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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

**APR 30 2009**

[Redacted]

FILE:

[Redacted]

Office: VERMONT SERVICE CENTER

Date:

EAC 07 158 50145

IN RE:

Petitioner:

[Redacted]

PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(B)(ii)

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.

John F. Grissom,  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action.

The petitioner seeks immigrant classification under section 204(a)(1)(B)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(B)(ii), as an alien battered or subjected to extreme cruelty by a United States lawful permanent resident.

The director denied the petition, determining that the petitioner failed to establish that she had a qualifying relationship with her former husband.

On appeal, counsel submits a timely filed Form I-290B, Notice of Appeal, on the director's motion decision.

Section 204(a)(1)(A)(iii) of the Act provides that an alien who is the spouse of a lawful permanent resident may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the lawful permanent resident 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)(B)(ii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(II).

An alien who has divorced a United States lawful permanent resident may still self-petition under this provision of the Act if the alien demonstrates "a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse." Section 204(a)(1)(B)(ii)(II)(aa)(CC)(bbb) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(II)(aa)(CC)(bbb).

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

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

(B) Is eligible for immigrant classification under section . . . 203(a)(2)(A) of the Act based on that relationship [to the U.S. lawful permanent resident].

The record in this matter provides the following pertinent facts and procedural history. The petitioner in this matter is a native and citizen of Colombia who claims to have entered the United States without inspection. The petitioner married J-Z-<sup>1</sup>, a U.S. lawful permanent resident on February 4, 1993. According to United States Citizenship and Immigration Services' (USCIS) records, the petitioner's husband's permanent resident status was terminated on February 25, 2003. The petitioner filed her first Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, on August 22, 2005. The director issued a Notice of Intent to Deny (NOID) the petition on March 7, 2006 and after receiving no response, denied the petition on August 2, 2006. The petitioner filed the Form I-360 that is the subject of this appeal on May 8, 2007. The director subsequently denied the petition on January 23, 2008, finding that the petitioner had not established that she had a qualifying relationship as the spouse, intended spouse, or former spouse of a lawful permanent resident of the United States. The director properly determined that the petitioner's husband's lawful permanent resident status had been terminated on February 25, 2003 and that although section 204(a)(1) of the Act allowed an alien to self-petition for up to two years following a spouse's loss of status as a citizen or lawful permanent resident, when such status was lost due to an incident of domestic violence, there is no provision whereby an alien could self-petition beyond this two-year period.

Counsel for the petitioner submitted an appeal that was received by the USCIS on February 29, 2008, or 37 days after the date of the director's decision. In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a USCIS office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct fee. For calculating the date of filing, the appeal shall be regarded as properly filed on the date that it is so stamped by the service center or district office. As the appeal was received by USCIS 37 days after the date of the director's decision, the director properly considered the appeal as a motion to reopen and reconsider. Upon review of the evidence in the record, the director issued a denial of the motion on June 6, 2008 and the petitioner, through counsel, submitted a timely filed appeal on July 8, 2008.

On appeal, counsel asserts that the initial appeal was filed February 25, 2008, as that was the date of mailing. Counsel asserts that the petitioner has suffered abuse at the hands of her former spouse and requests that these factors be taken into consideration. As noted above, the Form I-290B filed February 29, 2008 was untimely. The director properly considered the matter as a motion and properly determined that the petitioner had not established that she had a qualifying relationship with a lawful permanent resident when the petition was filed and that there was no provision in law for an exception to filing a self-petition more than two years subsequent to the date the petitioner's

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<sup>1</sup> Name withheld to protect individual's identity.

husband's lawful permanent status was terminated.

*Qualifying Relationship and Eligibility for Immediate Relative Classification*

Although the record reflects that J-Z- was, at one time, a lawful permanent resident of the United States, he lost his immigrant status on February 25, 2003, more than two years prior to the filing of the petition, when he was ordered removed from the United States. As the director found, there is no exception to this requirement. Further, as the petitioner did not have a qualifying relationship as the spouse of a lawful permanent resident pursuant to section 204(a)(1)(B)(ii)(II) of the Act, she also was not eligible for preference immigrant classification based on such a relationship, as required by section 204(a)(1)(B)(ii)(II)(cc) of the Act.

Accordingly, we concur with the director's determination that the petitioner did not establish a qualifying relationship with her husband and find beyond the director's decision that the present record also fails to establish that the petitioner was eligible for immediate relative classification based on a qualifying relationship with her husband.

Although the petitioner's appeal does not overcome the director's stated ground for denial and we have found an additional issue that precludes approval of the petition, we find the matter must be remanded to the director for further consideration as the director denied the petition without first issuing a NOID. The regulation at 8 C.F.R. § 204.2(c)(3)(ii) directs that USCIS must provide a self-petitioner with a NOID and an opportunity to present additional information and arguments before a final adverse decision is made. Accordingly, the case will be remanded for issuance of a NOID, which will give the petitioner a final opportunity to overcome the deficiencies of her case.

Accordingly, the decision of the director must be withdrawn and the case remanded for the purpose of the issuance of a NOID as well as a new final decision. On remand, the director should address all grounds for the intended denial of the petition as cited in the foregoing discussion. The new decision, if adverse to the petitioner, shall be certified to this office for review.

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, the petitioner has not sustained that burden.

**ORDER:** The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.