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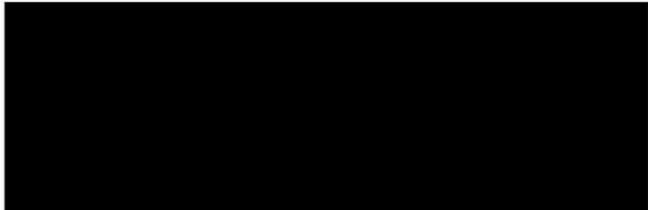
U.S. Department of Homeland Security
U.S. Citizenship & Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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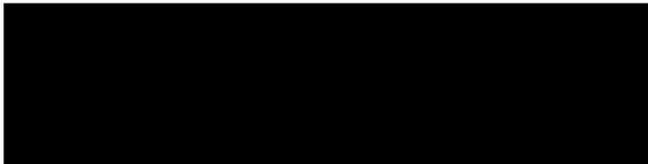
APR 28 2009

FILE: [Redacted] Office: VERMONT SERVICE CENTER Date:
EAC 07 009 50094

IN RE: Petitioner: [Redacted]

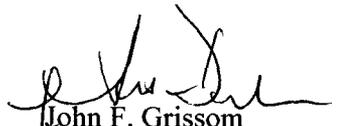
PETITION: Petition for Immigrant Battered Spouse Pursuant to Section 204(a)(1)(B)(ii) of the
Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

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.


John F. Grissom
Acting 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 AAO will withdraw the director's decision; however, because the petition is not approvable, it will be remanded for further action and consideration.

The petitioner seeks classification pursuant to section 204(a)(1)(B)(ii) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii), as an alien battered or subjected to extreme cruelty by her lawful permanent resident spouse.

The director denied the petition because the record failed to establish that the petitioner had a qualifying relationship with her former husband.

The petitioner, through counsel, submitted a timely appeal.

We concur with the director's determination that the petitioner has not established a qualifying relationship with her former husband. Nonetheless, the case must 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).

Section 204(a)(1)(B)(ii) of the Act provides that an alien who is the spouse of a lawful permanent resident may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the lawful permanent resident spouse in good faith and that during the marriage, the alien or a child of 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)(B)(ii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(II).

An alien who has divorced a lawful permanent resident may still self-petition under this provision of the Act if the alien 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." Section 204(a)(1)(A)(iii)(II)(aa)(CC)(bbb) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(bbb).

Section 204(a)(1)(J) of the Act further states, in pertinent part:

In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) . . . , or in making determinations under subparagraphs (C) and (D), the [Secretary of Homeland Security] shall consider 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 [Secretary of Homeland Security].

The petitioner in this case is a native and citizen of Mexico who married R-V-,¹ a U.S. legal permanent resident, on August 21, 1985 in Mexico. On July 2, 2003, their marriage was dissolved by order of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida.² The petitioner filed this Form I-360 on October 10, 2006. The director denied the petition on November 13, 2007, finding that the petitioner did not establish that she had a qualifying relationship with her former husband due to the dissolution of their marriage over two years before the petition was filed.

On appeal, counsel does not contest the fact that the petitioner was divorced from her legal permanent resident spouse for more than two years at the time of filing but states that she was unaware of this requirement. Counsel states that the petitioner filed the Form I-485, Application to Register Permanent Residence or Adjust Status “through the assistance of a ‘notario’” and argues that the filing of the Form I-485 should be “considered a ‘constructive’ filing of the [Form] I-360.” Therefore, the petitioner claims to have received ineffective assistance from an unaccredited representative.

Although counsel notes that the petitioner was not assisted by an attorney but by an agent, there is no remedy available for a petitioner who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on its behalf. *See* 8 C.F.R. § 292.1. The AAO only considers complaints based upon ineffective assistance against accredited representatives. *Cf. Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff’d*, 857 F.2d 10 (1st Cir. 1988) (requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel), and *Matter of Compean, Bangaly and J-E-C-, et al.*, 24 I&N Dec. 710 (A.G. 2009).

The language of the statute clearly indicates that to remain eligible for classification despite no longer being married to a United States citizen, an alien must have been the bona fide spouse of a legal permanent resident “within the past two years” and demonstrate a connection between the abuse and the legal termination of the marriage. 204(a)(1)(B)(ii)(II)(aa)(CC)(ccc) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(II)(aa)(CC)(ccc). As previously noted, the petitioner in this case was divorced from her spouse for more than two years at the time of filing the petition. Although counsel argues that the petitioner’s Form I-485 filing should be considered a constructive filing of the Form I-360, U.S. Citizenship and Immigration Services (USCIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). Counsel does not provide any supporting evidence indicating that USCIS should consider the filing of the Form I-485 as a constructive filing of the Form I-360. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, we concur with the director’s determination that the petitioner did not establish a qualifying relationship with her former husband.

Despite the petitioner’s ineligibility based on the present record, this case must be remanded to the director for issuance of a NOID in compliance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii). On remand, the director should address the ground for the intended denial of the petition as cited in the

¹Name withheld to protect individual’s identity.

²Case No. [REDACTED]

foregoing discussion.

As always in visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.