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

U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
EAC 07 178 50749

Office: VERMONT SERVICE CENTER

Date: JUN 04 2009

IN RE: [Redacted]

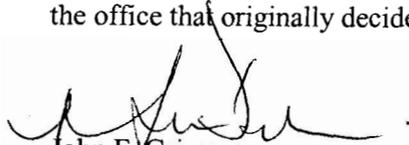
PETITION: Petition for Immigrant Abused Child Pursuant to Section 204(a)(1)(B)(iii) of the
Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(B)(iii)

ON BEHALF OF PETITIONER:

[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.


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for further action.

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

The director denied the petition on the basis of his determination that the petitioner had failed to establish that he had a qualifying relationship as the child of a lawful permanent resident of the United States.

Counsel submitted a timely appeal on March 19, 2008.

Section 204(a)(1)(B)(iii) of the Act provides, in pertinent part, that an alien who is the child of a lawful permanent resident, who is a person of good moral character, who is eligible for classification under section 203(a)(2)(A)(i) of the Act, and who resides, or has resided in the past, with the permanent resident 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)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J) states, in pertinent part, the following:

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 eligibility requirements are explained further at 8 C.F.R. § 204.2(e), which states, in pertinent part, the following:

Self-petition by child of abusive citizen or lawful permanent resident—Eligibility.

- (i) A child may file a self-petition under section 204(a)(1)(A)(iv) or 204(a)(1)(B)(iii) of the Act if he or she:
 - (A) Is the child 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 parent;
 - (E) Has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident parent while residing with that parent;
 - (F) Is a person of good moral character
- (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 and when it is approved. . . .

According to the evidence of record, the petitioner was born in Mexico City, Mexico on June 8, 1982. His mother married J-O-, a citizen of the United States, on March 22, 1996. J-O- died on August 1, 2000.

The petitioner filed the instant Form I-360 on June 4, 2007. The director denied the petition on February 20, 2008.

The sole issue on appeal is whether the petitioner qualified as a child of a citizen or lawful permanent resident of the United States as of the date of the filing the instant petition. A petitioner must establish eligibility as of the date of the filing of the petition. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The director determined that since the petitioner's stepfather died on August 1, 2000, no qualifying relationship between the petitioner and his citizen stepfather existed on June 4, 2007, the date the petition was filed.

On appeal, counsel states that "the Immigration Act does not specifically prohibit the filing of an application," and that, "[t]herefore the application is eligible for benefits under the Immigration Act." Counsel states further that the petitioner is permitted to file a VAWA petition until the age of 25. However, counsel's apparent assertion the petitioner remains eligible for the classification despite the fact that the marriage between his mother and citizen stepfather ended nearly seven years before he filed the self-petition is not supported by statute, regulation, or case law.

The AAO finds that it was reasonable for the director to determine that the petitioner was not eligible because his biological parent was no longer married to the citizen stepparent at the time of

filing. In *Matter of Pagnerre*, 13 I&N Dec. 688 (BIA 1971), the Board of Immigration Appeals (BIA) held that the death of the natural parent did not result in termination of the stepparent-stepchild relationship where the evidence indicated that a family relationship continued as a matter of fact. The facts described in *Pagnerre*, which involved the death of a natural parent “during the existence of the relationship” between the stepparent and stepchild and a continued bond with the surviving stepparent, are clearly distinguishable from the instant case, where the marital relationship was terminated by the death of J-O-, and the petitioner no longer shares a relationship with J-O-. There was no continuing family relationship “as a matter of fact” between J-O- and the petitioner after the death of J-O-.

Additionally, although section 204(a)(1)(D)(v) of the Act allows sons and daughters of abusive U.S. citizens and permanent residents to file a self-petition under section 204(a)(1)(A)(iv) of the Act until they are 25 years of age, such sons and daughters must establish that they were eligible to file such a petition when they were under 21 years old and they show that the abuse was at least one central reason for the filing delay. Here, the petitioner has not submitted any evidence regarding the delay in filing the petition seven years after his stepfather’s death.

The AAO agrees with the director’s determination that the petitioner has failed to establish that he has a qualifying relationship as the child of a lawful permanent resident of the United States. However, the record indicates that the director did not issue a notice of intent to deny the petition (NOID) before he issued his decision. Although the record establishes that the petitioner is ineligible for the benefit sought, the petition must be remanded, solely on procedural grounds, so that the petitioner has the opportunity to respond to a NOID. The petition must be remanded to the director for issuance of a NOID in compliance with the regulation in effect at 8 C.F.R. § 204.2(c)(3)(ii)¹ on the date this petition was filed.

As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director’s February 20, 2008 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

¹ USCIS promulgated a rule on April 17, 2007 related to the issuance of requests for evidence and NOIDs. 72 Fed. Reg. 19100 (Apr. 17, 2007). The rule became effective on June 18, 2007, *after* the filing of this petition on June 4, 2007.