U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

Public Copy

FILE: [redacted] Office: Vermont Service Center Date: AUG 08 2001
EAC 00 229 52610

IN RE: Petitioner:
Beneficiary: [redacted]

APPLICATION: 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)

IN BEHALF OF PETITIONER:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a native and citizen of Mexico who is seeking 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 the battered spouse of a lawful permanent resident of the United States.

The director determined that the petitioner's spouse was deported from the United States on May 20, 1998. Therefore, the petitioner failed to establish that she: (1) is the spouse of a citizen or lawful permanent resident of the United States; and (2) is eligible for immigrant classification under section 201(b)(2)(A)(i) or 203(a)(2)(A) of the Act, 8 U.S.C. 1151(b)(2)(A)(i) or 1153(a)(2)(A), based on that relationship. The director, therefore, denied the petition.

On appeal, counsel asserts that the petitioner is eligible for relief as a battered or abused spouse, and because the petitioner's abusive spouse may have lost his permanent residence out of his own actions, this fact alone should not eliminate her and her children from the class of people Congress sought to protect by enacting the Violence Against Women Act. He further asserts that it is absurd to deny the petitioner this relief, particularly when it was her abuser's actions which prompted his alleged removal and not the actions or will of the petitioner. Counsel further states that if the petitioner is returned to Mexico, she will be faced once more with the fear of seeing her husband and regressing to the abusive and cruel life she had when they lived together.

8 C.F.R. 204.2(c)(1), in effect at the time the self-petition was filed, states, in pertinent part, that:

> (i) 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 in the United States 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;

(G) Is a person whose deportation (removal) would result in extreme hardship to himself, herself, or his or her child; and

(H) Entered into the marriage to the citizen or lawful permanent resident in good faith.

The record reflects that the petitioner married her spouse on [redacted] in Mexico. The petition, Form I-360, shows that the petitioner claimed to have arrived in the United States on August 14, 1987. Her current nonimmigrant status or how she entered the United States was not shown. The Service records also reflect that on May 20, 1998, the petitioner's spouse, a native and citizen of Mexico, was ordered removed from the United States from the San Ysidro port of entry based on his convictions for aggravated felonies, including "cruelty towards wife."

8 C.F.R. 204.2(c)(1)(i)(A), which was in effect at the time the petition was filed, requires that the petitioner must be the spouse of a citizen or lawful permanent resident of the United States. As the petitioner's spouse was deported from the United States and, therefore, lost his resident alien status, the director determined that the petitioner was not the spouse of a lawful permanent resident of the United States at the time the petition was filed.

Subsequent to the filing of the instant petition, on October 28, 2000, the President approved enactment of the Violence Against Women Act, 2000, Pub. L. No. 106-386, Division B, 114 Stat. 1464, 1491 (2000). Section 1503(c) amends section 204(a)(1)(B)(ii) of the Act so that an alien, claiming to qualify for immigration as the battered spouse or child of a resident alien, may file a petition if the alien demonstrates that he or she was a bona fide

spouse of a lawful permanent resident within the past 2 years and whose spouse lost status within the past 2 years due to an incident of domestic violence. Id. section 1503(c), 114 Stat. at 1520-21. Pub. L. 106-386 does not specify an effective date for the amendments made by section 1503. This lack of an effective date strongly suggests that the amendments entered into force on the date of enactment. Johnson v. United States, 529 U.S. 694, 702 (2000); Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991).

As a general rule, an administrative agency must decide a case according to the law as it exists on the date of the decision. Bradley v. Richmond School Board, 416 U.S. 696, 710-11 (1974); United States v. The Schooner Peggy, 1 Cranch 103, 110 (1801); Matter of Soriano, 21 I & N Dec. 516 (BIA 1996, AG 1997); Matter of Alarcon, 20 I & N Dec. 557 (BIA 1992). For immigrant visa petitions, however, the Board has held that, to establish a priority date, the beneficiary must have been fully qualified for the visa classification on the date of filing. Matter of Atembe, 19 I & N Dec. 427 (BIA 1986); Matter of Drigo; 18 I & N Dec. 223 (BIA 1982); Matter of Bardouille, 18 I & N Dec. 114 (BIA 1981). Even if the law changes in a way that may benefit the beneficiary, the appeal must be denied, without prejudice to the filing of a new petition, to ensure that the beneficiary does not gain an advantage over the beneficiaries of other petitions. Id. These decisions bind the Service. 8 C.F.R. § 3.1(g). As required by Atembe, Drigo, and Bardouille, therefore, the appeal will be dismissed.

This dismissal is without prejudice, however, to the filing of a new visa petition under section 204 of the Act, as amended by section 1503(c) of Pub. L. No. 106-386. It is noted, however, that the record in this case shows that the petitioner's spouse lost his status as a lawful permanent resident of the United States when he was removed from the United States to Mexico on May 20, 1998 and that the petitioner filed the instant petition more than 2 years later, on July 14, 2000.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed, without prejudice to the filing of a new visa petition under section 204 of the Act, as amended by section 1503(c) of Pub. L. No. 106-386.