

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

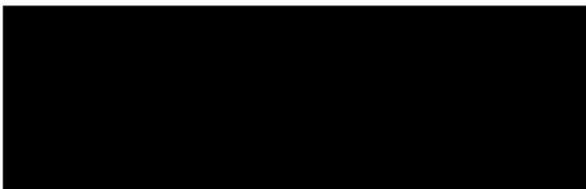
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B9



FILE:



EAC 05 219 51803

Office: VERMONT SERVICE CENTER

Date: **MAR 21 2008**

IN RE:

Petitioner:



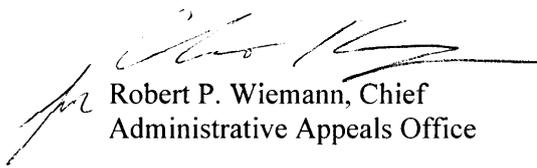
PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(A)(iii) of the
Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition. On appeal, the Administrative Appeals Office (AAO) remanded the matter for further action. The matter is now before the AAO upon certification of the director's subsequent, adverse decision. The decision of the director will be affirmed and the petition will be denied.

The petitioner seeks immigrant classification 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 an alien battered or subjected to extreme cruelty by a United States citizen.

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

Section 204(a)(1)(J) of the Act states, in pertinent part:

In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) or clause (ii) or (iii) of subparagraph (B), 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].

In this case, the director initially 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 as she divorced her allegedly abusive spouse and remarried another man prior to filing her petition. In our June 1, 2006 decision on appeal, we concurred with the director's determination but remanded the petition for issuance of a Notice of Intent to Deny (NOID) in compliance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii). Upon remand, the director issued a NOID on July 19, 2006, which afforded the petitioner the opportunity to establish her qualifying relationship as the spouse of a United States citizen. The petitioner, through counsel, responded with a brief on August 25, 2006. The director denied the petition on December 18, 2006, acknowledging counsel's submission of a brief but finding his arguments were not sufficient to establish that the petitioner had a qualifying relationship. The director certified her decision to the AAO for review. Subsequent to the director's certification, counsel filed a motion to reopen and requested that the director's decision be "recalled, reopened, and properly adjudicated" by the director. The regulations do not establish any procedure by which a petitioner may file a motion on a certified decision. The regulation at 8 C.F.R. § 103.5(a)(1)(ii) states that jurisdiction over a motion generally rests with the official who made the latest decision in the proceeding – here, the Director, Vermont Service Center. As the decision is now before us on certification, however, the matter is currently under the jurisdiction of the AAO, pursuant to 8 C.F.R.

§§ 103.3(a)(1)(iv), 103.4(a)(5). Because, for this type of proceeding, the AAO has appellate authority over the Service Centers, AAO decisions must supersede Service Center decisions. Under these circumstances, it would serve no useful purpose for the director to render a new decision on motion while the certification of the same decision is pending. Furthermore, once the AAO has rendered a final decision on certification, any motion filed prior to the AAO's decision becomes moot. Also, of course, there exists the chance that the director's decision on motion would conflict with the AAO's decision on appeal. The adjudication of the petition must follow a single uninterrupted thread; it cannot branch off into two simultaneous and possibly conflicting proceedings. For all of these reasons, the decision will not be returned for the director to consider the petitioner's motion. The materials submitted on motion will remain part of the record.

The central issue in this case is whether a petitioner who remarries prior to the filing of an abused spouse petition remains eligible for immigrant classification. The relevant evidence submitted below was fully addressed in our prior decision, incorporated here by reference. In response to the NOID, counsel for the petitioner submitted a brief. As indicated above, although the director acknowledged counsel's brief, he did not address any of the arguments contained therein. Counsel submitted an additional argument on certification.

