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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B₃

APR 03 2009

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date:

EAC 07 203 51356

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:

[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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting 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 classification pursuant to 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 her United States citizen spouse.

The director denied the petition because the record failed to establish that the petitioner had a qualifying relationship with her former husband.

The petitioner, through counsel, submitted a timely appeal

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 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 petitioner in this matter is a native and citizen of Jamaica. On April 5, 1997, the petitioner married J-M¹, a U.S. citizen, in New York. On July 19, 2004, their marriage was dissolved by order of the Supreme Court of Westchester County, New York. Prior counsel for the petitioner filed this Form I-360 on June 29, 2007. The director denied the petition on January 23, 2008, finding that the petitioner did not establish that she had a qualifying relationship with her former husband due to the dissolution of their marriage over two years before the petition was filed.

¹ Name withheld to protect individual's identity.

On appeal, new counsel for the petitioner does not contest the fact that the petitioner was divorced from her citizen spouse for more than two years at the time of filing the Form I-360 but asserts that the petitioner's failure to timely file the Form I-360 was due to the ineffective assistance of prior counsel. Current counsel provides the petitioner's affidavit setting forth in detail the agreement entered into with prior counsel with respect to the actions to be taken regarding her divorce and filing the Form I-360; evidence that prior counsel has been informed of the allegations leveled against him; and evidence that a complaint has been filed with the appropriate disciplinary authorities as required under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

However, the Attorney General has recently issued a binding precedent superseding *Lozada: Matter of Compean, Bangaly and J-E-C-, et al.*, 24 I&N Dec. 710 (A.G. 2009). In *Compean*, the Attorney General held that the Constitution affords no right to counsel or effective assistance of counsel to aliens in immigration proceedings under the Sixth Amendment or the Due Process Clause of the Fifth Amendment. *Id.* at 711-27. Although the Act and regulations also do not afford aliens a right to effective assistance of counsel, USCIS may, in its discretion, reopen proceedings based on the deficient performance of an alien's prior attorney. *Id.* at 727. *Compean* establishes three elements of proof and six documentary requirements² that an alien must meet to prevail on a claim of deficient performance of counsel. *Id.* Although *Compean* addresses deficient performance of counsel claims in the context of motions to reopen removal proceedings, the decision also applies to claims of deficient performance raised on direct review. *Id.* at 728 n.6.

To prevail on a deficient performance of counsel claim, the alien must show: (1) that counsel's failings were egregious; (2) in cases where the alien moves to reopen beyond the 30-day limit, the alien must show that he or she exercised due diligence in discovering and seeking to cure the lawyer's deficient performance; and (3) that the alien was prejudiced by the attorney's error(s). To establish prejudice, the alien must show that but for the deficient performance, it is more likely than not that the alien would have been entitled to the relief he or she was seeking.³ *Id.* at 732-34.

The three substantive requirements must be met for all deficient performance claims filed before and

² The six documents include: (1) the alien's detailed affidavit setting forth the relevant facts and specifically stating what the lawyer did or did not do and why the alien was consequently harmed;(2) a copy of the agreement, if any, between the lawyer and the alien. If no written agreement exists, the alien must specify what the lawyer agreed to do in his or her affidavit; (3) a copy of the alien's letter to the attorney setting forth the attorney's deficient performance and a copy of the attorney's response, if any; (4) a completed and signed complaint addressed to the appropriate State bar or disciplinary authorities; (5) any document(s) the alien claims the attorney failed to submit; and (6) when the alien is subsequently represented, a signed statement from the new attorney attesting to the deficient performance of the prior attorney. *Matter of Compean*, 24 I&N Dec. at 735-38.

³ Where the alien sought discretionary relief, the alien must not only show that he or she was eligible for such relief, but also would have merited a favorable exercise of discretion. *Matter of Compean*, 24 I&N Dec. at 734-35.

after *Compean* was issued on January 7, 2009. *Id.* at 741. For claims pending prior to January 7, 2009, the alien is not required to meet the six new documentary requirements, but must still comply with the requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

The petitioner in this matter has not met the requirements set out in *Compean* and even if she had provided such evidence, there are no exceptions to the filing requirements for the Form I-360. The language of the statute clearly indicates that to remain eligible for classification when the alien is no longer married to a United States citizen, the 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. 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). As previously noted, the petitioner in this matter was divorced from her spouse for more than two years at the time of filing the petition. There is no discretion that could be exercised to exempt the petitioner from the filing requirements. Accordingly, we concur with the director’s determination that the petitioner did not establish a qualifying relationship with her former husband.

The AAO acknowledges current counsel’s assertions that justice and equity require that the petitioner be exempted from the filing requirements. However, the Administrative Appeals Office, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable tolling of the statute so as to preclude a component part of United States Citizenship and Immigration Services from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Equitable forms of relief are available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Accordingly, the AAO has no authority to address the petitioner's equitable claims.

Beyond the director’s decision, the present record also fails to establish that the petitioner was eligible for immediate relative classification based on a qualifying relationship with her former husband, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act. 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).

As always, the burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The appeal is dismissed.