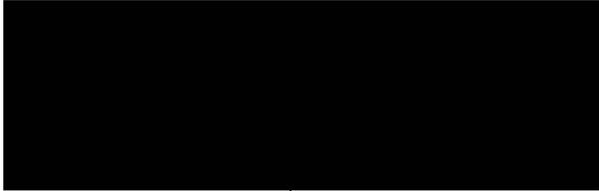


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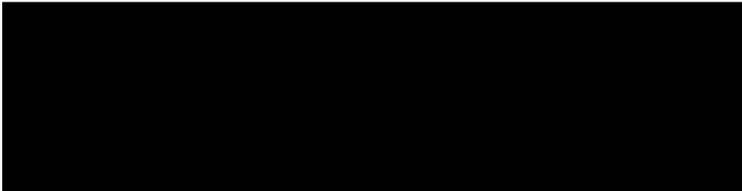
IN RE:

Petitioner:



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 preference visa petition was denied by the Director, Vermont Service Center. The matter 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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 seeks classification as a special immigrant pursuant to section 204(a)(1)(B)(ii), 8 U.S.C. § 1154(a)(1)(B)(ii), as the battered spouse of a lawful permanent resident of the United States.

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.

The record reflects that the petitioner married [REDACTED] on February 25, 1997 in Vietnam. The petitioner entered the United States as a V-1 nonimmigrant on March 29, 2002 at San Francisco. The petitioner filed a Form I-485, Application to Adjust Status on October 10, 2003. The Form I-485 application was denied on September 17, 2004 because approval of the underlying petition was automatically revoked because the petitioner's spouse's lawful permanent resident status was terminated due to his criminal convictions.¹

The petitioner filed the instant Form I-360 self-petition on March 17, 2005, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, her lawful permanent resident spouse during their marriage. The petitioner submitted a copy of an order from the Superior Court of California, which indicates that the petitioner was arrested in 2003 for possession of narcotics, and that the charge was dismissed. Finding the evidence insufficient, on March 24, 2005, the director requested further evidence (RFE), to establish that the petitioner is a person of good moral character. The petitioner requested a 60-day extension. On June 2, 2005, the director granted the petitioner's request for a 60-day extension. On May 18, 2005, the petitioner requested a second extension. On June 20, 2005, the petitioner responded to the RFE by submitting a criminal history transcript showing that the petitioner was arrested on September 29, 2003, and charged with possession of narcotics ([REDACTED]). The petitioner also resubmitted a copy of the minute order, which states that the charges against the petitioner were discharged by the District Attorney's office on September 30, 2003.

After reviewing the evidence submitted by the petitioner, the director denied the petition on August 9, 2005, finding that the evidence was not sufficient to establish that the petitioner has a qualifying relationship as the spouse, intended spouse, or former spouse of a citizen or lawful permanent resident of the United States.

Counsel for the petitioner filed a timely appeal, asserting that the director erred in finding that the petitioner's husband was no longer a lawful permanent resident as of August 30, 1994. Counsel reasoned that there must be a mistake, because:

the Service, in its wisdom, has admitted [the petitioner] as a V[-]1 spouse of a lawful permanent resident on March 28, 2002 (i.e. the Service considered [the petitioner's husband] a legal permanent resident as late as March 28, 2002). Moreover, the U.S. State Department, yet another agency, has seen fit to issue her a V[-]1 visa on March 19, 2002. . . Section 212(k) of the [Act] states that if an alien was admitted through no fault of her own in a visa issued erroneously by the Service, then she is entitled to have been issued that visa in the first place. Assuming arguendo that [the petitioner's] husband was not entitled to legal permanent status but nevertheless the fault lies not with [the petitioner] who was issued a V[-]1 visa in error by the Service. As such, the I-360 should be approved nevertheless.

¹ [REDACTED] was ordered deported on August 30, 1994, more than two years before he wed the petitioner.

Counsel's argument is not persuasive. Section 212(k) of the Act, 8 U.S.C. § 1182(k), states in pertinent part:

Any alien, inadmissible from the United States under paragraph (5)(A) or (7)(A)(i) of subsection (a) of this section, *who is possession of an immigrant visa* may, if otherwise admissible, be admitted in the *discretion* of the [Secretary of Homeland Security] if [he] is satisfied that inadmissibility was not known to, or could not have been ascertained by the exercise of reasonable diligence by, the immigrant before the time of departure . . . or the applicant's application for admission.

It is noted that this section of the Act is a discretionary provision and does not require the Secretary of Homeland Security to admit an alien or approve a petition. Further, the section is inapplicable to the instant case. The petitioner is not in possession of an immigrant visa, nor is this petition an application for admission.

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. The petitioner's husband lost his permanent resident status on August 30, 1994, prior to their marriage in 1997. The petitioner's spouse lost his status as a lawful permanent resident when a final administrative order of deportation was issued on August 30, 1994. *See* 8 C.F.R. §§ 1.1(p), 1001.1(p).

The petitioner filed her Form I-360 on March 17, 2005, more than ten years after her husband lost permanent resident status.

We concur with the finding that the record did not establish that the petitioner was spouse of a lawful permanent resident at the time of the filing of the instant petition.

The petitioner's appellate submission does not overcome the director's stated grounds for denial.

Despite our support of the director's findings, however, the director's decision cannot stand because of the director's failure to issue a Notice of Intent to Deny (NOID) to the petitioner prior the issuance of the denial.

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.

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.² On remand, the director should also address the issue of the petitioner's good moral character. The director should request that the petitioner

² When issuing the notice of intent to deny, the director should consider all of the evidence contained in the record, including the evidence submitted by the petitioner on appeal.

submit her own affidavit explaining the circumstances surrounding her arrest and to submit relevant excerpts of law for California showing the maximum possible penalty for each charge. 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 this decision.