



U.S. Citizenship
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FILE: [REDACTED]
EAC 05 189 51495

Office: VERMONT SERVICE CENTER

Date: MAR 20 2007

IN RE: Petitioner: [REDACTED]

PETITION: Petition for 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)

ON 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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien subjected to battery or extreme cruelty by his former spouse, a citizen of the United States.

The director denied the petition for lack of a qualifying relationship with a U.S. citizen.

On appeal, counsel submits a letter.

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 is still eligible for immigrant classification under section 204(a)(1)(A)(iii) 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 also 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].

Procedural History

The record in this case provides the following pertinent facts and procedural history. The petitioner is a native and citizen of Guinea who was admitted into the United States on June 6, 1995 as a nonimmigrant visitor (B-1). On March 21, 1997, the petitioner married S-G-¹, a citizen of the United States. On September 28, 1999, the former couple's marriage was dissolved by order of the Superior Court of California, Santa Clara County.

¹ Name withheld to protect individual's identity.

The petitioner filed his first Form I-360 (Receipt Number EAC99 203 52752), on June 21, 1999 through prior counsel. On July 20, 1999, the Vermont Service Center issued a notice to the petitioner in care of prior counsel stating that the petitioner had not established a prima facie case and requesting the petitioner to submit additional evidence of his former wife's U.S. citizenship, the petitioner's good moral character, his residence in the United States and with his former wife, the petitioner's good-faith entry into their marriage, and evidence that the petitioner's deportation would result in extreme hardship to himself. On October 12, 1999, former counsel responded to the notice with additional evidence and requested additional time to collect further evidence, although the record does not indicate that prior counsel ever submitted further evidence. On December 1, 1999, the director denied the first petition for lack of the requisite good moral character, extreme hardship and good-faith entry into the marriage.

The petitioner filed the instant Form I-360 on June 20, 2005. The director initially denied the petition on September 29, 2005 due to the petitioner's lack of a qualifying relationship with a U.S. citizen because the petitioner had divorced his wife more than two years before this petition was filed. Counsel timely appealed; stated that the petitioner had timely filed a previous Form I-360 which was denied due to the ineffective assistance of the petitioner's prior counsel; and claimed that the instant petition should be considered *nunc pro tunc* due to prior counsel's ineffective assistance. On appeal, the AAO remanded the case to the director for issuance of a Notice of Intent to Deny (NOID) and for further consideration of the petitioner's good moral character. The AAO noted that counsel had not complied with the requirements for an appeal based on a claim of ineffective assistance of counsel prescribed by *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). Upon remand, the director issued a NOID, to which counsel timely responded with additional evidence regarding the petitioner's good moral character² and compliance with the *Lozada* requirements. The director denied the petition on August 29, 2006 for lack of the requisite qualifying relationship. Counsel timely filed the instant appeal.

Qualifying Relationship

Section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act extends eligibility for immigrant classification under section 204(a)(1)(A)(iii) of the Act to aliens who have divorced their U.S. citizen spouses if,

² On January 14, 1999, the petitioner pled guilty to and was convicted of disorderly conduct in violation of section 240.20 of the New York Penal Law (Criminal Court of New York City, Queens County Docket [REDACTED]). The court sentenced the petitioner to 15 days imprisonment and ordered him to pay a \$250 fine. On February 23, 1999, the petitioner again pled guilty to and was convicted of disorderly conduct in violation of section 240.20 of the New York Penal Law (Criminal Court of New York City, Queens County Docket [REDACTED]). The court sentenced the petitioner to conditional discharge for one year. The director correctly determined that the petitioner's offenses do not affect his eligibility for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

inter alia, the petition is filed within two years of the legal termination of the marriage. The petitioner filed the instant Form I-360 on June 20, 2005, over five years after his marriage was dissolved. Consequently, the petitioner did not have a qualifying relationship with a U.S. citizen pursuant to section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act and the director correctly denied the petition on this ground.

Counsel's Claims on Appeal

On appeal, counsel requests the AAO to “consider the second application as if it were timely filed and/or reinstate the first application and accept the proffered evidence that [the petitioner] was eligible for the requested relief at the time of his first application.” The statute and regulations do not permit a waiver of the two-year filing deadline prescribed by section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act and counsel cites no statutory, regulatory, administrative or judicial authority to support her position that the instant petition may be considered as timely filed.

Counsel also fails to demonstrate that the ineffective assistance of the petitioner’s prior counsel is sufficient to reinstate the prior petition. Although the AAO noted that counsel had not complied with the *Lozada* requirements in its previous decision, the AAO did not indicate that such compliance would be sufficient to sustain an appeal. To clarify, the ineffective assistance of petitioner’s prior counsel is germane to his first petition. Counsel submits no evidence that she or the petitioner filed a motion to reopen the first petition based on prior counsel’s ineffective assistance.

Even if such a motion had been filed and granted, the record does not indicate that, contrary to counsel’s assertion, the petitioner’s case was approvable under the law in effect at the time the prior petition was filed in 1999. At that time, the law required that an alien be “a person whose removal, in the opinion of the Attorney General, would result in extreme hardship to the alien or a child of the alien.” Section 204(a)(1)(A)(iii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II) (1999). The petitioner submitted no evidence of extreme hardship. Although the petitioner claims that his prior counsel did not inform him of the director’s July 20, 1999 request for evidence of extreme hardship, the petitioner does not attest (in his June 27, 2006 affidavit regarding the prior counsel’s ineffective assistance) that he had or would have been able to obtain such evidence. The Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) amended section 204(a)(1) of the Act to eliminate the extreme hardship requirement. Pub. L. 106-386, § 1503, 114 Stat. 1464 (2000). However, this amendment became effective on October 28, 2000 and was not retroactive. *Id.* Accordingly, the record does not support counsel’s claim that the petitioner was eligible for immigrant classification under former section 204(a)(1)(A)(iii)(II) of the Act, as in effect at the time his first petition was filed in 1999.

Even if the record demonstrated the petitioner’s eligibility at the time his prior petition was filed, reinstatement of the prior petition would be impossible. Reinstatement of a prior self-petition for immigrant classification under section 204(a)(1)(A)(iii) of the Act is only possible where the prior self-petition was approved. 8 C.F.R. § 204.2(h)(2). In this case, the petitioner’s prior Form I-360

was denied. Consequently, the instant petition cannot be regarded as a reinstatement of the prior petition.

Eligibility for Immediate Relative Classification

Beyond the director's decision, the present record also fails to establish that the petitioner was eligible for immediate relative classification based on his relationship with his former wife, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act. The regulation at 8 C.F.R. § 204.2(c)(1)(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 qualifying relationship to a U.S. citizen. Because the petitioner has not established that he had a qualifying relationship with his former wife, he has also not demonstrated that he was eligible for immediate relative classification based on such a relationship.

The record fails to establish that the petitioner had a qualifying relationship with his former wife pursuant to section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act. The petitioner also fails to demonstrate that he was eligible for immediate relative classification based on a qualifying relationship with his former wife, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act. The petitioner is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act and his petition must be denied.

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 for the above stated reasons, 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.