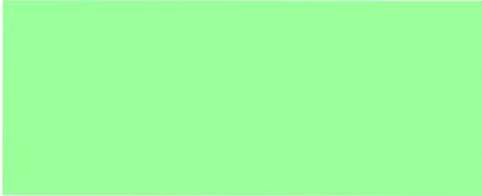


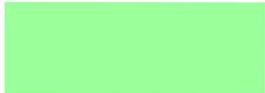
(b)(6)

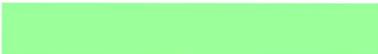
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
*Administrative Appeals Office (AAO)*  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



Date: **JAN 14 2015** Office: VERMONT SERVICE CENTER File: 

IN RE: Self-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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

 Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Vermont Service Center acting director (the director) denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision shall be withdrawn and the matter remanded for entry of a new decision.

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.

The director determined that the petitioner is subject to section 204(c) of the Act, 8 U.S.C. § 1154(c), which bars the approval of his petition because he attempted to enter into a prior marriage for the purpose of evading the immigration laws.

On appeal, the petitioner submits a brief and additional evidence.

#### *Relevant Law and Regulations*

Section 204(a)(1)(A)(iii)(I) 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 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 explained in the regulation at 8 C.F.R. § 204.2(c)(1)(iv), which states, in pertinent part: "*Eligibility for immigrant classification.* A self-petitioner is required to comply with the provisions of section 204(c) of the Act, section 204(g) of the Act, and section 204(a)(2) of the Act."

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

[N]o petition shall be approved if –

- (1) the alien has previously been accorded, or has sought to be accorded, . . . preference status as the spouse of a[n] . . . alien lawfully admitted for permanent residence, by

reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws or

- (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

The regulation corresponding to section 204(c) of the Act, at 8 C.F.R. § 204.2(a)(1)(ii), states:

*Fraudulent marriage prohibition.* Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

#### *Facts and Procedural History*

The petitioner is a citizen of Kenya who last entered the United States on March 12, 2001, as a nonimmigrant visitor. The petitioner married K-D-,<sup>1</sup> a U.S. citizen, on May [REDACTED] Massachusetts. The petitioner filed the instant Form I-360 self-petition on August 2, 2010. On February 19, 2013, the director issued a Notice of Intent to Deny (NOID) based on the petitioner's failure to establish the petitioner's good-faith entry into the marriage, his wife's battery or extreme cruelty and their shared residence. The petitioner responded with additional evidence which the director found insufficient to establish the petitioner's eligibility. The director denied the petition, finding that the petitioner previously sought to obtain immediate relative status by marrying T-D- for the purpose of evading the immigration laws, and that section 204(c) of the Act barred the approval of the petition. The petitioner filed a timely appeal.

We review these proceedings *de novo*. The petitioner's brief and evidence submitted on appeal overcome the director's ground for denial, but do not establish the petitioner's eligibility for the visa. The proceedings will be remanded for further review and the entry of a new decision for the reasons discussed below.

#### *Section 204(c) of the Act and the Petitioner's Marriage to T-D-*

A decision that section 204(c) of the Act applies must be made in the course of adjudicating a subsequent visa petition. *Matter of Rahmati*, 16 I&N Dec. 538, 539 (BIA 1978). U.S. Citizenship and Immigration Services (USCIS) may rely on any relevant evidence in the record, including evidence from prior USCIS proceedings involving the beneficiary. *Id.* However, the adjudicator must come to his or her own, independent conclusion and should not ordinarily give conclusive

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<sup>1</sup> Name withheld to protect the individual's identity.

effect to determinations made in prior collateral proceedings. *Id.*; *Matter of Tawfik*, 20 I&N Dec. 166, 168 (BIA 1990).

Here, the director determined that the petitioner's marital history and the previously filed alien relative petition filed by T-D-<sup>2</sup>, his previous wife, demonstrated that the petitioner entered into marriage with T-D- to evade immigration laws. The petitioner married T-D-, a United States citizen, on October [REDACTED] CA. On March 4, 2005, T-D- filed an alien relative petition (Form I-130) on behalf of the petitioner as her spouse and the petitioner filed a corresponding adjustment application (Form I-485). The petitioner failed to appear for the adjustment interview on July 13, 2005, and the Form I-485 adjustment application was denied on September 22, 2005.<sup>3</sup> The petitioner obtained a divorce from T-D- on March [REDACTED] Massachusetts.

The petitioner filed the instant Form I-360 self-petition on August 2, 2010 based on his relationship with his second wife, K-D-. In the NOID, the director expressed concerns about whether the petitioner's first marriage to T-D- was entered into for the purpose of evading immigration laws because the petitioner appeared to be in a relationship with and had children with someone else during their marriage. In response to the director's NOID, the petitioner stated that his marriage to T-D- was meant to be a lifelong commitment, and that they planned for T-D- to move to Massachusetts. He then stated that T-D- changed her mind and refused to move to Massachusetts, and instead engaged in another relationship; changed her phone number, moved to another apartment, and told all of her friends not to disclose any information about her to the petitioner.

A key factor in determining whether a petitioner entered into a marriage in good faith is whether he or she intended to establish a life together with the spouse at the time of the marriage. *Bark v. INS*, 511 F.2d 1200 (9th Cir.1975). While the petitioner did not address the director's concerns about his relationship with the mother of his children, there is no evidence that the visa petition previously filed on behalf of the petitioner was denied based on a finding of fraud and there is not sufficient primary evidence of the petitioner's own marriage fraud. Accordingly, section 204(c) of the Act does not bar approval of the instant petition.

#### *Eligibility under VAWA*

The petition may not be approved, however, as the director has not analyzed whether the evidence submitted in response to the NOID establishes that the petitioner: has a qualifying relationship with a United States citizen; qualifies as an immediate relative based upon such relationship; resided with the U.S. citizen spouse; has been battered by or subjected to extreme cruelty by his U.S. citizen spouse during their marriage; is a person of good moral character; and entered into the marriage with his spouse in good faith. While the director raised these issues in the NOID, she did not address them in her final decision. As the petitioner has overcome the sole ground for denial of the petition, the petition will be remanded in order for the director to address the petitioner's eligibility for the immigrant visa.

<sup>2</sup> Name withheld to protect the individual's identity.

<sup>3</sup> USCIS records do not reflect the corresponding termination date of the Form I-130.

*Conclusion*

On appeal, the petitioner has overcome the director's ground for denial that the marriage was entered into for the purposes of evading the immigration law. However, the director has not made a determination on whether the petitioner is eligible for the benefit under the statute and regulations.

Consequently, the matter will be remanded to the director to determine whether the petitioner meets the requirements for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act. The director may request further evidence or provide further notification to the petitioner and provide a reasonable opportunity for a response prior to entering a new decision. On remand, the burden of proof remains with the petitioner to establish eligibility for the immigration benefit sought. *See* Section 291 of the Act, 8 U.S.C. § 1361; *see also Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

**ORDER:** The September 9, 2013 decision of the Vermont Service Center is withdrawn. The petition is remanded to that service center for further action and issuance of a new decision. If the new decision is adverse to the petitioner, it shall be certified to the Administrative Appeals Office for review.