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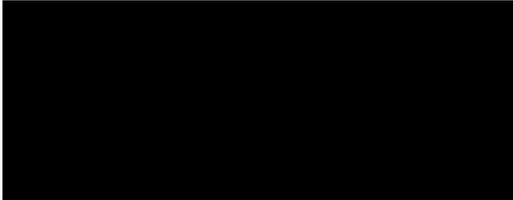
U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

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U.S. Citizenship
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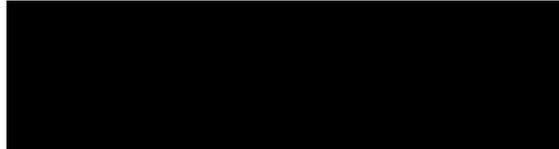


Office: VERMONT SERVICE CENTER

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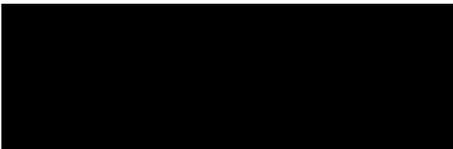
IN RE:

Petitioner:
Beneficiary:



PETITION: 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)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Cindy M. Somenzi for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. An appeal was summarily dismissed by the Administrative Appeals Office (AAO). A subsequent motion to reopen was dismissed by the AAO. The matter is again before the AAO on a motion to reconsider. 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 Mexico 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 on June 15, 2001, after determining that the petitioner failed to establish that she: (1) is the spouse of a citizen or lawful permanent resident of the United States, pursuant to 8 C.F.R. § 204.2(c)(1)(I)(A); (2) is eligible for immigrant classification under section 201(b)(2)(A)(i) or 203(a)(2)(A), 8 U.S.C. § 1151(b)(2)(A)(i) or § 1153(a)(2)(A), based on that relationship, pursuant to 8 C.F.R. § 204.2(c)(1)(I)(B); and (3) is a person of good moral character, pursuant to 8 C.F.R. § 204.2(c)(1)(I)(F).

On July 8, 2002, the AAO summarily dismissed the appeal based on the petitioner's failure to identify specifically any erroneous conclusion of law or statement of fact for the appeal, and for failure to submit additional evidence within 90 days as stated.

In a motion to reopen, counsel asserts that she did submit all of the information and supporting documents requested, including the marriage and divorce certificates of the petitioner's spouse on May 31, 2002, but that the AAO's decision of July 8, 2002, did not seem to take into account that additional material.

The AAO noted that, in her motion to reopen, counsel's assertion that the petitioner never departed from the United States since her entry in 1985, was contradicted by the petitioner's affidavit, filed with her petition, in which she indicated that she and her children lived in Mexico for three months in 1990. The AAO further noted that the petitioner still had not addressed the director's finding that she had not established good moral character based on her reentry into the United States after an order of removal. The AAO, therefore, dismissed the motion to reopen on February 24, 2003.

A motion to reconsider is now before the AAO. Counsel asserts that the petitioner was never deported from the United States. She states that the notes of the trial attorney made during a hearing in immigration court on December 6, 1990, show that the petitioner's representative informed the immigration judge that the petitioner had departed to Mexico. On December 10, 1990, the petitioner was ordered removed from the United States. Counsel indicates that the judge stated in the removal order that "since respondent failed to appear or show any reason for such failure to appear, deportation proceedings were held in absentia." Counsel maintains that this was clearly in disregard of the information given to the immigration judge by the alien's representative in court and that because of this, the deportation order is invalid as the petitioner departed prior to the order.

Counsel states that she is amending the petitioner's brief to reflect that the petitioner did depart from the United States, but that she was not deported. She further states that the petitioner did not fail to disclose her marriage to Honorio Martinez, and that the Service [now Citizenship and Immigration Services (CIS)] had the information regarding the marriage in its records since 1989. Counsel asserts that Form I-213 (Record of Deportable Alien) indicates that the petitioner advised the CIS officers regarding her marriage and divorce to Honorio Martinez and also to John Navarro. She further asserts that CIS was fully aware of what is already contained in the petitioner's file because the Form I-130, Petition for Alien Relative, filed by Mr. Navarro on behalf of the petitioner, was adjudicated by CIS and that the Service had issued an approval notice on July 6, 1998.

Based on CIS information contained in the record of proceeding, and the divorce decrees and marriage certificates furnished by the petitioner, it is concluded that the petitioner has overcome the findings of the director pursuant to 8 C.F.R. § 204.2(c)(1)(I)(A) and (B).

Counsel also asserts that the petitioner's 1990 departure is not a legal requirement for approval of the Form I-360 filed by the petitioner. The petitioner states that she left the United States for three months because of her husband's neglect. However, she returned to the United States through entry without inspection three months later to join her husband at his request. Counsel states that the Attorney General may waive section 212(a)(9)(C) of the Act, as a ground of inadmissibility based on the petitioner's departure and reentry, for a battered spouse when there is a connection between the spouse having been battered and the petitioner's departure and/or reentry.

Based on the trial attorney's notes in removal proceedings on November 6, 1990, that the petitioner had "left to return to Mexico," it appears that the petitioner voluntarily departed from the United States prior to the immigration judge's order of removal on December 10, 1990. No supporting evidence, however, was furnished to establish that the petitioner was, in fact, in Mexico prior to the immigration judge's order of removal. Nevertheless, the petitioner was ordered removed from the United States and, therefore, is inadmissible to the United States pursuant to section 212(a)(9)(C)(i) of the Act.

Section 212(a)(9)(C)(i)(II) of the Act states, in part, that any alien who...

has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

However, section 212(a)(9)(C)(ii) of the Act states, in part:

The Attorney General [now the Secretary of the Department of Homeland Security (the Secretary)] in the Secretary's discretion may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between...

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's...

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United states; or

(D) attempted reentry into the United States

Therefore, the case will be remanded so that the director may accord the applicant the opportunity to file an application for waiver of grounds of inadmissibility (Form I-601). The director shall enter a new decision as to the Form I-360 that, if adverse to the petitioner, is to be certified to the AAO for review.

ORDER: The AAO's decisions dated July 8, 2002 and February 24, 2003, are withdrawn. The case is remanded for appropriate action consistent with the above discussion and entry of a new decision.