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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B-9

PUBLIC COPY

[Redacted]

FILE:

[Redacted]
EAC 06 026 50735

Office: VERMONT SERVICE CENTER

Date: **SEP 21 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:

[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 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 The decision of the director will be withdrawn and the petition will be remanded for further action.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)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien battered or subjected to extreme cruelty by a United States citizen.

The director denied the petition, finding that the petitioner failed to establish a qualifying relationship with his former wife.

On appeal, counsel submits a brief and copies of documents preexisting in the record.

Section 204(a)(1)(A)(iii) of the Act provides that an alien who is the spouse of a United States citizen may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the United States citizen spouse in good faith and that during the marriage, the alien 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 an immediate relative under section 201(b)(2)(A)(i) of the Act, resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(A)(iii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II).

An alien who has divorced a United States citizen may still self-petition for immigrant classification under section 204(a)(1)(A)(iii) of the Act if the alien demonstrates that he or she is a person

who was a bona fide spouse of a United States citizen within the past 2 years and –

* * *

(ccc) who demonstrates a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse.

Section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC).

The evidentiary standard and guidelines for a self-petition under section 204(a)(1)(A)(iii) 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 Colombia who states on the Form I-360 that he entered the United States on March 27, 1995. The record shows that the petitioner married J-V-¹, a U.S. citizen, on April 10, 1996 in New York City. The couple divorced on September 24, 1999. The petitioner filed his Form I-360 on October 21, 2005. Accordingly, the director denied the petition because it was filed over two years after the petitioner's divorce.

On appeal, counsel asserts that the delay in filing the Form I-360 was caused by misinformation provided by the legacy Immigration and Naturalization Service (INS) and delays in the agency's processing of the petitioner's previously filed Form I-485, application to adjust status, and Form I-751, petition to remove the conditions on residence. We concur with the director's conclusion and find that counsel's claims on appeal do not overcome the grounds for denial. Nonetheless, the petition will be remanded because the director denied the petition without first issuing a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

Qualifying Relationship and Eligibility for Immediate Relative Classification

The petitioner and his former wife were divorced over six years before this petition was filed. Although the record shows that the divorce was connected to the battery or extreme cruelty inflicted upon the petitioner by his former wife, the petition was not filed within two years of their divorce. Consequently, the petitioner did not have a qualifying relationship pursuant to section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act.

Beyond the director's decision, the present record also fails to establish that the petitioner was eligible for immediate relative classification based on his relationship with his former wife, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act. The regulation at 8 C.F.R. § 204.2(c)(1)(B) requires that a self-petitioner be eligible for immediate relative classification under section 201(b)(2)(A)(i) of the Act based on his or her relationship to the abusive spouse. Because the petitioner was divorced from his abusive wife before this petition was filed, he was ineligible for immediate relative classification based on their former marriage.

Purported Errors of CIS

The record shows that the petitioner filed a Form I-485 based on a concurrently filed Form I-130, petition for alien relative, filed by his former spouse. The Form I-485 and Form I-130 were filed in 1997. On January 7, 2005, CIS denied the Form I-130 because the former couple was divorced. On January 7, 2005, CIS also denied the Form I-485 because his former wife's Form I-130 was denied and there was no evidence that the petitioner was the beneficiary of an approved Form I-360 self-petition. In 1998 the petitioner also filed a Form I-751. On September 27, 2005, CIS denied the Form I-751 because the petitioner had never been granted conditional permanent residency in the United States.

¹ Name withheld to protect individual's identity.

On appeal, counsel states that an INS officer misinformed the petitioner that he should file a Form I-751 because he was already a conditional permanent resident of the United States. Counsel cites the Form I-797C receipt notice for the petitioner's Form I-751 as evidence that the agency misinformed the petitioner that he was a conditional permanent resident because the notice states, "Your alien card is extended 1 year-employment & travel authorized." **The Form I-797C is not a notification of conditional permanent residency status; it can only extend a previously accorded status.** The agency never notified the petitioner that he had been lawfully admitted for permanent residence on a conditional basis and never issued him a Form I-551, permanent resident card.

On appeal, counsel further asserts that the petitioner's Form I-360 would have been filed within two years of his divorce were it not for the agency's misinformation and delay in adjudicating his Form I-485 and Form I-751. We disagree. The record indicates that the petitioner was represented by two previous attorneys who filed the petitioner's Form I-485 and Form I-751. Present counsel does not assert that the petitioner's delay in filing his Form I-360 was due to ineffective assistance of the petitioner's prior attorneys, that the two-year limitation of section 204(a)(1)(A)(iii)(II)(aa)(CC) is subject to equitable tolling due to ineffective assistance of counsel, or that the petitioner warrants such equitable action.

The present record does not establish that the petitioner had a qualifying relationship with his abusive former wife pursuant to section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act. Nonetheless, 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 his 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.