

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B9



FILE:



EAC 04 125 54639

Office: VERMONT SERVICE CENTER

Date: **MAR 26 2008**

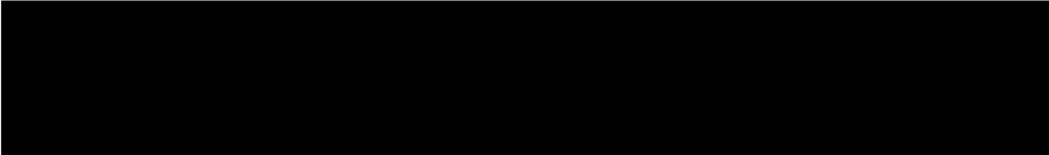
IN RE:

Petitioner:



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:

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.

Maura Deadrick
for Robert P. Wiemann, 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 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 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].

In this case, the director initially denied the petition on September 9, 2005 for failure to establish the requisite good-faith entry into the marriage. In its May 31, 2006 decision on appeal, the AAO concurred with the director's determination but remanded the petition for issuance of a Notice of Intent to Deny (NOID) in compliance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii). Upon remand, the director issued a NOID on July 19, 2006, which informed the petitioner, through prior counsel, that she had failed to establish her entry into the marriage in good faith. In response, the petitioner submitted further evidence, which the director found sufficient to establish her good-faith entry into the marriage.

However, in response to the July 19, 2006 NOID, the petitioner also submitted a copy of a divorce decree showing that her marriage to M-Y-¹ was legally terminated by order of the Harris County, Texas District Court (No. [REDACTED] on February 2, 2005. The petitioner also submitted a copy of her marriage certificate showing that she married another man, B-J-² on April 17, 2006 and that their

¹ The petitioner's spouse at the time she filed her Form I-360. Name withheld to protect the individual's identity.

² Name withheld to protect the individual's identity.

marriage was registered with the County Clerk of Harris County, Texas on April 18, 2006. Accordingly, the director issued a second NOID on January 10, 2007 informing the petitioner, through present counsel, that she no longer had a qualifying relationship with M-Y- due to her remarriage. In response, the petitioner submitted letters from herself and her current spouse, B-J-. The director found the letters insufficient to establish the requisite qualifying relationship. Accordingly, the director and denied the petition on this ground on May 11, 2007 and certified his decision to the AAO for review.

The director informed the petitioner, through counsel, that she could submit a brief to the AAO within 30 days after service of the certified decision. On July 9, 2007, counsel submitted a brief to the AAO and requested an extension of the filing period. Although the regulations allow the AAO to extend the period for filing a brief on appeal for good cause shown, no such provision exists for cases before the AAO on certification. *Compare* 8 C.F.R. § 103.3(a)(2)(vii) *with* 8 C.F.R. § 103.4(a)(2). Counsel's brief was received by the AAO on July 9, 2007, which was 59 days after the director's decision was issued. Consequently, we will not consider the untimely filed brief.

The relevant evidence submitted below was discussed in our prior decision, incorporated here by reference. Hence, we will only address the evidence submitted after that decision was issued. In response to the July 19, 2006 NOID, the petitioner submitted copies of documents previously submitted as well as her letter dated September 8, 2006, in which she provided further details regarding her courtship and marital relationship with M-Y-. The petitioner also submitted letters from three friends, her former sister-in-law and her former employer, which provide probative details regarding her intentions in marrying M-Y-, their marriage and shared experiences. Finally, the petitioner submitted a letter from Washington Mutual Bank confirming the joint checking account she shared with M-Y- from July 8, 2002 to October 31, 2003. The letter was accompanied by bank statements dated July 8, 2002 to February 26, 2003, which show frequent use of the account. We concur with the director's determination that these documents were sufficient to establish the petitioner's entry into marriage with M-Y- in good faith.

