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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B9

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 19 2010

EAC 08 056 50350

IN RE: Petitioner: [redacted]

PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(A)(iii) 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner seeks immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien battered or subjected to extreme cruelty by a United States citizen.

Section 204(a)(1)(A)(iii) of the Act provides that an alien who is the spouse of a United States citizen may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the United States citizen 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 an immediate relative under section 201(b)(2)(A)(i) of the Act, resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(A)(iii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II).

The director denied the petition on February 11, 2009, determining that the petitioner had not established that he had a qualifying relationship with his former spouse within two years of filing the Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant. The director also noted that the record is deficient in establishing that the petitioner resided with his spouse, that he was subjected to battery or extreme cruelty by his spouse, that he had entered into the marriage in good faith, and that his prior marriage had been legally terminated prior to his marriage to the claimed abusive spouse.

Counsel timely submits a Form I-290B, Notice of Appeal or Motion. Counsel submits the petitioner's statement on the Form I-290B, and evidence of a July 30, 2008 inquiry to United States Citizenship and Immigration Services (USCIS) regarding the petitioner's immigration status. The petitioner indicates, in pertinent part, on the Form I-290B that if he had known prior to 2007 that his former spouse had withdrawn the Form I-130, Petition for Alien Relative, she had filed on his behalf, he would have filed the Form I-360 petition earlier.

The record includes the following pertinent facts. The petitioner is a citizen of Brazil who entered the United States on a B-2 visa on January 21, 1997. The record includes a photocopy of an uncertified marriage certificate indicating the petitioner married M-O-[1] on December 2, 1997. The record includes a final divorce decree issued July 8, 2003 terminating the marriage. The petitioner filed the Form I-360 on December 13, 2007.

The language of the statute clearly indicates that to remain eligible for classification despite no longer being married to a United States citizen, an alien must have been the *bona fide* spouse of a United States citizen "within the past two years" and demonstrate a connection between the abuse and the legal termination of the marriage. 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act, 8 U.S.C.

[1] Name withheld to protect the individual and his family's identity.

§ 1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc). As previously noted, the petitioner in this matter was divorced from his spouse for more than two years at the time of filing the petition. There is no exception to this requirement. Accordingly, we concur with the director's determination that the petitioner did not establish a qualifying relationship with his former spouse.

Beyond the director's decision, the present record also fails to establish that the petitioner was eligible for immediate relative classification based on a qualifying relationship with his former spouse, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act. The AAO further finds that the record does not include sufficient evidence to establish that the petitioner resided with his former spouse, was subjected to battery or extreme cruelty by his former spouse, entered into the marriage in good faith, and that he terminated his prior marriage, thus making him eligible to enter into the claimed marriage with M-O-. As the petitioner is clearly ineligible for this benefit because he did not establish that he has or had a qualifying relationship with his former spouse, the AAO will not further address each of these additional issues that also preclude a determination of eligibility for this benefit. 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 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.