U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
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U.S. Citizenship and Immigration Services

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MAY 05 2009

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:
EAC 08-031-50142

IN RE: Petitioner: [redacted]

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:

[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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision. Because the petition is not approvable, however, it will be remanded for further action.

The petitioner seeks immigrant classification under section 204(a)(1)(A)(iii) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1154(a)(1)(A)(iii), as having been battered or subjected to extreme cruelty by her U.S. citizen spouse.

The director denied the petition finding that the petitioner failed to establish that she has a qualifying relationship with a U.S. citizen. The petitioner submits a timely appeal.

We concur with the director's determination that the petitioner has not established that she has a qualifying relationship with a U.S. citizen. Beyond the director's decision, the petitioner has also failed to demonstrate her eligibility for immigrant classification based on a qualifying relationship and that she is a person of good moral character. Nonetheless, the case must be remanded because the director denied the petition without first issuing a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

Eligibility for Immigrant Classification Under Section 204(a)(1)(A)(iii) of the Act

Section 204(a)(1)(A)(iii) of the Act provides that the spouse of a U.S. citizen may self-petition for immigrant classification if the petitioner demonstrates that he or she entered into the marriage with the U.S. citizen spouse in good faith and that, during the marriage, the petitioner or a child of the petitioner was battered or subjected to extreme cruelty perpetrated by the petitioner's spouse. In addition, the petitioner 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, 8 U.S.C. § 1154(a)(1)(J), states, in pertinent part:

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

The eligibility requirements are further explicated in the regulation at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part:

> (vii) *Good moral character.* A self-petitioner will be found to lack good moral character if he or she is a person described in section 101(f) of the Act. Extenuating circumstances may

> be taken into account if the person has not been convicted of an offense or offenses but admits to the commission of an act or acts that could show a lack of good moral character under section 101(f) of the Act. . . . A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she . . . committed unlawful acts that adversely reflect upon his or her moral character, or was convicted or imprisoned for such acts, although the acts do not require an automatic finding of lack of good moral character. A self-petitioner's claim of good moral character will be evaluated on a case-by-case basis, taking into account the provisions of section 101(f) of the Act and the standards of the average citizen in the community.

The evidentiary guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are further explicated in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

> *Evidence for a spousal self-petition –*
>
> (i) *General.* Self-petitioners are encouraged to submit primary evidence whenever possible. The Service will consider, however, 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 Service.
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> (ii) *Relationship.* A self-petition filed by a spouse must be accompanied by evidence of citizenship of the United States citizen or proof of the immigration status of the lawful permanent resident abuser. It must also be accompanied by evidence of the relationship. Primary evidence of a marital relationship is a marriage certificate issued by civil authorities, and proof of the termination of all prior marriages, if any, of . . . the self-petitioner . . . .
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> * * *
>
> (v) *Good moral character.* Primary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit. The affidavit should be accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. . . . If police clearances, criminal background checks, or similar reports are not available for some or all locations, the self-petitioner may include an explanation and submit other evidence with his or her affidavit. The Service will consider other credible evidence of good moral character, such as affidavits from responsible persons who can knowledgeably attest to the self-petitioner's good moral character.

Procedural History and Pertinent Facts

The record in this case provides the following pertinent facts and procedural history. The petitioner

is a native and citizen of Zimbabwe who entered the United States with a B-2 visitor visa on June 26, 1995; she was accompanied by her five children. She married J-B-,[1] a U.S. citizen, on December 18, 1995 in Texas. In February 1996, a protective order was issued against J-B- after a court finding of family violence. The couple separated at that time, and the petitioner subsequently filed for divorce. Her divorce from J-B- was finalized on September 15, 1997. The petitioner married M-A-[2] on May 10, 2003.

The petitioner, through prior counsel, filed the instant I-360 Petition on September 3, 1996. The petitioner concurrently filed Form I-485, Application to Register Permanent Residence or Adjust Status, which was administratively terminated on August 7, 2003 due to the petitioner's failure to respond to a request for fingerprinting. On May 2, 2007, the petitioner, through new counsel, filed a Motion to Reopen or Reconsider the termination of the I-485 Application; it was denied on June 26, 2007. On December 11, 2007, after finding the evidence submitted in support of the Form I-360 Petition insufficient to establish the petitioner's eligibility, U.S. Citizenship and Immigration Services (USCIS) issued a Request for Evidence (RFE) of, *inter alia*, the petitioner's current marital status and good moral character. In response, the petitioner submitted her own affidavit and two affidavits from friends attesting to her good moral character; reports from the County and District Clerks of Smith County, Texas, where the petitioner previously resided, showing no misdemeanor or felony history for "[redacted]"; copies of electronic mail from the law office of the petitioner's counsel to the Embassy of Zimbabwe requesting a police clearance letter from Zimbabwe for the petitioner; and copies of the petitioner's divorce decree showing the dissolution of her marriage to J-B- and her marriage certificate as proof of her subsequent marriage to M-A-.

