



U.S. Citizenship
and Immigration
Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

B9

[Redacted]

FILE: [Redacted]
EAC 05 148 53278

Office: VERMONT SERVICE CENTER

Date: SEP 11 2006

IN RE: Petitioner:

[Redacted]

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:

[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.

Maig Jensen

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Vermont Service Center Director 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 The decision of the director will be withdrawn and the petition will be remanded for further action.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 is a native and citizen of Venezuela 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. The petitioner filed her Form I-360 on April 23, 2005.

The petitioner submitted the following evidence: her own birth certificate, partial copy of her passport, her own affidavit, her stepfather's birth certificate, her mother and stepfather's marriage certificate, her mother's death certificate, two school records addressed to the parents of the petitioner, and copies of boarding passes.

Finding the evidence submitted with the Form I-360 insufficient to establish the petitioner's eligibility, on May 4, 2005, the director issued a notice requesting the petitioner to submit evidence that she is a person of good moral character. The petitioner, through counsel, submitted additional evidence on July 5, 2005.

On August 4, 2005, the director denied the petition because the record failed to establish that the petitioner had a qualifying relationship as the child of a U.S. citizen or lawful permanent resident as of the date of filing the instant petition.

On appeal, counsel for the petitioner asserts that the director erred in denying the petition. Counsel indicated that he would submit a brief and/or evidence within 30 days of filing the notice of appeal. More than six months have lapsed since the petitioner's counsel filed the notice of appeal and nothing more has been submitted for the record.

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, or who was a child of a United States citizen parent who within the past 2 years lost or renounced citizenship status related to an incident of domestic violence, and 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 Attorney General under this subparagraph for classification of the alien (and any child of the alien) under such section if the alien demonstrates to the Attorney General 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;
- (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

The issue to be addressed in this proceeding is whether the petitioner is a child of a citizen or lawful permanent resident of the United States as of the date of the filing 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). The petitioner filed the Form I-360 on April 23, 2005.

The director determined that since the petitioner's mother and stepfather marriage was terminated when the petitioner's mother died, no petitionable relationship existed between the petitioner and her citizen stepfather as of the date of the filing of the petition.

Counsel for the petitioner asserts that the director erred in denying the petition.

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 40701.¹ 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 *spouse* 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

¹ See 61 Fed. Reg. 13061 (March 26, 1996), available at 1996 WL 131508.

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 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.²

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.³ 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*⁴, 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.

² VTVPA § 1501.

³ Sections 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) and 204(a)(1)(B)(ii)(II)(aa)(CC)(bbb) of the Act.

⁴ "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).

As recently as January 5, 2006, Congress enacted VAWA 2005, which made further amendments to provisions related to battered spouses and children.⁵ 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."⁶ 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.

In *Matter of Pagnerre*, 13 I&N Dec. 688 (BIA 1971), the Board of Immigration Appeals (BIA) held that the death of the natural 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 relevant to the facts in the instant case.

According to the evidence on the record, the petitioner was born in Venezuela on February 17, 1986 of [REDACTED] and [REDACTED]. The evidence indicates that the petitioner's biological mother, [REDACTED] wed U.S. citizen [REDACTED] on August 24, 2002 in Ohio. The evidence further indicates that the petitioner's biological mother died on July 12, 2003. Twenty-one months after the petitioner's mother died, the petitioner filed the instant petition.

In review, the record does not establish that a family relationship continued to exist as a matter of fact between the stepparent and stepchild after the petitioner's mother and stepfather's marriage was legally terminated. The record shows that the petitioner's stepfather resides in Ohio and the petitioner resides in Florida.

We concur with the director's determination that the petitioner failed to establish that she had a petitionable relationship with a U.S. citizen as of the date of the filing of the instant petition. Counsel's claims and the evidence submitted do not overcome this basis for denial and the petition may not be approved. However, the case will be remanded because the director failed to issue a Notice of Intent to Deny (NOID).

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

⁵ Violence Against Women and Department of Justice Reauthorization Act of 2005, Public Law No. 109-162, (VAWA 2005).

⁶ *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).

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.

In this case, the director denied the petition without first issuing a NOID. Consequently, the case must be remanded for issuance of an NOID pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii), which will give the petitioner a final opportunity to overcome the deficiencies of her case.

The case will be remanded for the purpose of the issuance of a new notice of intent to deny as well as a new final decision to both the petitioner and counsel. The new decision, if adverse to the petitioner, shall be certified to this office for review. In his decision, the director declined to address other deficiencies within the record because he found that no qualifying relationship exists. Accordingly, if the petitioner establishes on remand that a petitionable relationship exists, then the director should also consider whether the petitioner established that she has met other eligibility criteria, including whether the petitioner established that she is a person of good moral character. Although she submitted a police clearance from Florida, she failed to submit a clearance from Ohio, where she had also resided for more than 6 months during the requisite period.

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).

As always in these proceedings, the burden of proof rests solely 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 this decision.