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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

[redacted]

Bq

Date: JAN 12 2012 Office: VERMONT SERVICE CENTER File: [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, ("the director") denied the immigrant visa petition. The AAO dismissed a subsequent appeal. The matter is now before the Administrative Appeals Office (AAO) on a motion to reconsider. The motion will be granted and the previous decision of the AAO will be affirmed.

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 her former U.S. citizen spouse.

On July 19, 2010, the director denied the petition for failure to establish that the petitioner had a qualifying relationship with a U.S. citizen spouse because the petition was filed more than 2 years after her divorce. The director also noted that the record did not contain sufficient evidence to establish that the petitioner is a person of good moral character, resided with her former spouse and he subjected her to battery or extreme cruelty.

On January 5, 2011, the AAO dismissed the petitioner's appeal. The AAO determined that the petitioner failed to establish that she had a qualifying relationship with a U.S. citizen spouse and her eligibility for immediate relative classification based upon that relationship. The AAO also found that the petitioner did not establish that she is a person of good moral character and was battered or subjected to extreme cruelty by her former spouse.

On motion, counsel asserts that the evidence of record demonstrates that the petitioner has been subjected to extreme cruelty during her marriage. Counsel contends that the petitioner is a person of good moral character who "has not been charged, arrested or convicted of any crime." Counsel concludes that the petitioner's delay in filing her Form I-360 was a result of ineffective assistance of counsel.

Relevant Law and Regulations

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 an abusive 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 further 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 explicated in the regulation at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part:

> (vi) *Battery or extreme cruelty.* For the purpose of this chapter, the phrase "was battered by or was the subject of extreme cruelty" includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence. The qualifying abuse must have been committed by the citizen . . . spouse, must have been perpetrated against the self-petitioner . . . and must have taken place during the self-petitioner's marriage to the abuser.
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> (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 self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she . . . 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.

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

> (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.
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> (iv) *Abuse.* Evidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel. Persons who have obtained an order of protection against the abuser or have taken other legal steps to end the abuse are strongly

encouraged to submit copies of the relating legal documents. Evidence that the abuse victim sought safe-haven in a battered women's shelter or similar refuge may be relevant, as may a combination of documents such as a photograph of the visibly injured self-petitioner supported by affidavits. Other forms of credible relevant evidence will also be considered. Documentary proof of non-qualifying abuses may only be used to establish a pattern of abuse and violence and to support a claim that qualifying abuse also occurred.

(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. . . . 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.

Pertinent Facts and Procedural History

The petitioner is a citizen of the Philippines who married B-S-, a United States citizen, on November 11, 1998 in the Philippines. She was admitted to the United States on May 11, 2004 as the K-3 spouse of a U.S. citizen. The petitioner filed the instant Form I-360 on February 2, 2010. The director denied the petition and counsel timely appealed. The AAO dismissed the appeal. Counsel has now filed a motion to reconsider with the AAO, which satisfies the requirements and will be granted.

The AAO reviews these proceedings *de novo*. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). A full review of the record fails to establish the petitioner's eligibility. The decision to dismiss the appeal will be affirmed for the following reasons.

Qualifying Relationship

The director determined that the petitioner had not established a qualifying relationship with B-S- because her marriage to B-S- was terminated on October 26, 2005 and the Form I-360 was not filed until February 2, 2010, more than two years later. The director correctly explained that section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act allows a former spouse to file a self-petition for up to two years following the termination of a qualifying marriage and that there was no exception to the two-year limitation.

On appeal, counsel asserted that the statue and regulations do not require that the petitioner file the Form I-360 within two years of the dissolution of the marriage, unless the reason for the divorce was due to battery or extreme cruelty. Counsel further asserted that the petitioner received ineffective assistance of counsel when her former attorney told her that she was not eligible to file a Form I-360 because there was no evidence of physical abuse. Counsel submitted a statement from the petitioner in which she asserted that her former attorney told her "that only those who have been physically abused

and who have proof of physical abuse such [as] police reports, medical certificates re injuries sustained while being abused, could self-petition as a battered spouse."

In its January 5, 2011 decision, the AAO dismissed counsel's claims and stated that the language of the statue clearly provides that to remain eligible for immigrant classification despite no longer being married to a United States citizen, an alien must have been the bona fide spouse of a United States citizen "within the past two years" and demonstrate a connection between the abuse and the legal termination of the marriage. 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).

