

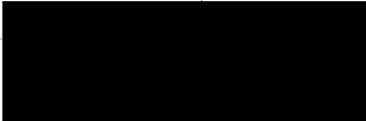


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U.S. Department of Justice

Immigration and Naturalization Service

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



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

FILE: [REDACTED]
EAC 97 206 51157

Office: Vermont Service Center

Date: DEC 19 2001

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]

Public Copy

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
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, and a subsequent motion to reopen was also dismissed by the Associate Commissioner. The matter is again before the Associate Commissioner on another motion to reopen. The motion will be granted and the case will be remanded to the director for further action.

The petitioner is a native and citizen of China 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 citizen of the United States.

The director originally denied the petition after noting that the dissolution of the marriage between the petitioner and her spouse became effective on December 25, 1996, and that the self-petition was filed by the petitioner on July 18, 1997. The director, therefore, denied the petition after determining that the petitioner was not legally married to the abusive spouse when the petition was filed.

Upon review of the record of proceeding, the Associate Commissioner concurred with the director's conclusion and dismissed the appeal on May 10, 1999.

Based on a motion to reopen, the Associate Commissioner determined that despite counsel's claim that the petitioner filed the I-360 petition in a timely manner in accordance with the Service officer's request, the self-petition was not properly filed pursuant to 8 C.F.R. 103.2(7)(i) and 8 C.F.R. 204.1. The Associate Commissioner, therefore, affirmed the director's decision on March 7, 2000.

Another motion to reopen, filed on April 3, 2000, is again before the Associate Commissioner. The petitioner, through former counsel, asserts that: (1) the government should be estopped from denying the self-petition when the petitioner's marriage was clearly bona fide; (2) she should not be punished for the improper filing of her first I-360 petition by her previous counsel; (3) since the petitioner and her ex-husband are still involved in ongoing asset separation dispute, the denial of her first and second I-360 petitions would unfairly benefit her former U.S. citizen spouse by putting the petitioner out of legal immigration status; and (4) although the court order dissolving the marital relationship was issued prior to the filing of the second I-360 petition, the ongoing litigation in family court is evidence that the marital dispute has not ended.

The Service, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of the Service from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. See Matter of Hernandez-Puente, 20 I&N Dec. 335, 338

(BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the Administrative Appeals Office is limited to that authority specifically granted to the Associate Commissioner for Examinations, through the regulations at 8 C.F.R. 103.1(f)(3)(iii). Accordingly, the Service has no authority to address the petitioner's equitable estoppel claim.

Additionally, despite the petitioner's claim that the ongoing litigation in family court is evidence that the marital dispute has not ended, the court, on December 25, 1996, entered a judgment of dissolution of the marriage, the marital status was terminated, and the parties were restored to the status of unmarried persons. The petitioner, therefore, was not legally married to her alleged abusive spouse when the petition was filed on July 18, 1997.

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 United States citizen 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 spouse. *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.*

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 dismissing the appeal in this case. For this reason, the appeal will be decided on the basis of section 204(a)(1)(A)(iii) as amended by section 1503.

The record in this case shows that the applicant was divorced from her U.S. citizen spouse less than two years when the petition was filed. Accordingly, the case will be remanded so that the director may request that the petitioner submit evidence which shows a connection between the legal termination of the marriage and battering or extreme cruelty, and review the record of proceeding to determine whether all other criteria listed in 8 C.F.R. 204.2(c)(1) are satisfied. The director shall enter a new decision which, if adverse to the petitioner, is to be certified to the Associate Commissioner, Examinations, for review, and without fee.

ORDER: The director's decision is withdrawn. The case is remanded for appropriate action consistent with the above discussion and entry of a new decision.