

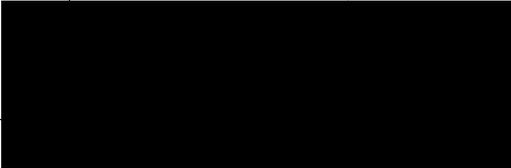
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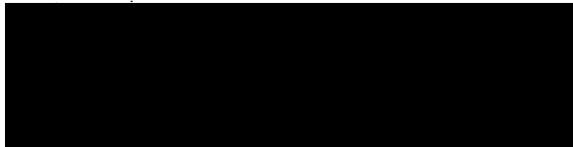
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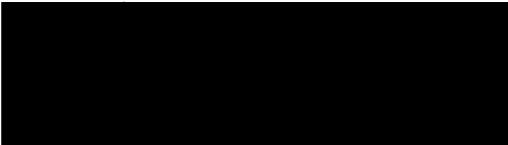
IN RE:

Petitioner:



PETITION: Petition for Special Immigrant Battered 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:

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*

2 Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center Director in a decision dated October 11, 2005. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.

The petitioner is a native and citizen of Romania who is seeking classification as a special immigrant 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 the battered spouse of a United States citizen.

The director denied the petition on October 11, 2005, finding that the petitioner failed to establish that she had a qualifying relationship as the spouse of a United States citizen.

The petitioner, through counsel, filed a timely appeal and brief, dated November 5, 2005.

Section 204(a)(1)(A)(iii) of the Act provides, in pertinent part, that an alien who is the spouse of a citizen of the United States, who is a person of good moral character, who is eligible to be classified as an immediate relative, and who has resided with his or her spouse, may self-petition for immigrant classification if the alien demonstrates to the [Secretary of Homeland Security] that—

(aa) the marriage or the intent to marry the United States citizen was entered into in good faith by the alien; and

(bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse.

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.

According to the evidence contained in the record, the self-petitioner entered the United States on March 21, 2003 as a K-1 nonimmigrant. The self-petitioner married United States citizen, [REDACTED] on June 11, 2003 in New York City, New York. The petitioner and [REDACTED] were divorced on July 13, 2004<sup>1</sup> and the petitioner married [REDACTED] on September 22, 2004. The instant petition was filed on August 2, 2005. The director denied the petition on October 11, 2005, based upon the determination that because the petitioner remarried prior to the filing of the Form I-360 petition, she was not eligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act based upon her claim of being battered or subjected to extreme cruelty by her spouse, [REDACTED].

On appeal, counsel does not dispute that fact that the petitioner is currently married and that her remarriage occurred prior to the filing of the Form I-360. Instead, counsel argues that the director's decision "contravenes the findings and purposes of the VTVPA of 2000." Counsel further argues that because the statute does not explicitly prohibit remarriage, it must be permitted and that because Congress did not limit or qualify the phrase "former spouse," the phrase, therefore, may include a petitioner who subsequently remarried. Finally, counsel argues that because the petitioner entered the United States as a K-1 nonimmigrant, her status is "in limbo" as the petitioner is not permitted to adjust status by means of her current marriage without obtaining a waiver of § 212(a)(9)(B). Thus, the material facts do not appear to be in dispute. Rather, the issue before us on appeal is whether the director's interpretation of section 204 is a reasonable construction of the statute.

#### History of Abused Spouse Status

##### 1. 1994 Amendments to section 204 of the Act.

Congress first granted an abused spouse the ability to self-petition in 1994, when it enacted the *Violent Crime Control and Law Enforcement Act of 1994*, Pub. L. 103-322, 108 Stat. 1796 (Sep. 13, 1994). Section 40701, located in Subtitle G, amended section 204 of the Act to permit an abused spouse and children of a United States citizen or lawful permanent resident to file a petition for immigrant status. Congress observed that:

Under current law only the United States citizen or lawful permanent resident spouse is authorized to file a relative petition, and this spouse maintains full control over the petitioning process. He or she may withdraw the petition at any time for any reason. The purpose of permitting self-petitioning is to prevent the citizen or resident from using the petitioning process as a means to control or abuse an alien spouse.<sup>2</sup>

<sup>1</sup> Index No: 302483-04, Matrimonial/IAS Part of the New York State Supreme Court.

<sup>2</sup> See H.R. Rep. 203-395, available at 1993 WL 484760 at p. 41.

Under the amended section 204 of the Act, an abused alien spouse would no longer have to rely on her abusive U.S. citizen or lawful permanent resident spouse to petition for immigrant status on her behalf.

