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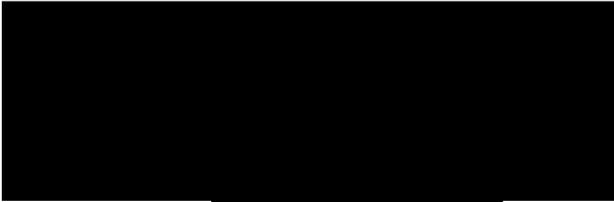
U.S. Department of Homeland Security  
20 Mass Ave., N.W., Rm. A3042  
Washington, DC 20529



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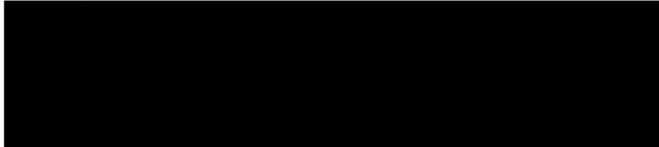
EAC 02 116 51250

Office: VERMONT SERVICE CENTER

Date: JUN 12 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.

Robert P. Wiemann, Chief  
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 The decision of the director will be withdrawn and the petition will be remanded for further action.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)(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.

Section 204(a)(1)(B)(ii) of the Act provides, in pertinent part, 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—

(I) \* \* \*

(aa) the marriage or the intent to marry the lawful permanent resident of the United States 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.

(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-

(aaa) whose spouse lost status within the past 2 years due to an incident of domestic violence[.]

\* \* \*

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 . . . 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 in the record, the petitioner wed [REDACTED] on January 29, 1985 in San Ciro de Acosta, San Luis Potosi, Mexico. [REDACTED] became a lawful permanent resident of the United States on December 1, 1989.

On June 19, 1997, [REDACTED] was convicted of battery, in violation of the California Penal Code section 242. [REDACTED] applied for cancellation of removal and was granted such relief on July 23, 1998.

On October 8, 1998, [REDACTED] was convicted in the Municipal Court of California of Possession of a Controlled Substance to wit: Methamphetamine. Due to his conviction, [REDACTED] was placed in removal proceedings under section 237(a)(2)(B)(i)<sup>1</sup> of the Act and a Notice to Appear was issued on December 4, 1998. On August 25, 1999, Immigration Judge [REDACTED] ordered that [REDACTED] be removed from the United States. [REDACTED] appealed the Immigration Judge's decision to the Board of Immigration Appeals (BIA). The BIA dismissed the appeal on March 22, 2000 and [REDACTED] was removed from the United States on March 28, 2000.

The petitioner filed the instant Form I-360 self-petition on February 19, 2002, 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 denied the petition on December 16, 2003, finding that because more than two years had elapsed between the date of the termination of the petitioner's spouse's permanent resident status and the filing of the Form I-360 petition, the petitioner could not establish that she had a qualifying relationship as the spouse of a lawful permanent resident of the United States.

On appeal, counsel for the petitioner argues that the director improperly used the date of the Immigration Judge's decision rather than the date the BIA dismissed the appeal as the date the petitioner's spouse's permanent resident status was terminated. Counsel's argument is persuasive. The petitioner's spouse's permanent resident status was not terminated until March 22, 2000, the date of the BIA's dismissal of his appeal. We, therefore, withdraw

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<sup>1</sup> A ground of deportation based upon a conviction for a violation (or a conspiracy or attempt to violate) of any law or regulation relating to a controlled substance, other than a single offense for one's own use of 30 grams or less of marijuana.

the director's determination in this regard and find that the petition was filed within the two-year period after the petitioner's spouse's loss of status.

Despite this determination, however, we find that the petitioner has not established eligibility for the classification. Specifically, the petitioner has failed to establish, in accordance with Section 204(a)(1)(B)(ii)(II)(CC)(aaa) of the Act, that she was a bona fide spouse of a lawful permanent resident within the past 2 years *and that her spouse's loss of status within the past 2 years was due to an incident of domestic violence*. As indicated previously, the petitioner's spouse's loss of status was not due to an incident of domestic violence, but rather was due to his conviction of a controlled substance related offense.

Despite our finding that the petitioner is statutorily ineligible for classification, the case must be remanded to the director for further consideration. The regulation at 8 C.F.R. § 204.2(c)(3)(ii) requires the director to issue a Notice of Intent to Deny (NOID) in all cases where "the preliminary decision on a properly filed self-petition is adverse to the self-petitioner . . . ." The regulation does not distinguish between cases where there is statutory ineligibility and those cases in which the evidence simply appears to be deficient. Accordingly, the case must be remanded to the director for issuance of an NOID pursuant to the regulation.

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.