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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: MAR 06 2006  
EAC 03 227 50384

IN RE: Petitioner: [Redacted]

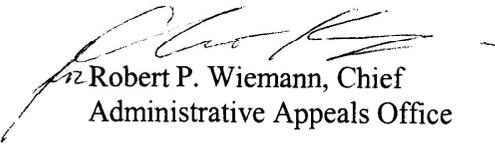
PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(A)(iii) of the  
Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON BEHALF OF PETITIONER:

[Redacted]

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 AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

The petitioner seeks immigrant classification under 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 denied the petition finding that the petitioner did not establish that she was eligible for immigrant classification based upon a qualifying relationship as the spouse of a United States citizen.

The petitioner, through counsel, submits a timely appeal.

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 whose citizen spouse is deceased may still self-petition for immigrant classification under section 204(a)(1)(A)(iii) of the Act if the alien demonstrates that his or her spouse died within the past two years. Section 204(a)(1)(A)(iii) (II)(aa)(CC)(aaa) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(aaa).

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 petitioner in this case is a native and citizen of Romania who entered the United States on September 27, 1999 as an F-1 nonimmigrant student. On May 31, 2000, the petitioner married R-R<sup>1</sup>, a U.S. citizen in Los Angeles, California. The petitioner's spouse died on July 8, 2001.

On June 5, 2003, the petitioner submitted a Form I-360, Petition for Widow (WAC 03 196 53672) to

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

the Vermont Service Center. In a Form I-797, Notice of Action, dated June 10, 2003, Citizenship and Immigration Services (CIS) returned the Form I-360 petition to counsel and notified her that the form was not properly filed and needed to be resubmitted to the CIS office with jurisdiction over the petitioner's place of residence, the California Service Center (CSC). CSC received the petition on June 20, 2003. CSC denied the petition in a decision dated July 28, 2003, finding that the petitioner was not statutorily eligible because she had not been married to her spouse for at least two years at the time of his death.

On August 5, 2003, the petitioner, through counsel, filed the instant petition claiming eligibility as the abused spouse of a United States citizen. The director denied the petition on August 13, 2004, finding that the petition was filed more than two years after the death of the petitioner's spouse. The petitioner, through counsel, timely appealed.

On appeal, counsel states that the petitioner's Form I-360 abused spouse petition was timely filed on May 29, 2003 but claims that it was "inadvertently filed with the California Service Center instead of the VSC." Counsel states that the Service should use the "original receipt date [of June 10, 2003] as the controlling date." Counsel made this same argument at the time of filing and on appeal, takes issue with the director for not considering this argument and the evidence submitted in support of her argument. As will be discussed, we are not persuaded by counsel's arguments.

First, counsel's argument that the battered spouse petition should be considered timely filed on the date that it was received by the CSC is based upon a mischaracterization of the procedural history of this case. As previously discussed, the record reflects the filing of two separate and distinct Forms I-360: the first was a widow petition and the second was the instant abused spouse petition. The widow petition was initially rejected by CIS as it was not properly filed. After the case was properly received by CSC, it was denied based upon the petitioner's statutory ineligibility. The petitioner then filed the abused spouse petition. At the time of filing her abused spouse petition, counsel requested CIS to use the "priority date" of the widow petition as the date of filing the abused spouse petition. In a letter dated August 1, 2003, counsel claimed that her previous filing was actually intended "to classify the petition as the *Self-Petitioning Spouse of Abusive U.S. citizen.*" Counsel made this statement despite the fact that in part 2 of the widow petition, which was prepared by counsel's firm, the box "Widow(er) of a U.S. citizen who died within the past two (2) years" was checked. The box for "Self-Petitioning Spouse of an Abusive U.S. citizen or Lawful Permanent Resident" is blank. More importantly, in a letter dated June 3, 2003, counsel herself indicated that the petitioner sought classification as a widow. Specifically, counsel stated the following: "Case Type: I-360 Petition for Widow(er) of a U.S. Citizen." Therefore, we find no merit in counsel's claim that the abused spouse petition was "inadvertently filed" and are not persuaded by her argument that the instant petition should be afforded the original receipt date of the widow petition.<sup>2</sup>

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<sup>2</sup> It is further noted that what counsel argues is the "original receipt date," June 10, 2003, is actually the date of the rejection notice. In actuality, the widow petition was considered to be properly filed on June 20, 2003, when it was received by the CSC. Regardless, the filing date of the widow

Counsel argues, in the alternative, that CIS should “equitably toll the filing deadline to permit her VAWA Petition in the interest of Justice and Fairness and so that [the petitioner] will not be without relief.” Again, we do not find counsel’s argument to be persuasive.

