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

(b)(6)

U.S. Citizenship and Immigration Services

Date: OCT 2 3 2014 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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Acting Vermont Service Center director (the 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 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 denied the petition, determining that the petitioner did not demonstrate that she has a qualifying spousal relationship with a U.S. citizen and is eligible for immigrant classification based upon that relationship.

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

Applicable Law

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).

An individual who is no longer married to a citizen of the United States remains eligible to self-petition under these provisions if he or she 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) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa).

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 eligibility requirements are explained further at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part:

> (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].

* * *

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:

> (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 filed by a spouse must be accompanied by evidence of citizenship of the United States citizen . . . . It must also be accompanied by evidence of the relationship. Primary evidence of a marital relationship is a marriage certificate issued by civil authorities, and proof of the termination of all prior marriages, if any, of . . . the self-petitioner . . . .

Pertinent Facts and Procedural History

The petitioner was born in Mexico and appears to have entered the United States without inspection around 1985 or 1986. She married her spouse, P-R-,[1] a U.S. citizen, on March 11, 1993, in Colorado, and they were divorced on May 11, 2011. The petitioner filed the instant Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant, May 28, 2013. The director issued a request for evidence (RFE) of the petitioner's good moral character. The petitioner timely responded. The director ultimately denied the petition, finding that the petitioner failed to establish that she has a qualifying spousal relationship with a U.S. citizen and is eligible for immigrant classification based upon that relationship. The petitioner filed a timely appeal.

We review these proceedings de novo. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). A full review of the record, including the evidence submitted on appeal, fails to establish the petitioner's eligibility.

Qualifying Relationship and Corresponding Eligibility for Immediate Relative Classification

As noted, the petitioner's divorce from P-R- took legal effect May 11, 2011, and she did not file

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

the instant petition until May 28, 2013. The petitioner is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act based on her relationship with P-R- because she was not his bona fide spouse within two years of the date she filed this petition.

On appeal, the petitioner does not dispute that the petition was filed more than two years after she and P-R- divorced. Instead, counsel for the petitioner contends that the late-filing was entirely his fault based on his erroneous reading of the petitioner's Decree of Dissolution of Marriage. Counsel suggests that the two-year post-divorce filing deadline is a statute of limitations subject to equitable tolling. Although counsel cites *Moreno-Gutierrez v. Napolitano*, 794 F.Supp. 2d 1207 (D.Colo. 2011), that decision is not precedential, as the agency is not bound to follow the published decision of United States district courts, even in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The other cases counsel cites do not directly address the matter at issue on appeal. Instead, they address the purposes of statutes of limitations, statutes of repose, and equitable tolling, and the Congressional intent behind enactment of the self-petitioning provisions of the Act. None of those issues are in dispute here.

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 binding case finding visa petition filing deadlines are 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 this statutory deadline.

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 Pace v. DiGuglielmo,* 544 U.S. 408, 418 (2005); *Albillo-DeLeon v. Gonzalez*, 410 F.3d at 1100. Counsel argues on appeal that the two-year post-divorce filing deadline should be tolled because the petitioner was the victim of his ineffective assistance. Because the two-year filing deadline is not subject to equitable tolling, we do not reach the issues of whether the petitioner has met the requirements for a claim of ineffective assistance of counsel as specified in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988); or, as counsel claims in the alternative, whether his actions were nonetheless egregious enough to warrant equitable tolling.

The petitioner has therefore failed to overcome the director's grounds for denial of this petition. As she failed to file the petition within two years of the legal termination of her marriage to P-R-, the petitioner has not demonstrated the qualifying spousal relationship and corresponding eligibility for immediate relative classification, as required by subsections 204(a)(1)(A)(iii)(II)(aa) and (cc) of the Act.

Conclusion

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. Accordingly, the appeal will be dismissed and the petition will remain denied for the reasons stated above.

ORDER: The appeal is dismissed.