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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **MAY 14 2008**
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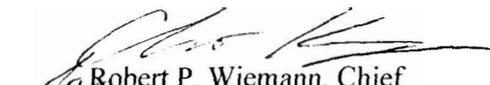
IN RE: Petitioner: [REDACTED]

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. 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).

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 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 15, 2005, finding that because the petitioner had been divorced for more than two years at the time of filing her petition, she failed to establish that she had a qualifying relationship as the spouse of a United States citizen. In our April 11, 2006 decision on appeal, we concurred with the director's determination and additionally found that the petitioner failed to establish her good moral character and failed to demonstrate that there was a connection between her divorce in the past two years and the battery or extreme cruelty. However, we remanded the petition to the director for issuance of a Notice of Intent to Deny (NOID) in compliance with the regulation then in effect at 8 C.F.R. § 204.2(c)(3)(ii)(2006). Upon remand, the director issued a NOID on July 19, 2006, which notified the petitioner of the deficiencies in the record and afforded her the opportunity to establish her qualifying relationship as the spouse of a United States citizen and her good moral character. The petitioner, through counsel, responded with a brief and additional evidence, including copies of documents previously submitted. The director

denied the petition on January 10, 2007, finding that although the petitioner had established her good moral character, she failed to establish that she had a qualifying relationship as the spouse of a United States citizen. The director certified her decision to the AAO for review and notified the petitioner, through counsel, that she could submit a brief to the AAO within 30 days after service of the certified decision. To date, no further submission has been received. Accordingly, we consider the record to be complete as it now stands.

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.

Qualifying Relationship

In response to the director's NOID, the petitioner submitted no additional testimonial or documentary evidence to establish her qualifying marriage. In her brief, counsel reiterated the argument made below that the petitioner submitted her first Form I-360 petition during the two-year period following her divorce and stated that "it is a miscarriage of justice to deny the petition simply on the basis that the case was not filed within the 2 year statutory period." Counsel then stated that although the denial of the first Form I-360 was sent to the petitioner's former counsel's address of record, the petitioner never received the denial. Counsel further claimed that had the petitioner known of the denial, "she certainly would have appealed the case and preserved for herself the ability to pursue the case." Counsel additionally stated that the petitioner initiated a complaint with the bar association against former counsel. As will be discussed, we are not persuaded by counsel's statements.

First, as acknowledged by counsel, the decision to deny the petitioner's first Form I-360 petition was mailed to the petitioner, through her counsel of record. Given that the service of that decision was proper, the contention that the petitioner did not receive the decision is not persuasive. *See* 8 C.F.R. § 292.5. Further, counsel's contentions that the petitioner would have filed an appeal had she known of the denial and that a complaint has been filed against former counsel are unsupported by any testimonial or documentary evidence. The unsupported statements of counsel on appeal, certification or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Counsel's arguments appear to assert a claim of ineffective assistance of counsel which requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him or her and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

We note that the Ninth Circuit Court of Appeals, within whose jurisdiction this petition arose, has held that strict adherence to *Lozada* is not required when the record clearly shows the ineffective assistance of counsel. See *Escobar-Grijalva v. I.N.S.*, 206 F.3d 1331, 1335 (9th Cir. 2000) (deportation hearing transcript showed immigration judge's own confusion over alien's representation by counsel and alien equivocally answered immigration judge's question of whether she wanted counsel, whom she had never met before, to represent her); *Castillo-Perez v. I.N.S.*, 212 F.3d 518, 526 (9th Cir. 2000) (record of proceedings documented prior counsel's failure to timely file alien's application for suspension of deportation); *Ontiveros-Lopez v. I.N.S.*, 213 F.3d 1121 (9th Cir. 1999) (record showed that former counsel conceded alien's deportability, sought relief for which the alien was statutorily ineligible and that new counsel could not comply with *Lozada* given his late receipt of the alien's file). In this instance, however, counsel has failed to have even minimally complied with the *Lozada* requirements and the record contains insufficient evidence to support a claim of ineffective assistance of the petitioner's former counsel. The petitioner submitted no description of her agreement or relationship with prior counsel and the actions taken or not taken by her former counsel. Further, the petitioner has not submitted any evidence which demonstrates that her former counsel has been advised of the allegation that he failed to provide the petitioner with a copy of the denial. Finally, as noted above, although counsel alleged that a complaint had been made with the bar, the record contains no evidence of the complaint to the appropriate disciplinary body. Regardless, even if counsel had adequately established a claim of ineffective assistance against the petitioner's former counsel, she has not established that this claim tolls the statutory limitation contained in section 204(a) of the Act as it relates to petitioner's who are divorced at the time of filing.

The equitable tolling doctrine is presumed to apply to every federal statute of limitation. *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946); *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1188 (9th 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 (9th 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)(superseded on other grounds); *Weddel v. Sec'y of H.H.S.*, 100 F.3d at 930-32.

For example, 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. See *Socop-Gonzalez*, 272 F.3d at 1187-90; *Iavorski v. I.N.S.*, 232 F.3d 124, 134 (2nd Cir. 2000); *Riley v. I.N.S.*, 310 F.3d 1253, 1257 (10th Cir. 2002); *Borges v. Gonzalez*, 402 F.3d 398, 406 (3^d Cir. 2005); *Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005). Yet 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 (11th Cir. 2005); *Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999). In addition, 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 (9th 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 (9th Cir. 2005).

Counsel provides no basis upon which to conclude that the two-year, post-divorce filing period of section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act is a statute of limitations subject to equitable tolling and counsel presents no reasons 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)(ccc) 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 1099-1100. Counsel makes no argument and provides no 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 her divorce and that she consequently has not established a qualifying relationship, as required by section 204(a)(1)(A)(iii)(II)(aa)(CC) 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. As discussed above, the petitioner has failed to establish that she had a qualifying relationship as the spouse of a United States citizen. Accordingly, she is ineligible for immediate relative classification under section 204(b)(2)(A)(i) of the Act, 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 (2^d Cir. 1989).

Good Moral Character

In our April 11, 2006 decision on appeal, we noted that primary evidence of the petitioner's good moral character is an affidavit from the petitioner, accompanied by a police clearance from each place the petitioner has resided for at least six months during the three-year period immediately preceding the filing of the petition. 8 C.F.R. § 204.2(c)(2)(v). We then determined that the record lacked any evidence of the petitioner's good moral character.

In response to the July 19, 2006 NOID, the petitioner submitted several documents, including copies of tax documents, certificates and letters from her school and employers, and a receipt evidencing a donation to the Goodwill. While we acknowledge the submission of these documents, the petitioner has failed to provide a statement regarding her character as well as the required police clearance. The petitioner has provided no explanation for her failure to submit this primary evidence or its unavailability. Accordingly, the documents submitted in response to the director's NOID cannot take the place of the police clearance and the petitioner's affidavit. We, therefore, withdraw the director's finding on this issue and find that the petitioner has failed to establish that she is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

The petition will be denied for the reasons stated above, 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 January 10, 2007 is affirmed. The petition is denied.