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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B9

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 13 2010

IN RE: [redacted]

PETITION: Petition for Immigrant Abused 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks immigrant classification under section 204(a)(1)(A)(iv) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(A)(iv), as an alien child battered or subjected to extreme cruelty by his United States citizen stepparent.

The director denied the petition on the basis of his determination that the petitioner had not established his eligibility for immigrant classification based upon a qualifying relationship with a citizen of the United States because the marriage between his mother and stepfather was declared legally invalid prior to the filing of the instant petition. On appeal, counsel submits a memorandum of law.

Section 101(b)(1) of the Act, 8 U.S.C. § 1101(b)(1), defines a child as, in pertinent part:

> an unmarried person under 21 years of age who is . . . (B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of 18 years at the time the marriage creating the status of stepchild occurred.

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 such 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), and who resides, or has resided in the past, with the citizen parent may file a petition with the Attorney General (now 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 that the alien has been battered by or has been the subject of extreme cruelty perpetrated by the alien's citizen parent.

Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J) states, in pertinent part, the following:

> 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].

The regulation at 8 C.F.R. § 204.2(e)(2)(i) further states:

> 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.

The petitioner, a citizen of Estonia, was born on [redacted] His mother married R-V-,[1] a citizen of the United States, on December 7, 1999, and that marriage was declared legally invalid on July 19, 2002.[2] The petitioner filed the instant Form I-360 on September 25, 2008. The director issued two subsequent requests for additional evidence, to which the petitioner, through counsel, filed timely responses. After considering the evidence of record, including the petitioner's responses to his requests for additional evidence, the director denied the petition on March 17, 2010.

The sole issue before the AAO on appeal is whether the petitioner may be considered to have been a child of R-V- as of September 25, 2008, the date on which the petition was filed. If so, he can establish his eligibility for immigrant classification based upon a qualifying relationship with a citizen of the United States based on the marriage between his mother and R-V-. If not, the petition may not be approved. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, the AAO finds that the petitioner has failed to overcome the director's grounds for denial of the petition.

Counsel's contention on appeal that the petitioner remains eligible for the classification despite the fact that the marriage between his mother and R-V- was declared legally invalid more than six years before the petition was filed 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 USCIS, promulgated an interim rule to implement the changes mandated by section 40701.[3] 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, in pertinent part, the following:

> 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

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

[2] The petitioner's mother has since remarried and become a lawful permanent resident of the United States, and a permanent residency petition she filed on behalf of the petitioner was recently approved. *See* Form I-130, [redacted], filed April 9, 2010 and approved August 27, 2010.

[3] *See* 61 Fed. Reg. 13061 (March 26, 1996), available at 1996[redacted]

[redacted]

> 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 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.[4]

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.[5] 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 an abused child. Congress made no allowance for an abused 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,*[6] the fact that Congress specifically addressed the issue of a divorce prior to filing in the context of an abused spouse but did not address it in the context of an abused child means that Congress did not intend to change any other provisions related to divorce prior to filing.

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[4] VTVPA § 1501.

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

[6] "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 abused spouses and children.[7] 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 USCIS's 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."[8] Accordingly, we do not find that it was unreasonable 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.

The Board of Immigration Appeals (BIA) issued guidance on this issue in *Matter of Mowrer,* 17 I&N Dec. 613, 615 (BIA 1981) when it stated the following:

> 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 this case, the record contains no evidence that, despite the invalidity of the marriage, there remained a continuing relationship between the petitioner and his stepfather. Counsel argues, however, that requiring evidence of a continued stepparent relationship "goes against the very purpose of the enactment of the Violence Against Women Act," and that it "creates arbitrary and capricious distinctions between a biological child and a step child." Thus, in contravention of the BIA's holding in *Mowrer,* counsel contends that USCIS must accept the existence of the pre-termination stepparent-stepchild relationship as evidence of the petitioner's eligibility without requiring that the petitioner maintain a relationship with his abuser. While we recognize that *Mowrer* was decided prior to the statutory amendments creating the self-petitioning provisions for abused children, counsel, provides no legal authority or other basis for her argument that the BIA's holding in *Mowrer* should not apply to self-petitioning stepchildren and that the definition of child should be extended 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, 506 (BIA 1980).

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

[8] *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).

In the instant case, the marriage between the petitioner's mother and stepfather was declared legally invalid more than six years before the petition was filed and the petitioner has not established an ongoing relationship with his stepfather. Accordingly, the AAO affirms the director's determination that the petitioner did not establish his eligibility for immigrant classification based upon a qualifying relationship with a citizen of the United States. The petitioner, therefore, is ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iv) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iv), and his petition must remain denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden and the appeal will be dismissed.

ORDER: The appeal is dismissed.