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U.S. Department of Homeland Security
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U.S. Citizenship
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FILE:

EAC 04 139 53822

Office: VERMONT SERVICE CENTER

Date: SEP 21 2006

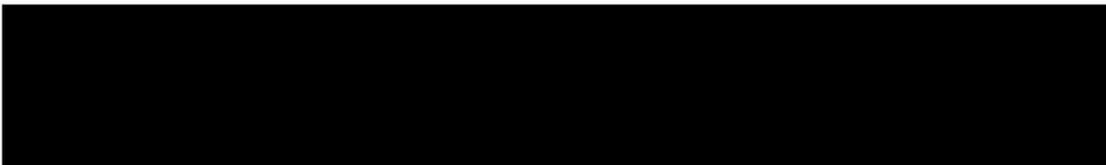
IN RE:

Petitioner:



PETITION: **Petition for Special Immigrant Battered Child Pursuant to Section 204(a)(1)(B)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(B)(iii)**

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.

A handwritten signature in black ink, appearing to read "R. Wichmann".

Robert P. Wichmann, 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 The decision of the director will be withdrawn and the petition will be remanded for further action.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 family-based second preference immigrant pursuant to section 204(a)(1)(B)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(B)(iii), as an alien battered or subjected to extreme cruelty by her United States citizen parent.

The director denied the petition, finding that the petitioner failed to establish a qualifying relationship with a U.S. citizen.

On appeal, counsel submits a brief and further evidence.

Section 204(a)(1)(B)(iii) of the Act provides, in pertinent part:

An alien who is the child of an alien lawfully admitted for permanent residence, or who was the child of a lawful permanent resident who within the past 2 years lost lawful permanent resident status due to an incident of domestic violence, and who is a person of good moral character, who is eligible for classification under section 1153(a)(2)(A) of this title [section 201(b)(2)(A) of the Act], and who resides, or has resided in the past, with the alien's permanent resident alien parent may file a petition with the [Secretary of Homeland Security] under this subparagraph for classification of the alien (and any child of the alien) under such section if the alien demonstrates to the [Secretary of Homeland Security] that the alien has been battered by or has been the subject of extreme cruelty perpetrated by the alien's permanent resident parent.

Section 204(a)(1)(B)(v)(I) of the Act states, in pertinent part:

For the purposes of any petition filed or approved under clause (ii) or (iii), divorce, or the loss of lawful permanent resident status by a spouse or parent after the filing of a petition under that clause shall not adversely affect approval of the petition

The eligibility requirements for a petition filed under section 204(a)(1)(B)(iii) of the Act are further explicated in the regulation at 8 C.F.R. § 204.2(e)(1), which states, in pertinent part:

(ii) Parent-child relationship to the abuser. The self-petitioning child must be unmarried, less than 21 years of age, and otherwise qualify as the abuser's child under the definition of child contained in section 101(b)(1) of the Act when the petition is filed Termination of the abuser's parental rights or a change in legal custody does not alter the self-petitioning relationship provided the child meets the requirements of section 101(b)(1) of the Act.

Section 101(b)(1) of the Act defines a "child" as, in pertinent part:

an unmarried person under twenty-one years of age who is –

* * *

(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred[.]

The petitioner in this case is a native and citizen of Mexico who states on the Form I-360 that she entered the United States in April 1992. The record shows that when the petitioner was ten years old, her biological mother married S-T-¹, who was then a lawful permanent resident of the United States. Citizenship and Immigration Services (CIS) records show that the petitioner's former stepfather was ordered removed from the United States on April 3, 2002. The petitioner filed her Form I-360 on April 6, 2004, when she was 18 years old.

Qualifying Relationship and Eligibility for Preference Immigrant Classification

1. Termination of the Marriage between the Petitioner's Mother and her Former Stepfather

The director denied the petition and stated:

[E]vidence in the record indicates that this marriage was terminated, and your mother has remarried. Pursuant to INA 204(a)(1) [sic] in order to be eligible for the benefit sought, the termination of the marriage between your natural parent and your former stepparent would have had to have occurred after the date upon which you filed your self-petition. . . . Therefore, a qualifying relationship did not exist at the time of filing this petition as required by law.

As noted by counsel on appeal, the director did not cite the specific dates of the termination of the marriage of the petitioner's biological mother and former stepfather and of her mother's remarriage. On appeal, counsel submits a copy of the Notice of Entry of Judgment of dissolution of the marriage between the petitioner's mother and former stepfather on June 24, 2004, over two months after this petition was filed on April 6, 2004. Accordingly, the dissolution of the marriage of her mother and former stepfather does not disqualify the petitioner pursuant to section 204(a)(1)(B)(v)(I) of the Act.

2. Remarriage of the Petitioner's Mother

CIS records contain a copy of a certified abstract of marriage from Clark County, Nevada, which shows that the petitioner's mother remarried another man on August 21, 2004, while this petition was pending. On appeal, counsel states that the petition was denied after CIS "was informed telephonically that the appellant's mother had remarried." However, the marriage abstract was obtained from the CIS file of the petitioner's mother. CIS records also show that the petitioner's mother adjusted her status to that of a lawful permanent resident on June 14, 2006, as the spouse of a

¹ Name withheld to protect individual's identity.