In our prior decision, we noted that the statute was silent as to whether remarriage prior to filing was permissible. As acknowledged by counsel in the brief submitted in response to the director's NOID, where a statute is silent or ambiguous with respect to an issue, the question for a court is whether the agency's determination is based upon a permissible construction of the statute. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). In our previous decision, we provided a lengthy discussion of the statutory history of the abused spouse legislation and reasons for finding that remarriage prior to filing served to disqualify the petitioner's eligibility. Specifically, we noted that, "as early as 1996, [with the promulgation of an interim rule implementing section 40701 of the *Violent Crime Control and Law Enforcement Act of 1994*] 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." In discussing subsequent amendments, we found that although Congress made allowances for petitioners whose marriage to the abusive spouse was terminated prior to filing and petitioners who remarried *after* approval, no such provisions were made for petitioners who remarried prior to filing their petitions. We also noted an analogous example in the definition of an immediate relative under section 201(b)(2)(A)(i) of the Act whereby a petitioner filing as the spouse of a deceased citizen continues to be eligible to file within two years of the date of the citizen's death and "*only until the date the spouse remarries.*" We then noted a case from the Southern District of Florida, wherein the court found our interpretation of the statute to be reasonable. We concluded our discussion by noting that despite numerous amendments to the abused spouse provisions, Congress failed to amend the statute to provide eligibility for a petitioner who remarried prior to the filing of his or her petition. We found this to be "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'" (quoting *Bledsoe v. Palm Beach County Soil and Water Conservation Dist.*, 133 F.3d 816, 822 (11th Cir. 1998)).

Despite his acknowledgment that the statute is silent on the issue of remarriage prior to filing, counsel takes issue with our decision and claims that our determination is “full of speculation as to what Congress may have thought or contemplated . . . [and] there is insufficient legislative history to determine if Congress had even thought at all.” Counsel then offers arguments to counter those made in our decision. For instance, counsel refers to section 201(b)(2)(A)(i) of the Act and argues that because “Congress knowingly limited a benefit in [section 201(b)(2)(A)(i), but] did not limit the benefit under VAWA [Violence Against Women Act] . . . Congress intentionally omitted a restriction of VAWA benefits upon remarriage when the statute was drafted.” Counsel’s argument merely counters, but does not overcome, our determination that the director’s interpretation of the statutory language and its restriction on remarriage prior to filing was consistent with the limit on section 201(b)(2)(A)(i) of the Act.

Similarly, in our prior decision we found support for the director’s decision based upon the maxim of statutory construction, *expressio unius est exclusio alterius* (mention of one thing implies exclusion of another), noting that although Congress specifically addressed the issue of remarriage in certain amendments to the Act regarding the eligibility of aliens who had divorced their abusive spouses or who remarried after approval of their petitions, it failed to do so in the context of remarriage prior to filing. In his brief, counsel simply argues the opposite, that the correct interpretation is that of “*expressio unius est expressio unius*” (mention of one thing is mention of one thing). Counsel’s rhetorical response fails to establish the petitioner’s eligibility.

Counsel also takes issue with our reference to *Delmas v. Gonzalez*, 422 F.Supp.2d 1299 (S.D. Fla. 2005), stating that we have “delegated” our expertise to a court and arguing that the *Delmas* and its “rationale cannot be used, cited or referenced.” Contrary to counsel’s statements and as noted in our previous decision, we did not cite *Delmas* as binding legal precedent but simply noted that the court had found our interpretation to be reasonable.

Counsel also attempts to distinguish this case and place added importance on the petitioner’s situation because she entered the U.S. as a K-1 nonimmigrant and “can only obtain lawful permanent residence if she . . . departs the United States and obtains a permanent resident visa through the United States Consulate in . . . her home country.” Counsel offers no case law or argument to support his position that the petitioner should be treated differently than other self-petitioning abused spouses because of her former nonimmigrant status. We find that it is neither practical nor equitable to give disparate treatment to self-petitioning abused spouses based upon their different statuses under immigration law. More importantly, there is no statutory or regulatory support for making an allowance for the petitioner because of her former K-1 nonimmigrant status.

Upon review, as discussed above, we are not persuaded by counsel’s arguments in response to the director’s NOID or on certification. As such, we concur with the director’s determination that the petitioner failed to establish that she had a qualifying relationship as the spouse of a United States citizen, as required by section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act. Beyond our previous

decision and the decision of the director, we additionally find that because the petitioner failed to establish a qualifying relationship, she has also failed to establish that she was eligible for immigrant classification under section 201(b)(2)(A)(i) of the Act, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act. Consequently, the petitioner is ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

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). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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, that burden has not been met.

ORDER: The director's decision of December 16, 2006 is affirmed. The petition is denied.