The director found that the petitioner had failed to establish that she has a qualifying relationship as the spouse or former spouse of a U.S. citizen, noting that section 204(a)(1) of the Act allows a former spouse to file a self-petition under certain circumstances, but that the qualifying relationship does not continue if the abused spouse remarries prior to the approval of the I-360 Petition. Accordingly, on April 8, 2008 the director denied the petition on that ground. The petitioner, through counsel, appealed, claiming that the director erred because section 204(a)(1) of the Act does not contain any language requiring that an I-360 self-petitioner remain divorced prior to the approval of the petition; and that the denial is a violation of the petitioner's fundamental right to marry. The claims of counsel do not overcome the director's grounds for denial. Moreover, as discussed below, beyond the director's decision we find two additional grounds for denial.

Qualifying Relationship

The Act Does Not Permit Remarriage of the Self-Petitioner Prior to the Approval of the Petition

1. 1994 Amendments to Section 204 of the Act.

[1] Name withheld to protect individual's identity.
[2] Name withheld to protect individual's identity.

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 abused spouses and children of U.S. citizens or lawful permanent residents to file petitions 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.[3]

Under the amended section 204 of the Act, an abused spouse would no longer have to rely on his or 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 USCIS, promulgated an interim rule to implement the changes mandated by section 40701 of the *Violent Crime Control and Law Enforcement Act of 1994*.[4] 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 denied or an approved 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.[5]

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.

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[3] *See* H.R. Rep. 203-395, available at 1993 WL 484760, p. 41.
[4] *See* 61 Fed. Reg. 13061 (Mar. 26, 1996), available at 1996 WL 131508.
[5] 61 Fed. Reg. at 13063.

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 "[u]pon 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 remarried prior to becoming a lawful permanent resident.

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 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]

The Battered Immigrant Women Protection Act of 2000 is contained within the VTVPA.[7] 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.[8] Second, it found that providing abused 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.[9] Third, Congress found there are several groups of abused women and children who do not have access to the immigration protections of VAWA 1994.[10] VTVPA §§ 1503(b) and (c) amended section 204 of the Act to permit an abused spouse, who had already terminated his or her marriage to the abusive U.S. citizen or lawful permanent resident, to self-petition, provided that the self-petitioner demonstrated a connection between the

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[6] Group 1 – abused spouses of U.S. citizens or lawful permanent residents (LPRs). Group 2 – spouses whose children are abused by the U.S. citizen or LPR spouse. Group 3 – children abused by their U.S. citizen or LPR parent. Group 4 – divorced abused spouses of U.S. citizens or LPRs who demonstrate a connection between the abuse suffered and the divorce and who file a petition within two years of the divorce. Group 5 – abused widowed spouses of U.S. citizens who file a petition within two years of the date of the U.S. citizen's death. Group 6 – abused spouses of former U.S. citizens or LPRs who lost their immigration status within the last two years related to or due to an incident of domestic violence. Group 7 – abused children of former U.S. citizens or LPRs who lost their immigration 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).

[7] VTVPA § 1501.

[8] VTVPA § 1502(a)(1).

[9] VTVPA § 1502(a)(2).

[10] VTVPA §1503(a)(3).

legal termination of the marriage within the past two years and battering or extreme cruelty by the spouse.[11] 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.

Congress also 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 his or her petition revoked. Under the maxim of statutory construction, *expressio unius est exclusio alterius,*[12] the fact that Congress specifically addressed the issue of remarriage in the context of revocations but did not address it elsewhere for unadjudicated petitions means that Congress did not intend to change any other provisions related to remarriage. Under section 204(h) of the Act, remarriage of the self-petitioner 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 remarriage in the other provisions of section 204 pertaining to abused spouses. Consequently, the director's interpretation that section 204 does not permit the remarriage of the abused spouse before his or her petition is approved 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.[13]

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 (and each child of the 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 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

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

[12] "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).

[13] Requiring applicants 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.

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.[14] 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 lawful permanent resident at the time the petition was filed.[15] Congress found this unsatisfactory and in 2000 further amended section 204 to permit an abused immigrant spouse to file a self-petition within two years of the legal termination of the abusive marriage.[16] The abused spouse must demonstrate a connection between the legal termination of the marriage within the past two years and battering or extreme cruelty by the U.S. citizen or lawful permanent resident spouse.[17] Congress also provided that remarriage, after the petition had been approved, would not be a basis for revoking the petition.[18]

However, while Congress broadened the eligibility requirement to include divorced spouses filing within two years of the divorce, *it decided to include the possibility of remarriage only in the section pertaining to divorced spouses who had approved petitions* but had not adjusted status or entered the United States as permanent residents. As recently as January 5, 2006, Congress enacted VAWA 2005, which made further amendments to provisions related to battered spouses and children.[19] Again, however, Congress made no provisions for a remarried self-petitioner to self-petition based upon his or her prior abusive marriage. The fact that in two separate amendments to the original VAWA statute Congress left alone USCIS's 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 fact is significant because "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States* 464 U.S. 16, 23 (quoting *United States v. Wong Bo Kim,* 472 F.2d 720, 722 (5th Cir. 1972). *See also Lorillard v. Pons* 434 U.S. 575, 580 (1978) (noting that Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change).

