

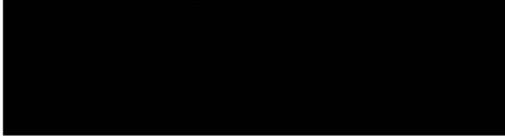
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U.S. Citizenship
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BA



FILE: [REDACTED]
EAC 06 008 50027

Office: VERMONT SERVICE CENTER

Date: OCT 19 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:

SELF-REPRESENTED

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 The decision of the director will be withdrawn and the petition will be remanded for further action.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 Peru 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 petition on October 6, 2005. The director denied the petition on December 27, 2005, based upon the determination that the petitioner did not have a qualifying relationship as the spouse of a United States citizen.

The petitioner files a timely appeal but fails to address the basis of the director's decision denying the Form I-360 petition.

Section 204(a)(1)(A)(iii) of the Act provides, in pertinent part, that an alien who is the spouse of a citizen 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 . . . 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 petitioner married [redacted] on March 13, 2000 in New York State. The petitioner's marriage to [redacted] was terminated in divorce on September 10, 2003.

The issue to be addressed in this proceeding is whether the petitioner established that she had a qualifying relationship as of the date of filing the instant petition and whether she is eligible for immigrant classification under section 201(b)(2)(A)(i) of the Act, based on that relationship with a United States citizen.

Section 204(a)(1)(A)(iii)(II) of the Act requires that the self-petitioner establish that she is married to a United States citizen or permanent resident at the time of the filing of the Form I-360 petition, with certain exceptions. The petitioner does not fall within one of the statutory exceptions to this requirement. She divorced her abusive spouse more than two years prior to the filing of the instant petition.

The director determined, and the AAO concurs, that the petitioner failed to establish that she has or had a qualifying relationship with a United States citizen. The petitioner's marriage was legally terminated more than two years prior to filing the instant petition; therefore, the petitioner failed to establish she has a qualifying relationship and is eligible for immigrant classification under section 201(b)(2)(A)(i) of the Act, based on that relationship.

Accordingly, we concur with the finding of the director that the petitioner is ineligible for classification because she does not have a qualifying relationship as the spouse, former spouse, or intended spouse of a United States citizen.

However, although the petitioner has failed to overcome her statutory ineligibility, we find 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 and a new decision.

¹ The petitioner's spouse's name is abbreviated to protect his confidentiality.

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 the petitioner. 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 that, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.