWA provisions in 2000 to allow former spouses to self-petition for a visa. *See* H. Rep. 106-939, Oct. 5, 2000. Under these provisions, an alien already has obtained a divorce and thus is not in need of assistance in fleeing the abusive relationship, but Congress nonetheless would permit the alien to apply for relief. We note that in the 2000 VAWA amendments, there is no expression of Congress's intent to limit adjustment of status to former

spouses and to exclude former spouses from cancellation of removal. Moreover, in the 2000 amendments to the VAWA provisions, Congress stated that it purpose was not only to "remove immigration laws as a barrier that kept battered immigrant women and children locked in abusive relationships," but also "to offer protection against domestic violence." *Id.* In fact, one federal appellate court has found that an intent of the original VAWA was to "protect *survivors* of domestic violence." *Hernandez v. Ashcroft, supra*, 245 F.3d at 840. We therefore decline to credit the DHS's argument that the Act's legislative history compels a finding that the respondent is ineligible for relief under section 240A(b)(2) of the Act. The DHS's appeal will be dismissed. However, we will remand this record to the Immigration Court in order to complete required background and other checks. Accordingly, the following orders will be entered.

ORDER: DHS's appeal is dismissed.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h). *See* Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743, 4752-54 (Jan. 31, 2005).

FOR THE BOARD