

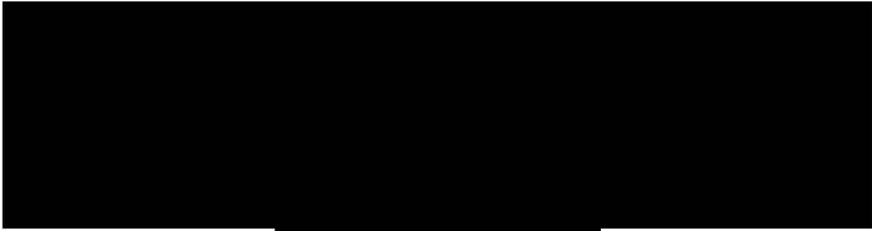
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FILE:



Office: VERMONT SERVICE CENTER

Date: JUN 29 2006

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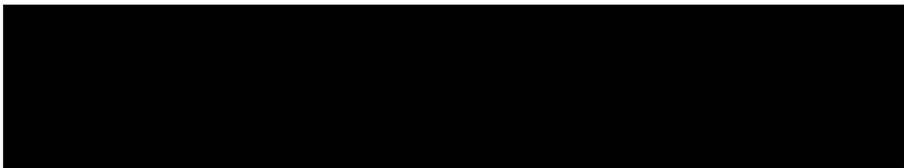
IN RE:

Petitioner:



PETITION: Petition for Special Immigrant Battered Child Pursuant to Section 204(a)(1)(A)(iv) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iv)

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.

2 Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. 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 The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.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 the United Kingdom who is seeking classification as a special immigrant pursuant to section 204(a)(1)(A)(iv) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(A)(iv), as the battered child of a United States citizen.

According to the evidence contained in the record, the petitioner was born in Lagos, Nigeria, on July 21, 1985 of [REDACTED] and [REDACTED]. The evidence indicates that the petitioner's biological mother, [REDACTED] wed U.S. citizen [REDACTED] on April 20, 2001 in Fulton, Georgia. The evidence further indicates that the petitioner's biological mother divorced her citizen spouse on June 23, 2003. The petitioner filed the Form I-360 on December 24, 2003. Without first issuing a notice of intent to deny in accordance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii),¹ the director denied the petition, finding that no qualifying relationship existed between the petitioner and his citizen stepfather as of the date of the filing of the petition. On appeal, counsel for the petitioner asserts that the petitioner is eligible for the classification because he is a stepchild of a United States citizen and the fact that his biological mother divorced his stepfather is "of no consequence as long as the step-parent relationship continues."

The sole issue to be addressed in this proceeding is whether the petitioner was considered a child of a citizen or lawful permanent resident of the United States as of the date of the filing of the instant petition. A petitioner must establish eligibility as of the date of the filing of the petition. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Section 204(a)(1)(A)(iv) of the Act provides, in pertinent part, that an alien who is the child 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 under section 201(b)(2)(A)(i) of the Act, and who resides, or has resided in the past, with the citizen parent may file a petition with the Secretary of Homeland Security under this subparagraph for classification of the alien (and any child of the alien) under such section if the alien demonstrates to the Secretary of Homeland Security that the alien has been battered by or has been the subject of extreme cruelty perpetrated by the alien's citizen parent.

The regulation at 8 C.F.R. § 204.2(e) states, in pertinent part:

Self-petition by child of abusive citizen or lawful permanent resident—Eligibility. (i) A child may file a self-petition under section 204(a)(1)(A)(iv) or 204(a)(1)(B)(iii) of the Act if he or she:

- (A) Is the child 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;

¹ The regulation at 8 C.F.R. § 204.2(c)(3)(ii) states, in pertinent part:

Notice of intent to deny. If the preliminary decision on a properly filed self-petition is adverse to the self-petitioner, the self-petitioner will be provided with written notice of this fact and offered an opportunity to present additional information or arguments before a final decision is rendered.

- (D) Has resided . . . with the citizen or lawful permanent resident parent;
- (E) Has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident parent while residing with that parent;
- (F) Is a person of good moral character

Counsel's contention that the petitioner remains eligible for the classification despite the fact his biological mother divorced his citizen stepfather is not supported by statute, regulation, or case law.

Congress first granted an abused spouse and child 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 child of a United States citizen or lawful permanent resident to file a petition for immigrant status.

