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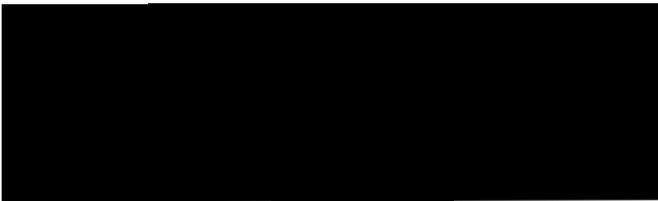
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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Services

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FILE: [Redacted]  
EAC 06 107 50454

Office: VERMONT SERVICE CENTER

Date: **FEB 09 2009**

IN RE: Petitioner:



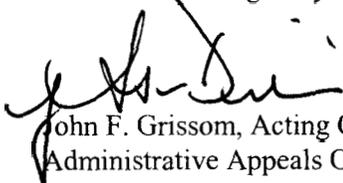
PETITION: Petition for Immigrant Battered Spouse Pursuant to Section 204(a)(1)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

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.

  
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 as an 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 an alien battered or subjected to extreme cruelty by her United States citizen spouse.

The director denied the petition because the petitioner did not establish that she had a qualifying relationship as the spouse of a United States citizen and that she was eligible for immigrant classification based upon that relationship.

The petitioner, through counsel, submits 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).

The record in this case provides the following pertinent facts and procedural history. The petitioner is a native and citizen of Mexico who claims to have entered the United States without inspection on October 16, 1989. The petitioner married R-S-S-<sup>1</sup>, who was then a lawful permanent resident of the United States, on December 19, 1994. R-S-S- subsequently filed a Form I-130 Petition for Alien Relative, on the petitioner's behalf, which was approved with a priority date of May 30, 1995. On October 22, 1998, R-S-S- became a naturalized citizen of the United States. On August 29, 2000, R-S-S- withdrew the I-130 petition filed on behalf of the petitioner, and on December 22, 2000, the approved I-130 petition was automatically revoked. The Form I-485, Application to Register Permanent Residence or Adjust Status, which was filed by the petitioner on April 12, 1999, was denied on December 12, 2000, based on the I-130 withdrawal. On March 22, 2001, the marriage between the petitioner and R-S-S- was dissolved.

On February 25, 2002, the petitioner filed Form I-360 (EAC-02-121-52275). On July 30, 2002, the director issued a Request for Evidence (RFE) of, *inter alia*, the requisite good moral character. No

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<sup>1</sup> Name withheld to protect identity.

response was received. The petitioner was then granted extensions of 60 days to present additional evidence from the date of notice, on March 7, 2002, August 12, 2002 and November 18, 2002, respectively. However, no response was received. As the petitioner failed to respond, the director denied the petition on January 13, 2003. The petitioner subsequently filed an appeal, asserting that she responded to the RFE, and that she was submitting copies of the documentation that she had submitted in response to the RFE. On August 4, 2004, the AAO dismissed the appeal, determining that the petitioner had not submitted any evidence in support of her assertion that she had responded to the director's RFE, and that, contrary to her assertion, the appeal was not accompanied by copies of any previously sent evidence.

On February 27, 2006, the petitioner through counsel filed the instant Form I-360 (EAC-06-107-50454) with the proper fee. On June 8, 2006, the director issued an RFE of, *inter alia*, the status of the petitioner's marriage to R-S-S- and the requisite good moral character. The petitioner through counsel responded to the RFE. On August 11, 2006, the director issued a Notice of Intent to Deny (NOID) the petition for lack of evidence of, *inter alia*, the requisite qualifying relationship, eligibility for immigrant classification based on the qualifying relationship, joint residency, battery or extreme cruelty, and good-faith entry into the marriage. The petitioner through counsel responded to the NOID on October 3, 2006. The director denied the petition on December 1, 2006, finding that the petitioner failed to establish that a qualifying relationship existed within the two-year exemption allowed by statute at the time of the February 27, 2006 filing.

On appeal, counsel for the petitioner argues that the new Form I-360 "should be used in conjunction with the old I-360 making petitioner eligible for benefits as a battered spouse under VAWA." Counsel also asserts: "[The] petitioner does not believe that the first I-360 denial should be given full credence given her representation by her former counsel, [REDACTED] who is not eligible to practice."

The AAO acknowledges counsel's assertion that the petitioner, at the time of filing her first I-360 petition (EAC-02-121-52275) on February 25, 2002, was represented by counsel [REDACTED], who was not eligible to practice. 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 requirements 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.<sup>[1]</sup> *Id.* at 732-34.

To establish these three requirements, the alien must submit six documents: 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. *Id.* at 735-38. If any of the latter five documents are unavailable or missing, the alien must explain why the documents are unavailable or summarize the contents of any missing documents. *Id.* at 735.

The three substantive requirements must be met for all deficient performance claims filed before and 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). *Lozada* required an alien to submit: 1) an affidavit attesting to the relevant facts, detailing the agreement that was entered into, what actions were supposed to be taken and what the attorney did or did not do; 2) evidence that former counsel was informed of the allegations, given an opportunity to respond and former counsel's response, if any; and 3) evidence that a complaint has been filed with the appropriate disciplinary authorities regarding such representation or an explanation of why such a complaint was not filed. *Id.* at 638-39. On appeal, counsel does not provide any documentary evidence listed above to satisfy her ineffective assistance of counsel claim. Accordingly, counsel's assertions in this regard have no merit.

The AAO also acknowledges counsel's assertion that the new I-360 petition should be used in conjunction with the petitioner's old I-360 petition. It must be emphasized that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). The petitioner's first I-360 petition was denied on January 13, 2003 and the AAO dismissed the petitioner's appeal based on that denial on August 4, 2004. At the time the petitioner filed her second I-360 petition on February 27, 2006, her first I-360 petition was no longer pending. Thus counsel's claim that the February 27, 2006 I-360 filing "should be used in conjunction with the old I-360" has no merit.

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<sup>[1]</sup> 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.

The evidence indicates that the petitioner was divorced from her citizen spouse for more than two years at the time of filing of the instant I-360 petition (EAC-06-107-50454). The language of the statute clearly indicates that to remain eligible for 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. 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 case was divorced from her spouse for more than two years at the time of filing the instant petition. Accordingly, we concur with the director’s determination that the petitioner in her I-360 petition filed on February 27, 2006 did not establish a qualifying relationship with her former husband.

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. The petition is denied.