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



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
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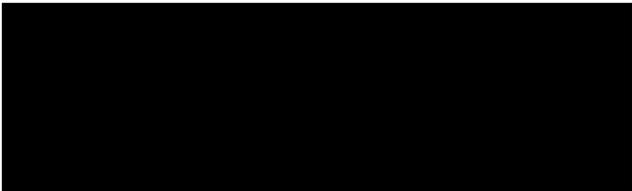
Office: VERMONT SERVICE CENTER

Date: APR 17 2007

IN RE: Petitioner: [REDACTED]

PETITION: Petition for 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.

fw *Maura Deadrick*
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 The decision of the director will be withdrawn and the petition will be remanded for further action.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 the Republic of Korea (South Korea) who is seeking classification 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 the battered spouse of a lawful permanent resident of the United States. The petitioner filed the instant Form I-360 petition on November 21, 2005. The director denied the petition on February 1, 2006, based upon the determination that the petitioner did not have a qualifying relationship as the spouse of a lawful permanent resident of the United States and was not eligible for classification under section 203(a)(2)(A) of the Act, 8 U.S.C. § 1153(a)(2)(A), based on a qualifying relationship with a lawful permanent resident of the United States. The petitioner, through counsel, files a timely appeal.

Section 204(a)(1)(B)(ii) of the Act provides, in pertinent part, 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 . . . 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.

According to the petitioner, she entered the United States as a B-2 nonimmigrant visitor on December 12, 1989. According to the evidence in the record, the petitioner bore a child named [REDACTED] on March 26, 1992 in New York City.¹ The petitioner wed lawful permanent resident J-C-² on February 29, 1996. J-C- filed a Form I-130 petition on the petitioner's behalf on June 25, 1998.

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 204(a)(1)(B)(ii) of the Act, based on that relationship with a lawful permanent resident of the United States.

Section 204(a)(1)(B)(ii) of the Act requires that the self-petitioner establish that she is married to a 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.

According to evidence in the record, the applicant's spouse, J-C-, lost his lawful permanent resident status on January 21, 2000.³ The petitioner filed the Form I-360 on November 21, 2005, more than five years after her spouse lost his lawful permanent resident status.

The director determined, and the AAO concurs, that the petitioner failed to establish that she had a qualifying relationship with a lawful permanent resident of the United States and that she was eligible for classification based upon that relationship as of the date of filing the instant petition. Accordingly, we concur with the finding of the director that the petitioner is ineligible for the classification sought.

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.

Despite the fact that the director's decision rested on the issues discussed above, we find one additional issue that should be addressed on remand. The petitioner failed to establish that she resided with J-C- as required by the regulation at

As evidence that she resided with her spouse, the petitioner submit the following evidence:

- A partial copy of a lease and a partial copy of a rental application.
- A letter dated March 5, 1999 addressed to the petitioner and J-C- at [REDACTED] Georgia.

¹ On February 20, 1997, the petitioner's daughter's name was changed from [REDACTED]

² Name withheld to protect confidentiality.

³ On June 29, 1998, J-C- was convicted of Cruelty to Children and sentenced to 20 years in prison. The conviction rendered J-C- an aggravated felon. He was ordered removed by an Immigration Judge on January 21, 2000.

- A notice from legacy INS to J-C- at 595 Colonial Circle.
- A marriage certificate.
- A letter dated March 5, 1999 from Allstate Insurance, addressed to the applicant and J-C- at [REDACTED], Georgia.

According to the marriage certificate, the applicant resided at [REDACTED] and J-C- resided in Elmhurst New York as of February 29, 1996, the date of their marriage.

The petitioner failed to answer questions on the Form I-360 as to when and where she resided with J-C-.

The lease provided by the petitioner is incomplete. No signatures are visible on the lease. Similarly, the rental agreement is unsigned.

On a Form I-130 petition signed June 10, 1998, J-C- resided at [REDACTED] and the petitioner resided in New York City.

On remand, the petitioner should be given the opportunity to explain the inconsistencies in the evidence on the record regarding joint residence.

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.