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 40701.² The rule outlined the various provisions for abused spouses and children of U.S. citizens and lawful permanent residents to file a self-petition. In the supplementary language of the interim rule, the Service made clear that the marriage between the petitioning *wife* and her abuser must be legally valid at the time of filing. The INS stated:

While section 40701 of the Crime Bill *requires the marriage to be legally valid at the time of filing* and specifies that its termination after approval will not be the sole basis for revocation, it does not address the effect of a legal termination occurring between the filing and the approval of the self-petition. In the absence of explicit legislative guidelines, the Service has determined that protections for spouses whose self-petitions have been approved should be extended to cover the entire period after the self-petition is filed. This rule, therefore allows an otherwise approvable self-petition to be granted despite the legal termination of the marriage through annulment, divorce, or death while the self-petition was pending before the Service. It provides that the legal termination of the marriage after the self-petition has been properly filed with the Service will have no effect on the Service's decision concerning the self-petition.

[Emphasis added.]

As it relates to the eligibility requirement for a petitioning child, the INS stated:

Section 40701 of the Crime Bill describes a self-petitioning child as a person who is the child of a citizen of the United States or lawful permanent resident of the United States. By again characterizing the relationship between the self-petitioner and the

² See 61 Fed. Reg. 13061 (March 26, 1996), available at 1996 WL 131508.

abuser in the present tense, these amendments to the Act clearly show that *the required relationship must exist when the petition is filed.*

In 2000, Congress further amended section 204 of the Act by enacting the *Victims of Trafficking and Violence Protection Act of 2000*, Pub. L. 106-386, 114 Stat. 1464 (Oct. 28, 2000) ("*VTVPA*"). Division B of that Act contained the *Violence Against Women Act of 2000 (VAWA 2000)*. The Battered Immigrant Women Protection Act of 2000 is contained within the VTVPA.³

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.⁴ As discussed previously, 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. While Congress broadened the eligibility requirement to include divorced spouses filing within two years of the divorce, it did not provide a similar provision for a battered child. Congress made no allowance for a battered child whose biological parent's marriage to the citizen stepparent was terminated prior to filing, to self-petition. Under the maxim of statutory construction, *expressio unius est exclusio alterius*⁵, the fact that Congress specifically addressed the issue of a divorce prior to filing in the context of a battered spouse but did not address it in the context of a battered child means that Congress did not intend to change any other provisions related to divorce prior to filing.

As recently as January 5, 2006, Congress enacted VAWA 2005, which made further amendments to provisions related to battered spouses and children.⁶ Again, however, Congress made no amendment to provide eligibility for a child whose biological parent and citizen stepparent were not married at the time of filing. The fact that Congress left untouched CIS' interpretation that divorce within two years applied only to battered spouses is compelling evidence that it considered the interpretation and found it an accurate view of Congressional intent. "[C]ongress is deemed to know the executive and judicial loss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning."⁷ Accordingly, we find that it was reasonable for the director to determine that the petitioner was not eligible because his biological parent was no longer married to the citizen stepparent at the time of filing.

On appeal, although counsel fails to provide any argument regarding the pertinent statute or regulations, he does cite to case law. Specifically, counsel references *Matter of Pagnerre*, 13 I&N Dec. 688 (BIA 1971) and argues that the petitioner's mother's divorce from the United States citizen stepfather "does not destroy the stepparent-stepchild relationship." In *Pagnerre*, the Board of Immigration Appeals (BIA) held that the death of the natural

³ VTVPA § 1501.

⁴ Sections 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) and 204(a)(1)(B)(ii)(II)(aa)(CC)(bbb) of the Act.

⁵ "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*, 6th Edition (1990).

⁶ Violence Against Women and Department of Justice Reauthorization Act of 2005, Public Law No. 109-162, (VAWA 2005).

⁷ *Bledsoe v. Palm Beach County Soil and Water Conservation District*, 133 F.3d 816, 822 (11th Cir. 1998), citing *Florida National Guard v. Federal Labor Relations Authority*, 699 F.2d 1082, 1087 (11th Cir. 1983).

parent did not result in termination of the stepparent-stepchild relationship where the evidence indicated that a family relationship continued as a matter of fact. The facts described in *Pagnerre*, which involved the death of a natural parent “during the existence of the relationship” and a continued bond with the surviving stepparent, are clearly distinguishable from the instant case, where the relationship terminated through divorce and the petitioner no longer shares a relationship with his abusive stepparent. In fact, in *Pagnerre*, the BIA reaffirmed its holding in a previous decision where the facts more closely match those in this case, and found that a stepparent-stepchild relationship had “dissolved by divorce.” *Matter of C-*, 8 I&N Dec. 592 (BIA 1960).

