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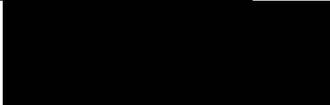
U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **AUG 08 2006**

IN RE:

Petitioner:

Beneficiary:



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

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, Chief
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 is a citizen of the United States who seeks to classify the beneficiary, a native and citizen of Brazil, as the fiancée of a United States citizen pursuant to § 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 after determining that the petitioner was not legally able to marry the beneficiary at the time he filed the petition, as required by §214(d) of the Act. Specifically, the director noted that the petitioner's divorce was not final as of September 21, 2005, the date he filed the Form I-129F. On appeal, counsel asserts that the petitioner was divorced in 1998, but due to a clerical error, the judgment was not entered until September 27, 2005.

Section 101(a)(15)(K) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(K), provides nonimmigrant classification to an alien who:

- (i) is the fiancé(e) of a U.S. citizen and who seeks to enter the United States solely to conclude a valid marriage with that citizen within 90 days after admission;
- (ii) 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; or
- (iii) is the minor child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien.

The record reflects that the petitioner filed a Form I-129F petition for alien fiancée on September 21, 2005, and his divorce became final on September 27, 2005. It was held in *Matter of Souza*, 14 I&N Dec. 1 (Reg. Comm. 1972) that both the petitioner and beneficiary must be unmarried and free to conclude a valid marriage at the time the petition is filed.

The director denied the petition after determining that the petitioner had failed to submit documentary evidence that he was legally free to marry the beneficiary at the time the petition was filed. The director found that the petitioner's divorce was not final at the time the petition was filed. On appeal, counsel explains that the petitioner and his ex-wife separated and began divorce proceedings in 1998, and the petitioner and his ex-wife believed themselves to be legally divorced since that time.

The record includes a "Findings and Order after Hearing" form from the Kings County superior court of California indicating that a hearing on the petitioner's divorce suit was held on September 18, 1998; however, the final order was never signed. The record also includes a superior court dissolution judgment form showing that a hearing on the matter was held on October 26, 1998. The Notice of Entry of Judgment issued by the Kings County court clearly shows that the judgment was entered on August 31, 2005, after the petitioner filed the I-129F. Therefore, because the beneficiary was not legally free to marry the petitioner at the time the petition was filed, the appeal will be dismissed.

Pursuant to 8 C.F.R. § 214.2(k)(2), this dismissal is without prejudice to the petitioner's filing a new Form I-129F in view of the fact that he is now divorced. 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 and the application is denied.