

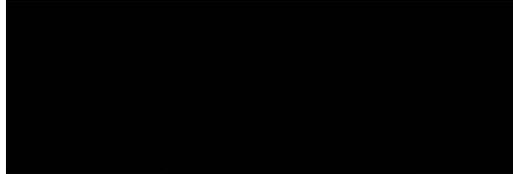
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U.S. Citizenship
and Immigration
Services

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By



FILE: [REDACTED]
EAC 06 210 51919

Office: VERMONT SERVICE CENTER

Date: **JUL 30 2008**

IN RE: Petitioner:



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:



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
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as a special immigrant 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 finding that the petitioner failed to establish that she had a qualifying relationship with her former husband.

The petitioner submits a timely appeal.

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 the alien demonstrates that he or she entered into the marriage with the 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 a preference immigrant 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).

An alien who has divorced a United States lawful permanent resident may still self-petition for immigrant classification under section 204(a)(1)(B)(ii) of the Act if the alien demonstrates that he or she is a person "who was a bona fide spouse of a lawful permanent resident within the past 2 years...." Section 204(a)(1)(B)(ii)(II)(aa)(CC) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(II)(aa)(CC).

Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J) 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 Guatemala who indicates on the Form I-360 that she entered the United States on or around May 1987, without inspection. On July 19, 1996, the petitioner married N-L-,¹ a permanent resident of the United States, in Florida. N-L- filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf on March 12, 1997. The Form I-130 was approved on July 28, 1997. The petitioner's marriage to N-L- was dissolved on July 8, 2003.²

¹ Name withheld to protect individual's identity.

² Final Judgment Dissolving Marriage, Circuit Court of the 17th Judicial Circuit, Broward County, Florida.

The petitioner filed this Form I-360 on July 10, 2006. The director issued a Notice of Intent to Deny (NOID) the petition on January 23, 2007. The petitioner timely responded to the NOID on March 19, 2007. The director denied the petition on May 1, 2007. The director found that the petitioner failed to establish that she had a qualifying relationship as the spouse or former spouse of a lawful permanent resident of the United States, noting the petitioner's failure to submit evidence of the termination of N-L-'s prior marriages and that the petitioner was divorced from N-L- for more than two years at the time of filing.

The petitioner, through counsel, filed a timely appeal on May 29, 2007. On appeal, counsel for the petitioner does not dispute that the petitioner was divorced from N-L- for more than two years at the time of filing. Instead, counsel argues that the "technical limitations uttered by the [director] . . . fail to take into account the Congressional intent behind the enactment of the battered spouse legislation." Although counsel indicates that he would submit a brief or further evidence in support of the appeal, to date, no further submission has been received. Accordingly, we consider the record to be complete as it now stands.

Counsel's argument on appeal is not persuasive. The plain language of the statute requires either that the petitioner be married to his or her lawful permanent resident spouse at the time of filing, or if no longer married at the time of filing, a bona fide spouse *within the past 2 years*. The statute does not contain any waivers of this provision. As discussed above, the record of proceeding demonstrates that the petitioner was not married to N-L- at the time of filing and that her divorce took place more than two years prior to the filing of the Form I-360 petition. Accordingly, we concur with the director's finding that the petitioner has not established that she had a qualifying relationship with her former husband, as required by section 204(a)(1)(B)(ii)(II)(aa)(CC) of the Act.

Beyond the director's decision, we further find that the record also fails to establish that the petitioner is eligible for preference classification, as required by section 204(a)(1)(B)(ii)(II)(cc) of the Act. The regulation at 8 C.F.R. § 204.2(c)(1)(B) requires that a self-petitioner be eligible for preference classification under section 203(a)(2)(A) of the Act based on his or her relationship to the abusive spouse. As the petitioner's marriage to her former husband was legally terminated over two years before this petition was filed, she is ineligible for preference classification based on their former relationship.

As it relates to the director's concern regarding the petitioner's failure to submit evidence of the termination of N-L-'s prior marriages, we note that section 204(a)(1)(B)(ii)(II)(cc) provides that an alien whose marriage is considered not to be legitimate due to bigamy of the lawful permanent resident spouse remains eligible for preference classification if the alien can demonstrate that she believed she had entered into a bona fide marriage with a lawful permanent resident of the United States and with whom a marriage ceremony was actually performed. In this instance, the record establishes that a marriage ceremony between the petitioner and N-L- was performed and we find no reason to question the petitioner's belief that she entered into a bona fide marriage with him. We, therefore, withdraw this particular finding of the director.

The AAO maintains plenary power to review each appeal 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 above stated reasons, 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 appeal is dismissed.