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U.S. Citizenship
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Services

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FILE: [Redacted]
EAC 04 076 52642

Office: VERMONT SERVICE CENTER

Date: OCT 04 2006

IN RE: Petitioner:



PETITION: Petition for Special Immigrant Battered 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 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 The decision of the director will be withdrawn and the petition will be remanded for further action.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 seeks classification as a special immigrant pursuant to section 204(a)(1)(A)(iii) of 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.

The director denied the petition, finding that the petitioner failed to establish that her former husband battered or subjected her to extreme cruelty.

On appeal, counsel submits a brief.

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 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).

An alien who has divorced a United States citizen may still self-petition under this provision of the Act if the alien demonstrates "a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse." Section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc).

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 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:

(vi) *Battery or extreme cruelty.* For the purpose of this chapter, the phrase "was battered by or was the subject of extreme cruelty" includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be

considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence. The qualifying abuse must have been committed by the citizen . . . , must have been perpetrated against the self-petitioner . . . and must have taken place during the self-petitioner's marriage to the abuser.

The evidentiary standard and 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.

* * *

(iv) *Abuse.* Evidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel. Persons who have obtained an order of protection against the abuser or have taken other legal steps to end the abuse are strongly encouraged to submit copies of the relating legal documents. Evidence that the abuse victim sought safe-haven in a battered women's shelter or similar refuge may be relevant, as may a combination of documents such as a photograph of the visibly injured self-petitioner supported by affidavits. Other forms of credible relevant evidence will also be considered. Documentary proof of non-qualifying abuses may only be used to establish a pattern of abuse and violence and to support a claim that qualifying abuse also occurred.

The record provides the following pertinent facts and procedural history of this case. The petitioner is a native and citizen of Vietnam who entered the United States on October 16, 2002 as the nonimmigrant fiancée (K-1) of A-C-L-,* a U.S. citizen. On December 7, 2002, the petitioner married her fiancé in Oklahoma. The petitioner subsequently filed a Form I-485, application to adjust status, based on her marriage to A-C-L-. On June 4, 2003, the couple was divorced by order of the District Court, Oklahoma County, Oklahoma. On February 12, 2004, Citizenship and Immigration Services (CIS) denied the petitioner's Form I-485. The decision informed the petitioner that her application was denied because she did not respond to a request for supporting evidence and because A-C-L- submitted a copy of the former couple's divorce decree. On February 12, 2004, CIS served the petitioner with a Notice to Appear for removal proceedings charging her as removable under section 237(a)(1)(B) of the Act for having remained in the United States beyond her period of authorized stay. The petitioner remains in proceedings and her next hearing before the Los Angeles Immigration Court is scheduled for

* Name withheld to protect individual's identity.

December 22, 2006. In February 2006, counsel (who also represents the petitioner in her removal case) filed a motion with the Orlando Immigration Court with which he submitted a copy of a certificate of marriage between the petitioner and another man, K-V-C-, * on September 6, 2005.

On January 20, 2004, the petitioner filed this Form I-360. The director subsequently requested additional evidence of, *inter alia*, battery or extreme cruelty. The petitioner, through counsel, requested and was granted additional time to respond and timely submitted further evidence on March 18, 2005. On August 24, 2005, the director denied the petition because the record failed to establish the requisite battery or extreme cruelty.

On appeal, counsel asserts that the petitioner's statement submitted below established that her former husband assaulted her, sexually abused her and subjected her to extreme cruelty. We concur with the director's conclusion and find that counsel's claim on appeal does not overcome the ground for denial. Beyond the director's decision, the present record also fails to establish that the petitioner had a qualifying relationship with her former husband and the evidence further establishes the petitioner's ineligibility due to her remarriage while this petition was pending. Nonetheless, the case will 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).

Battery or Extreme Cruelty

The petitioner initially submitted her "Affidavit Regarding Hardship" notarized on November 14, 2003. We note that section 204(a)(1)(A)(iii) of the Act no longer requires self-petitioners to establish extreme hardship upon deportation. With her Form I-360, the petitioner also submitted a document entitled "The Detail of Facts." Because this document was not attributed to or signed by the petitioner, the director requested the petitioner to submit a detailed statement in her own words regarding the alleged abuse.