U.S. citizen. Counsel does not present any reasons why the remarriage of the petitioner's mother while this petition was pending does not render the petitioner ineligible. However, we do not reach the issue of whether or not her mother's remarriage also rendered the petitioner ineligible for classification under section 204(a)(1)(B)(iii) of the Act because the petitioner has failed to establish that she had a qualifying relationship with her former stepfather on the two following grounds .

3. The Petitioner's Former Stepfather's Loss of Status was Not Due to Domestic Violence

CIS records show that the petitioner's former step-father was ordered removed from the United States on April 3, 2002 pursuant to sections 237(a)(2)(A)(iii) and 237(a)(2)(B)(i) of the Act because he was convicted of an aggravated felony and a controlled substance offense. This petition was filed on April 6, 2004, over two years after the petitioner's former stepfather lost his immigration status. In addition, CIS records indicate that the petitioner's former stepfather was ordered removed due to his conviction for a controlled substance offense and related aggravated felony, not an incident of domestic violence. Accordingly, the petitioner has not established that she had a qualifying relationship with her former stepfather at the time this petition was filed, as required by section 204(a)(1)(B)(iii) of the Act.

On page two of her cover letter submitted with the petition, counsel states that the petitioner's former stepfather was ordered removed as a result of abuse against the petitioner's mother, herself and her sisters. Counsel cites a Notice of Decision on the V-visa application of the petitioner's mother, as evidence of the date of deportation of the petitioner's former stepfather. This document is not included in the petitioner's file.² Counsel cites no evidence that the loss of the petitioner's former stepfather's status was due to an incident of domestic violence. On appeal, counsel submits a Protective Order in Criminal Proceeding for the petitioner against her former stepfather, which was issued on September 1, 2000 for three years. On appeal, counsel also submits a certified copy of the court docket showing that the petitioner's former stepfather was convicted of misdemeanor infliction of injury on a child on September 1, 2000 in California. While these documents indicate that the petitioner was battered or subjected to extreme cruelty by her former stepfather, the evidence does not establish that her former stepfather's loss of status was due to an incident of domestic violence. Rather, CIS records indicate that the petitioner's former stepfather was ordered removed due to his conviction for a controlled substance offense and related aggravated felony. Accordingly, the petitioner's former stepfather did not lose his immigration status due to an incident of domestic violence, as required by section 204(a)(1)(B)(iii) of the Act.

Counsel acknowledges that the petitioner's former stepfather was ordered removed over two years before this petition was filed, but counsel provides no reasons why such a late filing should not disqualify the petitioner. The petitioner's former stepfather was ordered removed on April 3, 2002.

² On her Index to Exhibits submitted in support of the appeal, counsel acknowledges that: "Because the appellant's self-petition was submitted as part of one package with her mother's and sister's self-petitions, these documents may not be found in her record."

April 3, 2004 was a Saturday. Accordingly, this petition would have been filed within two years of the petitioner's former stepfather's loss of status if CIS had received the petition on the following Monday, April 5, 2004. *See* 8 C.F.R. § 1.1(h). Although the petitioner signed the Form I-360 on March 25, 2004 and counsel dated her accompanying cover letter April 5, 2004, CIS did not receive the petition until April 6, 2004. The so-called "mailbox rule" does not apply in these proceedings. The date of filing is the date the petition was received by CIS. *See* 8 C.F.R. § 103.2(a)(7). Consequently, this petition was not filed within two years of the petitioner's former stepfather's loss of status, as required by section 204(a)(1)(B)(iii) of the Act.

4. Eligibility for Family Second-Preference Immigrant Classification

Beyond the director's decision, the present record also fails to establish that the petitioner was eligible for family second-preference immigrant classification under section 203(a)(2)(A) of the Act based on her relationship with her former stepfather. Because the petitioner did not have a qualifying relationship with her former stepfather at the time this petition was filed, she was also ineligible for preference immigrant classification based on such a relationship, as required by section 204(a)(1)(B)(iii) of the Act.

Good Moral Character

Beyond the director's decision, the present record also does not demonstrate that the petitioner is a person of good moral character. In her unsigned "Declaration" submitted on appeal, the petitioner does not discuss her moral character and the present record does not contain local police clearances, state criminal background checks, or an explanation that such documents are unavailable and other evidence of the petitioner's good moral character, as specified in the regulation at 8 C.F.R. § 204.2(e)(2)(v). In her cover letter submitted with the petition, counsel discusses the moral character of the petitioner's mother, but does not cite any evidence of the petitioner's own good moral character. Accordingly, the present record does not establish the petitioner's good moral character, as required by section 204(a)(1)(B)(iii) of the Act.

The present record does not demonstrate that the petitioner had a qualifying relationship with her former stepfather, that she was eligible for preference immigrant classification based on such a relationship, or that she is a person of good moral character. The petitioner is thus ineligible for immigrant classification pursuant to section 204(a)(1)(B)(iii) of the Act based on the evidence currently contained in her record.

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). This regulation 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 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.