We also concur with the director's determination that the petitioner has not established a qualifying relationship with M-Y- due to her remarriage. In response to the January 10, 2007 NOID, the petitioner submitted a letter from her current spouse in which he describes their courtship and states, "If I had known that marring [sic] me would effect [sic] her case, I would have waited to ask her to become my wife." In her own letter addressed to counsel, the petitioner expresses her disappointment and confusion over the director's May 11, 2007 decision and states, "You know, I really don't know the law very well. And all my decisions are based on my feelings and my hearth [sic]." The petitioner states that she never planed to remarry, but fell in love with her current husband. While the letters of the petitioner and her current spouse explain their situation, they do not overcome the fact that the petitioner divorced M-Y- and remarried while this petition was pending.

In his March 7, 2007 letter submitted in response to the January 10, 2007 NOID, counsel claims that the statute and regulations do not bar the petitioner from immigrant classification under section

204(a)(1)(A)(iii) of the Act because she has remarried. As the following discussion explains, counsel is mistaken.

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 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 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

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.

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.

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

⁶ 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."

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

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) & (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.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 her petition revoked. Under the maxim of statutory construction, *expressio unius est exclusio alterius*,¹³ the fact that Congress specifically addressed the issue of remarriage in the context of revocations but did not address it elsewhere means that Congress did not intend to change any other provisions related to remarriage. Under section 204(h) of the Act, remarriage of the alien after approval of the petition would not serve as the sole basis for revocation of the petition. Congress did not refer to the issue of 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 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

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 § 1502(a)(1).

¹⁰ § 1502(a)(2).

¹¹ § 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 in law . . . an intention to exclude all others from its operation may be inferred.” *See Black's Law Dictionary*, 6th Edition (1990).

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

The director's interpretation is also consistent with the definition of "immediate relative" at section 201(b)(2)(A)(i) of the Act, 8 U.S.C. § 1151(b)(2)(A)(i), which states, in pertinent part:

In the case of an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen's death and was not legally separated from the citizen at the time of the citizen's death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section 204(a)(1)(A)(ii) within 2 years after such date **and only until the date the spouse remarries**. For purposes of this clause, an alien who has filed a petition under clause (iii) or (iv) of section 204(a)(1)(A) of this Act [i.e., the VAWA self-petitioning provisions] remains an immediate relative in the event that the United States citizen spouse or parent loses United States citizenship on account of the abuse. [Emphasis added.]

Further, the director's interpretation is consistent with the Congressional intent of *VAWA 1994* and *VAWA 2000*. The motivation of Congress in 1994 was to provide a means for an abused immigrant spouse to obtain immigration benefits over which her abusive spouse held complete control.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 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

However, the abused spouse is required to 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

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.

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

¹⁷ VTVPA § 1503.

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

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 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 "[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."²¹

It is further noted that on December 9, 2005, in *Delmas v. Gonzalez*, 422 F.Supp. 2d 1299 (S.D. Fla. 2005), the District Court upheld CIS's interpretation of the VTVPA so as to disqualify an alien who had remarried before filing a self-petition. While we acknowledge that a district court's decision is not binding precedent, the decision underscores the fact that CIS's interpretation of the statute is reasonable. The court stated:

Plaintiff argues that there is no evidence that Congress intended remarriage to negate the need for protection of the abused spouse. The legislative history and context of VAWA and the VTVPA show otherwise. VAWA relief is limited to those vulnerable to abuse. The AAO apparently concluded that an abused spouse who remarries prior to filing a self-petition is not the type of battered immigrant woman Congress was concerned with when enacting VAWA or the VTVPA and, therefore, permissibly construed the statute to deny the instant petition.²²

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, we concur with the director's determination that the

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).

²¹ *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)).

²² *Delmas v. Gonzalez*, 422 F.Supp. 2d 1299, 1303 (S.D. Fla. 2005).

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 M-Y- and her remarriage to B-J- while this 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 this petition was pending, the petitioner divorced M-Y- and married B-J-. Accordingly, she is ineligible for immediate relative classification under section 204(b)(2)(A)(i) of the Act based on her relationship with M-Y-, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003). 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).

Accordingly, the May 11, 2007 decision of the director denying the petition is affirmed. The petitioner has not demonstrated that she has a qualifying relationship to an abusive U.S. citizen and that she is eligible for immediate relative classification based on such a relationship. She is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

The denial of the petition will be affirmed for the reasons stated above, with each considered 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. The petitioner has not sustained that burden.

ORDER: The director's decision of May 11, 2007 is affirmed. The petition is denied.