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U.S. Department of Homeland Security
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Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JAN 07 2009

EAC 06 129 51804

IN RE: [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.

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks immigrant classification under section 204(a)(1)(A)(iii) of 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 on the basis of his determination that because she had been divorced for longer than two years at the time she filed her petition, the petitioner failed to establish that she has a qualifying relationship with a United States citizen.

Counsel submitted a timely appeal on March 16, 2007.

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)(A)(ii)(II)(aa) of the Act states, in pertinent part, that an individual who is no longer married to a citizen of the United States is eligible to self-petition under these provisions if he or she is an alien:

> (CC) who was a bona fide spouse of a United States citizen within the past 2 years and –
>
> (aaa) whose spouse lost status within the past 2 years due to an incident of domestic violence . . . .
>
> (bbb) whose spouse lost or renounced citizenship status within the past 2 years related to an incident of domestic violence; or
>
> (ccc) who 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)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J) states, in pertinent part, the following:

> 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 explained further at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part, the following:

(i) *Basic eligibility requirements.* A spouse may file a self-petition under section 204(a)(1)(A)(iii) . . . of the Act for his or her classification as an immediate relative . . . if he or she:

* * *

(B) Is eligible for immigrant classification under section 201(b)(2)(A)(i) . . . of the Act based on that relationship [to the U.S. citizen spouse].

* * *

(vii) ***Good moral character.*** A self-petitioner will be found to lack good moral character if he or she is a person described in section 101(f) of the Act. Extenuating circumstances may be taken into account if the person has not been convicted of an offense or offenses but admits to the commission of an act or acts that could show a lack of good moral character under section 101(f) of the Act. A person who was subjected to abuse in the form of forced prostitution or who can establish that he or she was forced to engage in other behavior that could render the person excludable under section 212(a) of the Act would not be precluded from being found to be a person of good moral character, provided the person has not been convicted for the commission of the offense or offenses in a court of law. A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she willfully failed or refused to support dependents; or committed unlawful acts that adversely reflect upon his or her moral character, or was convicted or imprisoned for such acts, although the acts do not require an automatic finding of lack of good moral character. A self-petitioner's claim of good moral character will be evaluated on a case-by-case basis, taking into account the provisions of section 101(f) of the Act and the standards of the average citizen in the community. If the results of record checks conducted prior to the issuance of an immigrant visa or approval of an application for adjustment of status disclose that the self-petitioner is no longer a person of good moral character or that he or she has not been a person of good moral character in the past, a pending self-petition will be denied or the approval of a self-petition will be revoked.

The evidentiary standard and guidelines for a self-petition filed under section 204(a)(1)(A)(iii) of the Act are explained further at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part, the following:

> *Evidence for a spousal self-petition –*
>
> (i) *General.* Self-petitioners are encouraged to submit primary evidence whenever possible. The Service will consider, however, 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 Service.
>
> (ii) ***Relationship.*** A self-petition file by a spouse must be accompanied by evidence of ... the relationship. Primary evidence of a marital relationship is a marriage certificate issued by civil authorities. . . .
>
> * * *
>
> (v) *Good moral character.* Primary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit. The affidavit should be accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. Self-petitioners who lived outside the United States during this time should submit a police clearance, criminal background check, or similar report issued by the appropriate authority in each foreign country in which he or she resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. If police clearances, criminal background checks, or similar reports are not available for some or all locations, the self-petitioner may include an explanation and submit other evidence with his or her affidavit. The Service will consider other credible evidence of good moral character, such as affidavits from responsible persons who can knowledgeably attest to the self-petitioner's good moral character.

The record of proceeding establishes the following pertinent facts and procedural history. The petitioner, a citizen of Vietnam married D-Q-,[1] a United States citizen, in Vietnam on January 17, 2001. D-Q- filed Form I-130, Petition for Alien Relative, on behalf of the petitioner on February 22, 2001. The Form I-130 was approved, and the petitioner was issued an immigrant visa in Ho Chi Minh City on May 30, 2002. She was admitted to the United States as a conditional permanent resident on June 12, 2002.

[1] Name withheld to protect individual's identity.

According to the petitioner, she and D-Q- stopped living together in December 2002. The petitioner filed for divorce on or around May 10, 2003, and the divorce became final on November 11, 2003. The petitioner filed Form I-751, Petition to Remove the Conditions of Residence, on April 19, 2004. The Form I-751 was denied by the San Francisco District Office on December 2, 2005.

The petitioner filed the instant Form I-360 on March 27, 2006. The director issued a notice of intent to deny (NOID) the petition on July 26, 2006, which notified the petitioner of the deficiencies in the record and afforded her the opportunity to submit further evidence to establish that she had had a qualifying relationship with a U.S. citizen within two years of the filing date of the Form I-360. Counsel responded to the NOID on September 19, 2006. After considering the evidence of record, including the response to the NOID, the director denied the petition on February 16, 2007. On appeal, counsel submits a brief.