In response, the petitioner submitted her February 2, 2005 letter in which she states that her former husband ordered her to stay in their apartment when he was at work, prohibited her from contacting anyone in their apartment building and did not mail her letters to her family in Vietnam. The petitioner reports that her husband forced her to have intimate relations against her will, assaulted her, beat her and threatened that if she told anyone about the abuse, he would hit her even harder. The petitioner states that one day after an argument, her husband told her to kneel down and beg for his forgiveness or he would call the police to have her deported. When the petitioner did not kneel down and beg, she reports that her former husband threw her out of the apartment when it was cold and snowing. The petitioner explains that she was too scared to talk to any outsiders or report her former husband's abuse to the police and that she was unable to call the police because she was not familiar with the law in this country, she could not speak English and she did not know the telephone number for the police.

In her affidavit [REDACTED] the petitioner's former neighbor states:

On February 1, 2003, I saw [the petitioner] stood outside her apartment crying with her suitcase in cold weather. I came over and asked her what's wrong. I then invited her into my apartment. My family had to let her sleep in our apartment that night. After that, she contacted her relative who was living in Florida to come to pick her up.

In her affidavit, the petitioner's aunt [REDACTED] states that a couple of months after the former couple's marriage, Ms. [REDACTED] learned that the petitioner's former husband ordered her to leave their apartment. In his affidavit, the petitioner's uncle, [REDACTED] also confirms that about two months after the former couple's marriage, he learned that the petitioner's former husband ordered her to leave their apartment and the petitioner was picked up by a relative from Florida.

The petitioner submitted no further evidence relevant to her former husband's alleged battery or extreme cruelty. Apart from the occasion when her former husband ordered her to leave their apartment, the petitioner does not describe any particular incidents of his battery or extreme cruelty in any probative detail. Ms. [REDACTED] confirms that the petitioner was crying and took shelter in Ms. [REDACTED] apartment, but Ms. [REDACTED] does not state the particular reasons for the petitioner's distress or provide any other substantive details to corroborate the petitioner's claims. Similarly, the petitioner's aunt and uncle merely confirm their second-hand knowledge that the petitioner's former husband forced her to leave and that she was picked up by a relative from Florida.

Moreover, in her February 2, 2005 letter, the petitioner states, "I called my aunt and explain[ed] to her the whole situation and how my husband mistreated me in the past several months. She felt sorry for me and came to pick me up and let me stay at her house. My aunt wanted to save my life from my sick husband who abused me and hurt me so much." The record is devoid of any supporting statement from the petitioner's aunt in Florida. The petitioner's other aunt, Ms. [REDACTED] whose affidavit was submitted below, resides in Louisiana. With his August 4, 2004 Motion filed in the petitioner's removal case, counsel submitted an August 3, 2004 letter from [REDACTED] who states that the petitioner is her niece and has been living with her in Florida since March 2002. Although she is not required to do so, the petitioner does not explain why additional testimony from Ms. [REDACTED] is unobtainable. See 8 C.F.R. §§ 204.1(f)(1), 204.2(c)(2)(i). In addition, Ms. [REDACTED] August 4, 2004 letter states that the petitioner began living with her in March 2002, not in February 2003, as stated by the petitioner, Ms. [REDACTED] the petitioner's uncle and other aunt, Ms. [REDACTED]. The present record does not resolve this discrepancy, which detracts from the credibility of the petitioner's statements. The present record thus fails to establish that the petitioner's former husband battered or subjected her to extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Qualifying Relationship and Eligibility for Immediate Relative Classification

Beyond the director's decision, the present record also fails to demonstrate that the petitioner had a qualifying relationship with her former husband and was eligible for immediate relative classification

based on such a relationship. Section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act requires that a self-petitioner who has divorced her abusive spouse demonstrate that the divorce occurred within two years of the petition filing date and that there was a connection between the divorce and the former spouse's battery or extreme cruelty. While the petitioner was divorced from her former husband within the two years preceding the filing of this petition, the evidence does not demonstrate a connection between her divorce and her former husband's alleged abuse. In her "Affidavit Regarding Hardship," the petitioner states, "As a Vietnamese lady who got marry [sic] and was divorced or abandoned by the husband I will not have a normal life in the society in Viet Nam." The petitioner does not further acknowledge or explain the circumstances of her divorce from her former husband. None of the other testimonial evidence discusses any connection between the alleged battery or extreme cruelty of the petitioner's former husband and their divorce. Moreover, the petitioner cannot demonstrate a connection between her divorce and her former husband's abuse because she has not established that her former husband battered or subjected her to extreme cruelty during their marriage, as discussed in the preceding section. Accordingly, the petitioner has not demonstrated that she had a qualifying relationship with her former husband pursuant to section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act.

