

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



B9

FILE:



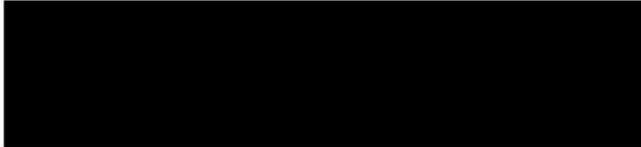
EAC 02 285 52934

Office: VERMONT SERVICE CENTER

Date: **AUG 16 2006**

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director (Director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.

The petitioner is a native and citizen of the Dominican Republic 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 noting that the petitioner failed to establish that she had a qualifying relationship and is eligible for classification as the spouse of a lawful permanent resident of the United States because her spouse was not a lawful permanent resident at the time of filing. The director then determined that although the statute does provide for certain exceptions, those exceptions were not applicable to the petitioner's case.¹

The petitioner, through counsel, filed a timely appeal on January 6, 2006.

Sections 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 lawful permanent resident 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;

¹ Section 204(a)(1)(B)(II)(aa)(CC)(aaa) of the Act indicates that in instances where the petitioner's spouse loses his or her permanent resident status, the petitioner may still be eligible to file if the petitioner's spouse "lost status within the past 2 years due to an incident of domestic violence."

(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.

The record reflects that the petitioner married lawful permanent resident [REDACTED] in the Dominican Republic on March 11, 1995. On June 13, 2000 the petitioner filed a Form I-360 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 petitioner's spouse was ordered deported on October 31, 2000. On September 12, 2002, the petitioner filed a second Form I-360 self-petition. The second Form I-360 was denied by the director on December 8, 2005, finding that the petitioner failed to establish a qualifying relationship as the spouse of a lawful permanent resident of the United States and that she is eligible for classification based upon that relationship. The petitioner, through counsel filed the instant appeal on January 6, 2006. The director approved the petitioner's first Form I-360 on February 6, 2006.

Although the approval of the petitioner's *first* Form I-360 appears to render this decision moot, we must still make a determination on the properly filed appeal that is before us, which is based upon the director's decision to deny the petitioner's *second* Form I-360 petition. As noted previously, the director's denial was based upon the fact that the petitioner's spouse was not a permanent resident at the time of filing. While section 204(a)(1)(B)(II)(aa)(CC)(aaa) of the Act does indicate that a petitioner may still be eligible despite the fact that her spouse was not a permanent resident at the time of filing, the petitioner must be able to establish that her spouse lost status within the two-year period prior to filing *and* that the loss of status was due to an incident of domestic violence.

On appeal, counsel does not dispute the fact that at the time of filing her second Form I-360 petition, the petitioner did not meet the statutory eligibility requirements. Instead, counsel refers to the petitioner's first Form I-360 and argues that the "priority date of the second [sic] I-360 should be restored to the original filing date." We are not persuaded by counsel's argument. 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. It does not however, act to preserve specific facts in existence at the time the priority date was assigned. Counsel appears to be under the mistaken belief that if the priority date of the petitioner's first Form I-360 is assigned to her second Form I-360, the fact that her spouse was not a lawful permanent resident can be overlooked or negated. Counsel provides no citation to a specific provision of law, 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.²

Based upon the above discussion, we concur with the finding of the director that the petitioner has failed to establish that she has a qualifying relationship as the spouse of a permanent resident of the United States and that she is eligible for classification based upon that relationship. Despite our concurrence with the director's determination, because the director failed to issue a notice of intent to deny prior to issuance of the denial, the case must be remanded to the director for further consideration. In accordance with the above discussion, the decision of the director is withdrawn. The case will be remanded for the purpose of the issuance of a new notice of intent to deny as well as a new final decision to both the applicant and counsel. The new decision, if adverse to the petitioner, shall be certified to this office for review.

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 director's decision 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.

² We note that while the regulation at 8 C.F.R. § 204.2(h)(2) and a Service memorandum² support counsel's contention that battered spouses may transfer priority dates from petitions filed by their abusers to their new self-petition "without regard to the current validity" of the previous 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.