In a subsequent decision, *Matter of Mowrer*, 17 I&N Dec. 613 (BIA 1981), the BIA issued further guidance on this issue. The BIA stated:

We believe the appropriate inquiry in cases where there has been a legal separation or where the marriage has been terminated by divorce or death is whether a family relationship has continued to exist as a matter of fact between the stepparent and the stepchild.

In its holding in *Mowrer*, the BIA made no indication that there should be a different inquiry in cases that involved battered spouses or children. Accordingly, the AAO will not modify the BIA’s holding in *Mowrer* in this case to extend the definition of child to include a stepchild of a stepparent whose marriage to the natural parent has terminated in divorce but who does not establish that a family relationship has continued to exist as a matter of fact between the stepparent and the stepchild.

In the instant case, the divorce was final at the time of filing. The statute contains no provision which allows a battered child to file a petition within two years of the divorce between his biological parent and his citizen stepparent.

As it relates to relevant case law, the record contains no evidence that, despite the divorce, there remained a continuing relationship between the petitioner and his stepfather. In fact, counsel admits that the petitioner no longer has a relationship with his former stepfather. Counsel argues, however, that in the context of a petition that is based upon abuse, “it would be counterproductive to seek evidence of a continued stepparent relationship.” Thus, in contravention of the BIA’s holding in *Mowrer*, counsel contends that CIS must accept the existence of the pre-divorce stepparent-stepchild relationship as evidence of the petitioner’s eligibility without requiring that the petitioner maintain a relationship with his abuser. Counsel provides no legal authority or other basis upon which to base his argument to overstep the BIA’s holding in *Mowrer* and to extend the definition of child to include a stepchild of a stepparent whose marriage to the natural parent has been terminated by divorce but who does not establish that a family relationship has continued to exist as a matter of fact between the stepparent and the stepchild. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Although we concur with the decision of the director that the petitioner is not eligible for classification as a self-petitioning battered child, the director’s decision cannot stand because of the director’s failure to issue a notice of intent to deny to the petitioner prior the issuance of the denial. Accordingly, the decision of the director must be withdrawn and the case remanded for the purpose of the issuance of a notice of intent to deny as well as a new final decision. The new decision, if adverse to the petitioner, shall be certified to this office for review.

Although the director's determination was based upon the single issue discussed above, on remand the director should consider the fact that the beneficiary was included on his mother's Form I-360. Under the Child Status Protection Act (CSPA), P.L. 107-278, 116 Stat. 927, which amended section 204(a) of the Act, certain petitioners are eligible to retain classification as a "child" under the Act if they reach the age of 21 after the filing of the petition.⁸ Section 204(a)(1)(D)(i)(I)(III) of the Act states:

Any derivative child who attains 21 years of age who is included in a petition described in clause (ii) *that was filed or approved* before the date on which the child attained 21 years of age shall be considered . . . a VAWA self-petitioner with the same priority date as that assigned to the petitioner in any petition described in clause (ii). No new petition shall be required to be filed.⁹

The self-petitioner's mother's Form I-360 was filed with the Vermont Service Center on December 24, 2003, when the petitioner was 18 years old. The self-petitioner was listed as a derivative child on his mother's petition, which was approved on September 8, 2004, when the beneficiary was 19 years old. As the petition was filed and approved prior to the self-petitioner's 21st birthday, the self-petitioner retains the same priority date that was assigned to his mother.¹⁰ Given the CSPA provisions cited, it appears that the self-petitioner may have already obtained the classification sought.

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.

⁸ The CSPA took effect on August 6, 2002 and applied to any petition currently pending at that time as well as approved petitions where no final action had been taken on the application for adjustment of status or immigrant visa.

⁹ See also policy memo from Johnny N. Williams, Executive Associate Commissioner, entitled "The Child Status Protection Act," (September 20, 2002) which provides guidance on the continued eligibility of derivative children who reach the age of 21 *after* the filing or approval of the parent's self-petition.

¹⁰ The self-petitioner's mother's Form I-360 was approved on November 20, 2001. She subsequently became a lawful permanent resident on January 24, 2005.