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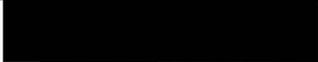
U.S. Citizenship
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Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: AUG 03 2006

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IN RE:



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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.

The record reflects that the petitioner filed the Form I-360 self-petition on April 8, 2004, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, his lawful permanent resident spouse during their marriage. The director denied the petition on February 18, 2005, without the issuance of a notice of intent to deny,¹ finding that the petitioner failed to establish that he was battered by or subjected to extreme cruelty by his permanent resident spouse. The petitioner appealed the director's decision on March 23, 2005. The appeal was dismissed by the AAO on November 14, 2005. The petitioner, through counsel, filed the instant motion to reopen and reconsider on December 13, 2005.

The regulation at 8 C.F.R. § 103.5(a)(2) states that a "motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Further, the regulation at 8 C.F.R. § 103.5(a)(3) states:

A motion to reconsider must state the reasons for reconsideration and be supported by any precedent decisions to establish that the decision was based on an incorrect application of law or [Citizenship and Immigration Services (CIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In her brief, counsel discusses facts and evidence previously considered and rejected by the director and the AAO. The submission does not contain any new facts or evidence. Further, while counsel indicates that she does not agree with the findings of the director and the AAO, counsel does not specify any error of fact or law. Counsel has failed to demonstrate that evidence was overlooked and rather than presenting any new argument is rehashing ones previously found to be insufficient.

Accordingly, counsel has failed to establish that her motion meets the requirements of the regulation. Upon review of the record, however, we find that because the director failed to issue a notice of intent to deny prior to denying the petition, the denial of the petition cannot stand. Although counsel's motion does not meet the requirements of the regulation, rather than reopening the case on our own motion in a separate proceeding, we will avail ourselves of the opportunity in this motion and will reopen the case and remand the case to the director for the issuance of a notice of intent to deny and a new decision. Because this matter is not being reopened based upon factual or evidentiary errors but rather because of a procedural error, we note that the record as it currently stands is not sufficient to establish that the petitioner is eligible for approval as the battered spouse of a lawful permanent resident of the United States.

¹ The regulation at 8 C.F.R. § 204.2(c)(3)(ii) states, in pertinent part:

Notice of intent to deny. If the preliminary decision on a properly filed self-petition is adverse to the self-petitioner, the self-petitioner will be provided with written notice of this fact and offered an opportunity to present additional information or arguments before a final decision is rendered

As always, the burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The previous decision of the AAO is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.