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U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE: [REDACTED]
EAC 05 130 53536

VERMONT SERVICE CENTER

Date: APR 14 2008

IN RE: Petitioner: [REDACTED]

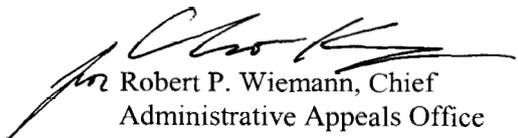
PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(B)(ii) of the
Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(B)(ii)

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition. On appeal, the Administrative Appeals Office (AAO) remanded the matter for further action. The matter is now before the AAO upon certification of the director's subsequent, adverse decision. The decision of the director will be affirmed and the petition will be denied.

The petitioner seeks immigrant classification 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 an alien battered or subjected to extreme cruelty by a lawful permanent resident of the United States.

Section 204(a)(1)(B)(ii) of the Act provides that an alien who is the spouse of a lawful permanent resident of the United States may self-petition for immigrant classification if he or she demonstrates that the marriage to the lawful permanent resident spouse was entered into in good faith and that during the marriage, the alien or the alien's child 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 a spouse of an alien lawfully admitted for permanent residence under section 203(a)(2)(A) 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).

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

In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) or clause (ii) or (iii) of subparagraph (B), 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].

In this case, the director initially denied the petition on October 11, 2005, for failure to establish the requisite battery or extreme cruelty and good moral character. In our June 14, 2006 decision on appeal, we concurred with the director's determinations. However, we remanded the petition for issuance of a Notice of Intent to Deny (NOID) in compliance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii). We also requested, on remand, that the director inquire as to the current status of the petitioner's marriage given the evidence in the record that indicated that she was single. Upon remand, the director issued a NOID on October 6, 2006, which informed the petitioner that she had failed to establish her claims of battery or extreme cruelty and good moral character. In addition, the director requested further evidence of the status of the petitioner's marriage, noting that, if divorced, the petitioner should submit documentation of the legal termination of her marriage. The petitioner failed to respond to the director's NOID and the director denied the petition on February 16, 2007, finding that the petitioner failed to establish that she had been battered or subjected to extreme cruelty by her spouse during their marriage and that she was a person of good moral character. The director certified his decision to the AAO for review. On certification, the petitioner submits a letter, and additional documents, and copies of documents previously submitted.

The relevant evidence submitted below was fully addressed in our prior decision, incorporated here by reference. In response to the NOID, the petitioner failed to submit any further testimonial or documentary evidence in support of her claims of battery or extreme cruelty and good moral character. The petitioner has now submitted additional evidence on certification. However, where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal or certification. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). The petitioner has provided no explanation and documentation of why the evidence submitted on certification was not available for submission below. Accordingly, the AAO need not and will not consider the evidence submitted for the first time on certification. If the petitioner wishes the evidence to be considered, she may submit it with a new self-petition. *See Matter of Obaigbena*, 19 I&N Dec. at 537.

Upon review, we concur with the director's determination. Based on the record before the director at the time of his February 16, 2007 decision, the petitioner had not demonstrated that she was battered or subjected to extreme cruelty by her spouse during their marriage and that she was a person of good moral character.

Beyond the decision of the director, as noted in our previous decision, the petitioner's 2004 federal income tax return indicates the petitioner's filing status as "single." As the petitioner filed the instant petition in 2005 indicating that she was married, her 2004 tax return contradicts her stated marital status at the time of filing. Despite being notified of this issue in our prior decision and being given the opportunity to clarify the matter in response to the director's NOID, the petitioner failed to submit any further evidence regarding her marital status. Accordingly, we find that the petitioner has failed to establish that she had a qualifying marriage as the spouse of a lawful permanent resident of the United States pursuant to section 204(a)(1)(B)(ii)(II)(aa) of the Act and that she was eligible for preference classification based upon that relationship as required by section 204(a)(1)(B)(ii)(II)(cc) of the Act.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003). The AAO maintains plenary power to review each case on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied for the four reasons stated above, with each considered as an independent and alternative basis for denial. 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. Here, that burden has not been met.

ORDER: The director's decision of February 16, 2007 is affirmed. The petition is denied.