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

U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 25 2006

EAC 05 117 53000

IN RE: Petitioner: [redacted]

PETITION: Petition for Special Immigrant Battered 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.

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 The decision of the director will be withdrawn and the petition will be remanded for further action.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 Egypt who is seeking classification as a special immigrant pursuant to section 204(a)(1)(B)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(B)(ii), as the battered spouse of a lawful permanent resident of the United States.

On November 22, 2005, the director denied the petition because the record failed to establish that the petitioner had a qualifying relationship as the spouse, intended spouse, or former spouse of a citizen or lawful permanent resident of the United States.

Counsel for the petitioner submitted a timely appeal. He indicated that he would send a brief and/or additional evidence to the AAO within 30 days of filing the appeal. More than seven months have lapsed and nothing more has been submitted for the record. On July 24, 2006, the AAO sent a facsimile to the petitioner's attorney asking him to inform the AAO as to whether he had submitted a brief and/or evidence. Counsel failed to respond to AAO's query. The record will be considered complete as it now stands.

Section 204(a)(1)(B)(ii) of the Act provides, in pertinent part, that an alien who is the spouse of a lawful permanent resident 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 Attorney General that—

> (aa) the marriage or the intent to marry the lawful permanent resident of the United States 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.

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 [a spousal] relationship [to the U.S. lawful permanent resident].

According to the evidence on the record, the petitioner entered the United States as a B-2 nonimmigrant visitor on June 23, 1986. She wed a lawful permanent resident of the United States, on May 30, 1987 in Miami, Florida. Her former husband filed a Form I-130 petition on the petitioner's behalf on November 28, 1995. The petitioner filed a Form I-485 concurrently with the Form I-130. The Form I-130 was approved on February 7, 1996. The petitioner's former husband initiated divorce proceedings and their marriage was legally terminated on September 14, 2000.

The first issue to be addressed in this proceeding is whether the petitioner established that she had a qualifying relationship as the spouse, intended spouse, or former spouse of a citizen or lawful permanent resident of the United States.

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[1] She indicated that she left the United States in 1982 and returned in 1986 with a B-2 nonimmigrant visa so she withdrew her LIFE Act application.

The record shows that the petitioner's marriage was legally terminated on September 14, 2000, over four years before this petition was filed.

On appeal, the petitioner has failed to submit any evidence that overcomes the finding of the director. Section 204(a)(1)(B)(ii)(II)(aa)(CC) of the Act indicates that a self-petitioner who is no longer married at the time of filing is still eligible for approval if he or she was the bona fide spouse of a lawful permanent resident of the United States "within the past 2 years." The statute contains no provision that would allow for a waiver of this requirement. Upon review, we concur with the finding of the director that the petitioner is ineligible for classification because she did not have a qualifying relationship as the spouse of a lawful permanent resident of the United States within two years of the filing of the petition. Consequently, the petitioner did not have a qualifying spousal relationship pursuant to section 204(a)(1)(B)(ii)(II)(CC)(bbb) of the Act. For this reason, the petition may not be approved.

History of Abused Spouse Status

1. 1994 Amendments to section 204 of the Act.

Congress first granted the ability of an abused spouse 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.[2]

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*.[3] 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:

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[2] *See* H.R. Rep. 203-395, available at 1993 WL 484760 at p. 41.
[3] *See* 61 Fed. Reg. 13061 (March 26, 1996), available at 1996 WL 131508.

> 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.[4]

2. 2000 Amendments to section 204 of the Act.

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.[5]

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[4] 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."

[5] Group 1 —abused alien spouses of U.S. citizens or lawful permanent residents (LPR). Group 2 — alien spouses whose children are abused by the U.S. citizen or LPR spouse. Group 3 – alien children abused by their U.S. citizen or LPR parent. Group 4 – divorced abused spouses of U.S. citizens or LPR who demonstrate a connection between the abuse

The Battered Immigrant Women Protection Act of 2000 is contained within the VTVPA.[6] 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.[7] 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.[8] Third, Congress found there are several groups of battered women and children who do not have access to the immigration protections of VAWA 1994.[9] 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.[10] 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.

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. A reasonable person might ask how a rational 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. The question is best answered by referring to the maxim of statutory construction, *expressio unius est exclusio alterius.*[11] 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

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suffered and the divorce and who file a petition within 2 years of the divorce. Group 5 – abused widowed spouses of U.S. citizens who file a petition within 2 years of the date of U.S. citizen's death. Group 6 – abused alien spouses of former U.S. citizens or LPRs who lost status within the lat two years related to or due to an incident of domestic violence. Group 7 – abused alien children of former U.S. citizens or LPRs who lost status within the last two years related to or due to an incident of domestic violence. *See* VAWA §§ 40701-02; VTVPA §§ 1503(b) and (c).

[6] VTVPA § 1501.

[7] VTVPA § 1502(a)(1).

[8] VTVPA § 1502(a)(2).

[9] VTVPA §1503(a)(3).

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

[11] "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).

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.[12]

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.[13] Because of such control, the immigrant spouse could hardly report the abuse to the police, or seek government assistance, for fear of 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.[14] 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.[15]

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.[16] Congress also provided that remarriage, after the petition had been approved, would not be a basis for revoking the petition.[17]

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[12] 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.
[13] H.R. Rep. 203-395, available at 1993 WL 484760 at p.41.
[14] *See* 8 C.F.R. § 204.2(c)(1)(ii)(1996).
[15] VTVPA § 1503.
[16] Section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act.
[17] VTVPA § 1507(b), amending 8 U.S.C. § 204(h).

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.[18] 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."[19]

It is further noted that on December 9, 2005, in *Delmas v. Gonzalez,* 422 F.Supp.2d 1299 (S.D. Fla, 2005), 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.[20]

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.

Beyond the director's decision, the record also fails to establish that the petitioner was eligible for preference immigrant classification under section 203(a)(2)(A) of the Act, as the spouse of a U.S. lawful permanent resident based on her relationship with her former husband. The former couple's marriage was legally terminated more than four years before the petitioner filed the instant petition. Consequently, the petitioner was ineligible for preference immigrant classification as his spouse, as required by section 204(a)(1)(B)(ii)(II)(cc) of the Act.

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

[19] *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).

[20] *Id.* at 3.

On remand, the director should determine whether the petitioner has established that she was abused by her spouse. The record contains only one item of evidence relevant to this issue: a police incident report dated January 14, 1999. According to the police report, an officer observed a small skin break in the petitioner's left big toe, which she claimed was caused by her husband during their "debate." The report further indicates that after the petitioner calmed down, she "confessed to officers that the tiny scratch on her toe was the result of her stubbing the toe." For this additional reason, the petition may not be approved.

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).

The present record does not demonstrate that the petitioner had a qualifying spousal relationship with a U.S. lawful permanent resident within the 2-year period preceding the time of filing, or that she was abused by, or subjected to extreme cruelty by, her spouse. Consequently, she is ineligible for immigrant classification under section 204(a)(1)(B)(ii) of the Act. Nonetheless, the case will be remanded because the director denied the petition without first issuing a NOID. The regulation at 8 C.F.R. § 204.2(c)(3)(ii) directs that CIS 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.

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-petition, 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.

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.

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.