



102

U.S. Department of Justice

Immigration and Naturalization Service

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

[Redacted]

FILE: [Redacted]

Office: Vermont Service Center

Date: AUG 08 2001

Public Copy

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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]

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 dismissed.

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

The director determined that the petitioner failed to establish eligibility for the benefit sought because she was divorced from her allegedly abusive spouse prior to the filing of the self-petition. The director, therefore, denied the petition.

On appeal, counsel argues that the equal protection guarantees of the due process clause of the Fifth Amendment to the United States Constitution guarantee protection against the very invidious distinctions drawn between battered aliens in 8 C.F.R. 204.2(c)(1)(ii). He asserts that requiring the battered alien to remain married until the petition is filed is "wholly irrational" and violates the alien's Constitutional rights for equal protection and, consequently, the right to due process.

It should be initially noted that the Immigration and Naturalization Service (the Service) cannot pass judgement upon constitutionality of the statute it administers. Counsel's contention, therefore, that a pertinent section of the Crime Bill as well as its implementing regulations violate both the Equal Protection and Due Process Clauses of the Constitution is simply advanced in an inappropriate forum. The Service can address questions relating to the constitutionality of its application of the law; however, since all applicants seeking special immigrant status under the battered spouse provisions of the Act must qualify on the same basis, as mandated by Congress, no violation of equal protection can be found.

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

The self-petitioning spouse must be legally married to the abuser when the petition is properly filed with the Service. A spousal self-petition must be denied if the marriage to the abuser legally ended through annulment, death, or divorce before that time. After the self-petition has been properly filed, the legal termination of the marriage will have no effect on the decision made

on the self-petition.

The petition, Form I-360, shows that the petitioner arrived in the United States on May 16, 1992. However, her current immigration status or how she entered the United States was not shown. The petitioner married her spouse on August 19, 1993 at Salt Lake City, Utah. The petitioner's spouse subsequently petitioned for dissolution of the marriage, and the final judgment of divorce became effective on November 8, 1996. The petitioner's marriage to the alleged abuser legally ended through divorce prior to the filing of the self-petition. The director, therefore, denied the petitioner the benefit sought pursuant to 8 C.F.R. 204.2(c)(1)(ii).

Subsequent to the filing of the petition, however, 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(c) amends section 204(a)(1)(B)(ii) of the Act so that an alien petitioner claiming to qualify for immigration as the battered spouse or child of a resident alien is no longer required to be married to the alleged abuser at the time the petition is filed as long as the petitioner can show a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen or resident alien spouse. 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. These decisions bind the Service. 8 C.F.R. § 3.1(g). As required by Atembe, Drigo, and Bardouille, therefore, the appeal will be dismissed.

new visa petition under section 204 of the Act, as amended by section 1503(c) of Pub. L. No. 106-386.

ORDER: The appeal is dismissed, without prejudice to the filing of a new visa petition under section 204 of the Act, as amended by section 1503(c) of Pub. L. No. 106-386.