The regulation at 8 C.F.R. § 204.2(c)(1)(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. The petitioner was divorced from her former husband before this petition was filed and she has not established that he subjected her to battery or extreme cruelty during their marriage. Consequently, the petitioner was ineligible for immediate relative classification based on her former marriage, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act.

Ineligibility due to the Petitioner's Remarriage while Petition was Pending

Beyond the director's decision, the petitioner is also ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act because she remarried during the pendency of this petition. The statute does not explicitly address the eligibility of a self-petitioner who remarries while his or her petition is pending. However, section 204(h) of the Act states, in pertinent part, "Remarriage of an alien whose petition was approved under section . . . 204(a)(1)(A)(iii) . . . shall not be the basis for revocation of a petition approval under section 205." Under the maxim of statutory interpretation known as "*expressio unius est exclusio alterius*" (mention of one thing implies exclusion of another), section 204(h) of the Act indicates that remarriage of the self-petitioner before the petition is approved, or while the petition is pending, will terminate the self-petitioner's eligibility for immigrant classification under section 204(a)(1)(A)(iii) of the Act. The legislative history of the Violence Against Women Act (VAWA) and its subsequent amendments supports this interpretation.

1. 1994 Amendments to Section 204 of the Act.

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 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.¹

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 CIS, promulgated an interim rule to implement the changes mandated by section 40701 of the *Violent Crime Control and Law Enforcement Act of 1994*. 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 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.²

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

¹ See H.R. Rep. 203-395, available at 1993 WL 484760 at p. 41.

² 61 FR 13061 (Mar. 26, 1996), available at 1996 WL 131508.

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.³

2. 2000 and 2005 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.⁴

The Battered Immigrant Women Protection Act of 2000 is contained within the VTVPA.⁵ 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.⁶ 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.⁷ Third, Congress found there are several groups of

³ 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."

⁴ Group 1 — abused alien spouses of citizens or lawful permanent residents (LPR) of the United States. 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 LPRs who demonstrate a connection between the abuse 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 their immigration status within the last 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 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).

⁵ VTVPA § 1501.

⁶ § 1502(a)(1).

⁷ § 1502(a)(2).

abused women and children who did not have access to the immigration protections of VAWA 1994.⁸ Sections 1503(b) and (c) of the VTVPA 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.⁹ 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 her petition revoked. Congress did not refer to remarriage in any of the other provisions of section 204 pertaining to abused spouses. The reference to remarriage after approval of a petition as non-disqualifying in section 204(h) of the Act thus indicates that remarriage while the petition is pending is disqualifying.

On January 5, 2006, Congress enacted VAWA 2005, which made further amendments to provisions related to abused spouses and children.¹⁰ Again, however, Congress made no provisions for a remarried petitioner to self-petition based upon a prior abusive marriage. The fact that two separate amendments to the original VAWA statute left undisturbed CIS's interpretation that remarriage while a petition is pending terminates eligibility is compelling evidence that Congress considered the interpretation and found it an accurate reflection of Congressional intent.¹¹

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 underscores the fact that our interpretation of the statute is reasonable. In addressing the plaintiff's claim that the AAO's interpretation burdened her constitutional right to marry, the *Delmas* court noted that "Congress could reasonably conclude that an abused spouse who chooses to remarry before approval of her self-petition based on the abuse of a former spouse is no longer in need of protection."¹²

The legislative history of the VAWA amendments to section 204 of the Act thus supports CIS's

⁸ §1503(a)(3).

⁹ Sections 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) and 204(a)(1)(B)(ii)(II)(aa)(CC)(bbb) of the Act.

¹⁰ Violence Against Women and Department of Justice Reauthorization Act of 2005, Public Law No. 109-162, (VAWA 2005).

¹¹ *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), ("[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.").

¹² *Delmas v. Gonzalez*, 422 F.Supp 2d 1299, 1304 (S.D. Fla. 2005).

interpretation of the statute and shows that Congress intended that aliens who remarry another spouse while their petitions are pending are ineligible. Accordingly, the petitioner is ineligible for immigrant classification under section 204(a)(1)(A)(iii)(II)(aa)(AA) of the Act due to her divorce from her allegedly abusive spouse and remarriage to another man while this petition was pending.

The present record does not establish the petitioner's eligibility for immigrant classification under section 204(a)(1)(A)(iii) 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.

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. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision that, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.