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: DEC 14 2006

EAC 03 238 55020

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 Acting Director (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 The decision of the director will be withdrawn and the petition will be remanded for further action.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.

The petitioner, through counsel, submits a timely appeal.

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 Colombia who states that she entered the United States on February 29, 2000 as a nonimmigrant visitor. The petitioner married M-P-* in Port Chester, New York on August 18, 2000. At that time, the petitioner's spouse was a U.S. lawful permanent resident. On October 15, 2002, the petitioner's spouse was ordered removed from the United States by an immigration judge and lost his lawful permanent resident status. The Board of Immigration Appeals affirmed the immigration judge's order on March 19, 2003. The petitioner filed this Form I-360 on August 20, 2003. On January 13, 2006, the director denied the petition because the petitioner's spouse was not a permanent resident at the time of filing. While the director also indicated that the petitioner did not meet the exceptions provided by statute, the director failed to discuss the exceptions, the evidence in the record regarding the spouse's loss of status, and the reasons for the director's finding of ineligibility (e.g., that the spouse lost status more than two years prior to filing, that the loss of status was not due to an incident of domestic violence, or both). The petitioner, through counsel, timely appealed.

On appeal, counsel submits evidence of the petitioner's spouse's lawful permanent resident status. However, no further evidence has been submitted regarding the petitioner's spouse's loss of status. Given the lack of detail and analysis regarding the specific facts of this case and the statutory exceptions, we cannot fault counsel for failing to address this issue on appeal.

A review of the record in this case as well as CIS records regarding the petitioner's spouse show that he lost his immigrant status due to a conviction in New York on May 4, 2001 that did not involve the petitioner or her child. The petitioner's statement indicates that she was not aware of the incident leading to her husband's loss of status until the police came to her mother-in-law's home to look for her spouse. 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 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.

In addition to the issues discussed above, we find three additional issues beyond those named in the director's decision, which preclude approval. Specifically, the record does not establish that the petitioner resided with her spouse and that she entered into the marriage in good faith. On her Form I-360 the petitioner claims to have resided with her spouse from June 2000 until May 2001 and that she last resided with her spouse at 12

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* Name withheld to protect individual's identity.

In her personal statement, the petitioner makes several references to moving into her spouse's apartment at [redacted] prior to their marriage. The information contained on the previously submitted Form I-130 and the Form G-325A, signed by the petitioner on April 26, 2001, contradict these claims. On those forms, the petitioner claimed to have resided at [redacted] These discrepancies detract from the credibility of the testimony of the petitioner. We note that the petitioner has submitted no documentary evidence of a joint residence at either of these addresses. The record also lacks documentary evidence of the petitioner's good faith marriage. Although the petitioner has submitted photographs of the petitioner and her spouse at different places and times, these photographs do not establish the petitioner's intent at the time of her marriage.

As it relates to her claim of abuse, the petitioner has submitted two personal statements in which she generally claims that her spouse was aggressive and jealous. While the petitioner also claims that she was harassed and assaulted by her spouse's ex-girlfriend, this claim is not sufficient to establish eligibility for this classification as the statute requires that the abuse be perpetrated by the spouse, not a third party. Although the petitioner recounts two incidents of abuse that were purportedly witnessed by friends of the petitioner, the petitioner has not submitted affidavits from any of these individuals. Although she is not required to do so, the petitioner does not explain why such evidence does not exist or is unobtainable. *See* 8 C.F.R. §§ 204.1(f)(1), 204.2(c)(2)(i).

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.