On March 26, 1996, the legacy Immigration and Naturalization Service (INS), predecessor to the USCIS, promulgated an interim rule to implement the changes mandated by section 40701 of the *Violent Crime Control and Law Enforcement Act of 1994*.<sup>3</sup> The rule outlined the various provisions for abused spouses of U.S. citizens and lawful permanent residents to file a self-petition. In explaining the interim rule, the INS stated:

The rule further provides, however, that a pending spousal self-petition will be revoked if the self-petitioner chooses to remarry before becoming a lawful permanent resident. By remarrying, the self-petitioner has established a new spousal relationship and has shown that he or she no longer needs the protections of section 40701 of the Crime Bill to equalize the balance of power in the relationship with the abuser.

The implementing regulatory language at 8 C.F.R. § 204.2(c)(1)(ii) states:

The self-petitioning spouse must be legally married to the abuser when the petition is properly filed with the Service. A spousal self-petition must be denied if the marriage to the abuser legally ended through annulment, death, or divorce before that time. After the self-petition has been properly filed, the legal termination of the marriage will have no effect on the decision made on the self-petition. The self-petitioner's remarriage, however, will be a basis for the denial of a pending self-petition.

Finally, the interim rule at 8 C.F.R. § 205.1(a)(3)(i)(E) established that approval of a self-petition made under section 204 of the Act is automatically revoked as of the date of approval:

Upon the remarriage of the spouse of an abusive citizen or lawful permanent resident of the United States when the spouse has self-petitioned under section 204(a)(1)(A)(iii) or 204(a)(1)(B)(ii) of the Act.

Thus, as early as 1996, section 204 of the Act was interpreted as requiring a self-petitioning abused spouse to be married at the time of filing and not remarry prior to becoming a lawful permanent resident.<sup>4</sup>

## 2. 2000 Amendments to section 204 of the Act.

<sup>3</sup> See 61 FR 13061 (Mar. 26, 1996), available at 1996 WL 131508.

<sup>4</sup> In a policy memo from T. Alexander Aleinikoff, Executive Associate Commissioner, entitled "Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents," (April 16, 1996), the INS Office of Programs emphasized the regulatory requirement that "[a] pending spousal self-petition will be denied or the approval of a spousal self-petition revoked, however, if the self-petitioning spouse remarries before he or she becomes a lawful permanent resident."

In 2000, Congress further amended section 204 of the Act by enacting the *Victims of Trafficking and Violence Protection Act of 2000* (VTVPA), Pub. L. 106-386, 114 Stat. 1464 (Oct. 28, 2000). Division B of that Act contained the *Violence Against Women Act of 2000* (VAWA 2000). Pursuant to VAWA 2000 and the VTVPA, seven groups of battered aliens became eligible to self-petition for classification as immediate relatives or preference immigrants under sections 204(a)(1)(A)(iii) or (iv), or 204(a)(1)(B)(ii) or (iii) of the Act.<sup>5</sup>

The Battered Immigrant Women Protection Act of 2000 is contained within the VTVPA.<sup>6</sup> In VTVPA § 1502(a), Congress made three findings. First, it found that the goal of VAWA 1994 was to remove immigration laws as a barrier that kept battered immigrant women and children locked in abusive relationships.<sup>7</sup> Second, it found that providing battered immigrant women and children with protection from deportation freed them to cooperate with law enforcement and prosecutors, without fear that the abuser would retaliate by withdrawing or threatening to withdraw, access to an immigration benefit under the abuser's control.<sup>8</sup> Third, Congress found there are several groups of battered women and children who do not have access to the immigration protections of VAWA 1994.<sup>9</sup> VTVPA §§ 1503(b) & (c) amended section 204 of the Act to permit an abused alien spouse, who had already terminated her marriage to the abusive U.S. citizen or lawful permanent resident, to self-petition, provided that the alien demonstrated a connection between the legal termination of the marriage within the past two years and battering or extreme cruelty by the spouse.<sup>10</sup> Prior to this amendment, a self-petitioning abused spouse was required to be married to the abusive spouse at the time of filing the petition. On appeal, counsel correctly notes that the director erroneously referenced a portion of the regulation that was superseded by §§ 1503(b) and (c) of the VTVPA.<sup>11</sup> We, therefore, withdraw the portion of the director's decision which is based upon 8 C.F.R. § 204.2(c)(1)(ii). However, counsel's argument regarding the fact that Congress failed to limit the phrase "former spouse" is not persuasive. The limit on aliens who are no longer married to their abusers, or who are the "former spouses" of United States citizens or lawful permanent residents, is that the petition must be filed within two years of the termination of the marriage and the termination must be connected to the battering or extreme cruelty.

