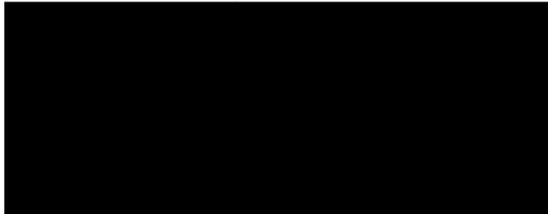


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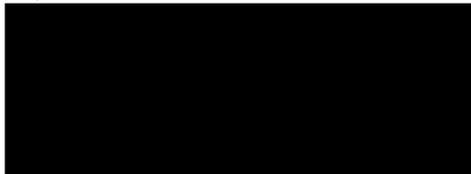
Office: VERMONT SERVICE CENTER

Date: JUL 28 2006

IN RE: Petitioner: [Redacted]

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.

2 Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Vermont Service Center Director denied the immigrant visa petition, and the matter 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 The decision of the director will be withdrawn and the petition will be remanded for further action.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 the Dominican Republic 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 petitioner filed the instant Form I-360 on June 15, 2005.

On August 24, 2005, the director denied the petition because the record failed to establish that the petitioner has a qualifying relationship as the spouse, intended spouse, or former spouse of a citizen or lawful permanent resident of the United States as required by section 204(a)(1)(A)(ii)(II).

On appeal, counsel for the petitioner resubmits evidence and asserts that the director erred in denying the instant petition because he filed the petition more than two years after his divorce. Counsel states that the director "failed to consider that the applicant had previously filed an I-360 petition back in 1995 . . . [therefore,] the applicant filed for battered spouse benefits prior to the divorce."

Section 204(a)(1)(A)(iii) of the Act provides, in pertinent part, that an alien who is the spouse of a United States citizen, 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 Attorney General 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 . . . 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 issue to be addressed in this proceeding is whether the petitioner established that he is eligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act. According to the evidence on the record, the petitioner wed United States citizen Nancy Ilisastigui on December 7, 1995 in Bronx, New York. The petitioner and [redacted] marriage ended in divorce on December 20, 1996, more than two years prior to the filing of the petition.

The petitioner submitted the following evidence:

- Two statements from friends of the petitioner regarding verbal abuse.
- A police clearance from New York City Police Department.
- A marriage certificate.
- A birth certificate and naturalization certificate for the petitioner's spouse [redacted]
- A partial copy of the petitioner's wife's passport.
- A divorce decree and translation indicating that the petitioner's marriage to [redacted] ended in divorce in 1989.
- The petitioner's wife's divorce decree from a prior spouse dated 1988.
- The petitioner and his U.S. citizen spouse's divorce decree dated December 20, 1996.
- A verified complaint for divorce indicating that the petitioner's U.S. citizen spouse initiated divorce proceedings on the grounds that the petitioner had engaged in a course of cruel and inhuman treatment and conduct of his wife.
- An affidavit of service indicating that the petitioner was served with his wife's complaint for divorce.
- A copy of a Form I-130 filed by the petitioner's spouse on the petitioner's behalf.
- A copy of a Form I-485 filed by the petitioner.
- A psychiatric evaluation of the petitioner dated March 5, 1997.
- A police incident information slip dated reported on December 14, 1995 regarding an incident on November 1, 1995.

- A copy of the petitioner's I-94 admission card.
- Copies of photographs of the petitioner and his U.S. citizen wife.
- Copies of two postmarked envelopes addressed to the petitioner and his wife.
- A copy of a cable bill addressed to the petitioner's wife at [REDACTED]
- Evidence that the petitioner and his wife filed a joint income tax return in 1997.

The director determined and the AAO concurs that there is no provision of law whereby an alien may self-petition based on a former spousal relationship when more than two years have passed between the date of the legal termination of the marriage and the date of filing a self-petition. On appeal, counsel asserts that the director should have considered that the petitioner had previously filed a Form I-360 petition prior to his divorce. Counsel's argument is not persuasive. While it is true that the petitioner previously filed a Form I-360 petition on April 8, 1997 (EAC 97 131 50072), it was denied for failure to establish *any* of the requirements of 8 C.F.R. § 204.2(c)(1)(i). We note that the petitioner failed to appeal that decision. What is issue here is whether the petitioner established his eligibility for the benefit sought as of the date of filing the instant petition. The evidence is clear that the petitioner's marriage to [REDACTED] ended in December 1996, nine years before the petitioner filed the instant petition.

Accordingly, the petitioner has not established that he is eligible for classification under section 204(a)(1)(A)(iii) of the Act, and his self-petition must be denied. However, the case will be remanded because the director failed to issue a Notice of Intent to Deny (NOID).

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-petition, 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.

In this case, the director denied the petition without first issuing a NOID. Consequently, the case must be remanded for issuance of an NOID pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii), which will give the petitioner a final opportunity to overcome the deficiencies of his case.

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 petitioner and counsel. The new decision, if adverse to the petitioner, shall be certified to this office for review.

As always in these proceedings, the burden of proof rests solely 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 this decision.