Qualifying Relationship and Eligibility for Classification as an Immediate Relative

Counsel and the petitioner concede that the petitioner and D-Q- had been divorced for longer than two years at the time the petition was filed: the petitioner's divorce from D-Q- became final on November 11, 2003, but she did not file the Form I-360 until March 27, 2006. In his March 14, 2007 appellate brief, counsel asserts that the petitioner was the victim of ineffective assistance of her former counsel. Specifically, counsel states that two attorneys who assisted the petitioner in filing her Form I-751, Petition to Remove the Conditions of Residence, failed to perform their duties with sufficient competence, and that she was prejudiced by that failure.

Counsel states that when the petitioner contacted her previous attorneys, she was advised to divorce D-Q- and file the Form I-751. She was not informed of the possibility of filing a Form I-360 and, by the time the Form I-751 was denied on December 2, 2005, the two-year period in which to file a Form I-360 had elapsed. Therefore, counsel asserts, the deadline for filing the Form I-360 should be equitably tolled in this case.

Any appeal or motion based upon a claim of ineffective assistance of counsel 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 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).

The AAO notes that the Ninth Circuit Court of Appeals, within whose jurisdiction this case falls, 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 transcripts showed immigration judge's own confusion over alien's

representation by counsel and alien equivocally answered immigration judge's own confusion over alien's representation by 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). The record in this particular case does not clearly demonstrate the ineffectiveness of prior counsel, and the petitioner has failed to comply with *Lozada*. The record contains no description of the petitioner's agreement or relationship with her previous attorneys with respect to the specific actions that were to be taken and what representations they did or did not make to the petitioner in this regard, so the petitioner has not complied with the first *Lozada* requirement. Nor has the petitioner complied with the second *Lozada* requirement: the record does not indicate whether the attorneys whose integrity or competence are being impugned by the petitioner have been informed of the allegations leveled against them, and have been given an opportunity to respond.[2] The record does contain evidence indicating that the petitioner has attempted to comply with the third *Lozada* requirement, as the record indicates that the petitioner has filed complaints with the State Bar of California. However, the AAO notes that the petitioner elected not to submit the complaints until after the Form I-360 was denied. Regardless, even if the petitioner had adequately established a claim of ineffectiveness of counsel against her former attorneys, she has not established that the claim would have tolled the statutory limitation contained in section 204(a) of the Act as it relates to the petitioners who are divorced at the time of filing the Form I-360.

As noted by counsel, 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 (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). Statues of repose are not subject to equitable tolling. *Lampf Pleva, Lipkin, 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 limitation 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 (3d Cir. 2005); *Pervais v. Gonzalez*, 405 F.3d 488, 490 (7th Cir. 2005). Yet, the Eleventh Circuit

[2] The record contains no response to the petitioner's allegations from her previous attorneys regarding her charges, and the record does not indicate that she has contacted them so as to afford them the opportunity to submit a response to her allegations.

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 Court of Appeals has held that the filing deadline for special rule cancellation under the Nicaraguan Adjustment and Central American Relief (NACARA) is a statute of repose not subject to equitable tolling, *Munoz v. Ashcroft*, 339 F.3d at 957, but has held that the time limit for filing motions to reopen under NACARA is a statute of limitations subject to equitable tolling, *Albillo-DeLeon 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 not a statute of repose not subject to equitable tolling), and presents no argument as to why this portion of the Act is comparable to other immigration statutes that federal circuit courts have found subject to equitable tolling.

Counsel has failed to establish that this section of the Act is a statute of limitations subject to equitable tolling. Accordingly, the AAO concurs with the director's finding that the petitioner has failed to establish a qualifying relationship, as required by section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act. The director, therefore, properly denied the petition on this ground.

Good Moral Character

Beyond the decision of the director, the AAO finds that the petition may not be approved for another reason, as the petitioner has failed to establish that she is a person of good moral character. As noted previously, the 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).

The record lacks the requisite police certificate(s), and the petitioner has provided no explanation for her failure to submit this primary evidence, or its unavailability. The petitioner, therefore, 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. For this additional reason, the petition may not be approved.

Conclusion

The AAO agrees with the director's determination that because the petitioner had been divorced from D-Q- for longer than two years at the time she filed the Form I-360, she has failed to establish that she has a qualifying relationship with a United States citizen. Beyond the decision of the director, the AAO also finds that the petitioner has failed to establish that she is a person of good moral character. Accordingly, the AAO will not disturb the director's decision.

For all of these reasons, the petition may not be approved. 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); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 appeal is dismissed.