In addition to the amendments contained in §§ 1503(b) and (c) § 1507(b) of the VTVPA, Congress amended section 204(h) of the Act to permit an abused self-petitioning spouse *whose petition had already been approved* to remarry without having the approval of her petition revoked. On appeal, counsel asks, "how a

<sup>5</sup> Group 1 — battered alien spouses of U.S. citizens or lawful permanent residents (LPR). Group 2 — alien spouses whose USC or LPR children are being battered by the U.S. citizen or LPR spouse. Group 3 — alien children battered by their U.S. citizen or LPR parent. Group 4 — divorced battered spouses of U.S. citizens or LPR who demonstrate a connection between the abuse suffered and the divorce and who file a petition within 2 years of the divorce. Group 5 — battered widowed spouses of U.S. citizens who file a petition within 2 years of the date of U.S. citizen's death. Group 6 — battered alien spouses of former U.S. citizens or LPRs spouse and who file a petition within 2 years of the date of loss. Group 7 — battered alien children of former U.S. citizens or LPRs and who file a petition within 2 years of the date of loss. See VAWA §§ 40701-02; VTVPA §§ 1503(b) and (c).

<sup>6</sup> VTVPA § 1501.

<sup>7</sup> § 1502(a)(1).

<sup>8</sup> § 1502(a)(2).

<sup>9</sup> § 1503(a)(3).

<sup>10</sup> Sections 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) and 204(a)(1)(B)(ii)(II)(aa)(CC)(bbb) of the Act.

<sup>11</sup> On page 2 of the director's decision, the director states, "Further, 8 C.F.R. § 204.2(c)(1)(ii) requires the denial of a self-petition when the self-petitioner has remarried."

rational and reasonable distinction may be drawn between a remarriage after the self-petition is approved, and a remarriage prior to the approval of the self-petition," as in this case. Counsel's question is best answered by referring to the maxim of statutory construction, *expressio unius est exclusio alterius*.<sup>12</sup> The fact that Congress specifically addressed the issue of remarriage in the context of revocations but did not address it elsewhere means that Congress did not intend to change any other provisions related to remarriage. Under section 204(h) of the Act, remarriage of the alien after approval of the petition would not serve as the sole basis for revocation of the petition. Congress did not refer to the issue of marriage in the other provisions of section 204 pertaining to abused spouses about the issue of remarriage. Consequently, the director's interpretation of section 204 that remarriage of the abused spouse while her petition was pending served to disqualify her, was reasonable given that Congress only provided that *remarriage after approval* would not disqualify the abused spouse. The inclusion of remarriage in section 204(h) of the Act as a non-disqualifying factor, after petition approval, strongly suggests that remarriage is a disqualifying factor prior to petition approval. The prohibition against using remarriage as a basis for revoking an approved petition is likely based on a desire for finality. Once the abused spouse made a sufficient showing that her self-petition should be granted, and such petition was granted, there would not be any purpose in requiring the abused spouse to delay remarrying.<sup>13</sup>

The director's interpretation is also consistent with the definition of "immediate relative" at section 201(b)(2)(A)(i) of the Act, 8 U.S.C. § 1151(b)(2)(A)(i), which states, in pertinent part:

In the case of an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen's death and was not legally separated from the citizen at the time of the citizen's death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section 204(a)(1)(A)(ii) within 2 years after such date **and only until the date the spouse remarries**. For purposes of this clause, an alien who has filed a petition under clause (iii) or (iv) of section 204(a)(1)(A) of this Act [i.e., the VAWA self-petitioning provisions] remains an immediate relative in the event that the United States citizen spouse or parent loses United States citizenship on account of the abuse.

[Emphasis added.]

Further, the director's interpretation is consistent with the Congressional intent of *VAWA 1994* and *VAWA 2000*. The motivation of Congress in 1994 was to provide a means for an abused immigrant spouse to obtain immigration benefits over which her abusive spouse held complete control.<sup>14</sup> Because of such control, the immigrant spouse could hardly report the abuse to the police, or seek government assistance, for fear of

<sup>12</sup> "Mention of one thing implies exclusion of another. When certain persons or things are specified in law . . . an intention to exclude all others from its operation may be inferred." See *Black's Law Dictionary*, 6<sup>th</sup> Edition (1990).

