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

B7

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: APR 26 2005

EAC 04 072 52129

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for Special Immigrant Battered Spouse Pursuant to Section 204(a)(1)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON BEHALF OF PETITIONER:

[redacted]

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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION**: The Acting Director, Vermont Service Center, denied the preference visa petition in a decision dated March 11, 2004. Counsel for the petitioner filed a timely appeal. The matter is now before the Administrative Appeals Office (AAO) on appeal.

The petitioner is a native of the former Soviet Union and citizen of Russia 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 United States citizen.

The director denied the petition, finding that the petitioner failed to establish that she was a bona fide spouse of the allegedly abusive United States citizen within two years of filing the instant petition.

The regulation at 8 C.F.R. § 204.2(c)(1)(i) states, in pertinent part, that:

> 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 . . . 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; [and]
>
> * * *
>
> (H) Entered into the marriage to the citizen or lawful permanent resident in good faith.

The regulation at 8 C.F.R. § 204.2(c)(1)(i)(E) requires the petitioner to establish that she 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.

The director determined that the petitioner failed to establish that she is eligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act, because according to the evidence on the record, the petitioner had divorced her citizen spouse more than two years prior to the filing of the petition. The director determined and the AAO concurs that there is no provision of law whereby an alien may self-petition based on a former spousal relationship when more than two years have passed between the date of the legal termination of the marriage and the date of filing a Form I-360 petition.

According to the evidence on the record, the petitioner's first marriage ended in divorce on April 2, 1996. On October 14, 1997, [redacted] filed a Petition for Alien Fiancée on the petitioner's behalf. The petition was approved on November 7, 1997. The petitioner entered the U.S. as a K-1 fiancée on December 27, 1997. The petitioner wed U.S. citizen [redacted] on February 26, 1998. On June 7, 1999, [redacted] withdrew his petition. The petitioner and [redacted] divorced on February 4, 2000. On July 24, 2000, the petitioner wed U.S. citizen [redacted] in Wausau, Wisconsin. On January 14, 2004, the petitioner filed the Form I-360 self-petition, almost four years after the petitioner's marriage to the allegedly abusive spouse was legally terminated.

On appeal, counsel for the petitioner asserts that the director's decision denying the Form I-360 petition violates the petitioner's rights to due process and equal protection.

Counsel asserts that the director's actions violated the petitioner's rights to procedural due process by denying her case without reviewing the factual merits of the case. Counsel's assertion is without merit. This due process attack fails because proof of a denial of due process in an administrative proceeding requires a showing of "substantial prejudice." *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004). The petitioner has not demonstrated any prejudice. Upon review of the director's decision, the director considered the totality of the facts and applied the appropriate law. The director demonstrated ample analysis of the facts and law in her decision denying the instant petition. The petitioner has not met her burden of proof and the denial was the proper result under the statute and regulations.

Counsel for the petitioner asserts that certain provisions of the immigration laws, including the law governing the requested immigration benefit, violate the equal protection clause and are unconstitutional. The AAO observes that, like Board of Immigration Appeals, this office cannot rule on the constitutionality of laws enacted by Congress. *See, e.g. Matter of Fuentes-Campos*, 21 I&N Dec. 905 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992).

In any event, there is a rational basis[1] to treat battered women who are married or recently divorced differently from divorced battered women who are no longer under the yoke of an oppressive spouse. Congress's goal in enacting the Violence Against Women Act of 1994 (VAWA) was to eliminate barriers to women leaving abusive relationships. *H.R. Rep. No. 103-395*, at 25 (stating that the goal of the bill is to "permit[ ] battered immigrant women to leave their batterers without fearing deportation"). Counsel's argument is not persuasive.

The petitioner failed to establish that she was the spouse of a citizen either at the time of or within two years prior to the filing of the petition.

[1] *See Anetkhai v. INS*, 876 F.2d 1218 (5th Cir. 1989)(the deferential standard of review is appropriate in analyzing provisions of immigration law).

Section 204(a)(1)(A)(iii)(II) of the Act requires that the self-petitioner establish that she is married to a United States citizen or permanent resident at the time of the filing of the Form I-360 petition with certain exceptions. The petitioner does not fall within one of the statutory exceptions to this requirement. She divorced her allegedly abusive spouse more than two years prior to the filing of the instant petition.

The petitioner's remarriage to one other than her abusive spouse prior to the filing of the petition is a bar to granting the petition.

Section 204 of the Act, as amended, does not provide that re-marriage before the self-petition is filed or approved is permitted. There is no provision for the approval of such a self-petition. Section 204(h) of the Act provides in part that the "[r]emarriage of an alien whose petition was approved under section 204(a)(1)(B)(ii) or 204(a)(1)(A)(iii) . . . shall not be the basis for revocation of a petition approval under section 1155 of this title." Congress specifically considered that remarriage of an abused spouse would not terminate eligibility once a petition had been approved; by implication, remarriage before filing the Form I-360 petition does terminate eligibility.

Congress's goal in enacting the Violence Against Women Act of 1994 (VAWA) was to eliminate barriers to women leaving abusive relationships. *H.R. Rep. No. 103-395*, at 25 (stating that the goal of the bill is to "permit[ ] battered immigrant women to leave their batterers without fearing deportation"). While the spirit and intent of the 1994 law was to allow immigrants to safely escape the violence and bring their abusers to justice, Congress found the Act failed to protect all that it intended to protect, including divorced battered immigrants and children who were abused before the age of 21. In a hearing before the Subcommittee on Immigration and Claims, Congresswoman Jackson-Lee discussed those people for whom VAWA was created to protect. The Congresswoman stated:

> The 1994 VAWA requires the victim to be married to a citizen or permanent resident and prove battery or extreme cruelty by the abuser . . . I can say that unfortunately, our job, as lawmakers, is not yet done. Our intent in 1994 was to provide battered immigrants with meaningful access to lawful immigration status, thus allowing them to safely leave their abusers. Nevertheless, we are still finding groups of battered immigrants who are trapped in abusive relationships despite the access to such lawful status . . . [D]ivorced battered immigrants do not have access to VAWA immigration relief. There are many "savvy" abusers who know that if they divorce their abused spouse they will cut off their victim's access to VAWA relief. H.R 3083 allows battered immigrants to file VAWA self-petitions if it is filed within two years of divorce.[2]

Clearly, the petitioner is not the type of battered immigrant woman with whom Congress was concerned with protecting when enacting VAWA or BIWPA as, after the petitioner's divorce from her abusive spouse, she remarried another United States citizen.

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.

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[2] *Battered Immigrant Women Protection Act of 2000*, (BIWPA): *Hearing on H.R. 3083 Before the House Subcommittee on Immigration and Claims*, 106th Cong. (2000)(statement of Congresswoman Jackson-Lee).

**ORDER:** The appeal is dismissed.