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U.S. Department of Homeland Security
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536

Identifying information related to
prevention of terrorism and
invasion of personal privacy



DEC 29 2003

FILE: [Redacted]
EAC 02 039 51319

Office: Vermont Service Center

Date:

IN RE: Petitioner:
Beneficiary:



APPLICATION: Petition for Special Immigrant Battered Spouse Pursuant to Section 204(a)(1)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(B)(ii)

ON BEHALF OF PETITIONER:



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 Citizenship and Immigration Services (CIS) 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.

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a native and citizen of Poland who is seeking classification as a special immigrant pursuant to section 204(a)(1)(B)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(B)(ii), as the battered spouse of a 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 permanent resident spouse for more than two years prior to the filing of the self-petition.

On appeal, counsel states that the petitioner filed her first petition on January 14, 1998, after the judgment of divorce became final on August 11, 1997. The AAO denied the petition on October 18, 2001, because the self-petitioning spouse must be married to the abusive spouse at the time that the petition was first properly filed. Counsel asserts that the AAO should have decided the case according to the law as it existed on the date of the decision. However, the AAO dismissed the case without prejudice to the filing of a new visa petition in order to ensure that the petitioner would not have gained an unfair advantage over the beneficiaries of other petitions. The petitioner, therefore, filed a new petition as advised by the AAO. The new petition, however, was again denied by the Vermont Service Center on February 6, 2003, because more than two years had passed since the petitioner's divorce from her husband. (Note that this petition is the subject for this appeal.)

Counsel further asserts that the recently enacted Child Status Protection Act (CSPA) indicates that the Board's protectionism concerning beneficiaries gaining the unfair advantage over other petitioners' priority dates is no longer required under the law. He maintained that according to CSPA, the cases that the AAO relied on in its decision to dismiss the first self-petition [such as *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)], are no longer relevant, as the Board is no longer required to dismiss visa petitions to protect priority dates of other beneficiaries.

Notwithstanding counsel's assertion, the AAO was correct in his decision to deny the first self-petition on October 18, 2001. The petitioner, however, was erroneously advised to file a new petition because she was not eligible at that time.

8 C.F.R. § 204.2(c) (1) 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 entered the United States as a visitor on February 26, 1989. The petitioner married her lawful permanent resident spouse on November 17, 1994 at Brooklyn, New York. The petitioner subsequently petitioned for dissolution of the marriage, and the judgment of divorce became effective on August 11, 1997. On November 7, 2001, 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 permanent resident spouse during their marriage.

8 C.F.R. § 204.2(c)(1)(ii) 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.

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 to read as follows:

(II) For purposes of subclause (I), an alien described in this paragraph is an alien---

(CC) who was a bona fide spouse of a lawful permanent resident within the past 2 years and---

(bbb) who demonstrates a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the lawful permanent resident spouse.

The director determined that the petitioner was ineligible for the benefit sought because she was divorced from her spouse for more than two years prior to the filing of the self-petition. He maintained that there is no provision of law whereby an alien may self-petition based on a former spousal relationship when more than two years have passed between the date of the legal termination of the marriage and the date of filing of the Form I-360 self-petition. The director is correct in his conclusion. Accordingly, the appeal must be dismissed.

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 not met that burden.

ORDER: The appeal is dismissed.