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**U.S. Citizenship  
and Immigration  
Services**

Db



FILE: [Redacted]  
WAC 04 061 52019

Office: CALIFORNIA SERVICE CENTER

Date: **SEP 06 2005**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Petition for Alien Fiancé(e) Pursuant to Section 101(a)(15)(K) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(K)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision 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, Director  
Administrative Appeals Office

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

The petitioner seeks to classify the beneficiary, a native and citizen of Australia, as the fiancée of a United States citizen pursuant to section 101(a)(15)(K) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(K).

The director denied the petition because he found the beneficiary's marriage to the petitioner prior to the filing of the petition precluded her from benefiting under section 101(a)(15)(K) of the Act. *Decision of the Director*, dated July 20, 2004. The director erred in reaching this conclusion.

A U.S. citizen petitioner may file a Form I-129F on behalf of a spouse. Section 101(a)(15)(K)(ii) of the Act, 8 U.S.C. § 1101(a)(15)(K)(ii), provides nonimmigrant classification to an alien who:

has concluded a valid marriage with a citizen of the United States who is the petitioner, is the beneficiary of a petition to accord a status under section 201(b)(2)(A)(i) that was filed under section 204 by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa . . .

However, at the time of filing, the record indicates that the petitioner was a lawful permanent resident of the United States, not a citizen. As section 101(a)(15)(K)(ii) of the Act, 8 U.S.C. § 1101(a)(15)(K)(ii), provides nonimmigrant classification only to aliens who are the spouses of U.S. citizens, the petitioner was not eligible to file the Form I-129F on behalf of his wife. Accordingly, the appeal will be dismissed and the petition will be denied.

The basis for the AAO's denial of the instant petition differs from that provided by the director. However, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if a 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. 2001), *aff'd* 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.

**ORDER:** The appeal is dismissed.