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20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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FILE: [Redacted]
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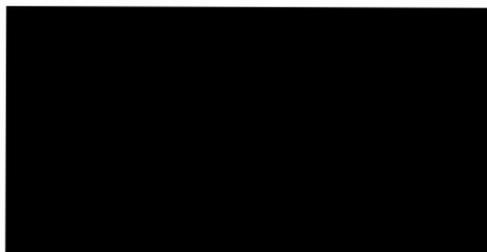
Office: VERMONT SERVICE CENTER

Date: SEP 06 2006

IN RE: Petitioner: [Redacted]

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 Director, Vermont Service Center, 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 The decision of the director will be withdrawn and the petition will be remanded for further action.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 seeks 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 an alien battered or subjected to extreme cruelty by her former United States lawful permanent resident spouse.

The director denied the petition, finding that the petitioner failed to establish a qualifying relationship with a U.S. lawful permanent resident and her eligibility for preference immigrant classification based on such a relationship.

On appeal, counsel submits a brief, additional evidence and copies of documents previously submitted.

Section 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 may self-petition for immigrant classification if he or she demonstrates that the marriage to the lawful permanent resident spouse was entered into in good faith and that during the marriage, the alien or the alien's child was battered or subjected to extreme cruelty perpetrated by the alien's spouse. In addition, the alien must show that he or she is eligible to be classified as a spouse of an alien lawfully admitted for permanent residence under section 203(a)(2)(A) of the Act, resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(B)(ii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(II).

Section 204(a)(1)(B)(ii)(II)(aa) of the Act states, in pertinent part, that an individual who is no longer married to a U.S. lawful permanent resident is eligible to self-petition under these provisions if he or she 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; or

(bbb) who demonstrates a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the lawful permanent resident spouse.

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

(i) *Basic eligibility requirements.* A spouse may file a self-petition under section . . . 204(a)(1)(B)(ii) of the Act for his or her classification as . . . a preference immigrant if he or she:

* * *

(B) Is eligible for immigrant classification under section . . . 203(a)(2)(A) of the Act based on that relationship [to the U.S. lawful permanent resident].

The evidentiary standard and guidelines for a self-petition under section 204(a)(1)(B)(ii) of the Act are contained in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

Evidence for a spousal self-petition –

- (i) *General.* Self-petitioners are encouraged to submit primary evidence whenever possible. The Service will consider, however, any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service.

The petitioner in this case is a native and citizen of Mexico who states on the Form I-360 that she entered the United States on January 9, 1992. The petitioner's marriage to M-D-* was registered in Houston, Texas on September 22, 1997. At that time, the petitioner's former spouse was a U.S. lawful permanent resident. On June 14, 2004, the petitioner's former spouse was ordered removed from the United States and lost his lawful permanent resident status. The petitioner filed this Form I-360 on August 30, 2004. On March 9, 2005, the petitioner and her former spouse were divorced by order of the District Court of Jefferson County, Texas. On December 8, 2005, the director denied the petition because the record did not demonstrate that the petitioner's former spouse lost his status due to an incident of domestic violence. The petitioner, through counsel timely appealed.

On appeal, counsel claims that the petitioner's former spouse lost his status due to an incident of domestic violence in December 2002 that involved the former couple's son and warrant for the arrest of the petitioner's former spouse for a domestic violence charge in a Texas criminal court. A review of the record in this case as well as CIS records regarding the petitioner's former spouse show that he lost his immigrant status due to a separate incident in January 2003 that did not involve the petitioner or the former couple's children; was not effected by or otherwise related to his criminal arrest, charge and conviction of family assault in the Texas criminal court; but which led to his conviction of a federal offense in June 2003. The petitioner's former spouse's federal offense is not classified as a domestic violence crime and the conviction record does not indicate that the offense otherwise involved domestic violence or that the petitioner or her children were in any way involved in the January 2003 incident.

While the record in this case shows that the December 2002 incident involved domestic violence against the petitioner and her son, the record in this case and the record of the petitioner's former spouse do not show any relation between the battery and extreme cruelty of the petitioner's former spouse and the January 2003 incident that led to his federal conviction and subsequent loss of status. In her affidavit, the petitioner states that her former spouse called her in February 2003 and told her that he was in jail for transporting illegal aliens in his van. The petitioner further explains:

* Name withheld to protect individual's identity.

That was hard for me at first, because of so many times I had wished bad things for him. Also, apart from that, were the house payments and [he] had the two car payments and other payments. [He] told me that I was going to have to pay them. But it was too much for me to pay. [He] would call me up very authoritatively, until one day in March 2003, I told him that I was very sorry but that I couldn't make all those payments and I returned the cars. [He] got very angry at me and that's when I told him that he was inside, but I was not. That now my own life [sic] and the kids were dependent on only me. I told him that now I made the decisions. He accepted because he had no other choice.

The petitioner's testimony indicates that she was not aware of the January 2003 incident leading to her husband's loss of status until after it occurred and he called her from jail in February 2003. Although his subsequent authoritative telephone calls and anger may have been part of his extreme cruelty and overall pattern of domestic violence, the petitioner does not indicate that her former spouse made threatening telephone calls or engaged in other abusive behavior that directly preceded or was otherwise connected to his January 2003 offense. Accordingly, the present record does not establish that the petitioner's former spouse lost his lawful permanent resident status due to an incident of domestic violence, as required by section 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa) of the Act.

Because the petitioner thus did not have a qualifying relationship with a U.S. lawful permanent resident pursuant to section 204(a)(1)(B)(ii)(II) of the Act, she also was not eligible for preference immigrant classification based on such a relationship, as required by section 204(a)(1)(B)(ii)(II)(cc) of the Act. Despite the petitioner's ineligibility on these two grounds, the case will be remanded because the director denied the petition without first issuing a NOID. The regulation at 8 C.F.R. § 204.2(c)(3)(ii) directs that CIS must provide a self-petitioner with a NOID and an opportunity to present additional information and arguments before a final adverse decision is made. Accordingly, the case will be remanded for issuance of a NOID, which will give the petitioner a final opportunity to overcome the deficiencies of her case.

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.