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U.S. Citizenship
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FILE:

EAC 04 109 50780

Office: VERMONT SERVICE CENTER

Date: JAN 24 2006

IN RE:

Petitioner:

PETITION:

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

IN BEHALF OF PETITIONER:

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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The self-petitioner is a native and citizen of Colombia who is seeking classification as a special immigrant 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 the battered spouse of a United States citizen.

Section 204(a)(1)(A)(iii) of the Act provides, in pertinent part, that an alien who is the spouse of a United States citizen, who is a person of good moral character, who is eligible to be classified as an immediate relative, and who has resided with his spouse, may self-petition for immigrant classification if the alien demonstrates to the [Secretary of Homeland Security] that—

(aa) the marriage or the intent to marry the United States citizen was entered into in good faith by the alien; and

(bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse.

The regulation at 8 C.F.R. § 204.2(c)(1)(i) states, in pertinent part, that:

A spouse may file a self-petition under section 204(a)(1)(A)(iii) or 204(a)(1)(B)(ii) of the Act for his or her classification as an immigrant relative or as a preference immigrant if he or she:

(A) Is the spouse of a citizen or lawful permanent resident of the United States;

(B) Is eligible for immigrant classification under section 201(b)(2)(A)(i) or 203(a)(2)(A) of the Act based on that relationship;

* * *

(D) Has resided . . . with the citizen or lawful permanent resident spouse;

(E) Has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage; or is the parent of a child who has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage;

(F) Is a person of good moral character; [and]

* * *

(H) Entered into the marriage to the citizen or lawful permanent resident in good faith.

According to the evidence in the record, the self-petitioner wed her U.S. citizen spouse, [REDACTED], on June 20, 1998, in Loveland, Colorado. On November 24, 1998, the self-petitioner's citizen spouse filed a

Form I-130 petition in the self-petitioner's behalf. The self-petitioner filed a Form I-485 application on that same date. In a letter dated February 24, 2000, the District Director, Denver, Colorado, requested the petitioning citizen spouse and the self-petitioner to appear for an interview on March 22, 2000. Counsel for the petitioning citizen spouse requested that the interview be scheduled for a later date.¹ The director complied with counsel's request to reschedule the interview and on May 25, 2000 requested the petitioning citizen spouse and the self-petitioner to appear for an interview on June 20, 2000. On June 12, 2000, counsel for the petitioning citizen spouse sent a letter to the director requesting that the interview be rescheduled for a later date.² The director again complied with the request to reschedule and sent a third letter, dated October 23, 2000, informing the petitioning citizen spouse and the petitioner of an interview scheduled for November 6, 2000.³ The petitioning citizen spouse and the self-petitioner failed to appear for the scheduled interview, and the petition and application were denied for abandonment on December 5, 2000.

In the interim, on July 13, 2000, the self-petitioner in this proceeding had filed a Form I-360 claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, her citizen spouse during their marriage. The petition was denied on March 6, 2001 due to the self-petitioner's failure to respond to the director's request for evidence. The self-petitioner was then placed in removal proceedings.⁴

The self-petitioner and her citizen spouse were divorced on September 24, 2001, and on March 4, 2004, the self-petitioner filed the instant Form I-360 petition. The petition was denied by the director on February 16, 2005, because more than two years had lapsed since the self-petitioner was the spouse of a citizen of the United States; hence, she was ineligible for this classification.

The self-petitioner, through counsel, submits a timely appeal. Counsel argues that because the self-petitioner received ineffective assistance of counsel from her prior counsel, Shaun Shahmardian, the self-petitioner should be allowed to use the filing date of her first Form I-360 petition.⁵ In the alternative, counsel argues that "the Board of Immigration Appeals [BIA] should grant the Petitioner permission to reopen her case in Immigration Court *sua sponte* in order to prevent a manifest injustice"

We will address counsel's alternative proposal at the outset as it is a proposal for which we have no authority to comply. The BIA and the Immigration Court are separate and distinct bodies from that of the AAO. Therefore, any request for the BIA or the Immigration Court to reopen the self-petitioner's case should be made to the BIA or the Immigration Court, not the AAO.