The equitable tolling doctrine is presumed to apply to every federal statute of limitation. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1188 (9<sup>th</sup> Cir. 2001). However, not every statutory time limit is a statute of limitations subject to equitable tolling. A crucial distinction exists between statutes of limitation and statutes of repose. *Munoz v. Ashcroft*, 339 F.3d 950, 957 (9<sup>th</sup> Cir. 2003). A statute of limitations limits the time in which a plaintiff may bring suit after a cause of action accrues. A statute of repose, in contrast, “cuts off a cause of action at a certain time irrespective of the time of accrual of the cause of action.” *Weddel v. Sec’y of H.H.S.*, 100 F.3d 929, 931 (Fed. Cir. 1996). Statutes of repose are not subject to equitable tolling. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991); *Weddel v. Sec’y of H.H.S.*, 100 F.3d at 930-32.

The immigration laws contain statutes of limitations that are subject to equitable tolling as well as statutes of repose, which are not. The cases cited by counsel, including *Socop-Gonzalez*, 272 F.3d at 1187-90, *Iavorski v. I.N.S.*, 232 F.3d 124,134 (2<sup>nd</sup> Cir. 2000), and *Riley v. I.N.S.*, 310 F.3d 1253, 1257 (10<sup>th</sup> Cir. 2002), indicate that several federal circuits have held that the 90 and 180 day filing deadlines for motions to reopen removal (or deportation) proceedings are statutes of limitations subject to equitable tolling. However, although not acknowledged by counsel, the Eleventh Circuit Court of Appeals has held that the filing deadlines for motions to reopen deportation and removal proceedings are mandatory and jurisdictional and consequently not subject to equitable tolling. *Abdi v. U.S. Atty Gen.*, 430 F.3d 1148, 1150 (11<sup>th</sup> Cir. 2005); *Anin v. Reno*, 188 F.3d 1273, 1278 (11<sup>th</sup> Cir. 1999). In addition, we note that the Ninth Circuit has held that the filing deadline for special rule cancellation under the Nicaraguan Adjustment and Central American Relief Act (NACARA) is a statute of repose not subject to equitable tolling, *Munoz v. Ashcroft*, 339 F.3d 950, 957 (9<sup>th</sup> Cir. 2003), but has held that the time limit for filing motions to reopen under NACARA is a statute of limitations subject to equitable tolling, *Albillo-De Leon v. Gonzalez*, 410 F.3d 1090, 1098 (9<sup>th</sup> Cir. 2005). Counsel provides no basis and cites no case law upon which to conclude that the two-year period contained in section 204(a)(1)(A)(iii)(II)(aa)(CC)(aaa) of the Act is a statute of limitations subject to equitable tolling and counsel presents no claims as to why this portion of the Act is comparable to other immigration statutes that federal circuit courts have found subject to equitable tolling.

Moreover, even if section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act is a statute of limitations subject to equitable tolling, counsel has failed to demonstrate that the petitioner is entitled to such equitable relief. To warrant equitable tolling, an alien must demonstrate that he or she exercised due diligence in pursuing the case during the period sought to be tolled. *Iavorski v. I.N.S.*, 232 F.3d at 135; *Albillo-De Leon v. Gonzalez*, 410 F.3d at 1099-100. Counsel makes no argument and provides no

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petition is not relevant to the filing date of the instant petition.

evidence regarding the petitioner's due diligence in this matter. Counsel fails to establish that this section of the Act is a statute of limitations that is subject to equitable tolling and that the petitioner exercised due diligence, thus meriting such equitable action.

Accordingly, we concur with the finding of the director that the instant petition was filed more than two years after the death of the petitioner's spouse and, therefore, that the petitioner has failed to establish that she is eligible for immigrant classification based upon a qualifying relationship, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act.

In addition, beyond the decision of the director, the record does not establish that the petitioner had a qualifying relationship with a U.S. citizen at the time this petition was filed pursuant to section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act.

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). Therefore, this matter will be remanded for issuance of a NOID informing the petitioner of her ineligibility under sections 204(a)(1)(A)(iii)(II)(aa)(CC) and 204(a)(1)(A)(iii)(II)(cc) of the Act based on the current record. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision, which, if adverse to the petitioner, is to be certified to the AAO for review.