In regard to counsel's ineffective assistance of counsel claim, the AAO found that the petitioner had not met the criteria set out in *Matter of Lozada*, 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 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 noted 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 questions regarding 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 AAO reviewed the petitioner's declaration and determined that the petitioner had not established that her delay in filing was the result of ineffective assistance of counsel. The AAO stated that the petitioner had not presented detailed testimony concerning the contractual agreements she made with a prior attorney, or any other evidence to establish her prior attorney's ineffective representation. The AAO also concluded that even if the petitioner could demonstrate the ineffective assistance of her former counsel, there is no provision that would allow U.S. Citizenship and Immigration Services (USCIS) to waive the two-year limitation of section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act.

On motion, counsel requests "the AAO to exercise its discretion and be flexible in applying the Lozada requirements by favorably considering the petitioner's explanation for her failure to seasonably file her I-360 petition." Counsel asserts, "[f]or [the petitioner's former attorney] to advise petitioner that only those who have been physically abused and battered could self-petition as a battered spouse is a terrible

mistake, a gross, inexcusable and costly one at that." Counsel requests that "the AAO exercise its discretion and waive adherence to the Lozada requirements."

[redacted] of the record fails to establish ineffective assistance of counsel. As previously determined, the petitioner has not presented detailed testimony concerning the contractual agreements she made with her prior attorney, or any other evidence to establish her prior attorney's ineffective representation. Moreover, even if the petitioner had established her prior counsel's ineffective assistance, present counsel cites no legal basis for U.S. Citizenship and Immigration Services (USCIS) to waive the two-year limitation of section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act. Although courts have found certain filing deadlines to be statutes of limitations subject to equitable tolling in the context of removal or deportation, the petitioner cites no case finding visa petition filing deadlines subject to equitable tolling. *Compare Albillo-DeLeon v. Gonzalez*, 410 F.3d 1090, 1098 (9th Cir. 2005) (time limit for filing motions to reopen under NACARA is a statute of limitations subject to equitable tolling) *with Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1048-50 (9th Cir. 2008) (deadline for filing a visa petition to qualify under section 245(i) of the Act is a statute of repose not subject to equitable tolling). The two-year, post-divorce filing period of section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act is a statute of repose not subject to equitable tolling, and we lack the authority to waive the statutory deadline.[1] Accordingly, the AAO affirms its determination that the petitioner has failed to establish the existence of a qualifying relationship with a United States citizen and her eligibility for immediate relative classification based upon that relationship, as required by section 204(a)(1)(A)(iii)(II)(aa), (cc) of the Act.

Battery or Extreme Cruelty

In its January 5, 2011 decision, the AAO determined that the record failed to establish that the petitioner was subjected to battery or extreme cruelty perpetrated by her former spouse. The AAO found that the claims made by the petitioner and the psychological evaluation submitted on her behalf fail to establish that she was the victim of any act or threatened act of physical violence or extreme cruelty, that her former spouse's non-physical behavior was accompanied by any coercive actions or threats of harm, or that his actions were aimed at insuring dominance or control over the petitioner.

On motion, counsel asserts, "the AAO's analysis and evaluation of the acts perpetrated by the husband was flawed." Counsel states that examples of the abuse include "blaming the petitioner for her miscarriage and accusing her of doing it on purpose" and "treating the petitioner not as his wife but as his maid." Counsel also states that B-S-'s "refusal to support his child clearly demonstrates his callousness and lack of good moral character as well as his partiality to abuse."

Counsel's claims fail to demonstrate any error in the AAO's prior determination that the petitioner's former husband did not subject her to battery or extreme cruelty. In her declaration, the petitioner recalled that shortly after her marriage to B-S- she learned that she was pregnant. She stated that when she had a miscarriage, B-S- blamed her for the miscarriage. The petitioner stated that she became

[1] Even if the deadline were found to be a statute of limitations, the petitioner would still have to show that she exercised due diligence in pursuit of her claim. *See Albillo-DeLeon v. Gonzalez*, 410 F.3d at 1100.