<sup>13</sup> Requiring an alien to be unmarried in order to be eligible for an immigration benefit is not limited to section 204 of the Act. For example, section 203 of the Act sets forth the preference allocation for family-sponsored immigrants. The first preference is the unmarried sons and daughters of U.S. citizens. See Section 203(a)(1) of the Act.

<sup>14</sup> H.R. Rep. 203-395, available at 1993 WL 484760 at p.41.

jeopardizing any chance to obtain lawful status in the United States. VAWA 1994 limited the abusive spouse's control by permitting the abused spouse to self-petition. However, the self-petitioning spouse was still required to be married to the abusive U.S. citizen or LPR at the time the petition was filed.<sup>15</sup> Congress found this unsatisfactory, such that in 2000, it further amended section 204 to permit an abused immigrant spouse to file a self-petition, even though the abusive marriage had been legally terminated.<sup>16</sup>

The abused spouse was required to demonstrate a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the lawful permanent resident spouse.<sup>17</sup> Congress also provided that remarriage, after the petition had been approved, would not be a basis for revoking the petition.<sup>18</sup>

While Congress broadened the eligibility requirement to include divorced spouses filing within two years of the divorce, it decided only to include the possibility of remarriage in the section pertaining to divorced spouses that had approved petitions but had not adjusted status or entered the United States as a permanent resident. As recently as January 5, 2006, Congress enacted VAWA 2005, which made further amendments to provisions related to battered spouses and children.<sup>19</sup> Again, however, Congress made no provisions for a remarried petitioner to self-petition based upon her prior abusive marriage. The fact that in three separate amendments to the original VAWA statute Congress left alone CIS' interpretation that remarriage prior to petition approval would result in a denial is compelling evidence that it considered the interpretation and found it an accurate view of Congressional intent. This is very significant because "[C]ongress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning."<sup>20</sup>

It is further noted that on December 9, 2005, in *Delmas v. Gonzalez*, 2005 WL 3926090 (Case No. 05-21507, S.D. Fla), the District Court upheld CIS's interpretation of the VTVPA so as to disqualify an alien who had remarried before filing a self-petition. While we acknowledge that a district court's decision is not binding precedent, the decision underlines the fact that CIS' interpretation of the statute is reasonable. The court stated:

Plaintiff argues that there is no evidence that Congress intended remarriage to negate the need for protection of the abused spouse. The legislative history and context of VAWA and the VTVPA show otherwise. VAWA relief is limited to those vulnerable to abuse. The AAO apparently concluded that an abused spouse who remarries prior to filing a self-petition is not the type of battered immigrant woman Congress was concerned with when enacting VAWA or the VTVPA ad, therefore, permissibly construed the statute to deny the instant petition.<sup>21</sup>

<sup>15</sup> See 8 C.F.R. § 204.2(c)(1)(ii)(1996).

<sup>16</sup> VTVPA § 1503.

<sup>17</sup> Section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act.

<sup>18</sup> VTVPA § 1507(b), amending 8 U.S.C. § 204(h).

<sup>19</sup> Violence Against Women and Department of Justice Reauthorization Act of 2005, Public Law No. 109-162, (VAWA 2005).

<sup>20</sup> *Bledsoe v. Palm Beach County Soil and Water Conservation District*, 133 F.3d 816, 822 (11<sup>th</sup> Cir. 1998), citing *Florida National Guard v. Federal Labor Relations Authority*, 699 F.2d 1082, 1087 (11<sup>th</sup> Cir. 1983).

<sup>21</sup> *Id.* at 3.

Based upon the above discussion, it is apparent that Congress wanted aliens with pending petitions to be either still married to the abusive spouse, or divorced within the last two years but not married to another person at the time of filing. The fact that the petitioner entered the United States as a K-1 nonimmigrant is irrelevant to our determination. Therefore, we do not find that the director erred in denying the instant petition.

However, although the petitioner's appeal does not overcome her statutory ineligibility, we find the case must be remanded to the director for further consideration. The regulation at 8 C.F.R. § 204.2(c)(3)(ii) requires the director to issue a Notice of Intent to Deny (NOID) in all cases where "the preliminary decision on a properly filed self-petition is adverse to the self-petitioner . . . ." The regulation does not distinguish between cases where there is statutory ineligibility and those cases in which the evidence simply appears to be deficient. Accordingly, the case must be remanded to the director for issuance of an NOID pursuant to the regulation.

As always, the burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.