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

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[14] H.R. Rep. 203-395, available at 1993 WL 484760 at p.41.
[15] *See* 8 C.F.R. § 204.2(c)(1)(ii)(1996).
[16] VTVPA § 1503.
[17] Sections 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) and 204(a)(1)(B)(ii)(II)(aa)(CC)(bbb) of the Act.
[18] VTVPA § 1507(b), amending 8 U.S.C. § 1154(h).
[19] Violence Against Women and Department of Justice Reauthorization Act of 2005, Public Law No. 109-162, (VAWA 2005).

2005), the District Court upheld USCIS's interpretation of the VTVPA so as to disqualify a self-petitioner who had remarried before filing a self-petition. While we acknowledge that the facts of this case differ slightly from those of *Delmas,* in that the petitioner in the instant case did not remarry until after filing, as well as the fact that a district court's decision is not binding precedent, the decision underscores the fact that USCIS's interpretation that remarriage prior to approval precludes approval. 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 and, therefore, permissibly construed the statute to deny the instant petition.[20]

Based upon the above discussion, it is apparent that Congress wanted self-petitioners 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. Accordingly, we concur with the director's determination that the petitioner has not established a qualifying relationship, as required by section 204(a)(1)(A)(iii)(II)(aa) of the Act due to her divorce from J-B- and her remarriage to M-A- while her I-360 Petition was pending.

Eligibility for Immediate Relative Classification under Section 201(b)(2)(A)(i) of the Act

Beyond the director's decision, the petitioner has also failed to demonstrate her eligibility for immigrant classification based on a qualifying relationship. The regulation at 8 C.F.R. § 204.2(c)(1)(i)(B) requires that a self-petitioner be eligible for immediate relative classification under section 201(b)(2)(A)(i) of the Act based on his or her relationship to the abusive spouse. While her I-360 Petition was pending, the petitioner divorced J-B- and remarried another individual. Accordingly, she is ineligible for immediate relative classification under section 204(b)(2)(A)(i) of the Act based on her former relationship with J-B-, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act.

Good Moral Character

Beyond the director's decision, the petitioner has also failed to provide sufficient evidence of good moral character. The regulation at 8 C.F.R. § 204.2(c)(2)(v) states that primary evidence of a petitioner's good moral character is an affidavit from the petitioner, accompanied by local police clearances or state-issued criminal background checks from each place the petitioner has lived for at least six months during the three-year period immediately preceding the filing of the self-petition. The record indicates that the petitioner filed her I-360 Petition on September 3, 1996, and lived in

[20] *Delmas v. Gonzalez,* 422 F.Supp. 2d 1299, 1303 (S.D. Fla. 2005).

Tyler, Texas, immediately preceding that, beginning on June 26, 1995 when she arrived in the United States. Before then, she resided in Zimbabwe. Accordingly, the petitioner submitted criminal record checks indicating "no record" from the relevant jurisdictions in Texas based on her name and date of birth. In its RFE, USCIS explained that all clearances, unless obtained by fingerprint analysis, must establish that the investigating agency was aware of all aliases used by the petitioner. The record shows that the petitioner entered the United States under the name of '[redacted] and later used the names '[redacted]" or [redacted]' However, Texas records do not indicate that all of these names were checked. Moreover, despite evidence that counsel sought help from the Embassy of Zimbabwe in obtaining records from Zimbabwe, no response from Zimbabwean authorities or explanation for a lack of response was provided. Although the petitioner has submitted her own statement and numerous statements from friends regarding her good moral character, she has failed to provide all of the required police clearances or state-issued criminal background checks.

Accordingly, the petitioner has failed to establish that she is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

Conclusion

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).

For the reasons noted above, the AAO concurs with the director's decision that the petitioner did not establish that she has a qualifying relationship with a U.S. citizen spouse; and, beyond the director's decision, we also find that the petitioner is not eligible for immediate relative classification based on such a relationship and failed to establish by a preponderance of the evidence that she is a person of good moral character. The petitioner is consequently ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act. The petition is not approvable for the above stated reasons, with each considered as an independent and alternative bar to approval.

Nonetheless, the case will be remanded because the director denied the petition without first issuing a NOID as required under former 8 C.F.R. § 204.2(c)(3)(ii)(2006). While it is no longer a regulatory requirement for petitions filed on or after June 18, 2007, a NOID is required in this case, as it was filed on September 3, 1996.

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; however, the petition is currently not approvable for the reasons discussed above. Because the petition is not approvable, the petition is remanded to the director for issuance of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.