1 At the time, the self-petitioner was represented by the law firm of [REDACTED]

2 At that time, the self-petitioner was represented by [REDACTED] Law Offices, P.C.

3 It appears that the third interview notice was sent to the self-petitioner's previous address as well as the self-petitioner's previous attorney. The first two interview notices were sent to the self-petitioner at [REDACTED] Court, Fort Collins, CO, while the third was sent to the address listed on the Form I-485 application, [REDACTED] Masonville, CO.

4 It appears that the self-petitioner's hearing in immigration court has been rescheduled to await the outcome of the decision on appeal.

5 The assertion in counsel's brief that the self-petitioner should be allowed to use the "original filing date of [her] I-751, December 20, 2001, to adjudicate her I-360" appears to be in error. We find no evidence in the record of the filing of a Form I-751. In fact, as noted previously, the Forms I-130 and I-485 were both denied. Accordingly, without the approval of the Form I-130, the Form I-485 could not be approved, and without approval of the self-petitioner's permanent resident status, there would be no reason to file a Form I-751 to remove conditions on her residence.

We next turn to counsel's claim of ineffective assistance of counsel. Any appeal 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).

To support the assertion that the self-petitioner was a victim of ineffective assistance of counsel, the self-petitioner submits an affidavit. In her affidavit, the self-petitioner makes claims of ineffective assistance of counsel related to the handling of the Form I-130, the Form I-485, and her representation in Immigration Court. The self-petitioner does not discuss prior counsel's handling of the self-petitioner's initial Form I-360. Also, the self-petitioner's affidavit also does not indicate that she informed prior counsel of her allegation of ineffective assistance of counsel or that she filed a complaint with the appropriate disciplinary authority.

In his brief, current counsel states that the self-petitioner is "in the process of pursuing these claims with the appropriate disciplinary authorities," but does not indicate whether "in the process" means that a complaint has actually been filed. To date, the record contains no documentary evidence that a complaint has been filed against prior counsel. 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).

Counsel also fails to address the second prong of *Lozada* which requires the self-petitioner to inform former counsel of the allegations and allow him or her the opportunity to respond to the allegations. Rather, counsel cites to [REDACTED] v. *Immigration and Naturalization Service*, 69 Fed. Appx. 878, 2003 WL 21659419 (9th Cir. 2003) for the proposition that not all of the requirements of *Lozada* must be met in order to establish an ineffective assistance of counsel claim. In [REDACTED] the court noted that Gwadhuri had complied with the first two *Lozada* requirements, but failed to comply with the third. The Court then found that the failure to comply with all of the requirements was not fatal to [REDACTED] ineffective assistance of counsel claim. The Court stated:

Because the administrative record shows that [REDACTED] has a substantial claim that he was denied effective assistance of counsel, [REDACTED] purpose is fully served. It was not necessary, therefore, for [REDACTED] to strictly comply with the [REDACTED] procedural requirements. In this connection, it is uncontested that [REDACTED] counsel . . . erroneously stated on the immigration form he submitted on [REDACTED] behalf that [REDACTED] did not have any convictions, even though [counsel] himself had been responsible for expunging the nolo contendere plea and its subsequent expungement, undoubtedly because of [counsel's] own misunderstanding of the law.

Unlike the facts of [REDACTED] the self-petitioner in the instant case has shown that, at best, she has complied with only one of the three *Lozada* requirements. We say "at best" because as it relates to [REDACTED] first

requirement that the petitioner's affidavit should describe, in detail, the agreement with counsel, the self-petitioner's affidavit provides no details regarding counsel's representation during the initial Form I-360 proceeding. As it relates to [REDACTED] second and third requirements, the record does not indicate that former counsel is even aware of the self-petitioner's allegations or that he has had an opportunity to acknowledge his error or refute the allegations. Accordingly, contrary to current counsel's statement, the administrative record in the instant case does not show that the petitioner has "substantially complied" with the [REDACTED] requirements or that "she has a substantial claim" against former counsel.

