

(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

Date: **SEP 22 2014** Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Self-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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

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 his U.S. citizen spouse.

The director denied the petition on the basis of his determination that the petitioner had failed to establish a qualifying relationship with a citizen of the United States and his eligibility for immigrant classification based upon that relationship. On appeal, counsel submits a brief statement.

Relevant Law and Regulations

Section 204(a)(1)(A)(iii)(I) 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).

Section 204(a)(1)(J) of the Act 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 eligibility requirements are explained further at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part, the following:

(i) *Basic eligibility requirements.* A spouse may file a self-petition under section 204(a)(1)(A)(iii) . . . of the Act for his or her classification as an immediate relative . . . if he or she:

* * *

(B) Is eligible for immigrant classification under section 201(b)(2)(A)(i) . . . of the Act based on that relationship [to the U.S. citizen spouse].

(ii) *Legal status of the marriage.* . . . The self-petitioner’s remarriage . . . will be a basis for the denial of a pending self-petition.

Pertinent Facts and Procedural History

The record reflects that the petitioner is a citizen of Yemen who entered the United States on July 6, 1998 as a nonimmigrant visitor. The petitioner's marriage certificate indicates that the petitioner married L-H, a U.S. citizen, on December 23, 1999.¹ Their marriage terminated in a divorce on April [REDACTED] in the New York Supreme Court, [REDACTED]. The petitioner filed the instant Form I-360 on March [REDACTED]. On February [REDACTED] the petitioner married N-S-, a U.S. citizen, in New York. N-S- subsequently filed an alien relative petition (Form I-130) on his behalf and that petition remains pending.

The director denied the I-360 self-petition and the petitioner timely appealed with a brief statement. We conduct appellate review on *a de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). A full review of the record fails to establish the petitioner's eligibility. Counsel's claims do not overcome the director's determination. The appeal will be dismissed for the following reasons.

*Qualifying Relationship and Corresponding Eligibility for Immediate Relative Classification**Divorce*

The petitioner's divorce from L-H- took legal effect April [REDACTED], and he did not file the instant petition until March [REDACTED] almost four years later. The director determined that the petitioner is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act based on his relationship with L-H- because he was not her bona fide spouse within two years of the date he filed this petition.

On appeal, counsel asserts that the director failed to consider the petitioner's and L-H-'s joint stipulation to vacate the judgment of divorce, filed with the clerk's office in the New York Supreme Court, New York County, on September [REDACTED]. The petitioner, however, has not provided court records to show that the divorce was vacated. The New York Supreme Court, in *Doe v. Doe*, stated that there is no basis in law for a motion to vacate an uncontested, final judgment of divorce solely on grounds of reconciliation, and the only remedy for parties who have reconciled after a divorce decree is entered is to remarry. 905 N.Y.S.2d 901, 902-906. (N.Y. Sup. Ct. 2010). In addition, in *Doe*, the court explained that "[t]he Office of the County Clerk would not have been able to vacate an order or judgment, even upon stipulation, absent a court order." Since the petitioner failed to demonstrate that his divorce from L-H- was vacated by court order or that the couple later remarried prior to filing the Form I-360, he has not demonstrated a qualifying spousal relationship requisite for immigrant classification under section 204(a)(1)(A)(iii) of the Act and his corresponding eligibility for immediate relative classification on the basis of such a relationship, as required by subsections 204(a)(1)(A)(iii)(II)(aa) and (cc) of the Act.

Remarriage

¹ Name withheld to protect the individual's identity.

De novo review of the record reveals that the petitioner has also failed to demonstrate a qualifying relationship requisite for immigrant classification because he remarried while this appeal was pending.² The regulation at 8 C.F.R. § 204.2(c)(1)(ii) specifically states that remarriage prior to adjudication of a self-petition is a basis for denial. As the petitioner remarried while this petition was pending he no longer qualifies for protection under the Violence Against Women Act (VAWA) provisions of section 204(a)(1)(A)(iii) of the Act. Accordingly, the petitioner has not established that he had a qualifying spousal relationship and is eligible for immigrant classification based upon that relationship, as required by subsections 204(a)(1)(A)(iii)(II)(aa) and (cc) of the Act due to his divorce from L-H- and his remarriage to N-S- while this petition was pending.

Conclusion

As the petition was filed more than two years after the petitioner's divorce from L-H- and he remarried N-S- while the petition was pending, the petitioner failed to demonstrate the existence of a qualifying relationship with a U.S. citizen and his corresponding eligibility for immigrant classification as an immediate relative on the basis of such a relationship. He is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.³

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013); *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Here, that burden has not been met.

ORDER: The appeal is dismissed.

² 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); 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).

³ The director issued a Notice of Intent to Deny (NOID) because the petitioner had not submitted sufficient evidence to establish that L-H- subjected him to battery or extreme cruelty during their marriage. In the denial notice, the director did not make a final determination on this issue because the petitioner failed to establish a qualifying spousal relationship and his corresponding eligibility for immigrant classification based upon that relationship. As the appeal is now dismissed for those same reasons, we will similarly not reach the issue of battery or extreme cruelty during the petitioner's marriage to L-H-.