



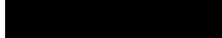
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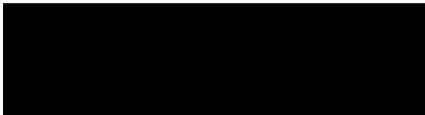
Date: NOV 07 2005

IN RE: Petitioner:



PETITION: 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:



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.

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 Mexico who is seeking classification as a special immigrant pursuant to section 204(a)(1)(B)(ii) of 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 denied the petition, finding that the petitioner failed to establish she was the spouse of a lawful permanent resident of the United States.

Section 204(a)(1)(B)(ii) of the Act provides that an alien who is the spouse of a lawful permanent resident of the United States, who is a person of good moral character, who is eligible to be classified as an immediate relative, and who has resided with his or her spouse, may self-petition for immigrant classification if the alien demonstrates to the [Secretary of Homeland Security] that—

(aa) the marriage or the intent to marry the United States citizen was entered into in good faith by the alien; and

(bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse.

The regulation at 8 C.F.R. § 204.2(c)(1)(i) states, in pertinent part, that:

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; [and]

* * *

(H) Entered into the marriage to the citizen or lawful permanent resident in good faith.

According to the evidence contained in the record, the petitioner married [REDACTED] Mexico on July 28, 1983. Mr. [REDACTED] became a permanent resident on October 4, 1990. However, Mr. [REDACTED] was placed in removal proceedings on August 4, 1998 and ordered removed on September 25, 1998.¹ Mr. [REDACTED] appealed his removal order on October 26, 1998 but withdrew the appeal on March 29, 1999. Mr. [REDACTED] was removed from the United States on April 21, 1999.

On June 18, 2003, more than four years after the petitioner's spouse was removed from the United States, the petitioner filed the instant self-petition 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. The director notified the petitioner of the intent to deny the petition on June 15, 2004 and denied the petition on September 7, 2004.

The petitioner, through counsel, files a timely appeal. On appeal, counsel submits a brief with no additional documentation. Counsel claims that the petitioner is eligible for classification under section 204 of the Act as an alien who was a bona fide spouse of a lawful permanent resident within the past 2 years and whose spouse lost status within the past 2 years due to an incident of domestic violence.² There does not appear to be any dispute of material facts. Rather, the sole issue is whether the priority date assigned to the petitioner's approved Form I-130, preserves her priority date such that her spouse's subsequent loss of permanent resident status has no effect on the Form I-360 petition.

Counsel asserts:

INS regulations and policy provide that upon filing the I-360 the applicant is entitled to the priority date of her approved I-130, if any. In the instant case, the applicant did have an approved I-130 spousal petition with a priority date [of] February 12, 1993. However, the USCIS did not assign that priority date to her I-360 petition.

¹ The petitioner filed her first Form I-360 petition on September 21, 1998. The petition was denied on November 23, 1999, due to the petitioner's spouse's loss of his permanent resident status.

² See section 204(a)(1)(B)(II)(aa)(CC)(aaa) of the Act. We note that counsel mistakenly refers to section 204(a)(1)(A)(iii)(II)(CC)(bbb) which pertains to spouses of United States citizens rather than section 204(a)(1)(B)(II)(aa)(CC)(aaa) which applies to spouses of lawful permanent residents of the United States, as is the petitioner in this case.

By correctly assigning the 1993 priority date of the original I-130, the applicant's I-360 should be deemed as timely filed and approved within two years of the abuser's removal on April 21, 1999.³

Counsel's argument is without merit. A priority date is established by the filing date of a visa petition. It simply establishes an alien's place on the "waiting list" for an immigrant visa. A priority date does not however, act to preserve specific facts in existence at the time the priority date is assigned. Counsel appears to be under the mistaken belief that if the priority date of the petitioner's Form I-130 is assigned to the Form I-360, the fact that her spouse was not a lawful permanent resident at the time of filing or in the two-year period preceding filing, can be overlooked or negated. Counsel refers to "regulations and policy" but provides no citation to a specific regulation or policy that indicates the eligibility requirements of section 204(a)(1)(B)(II)(aa)(CC)(aaa) do not need to be met if the petitioner has a priority date from a previously filed petition.

We note that while the regulation at 8 C.F.R. § 204.2(h)(2) and a Service memorandum⁴ support counsel's contention that battered spouses may transfer priority dates from petitions filed by their abusers to their new self-petition, neither the regulation nor the memorandum indicate that the transference of a priority date somehow remedies the fact that the petitioner's spouse was not a lawful permanent resident at the time the instant petition was filed. Rather, the significance of the priority date is that if the instant Form I-360 was approved, the petitioner could transfer the priority date from the Form I-130 to the Form I-360.

The fact that the petitioner had a Form I-130 filed and approved on her behalf is not relevant to whether she meets the statutory requirements to be classified as a battered spouse under section 204 of the Act. While the existence of a priority date is relevant to the issue of adjustment, it does not waive the prima facie eligibility requirements for approval of the Form I-360 petition. Section 204(a)(1)(B)(II)(aa)(CC)(aaa) of the Act is clear that the spouse's loss of permanent resident status must have occurred within the two-year period prior to the filing of the petition. As the petitioner's spouse lost his status more than two years prior to the filing of the instant Form I-360, the petitioner does not meet the statutory requirements.

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.

³ Counsel also refers to the director's erroneous denial of the petitioner's previous Form I-360. However, as this decision relates to the appeal of the petitioner's most recent Form I-360, we will not address the director's determination in the previous decision.

⁴ HQ 204-P, Aleinikoff, Executive Associate Commissioner Programs, Title, (April 16, 1996).