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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: SEP 14 2006
EAC 06 055 51724

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:
[Redacted]

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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 Mexico 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 finding that the petitioner failed to establish she had 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.

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;

(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 [REDACTED] a lawful permanent resident of the United States, on August 27, 1994 in Mexico. The petitioner's spouse filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf which was approved on November 20, 2001.

On October 3, 2005, the petitioner filed the instant 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 petition was denied by the director on January 18, 2006, without the issuance of a Notice of Intent to Deny in accordance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii),¹ based upon a determination that the petitioner did not have a qualifying relationship as the spouse of a lawful permanent resident of the United States and that she was not eligible for classification based upon that relationship. While the director indicated that the petitioner did not meet the exceptions provided by statute,² she failed to discuss the exceptions and the reasons for such a finding (e.g., that the spouse lost status more than two years prior to filing, or that the loss of status was not due to an incident of domestic violence or both).

On appeal, counsel argues that the petitioner was the bona fide spouse of a lawful permanent resident within the two-year period preceding the filing of the Form I-360 petition and that the petitioner's spouse lost his permanent resident status due to an incident of domestic violence.³ To support her argument that the petitioner's spouse's loss of status was due to an incident of domestic violence, counsel states:

. . . the inquiry as to whether the LPR spouse's status was terminated due to an "incident of domestic violence" is a fact based inquiry. The statute does not require a conviction for domestic violence, merely that the termination was for an "incident" related to domestic violence. The affidavit of [the petitioner] details the abuse that she suffered and the economic deprivation caused by her LPR spouse. Applicant contends that the drug abuse and drug dealing of an abusive spouse, when that spouse is convicted of a drug related

¹ 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-petitioner, 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.

² 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."

³ Counsel mistakenly refers to the statutory provision related to a petitioner whose citizen spouse died within the past two years [Section 204(a)(1)(A)(II)(aa)(CC)(aaa)], rather than the provision related to a petitioner's who lawful permanent resident spouse lost status.

offense and loses his LPR status, is intimately connected to an abuser's pattern of violence. An abusive spouse's drug use makes him more violent and requires that he deprive his spouse and family of money in order to have the money needed to fuel his drug habit.

Upon review of the record, we do not dispute that the petitioner's Form I-360 was filed within two years of her spouse's loss of status. However, the record does not support a finding that the petitioner's spouse's loss of status was due to an incident of domestic violence. Rather, the petitioner's spouse's loss of status was based upon a controlled substance violation, an aggravated felony conviction based on drug trafficking, and on fraud in obtaining adjustment of status. We, therefore, find no connection between the petitioner's spouse's removal on drug and fraud related grounds and the claimed domestic violence.⁴

Despite our concurrence with the director's findings, the decision cannot stand because of the director's failure to issue a Notice of Intent to Deny to the petitioner prior the issuance of the denial. Accordingly, the decision of the director must be withdrawn and the case remanded for the purpose of the issuance of a notice of intent to deny as well as a new final decision. The new decision, if adverse to the petitioner, shall be certified to this office for review.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

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.

⁴ It is noted that while the petitioner makes numerous references to the fact that her spouse's gambling caused monetary problems, the petitioner makes no claim in her statement regarding her spouse's drug use or drug dealing.