Although we find that the self-petitioner has not sufficiently established a claim of ineffective assistance of counsel against her former counsel, we will also address counsel's assertion that "the two-year period should be tolled." Specifically, even if the self-petitioner had established her claim of ineffective assistance of counsel, such a claim does not necessarily result in a tolling of the statutory requirements.

First, while we agree with the general assertion that aliens in immigration related proceedings have the right to assert a claim of ineffective assistance of counsel, counsel has not provided any support for the assertion that the two-year period should be tolled due to ineffective assistance of counsel. In fact, a majority of circuits have held that attorney error is generally not a basis for equitable tolling. *See, e.g., Merritt v. Blaine*, 326 F.3d 157, 169 (3d Cir. 2003) (applying general rule that "attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the extraordinary circumstances required for equitable tolling"); *United States v. Martin*, 408 F.3d 1089, 1093 (8th Cir. 2005) ("Ineffective assistance of counsel, where it is due to an attorney's negligence or mistake, has not generally been considered an extraordinary circumstance [with respect to equitable tolling]"); *Smaldone v. Senkowski*, 273 F.3d 133, 138 (2d Cir. 2001) ("[A]ttorney error [is] inadequate to create the 'extraordinary' circumstances equitable tolling requires."); *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001) ("We conclude that the miscalculation of the limitations period by Frye's counsel and his negligence in general do not constitute extraordinary circumstances sufficient to warrant equitable tolling; *Gilbert v. Gilbert v. Sec. of Health and Human Servs.*, 51 F.3d 254, 257 (Fed. Cir. 1995) ("The negligence of Gilbert's attorney does not justify applying equitable tolling.")

Second, even if we were persuaded that equitable tolling is a remedy for the self-petitioner's claim of ineffective assistance of counsel, the question remains as to whether VAWA 2000 is a statute that is subject to equitable tolling. While we agree, as noted above, that equitable tolling may be applied to immigration cases, it is not applicable to every statute.⁶ As not all time limitations are subject to equitable tolling, the determinative factor is whether the statute in question is considered a "statute of limitations" or a "statute of repose," because while a statute of limitations may be equitably tolled, a statute of repose may not. *See Lampf, Pleva, Lipkind, Prupis & Petigrew v. Gilbertson*, 501 U.S. 350, 363 (1991).⁷

In this instance, counsel has not provided any authority regarding whether the two-year requirement contained in VAWA 2000 is considered an ordinary statute of limitations or whether it is a statute of repose. Thus, even if counsel had established that equitable tolling was available in instances where a claim of ineffective assistance has been established, counsel has still failed to establish that this particular statute can be equitably tolled.

⁶ Not all time limitations are subject to equitable tolling. In instances where Congress enacts a jurisdictional bar to untimely claims, equitable tolling will not apply. *See Zipes v. Trans World Airlines, Inc.; Indep. Fed'n of Flight Attendants*, 455 U.S. 385, 393, 102 S. Ct. 1127 (1982).

⁷ A statute of repose is a fixed, statutory cutoff date, usually independent of any variable, such as claimant's awareness of a violation. *Cf. Lampf*, 501 U.S. at 363; *Weddel v. Sec'y of HHS*, 100 F.3d 929, 930-32 (Fed. Cir. 1996).

Turning to the director's decision, counsel does not dispute that the self-petitioner was divorced from her spouse for more than two years at the time of filing. Section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act indicates that a self-petitioner must have been a bona fide spouse of a United States citizen "within the past 2 years" and must also demonstrate "a connection between the legal termination of the marriage with the past 2 years and battering or extreme cruelty by the lawful permanent resident spouse." The statute contains no provision which would allow for a waiver of these two requirements. Accordingly, we concur with the finding of the director that the petitioner is ineligible for classification because she does not have a qualifying relationship as the spouse of a United States citizen. The director's decision has not been overcome on appeal.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.