

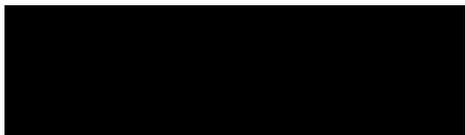
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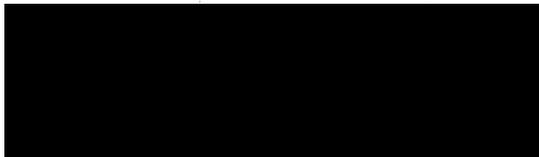
MAY 11 2004

FILE:

Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner:
 Beneficiary:



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: Self-represented

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.

Cindy M. Momen for
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The petitioner subsequently filed a motion to reopen the decision of the AAO. The AAO granted the motion and remanded the case to the director for further action. The director has again denied the petition and is now before the AAO on appeal. The appeal will be rejected.

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 originally denied the petition on November 8, 1999, after determining that the petitioner failed to establish eligibility for the benefit sought because she was divorced from her allegedly abusive permanent resident spouse on July 20, 1999, prior to the filing of the self-petition on October 13, 1999.

Upon review of the record of proceeding, the AAO noted that a motion was filed with the court to set aside the divorce; however, no documentary evidence was furnished to establish that the court vacated or set aside the previous judgment of divorce entered on July 20, 1999. He maintained that without this evidence, the final judgment of divorce was considered valid. The AAO, therefore, dismissed the appeal on October 22, 2001.

The petitioner subsequently filed a motion to reopen the AAO's decision. She submits a copy of the court docket reflecting that the order to set aside the divorce was granted on January 14, 2000. However, because the court docket furnished was a computer listing and was not certified by the court, the AAO remanded the case to the director in order that the petitioner may be given the opportunity to submit a certified copy of the order setting aside the divorce, and to also determine whether the petitioner met all the criteria listed in 8 C.F.R. § 204.2(c)(1).

The director, on August 6, 2002, mailed a Form I-797, Notice of Action, to the applicant, requesting the following:

1. The director noted that the petitioner had indicated that she and her spouse "had a spat and Hai left for a time and I thought that he was gone for good and thought that I could get my Resident papers by trying to self apply through cruelty which he cause me much anguish by leaving." The petitioner was, therefore, asked whether she desired to continue with the processing of her Form I-360 petition as a battered spouse of a lawful permanent resident.
2. The petitioner was asked whether she and [REDACTED] are still married. She was requested to submit divorce documents from the court if her marriage to Mr. [REDACTED] had been terminated; submit a "certified" copy of the order setting aside the divorce from [REDACTED] and submit proof of the legal termination of all her previous marriage(s), and the legal termination of all the previous marriage(s) of [REDACTED].
3. If her spouse had ever filed a Petition for Alien Relative (Form I-130), or any other application or petition on her behalf, the petitioner was requested to submit a copy of all documentation.
4. Evidence to show that she or her children had been the subject of battery or extreme mental cruelty committed by her spouse pursuant to 8 C.F.R. § 204.2(c)(1)(i)(E).
5. Evidence that she had resided with her spouse pursuant to 8 C.F.R. § 204.2(c)(1)(i)(D).
6. Evidence of her good moral character pursuant to 8 C.F.R. § 204.2(c)(1)(i)(F).

The petitioner was granted 60 days in which to present additional evidence listed above, to withdraw the petition, to request a decision based on the evidence submitted, or to request additional time to respond. Based on the petitioner's failure to respond, the director denied the petition on January 3, 2003.

8 C.F.R. § 103.3(a)(2) states, in pertinent part, that the affected party shall file an appeal, with fee, including any supporting brief with the office where the unfavorable decision was made within 30 days after service of the decision.

8 C.F.R. § 103.3(a)(2)(v)(B)(1) states, in part:

An appeal which is not filed within the time allowed must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

Additionally, 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states, in part:

If an untimely appeal meets the requirements of a motion to reopen as described in § 103.5(a)(2) of this part or a motion to reconsider as described in § 103.5(a)(3) of this part, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

The petitioner, on appeal, submits a copy of the court's order setting aside the petitioner's divorce from her permanent resident spouse. The petitioner, however, neither acknowledged nor submitted the evidence requested by the director and listed in items 1 through 6 above. Thus, the petitioner, in this case, has not met the requirements of a motion.

Whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, three days shall be added to the prescribed period. Service by mail is complete upon mailing. 8 C.F.R. § 103.5a(b).

The director denied the application on January 3, 2003. The decision clearly advised the applicant that any appeal must be filed with the office where the unfavorable decision was made within 30 days after service of the decision. Coupled with three days for mailing, the appeal, in this case, should have been filed on or before February 6, 2003. The appeal was properly received by the Vermont Service Center on February 22, 2003.

Based on the applicant's failure to file a timely appeal, the appeal will be rejected.

ORDER: The appeal is rejected.