pregnant again and when she delivered her daughter, B-S- declared that he could have saved money if she used a midwife instead of going to the hospital. She recalled that B-S- never invited her parents and other relatives to their daughter's baptism. The petitioner noted that B-S- never consulted her when he was building their home in the Philippines, and left her by herself with their daughter. The petitioner stated that when B-S- returned to the United States in June 2000, he did not allow her to handle their finances in the Philippines. She recalled that she moved to her parents' home and did not hear from B-S- until June 2003 when he informed her that he filed an immigrant petition for her and their daughter. She noted that B-S- became upset at her for not directly informing him of her father's death. She stated that after she received her K-3 visa in November 2003, B-S- refused to send her an airline ticket or call her. The petitioner stated that her relatives in Los Angeles helped pay for her airline ticket. She noted that she flew to New Jersey to meet B-S-, but he was not enthusiastic to see her. She recounted that B-S- instructed her to care for his mother, who was taking medications, and help his mother with cooking meals and keeping the kitchen and house clean. She stated that B-S- also instructed her to not use the telephone without his permission. The petitioner recalled that when she told B-S- that his mother was demanding and his sister was unfriendly, he told her that she could return to the Philippines. She noted that she had to work as a babysitter to send money to their daughter in the Philippines because B-S- refused to provide financial support to their daughter. She recalled that when she asked B-S- if he filed her immigration application for permanent residency, he told her that it is better for her to return to the Philippines. She stated that she then decided to leave him and join her relatives in California. The petitioner's statements do not demonstrate that her former husband ever battered her or that his behavior involved threatened violence, psychological or sexual abuse, or otherwise constituted extreme cruelty, as that term is defined at 8 C.F.R. § 204.2(c)(1)(vi).

The petitioner submitted an August 12, 2009 psychological evaluation from [redacted] who interviewed the petitioner almost four years after her separation from B-S-. [redacted] stated that the petitioner "is reporting experiencing severe levels of anxiety and depression." She diagnosed the petitioner with Posttraumatic Stress Disorder and Major Depressive Disorder, Single Episode, Moderate. [redacted] indicated that the petitioner has suffered from "years of insults, shouts, dismissal and demeaning comments." However, her evaluation speaks in general terms about these incidents without sufficient probative information to support a claim of psychological abuse. Moreover, the petitioner herself does not mention any of these incidents in her declaration.

On motion, counsel has cited to the events described by the petitioner in her declaration and states that these incidents amount to extreme cruelty. Counsel fails to articulate, however, how the relevant evidence demonstrates that the specific behaviors of the petitioner's former husband constituted extreme cruelty. The petitioner's declaration attests to her troubled marriage and her former husband's maltreatment. [redacted] psychological evaluation contains a single-sentence statement discussing in general terms incidents of alleged verbal abuse. These documents, however, do not establish that the petitioner's former husband's behavior involved threats of violence, psychological or sexual abuse, or otherwise constituted extreme cruelty, as that term is defined at 8 C.F.R. § 204.2(c)(1)(vi). Accordingly, the petitioner has not established that her former husband subjected her to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Good Moral Character

In its January 5, 2011 decision, the AAO determined that the petitioner had not provided evidence of her good moral character as required in the statue and regulations. On motion, counsel asserts that the petitioner "has not been charged, arrested or convicted of any crime." Counsel states that the petitioner "had been issued and granted local police clearances and certificate indicating that she has no criminal record."

The regulation at 8 C.F.R. § 204.2(c)(2)(v) states that primary evidence of a petitioner's good moral character is an affidavit from the petitioner, accompanied by local police clearances or state-issued criminal background checks from each place the petitioner has lived for at least six months during the three-year period immediately preceding the filing of the self-petition (in this case, during the period beginning in February 2007 and ending in February 2010).

The record contains a criminal history search the petitioner submitted from the County of Los Angeles, Sheriff's Department Headquarters. The police clearance, dated February 24, 2010, was conducted as a name only search of Los Angeles County Sheriff's Department records from the year 2007 until the date of the clearance. It stated that there were no arrest records, booking records, and active arrest warrants for the petitioner. The clearance, however, noted that the investigation did not include a search of records held by the State of California, or any other law enforcement agency serving local municipalities in Los Angeles County.

[redacted] of the entire record of proceeding fails to establish the petitioner's good moral character. Counsel's mere assertion that the petitioner "has not been charged, arrested or convicted of any crime" is not considered evidence.[2] Pursuant to the regulations, the primary evidence of a petitioner's good moral character is an affidavit from the petitioner. In her affidavit, the petitioner did not attest to her good moral character. Nor did she indicate where she resided during the requisite period of February 2007 until February 2010. Without this information, the Los Angeles County Sheriff's Department police clearance is of little probative value. Accordingly, 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.

Conclusion

On motion, the petitioner has failed to establish: the existence of a qualifying relationship with a United States citizen; her eligibility for immediate relative classification based upon that relationship; her good moral character; and that she was battered or subjected to extreme cruelty during her former marriage.

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[2] Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In these proceedings, the petitioner bears the burden of proof to establish her eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Here, that burden has not been met.

ORDER: The AAO's decision, dated January 5, 2011, is affirmed. The appeal remains dismissed. The petition remains denied.