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U.S. Citizenship
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Services

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Date: DEC 18 2008

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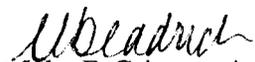
Petitioner: [REDACTED]

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:

INSTRUCTIONS:

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

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

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

Section 204(a)(1)(A)(iii) of the Act provides that an alien who is the spouse of a United States citizen may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the United States citizen spouse in good faith and that during the marriage, the alien or a child of the alien was battered or subjected to extreme cruelty perpetrated by the alien's spouse. In addition, the alien must show that he or she is eligible to be classified as an immediate relative under section 201(b)(2)(A)(i) of the Act, resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(A)(iii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II).

Section 204(a)(1)(J) of the Act, 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 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].

As the facts and procedural history have been adequately documented in the previous decision of the AAO, we will only repeat certain facts as necessary here. In this case, the director initially denied the petition on October 3, 2005, finding that the petitioner failed to establish that he had been battered by, or had been the subject of extreme cruelty perpetrated by, his citizen spouse. In the AAO's July 21, 2006 decision on appeal, the AAO concurred with the director's determination and specifically found that the petitioner failed to establish that he had been battered by, or had been the subject of extreme cruelty perpetrated by, his citizen spouse. However, the AAO remanded the petition for issuance of a Notice of Intent to Deny (NOID), as required by the regulation then in effect at 8 C.F.R. § 204.2(c)(3)(ii)(2006).¹ Upon remand, the director issued a NOID on June 1, 2007, which informed the petitioner of the deficiencies in the record and afforded him the opportunity to submit further evidence to establish the abuse. The petitioner failed to respond to the NOID and the director denied the petition on November 14, 2007, finding that the petitioner failed to establish that he had been battered by, or had been the subject of extreme cruelty perpetrated by, his citizen spouse. The director certified his decision to the AAO for review and notified the petitioner

¹ On April 17, 2007, Citizenship and Immigration Services (CIS) promulgated a rule related to the issuance of requests for evidence and NOIDs. 72 Fed. Reg. 19100 (Apr. 17, 2007). The rule became effective on June 18, 2007, *after* the filing and adjudication of this petition.

that he could submit a brief to the AAO within 30 days of service of the director's decision. To date, no further submission has been received. Accordingly, the record is considered to be complete as it now stands.

Upon review, we concur with the director's determination. The relevant evidence submitted below was discussed in the previous decision of the AAO, which is incorporated here by reference. The petitioner has submitted no further evidence since the issuance of that decision. Consequently, the petitioner is ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act and his petition must be denied.

Beyond the decision of the director, we find two additional issues that preclude approval of the petition. Specifically, the record reflects that on June 8, 2005, the petitioner divorced M-G-², his first U.S. citizen spouse, and on September 7, 2007, married his current wife, A-W-. The petitioner's remarriage in September 2007 occurred during the pendency of this petition. As we shall discuss below, a petitioner may not remarry while his petition remains pending, and the remarriage of the petitioner makes him ineligible for Immediate Relative Classification under Section 201(b)(2)(A)(i) of the Act.

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

I. History of Abused Spouse Status

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 abused spouses and children of United States 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 alien 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

² Name withheld to protect her identity.

³ See H.R. Rep. 203-395, available at 1993 WL 484760, p. 41.

Citizenship and Immigration Services (CIS), 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.

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.⁶

2. 2000 Amendments to Section 204 of the Act.

⁴ See 61 Fed. Reg. 13061 (Mar. 26, 1996), available at 1996 WL 131508.

⁵ 61 Fed. Reg. at 13063.

⁶ In a policy memo from [REDACTED] 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."

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 abused 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.⁷

The Battered Immigrant Women Protection Act of 2000 is contained within the VTVPA.⁸ 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.⁹ 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.¹⁰ Third, Congress found there are several groups of abused women and children who do not have access to the immigration protections of VAWA 1994.¹¹ VTVPA §§ 1503(b) and (c) amended section 204 of the Act to permit an abused alien 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 alien demonstrated a connection between the legal termination of the marriage within the past two years and battering or extreme cruelty by the spouse.¹² 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*,¹³ the

⁷ Group 1 — abused alien spouses of U.S. citizens or lawful permanent residents (LPRs). 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).

⁸ VTVPA § 1501.

⁹ VTVPA § 1502(a)(1).

¹⁰ VTVPA § 1502(a)(2).

¹¹ VTVPA § 1503(a)(3).

¹² Sections 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) and 204(a)(1)(B)(ii)(II)(aa)(CC)(bbb) of the Act.

¹³ "Mention of one thing implies exclusion of another. When certain persons or things are specified

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 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 remarriage in the other provisions of section 204 pertaining to abused spouses. However, 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.¹⁴

Our 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 added.]

Further, our 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.¹⁵ 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

in law . . . an intention to exclude all others from its operation may be inferred." *See Black's Law Dictionary*, 6th Edition (1990).

¹⁴ 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.

¹⁵ H.R. Rep. 203-395, available at 1993 WL 484760 at p.41.

time the petition was filed.¹⁶ 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.¹⁷ 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.¹⁸ Congress also provided that remarriage, after the petition had been approved, would not be a basis for revoking the petition.¹⁹

However, 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.²⁰ Again, however, Congress made no provisions for a remarried alien 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 CIS'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. 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 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 CIS'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

¹⁶ See 8 C.F.R. § 204.2(c)(1)(ii)(1996).

¹⁷ VTVPA § 1503.

¹⁸ Sections 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) and 204(a)(1)(B)(ii)(II)(aa)(CC)(bbb) of the Act.

¹⁹ VTVPA § 1507(b), amending 8 U.S.C. § 1154(h).

²⁰ Violence Against Women and Department of Justice Reauthorization Act of 2005, Public Law No. 109-162, (VAWA 2005).

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.²¹

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. Accordingly, the petitioner has not established a qualifying relationship, as required by section 204(a)(1)(A)(iii)(II)(aa) of the Act due to his divorce from M-G- and his remarriage to A-W- while this petition was pending.

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

The petitioner has also failed to demonstrate his 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. During the pendency of this petition, the petitioner divorced M-G- and remarried another individual. Accordingly, he is ineligible for immediate relative classification under section 204(b)(2)(A)(i) of the Act based on his relationship with A-W-, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act.

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

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's decision of November 14, 2007 is affirmed. The petition is denied.

²¹ *Delmas v. Gonzalez*, 422 F.Supp. 2d 1299, 1303 (S.D. Fla. 2005).