Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B9

FILE: [redacted] EAC 05 059 52060 Office: VERMONT SERVICE CENTER Date: JAN 2 2 2009

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 rejected as untimely filed.

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.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a U.S. Citizenship and Immigration Services (USCIS) office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct fee. For calculating the date of filing, the appeal shall be regarded as properly filed on the date that it is so stamped by the service center or district office.

The record indicates that the director issued the decision on August 2, 2006. According to the date stamp on the Form I-290B Notice of Appeal, it was received by USCIS on October 11, 2006, or 70 days after the decision was issued. Accordingly, the appeal was untimely filed[1].

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. An untimely-filed appeal must meet specific requirements to be treated as a motion. The regulation at 8 C.F.R. § 103.5(a)(2) requires that a motion to reopen state the new facts to be provided in the reopened proceeding, supported by affidavits or other documentary evidence. Furthermore, 8 C.F.R. § 103.5(a)(3) requires that a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy.

Review of the record indicates that the appeal does not meet the requirements of a motion. The appeal does not provide new facts or establish that the decision was based on an incorrect application of law or USCIS policy.

---

[1] On appeal, counsel argues that the director's decision was mailed on August 21, 2006 and provides a photocopy of an envelope with a postmark date of August 21, 2006. Counsel also states that the decision was received on August 23, 2006. Counsel initially sought to file the Form I-290B with the Vermont Service Center (VSC) on September 20, 2006; however, the VSC rejected the filing because the appeal was not properly signed. The petitioner did not file the Form I-290B with the VSC until October 11, 2006.

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 case is a native and citizen of Russia. On November 16, 1997, the petitioner married R-H-[2], a U.S. citizen, in New Hampshire. On January 30, 2002, their marriage was dissolved by order of the Superior Court of New Hampshire in the Southern District of Hillsborough County.[3] The petitioner filed this Form I-360 on December 22, 2004. The director denied the petition on August 2, 2006, 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.

On appeal, the petitioner does not contest the fact that she was divorced from her citizen spouse for more than two years at the time of filing. Counsel again argues that the petitioner's "time for filing [the Form I-360] should be tolled by operation of law, as she had no need to file a[] [Form] I-360 until she was served with a Notice to Appear on November 11, 2003." Counsel argues that despite R-H-'s "abusive behavior, [R-H-] was cooperative in assisting [the petitioner] with her immigration paperwork." Counsel states that November 11, 2003 should be the date used to determine the two-year time period instead of the date that the marriage was legally terminated. Counsel argues that "the doctrine of equitable tolling permits a court to toll a statute of limitations when extraordinary circumstances make rigid application of that statute unfair."

In her brief, counsel provides a quote from *Rouse v. Lee*, 339 F.3d 238, 242 n.2 (4th Cir. 2003) (en

---

Name withheld to protect individual's identity.
Index No. [redacted].

banc), *cert. denied* 124 S. Ct. 1605 (2004) which provides an "extraordinary circumstances" test described as "(1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time." Counsel states that "in the petitioner's case such circumstances existed." However, counsel does not explain how the petitioner's case meets the "extraordinary circumstances" test. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The doctrine of equitable tolling doctrine is presumed to apply to every federal statute of limitation. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1188 (9th Cir. 2001). However, not every statutory time limit is a statute of limitations subject to equitable tolling. A crucial distinction exists between statutes of limitation and statutes of repose. *Munoz v. Ashcroft*, 339 F.3d 950, 957 (9th Cir. 2003). A statute of limitations limits the time in which a plaintiff may bring suit after a cause of action accrues. A statute of repose, in contrast, "cuts off a cause of action at a certain time irrespective of the time of accrual of the cause of action." *Weddel v. Sec'y of H.H.S.*, 100 F.3d 929, 931 (Fed. Cir. 1996). Statues of repose are not subject to equitable tolling. *Lampf Pleva, Lipkin, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (superseded on other grounds); *Weddel v. Sec'y of H.H.S.*, 100 F.3d at 930-32.

For example, several federal circuits have held that the 90 and 180 day filing deadlines for motions to reopen removal (or deportation) proceedings are statutes of limitation subject to equitable tolling. *See Socop-Gonzalez*, 272 F.3d at 1187-90; *Iavorski v. I.N.S.*, 232 F.3d 124, 134 (2nd Cir. 2000); *Riley v. I.N.S.*, 310 F.3d 1253, 1257 (10th Cir. 2002); *Borges v. Gonzalez*, 402 F.3d 398, 406 (3d Cir. 2005); *Pervais v. Gonzalez*, 405 F.3d 488, 490 (7th Cir. 2005). Yet, the Eleventh Circuit Court of Appeals has held that the filing deadlines for motions to reopen deportation and removal proceedings are mandatory and jurisdictional and consequently not subject to equitable tolling. *Abdi v. U.S. Atty Gen.*, 430 F.3d 1148, 1150 (11th Cir. 2005); *Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999). In addition, the Ninth Circuit Court of Appeals has held that the filing deadline for special rule cancellation under the Nicaraguan Adjustment and Central American Relief (NACARA) is statute of repose not subject to equitable tolling, *Munoz v. Ashcroft*, 339 F.3d at 957, but has held that the time limit for filing motions to reopen under NACARA is a statute of limitations subject to equitable tolling, *Albillo-DeLeon v. Gonzalez*, 410 F.3d 1090, 1098 (9th Cir. 2005).

Counsel provides no basis upon which to conclude that the two-year, post-divorce filing period of section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act is a statute of limitations subject to equitable tolling (and not a statute of repose not subject to equitable tolling), and presents no argument as to why this portion of the Act is comparable to other immigration statutes that federal circuit courts have found subject to equitable tolling.

Counsel has failed to establish that this section of the Act is a statute of limitations subject to equitable tolling, and it is uncontroverted that the instant petition was filed on October 11, 2006, which was more than two years after the petitioner's divorce from R-H-. Accordingly, the AAO concurs with the director's finding that the petitioner has failed to establish a qualifying relationship,

as required by section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act. The director, therefore, properly denied the petition on this ground. Further, as the appeal was untimely filed and the petitioner has failed to provide any new facts or evidence that support a motion to reopen or reconsider, the appeal must be rejected.

ORDER: The appeal is rejected. The petition is denied.