

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B3

FILE: [REDACTED]
EAC 03 227 50384

Office: VERMONT SERVICE CENTER

Date: **JUN 03 2009**

IN RE: Petitioner: [REDACTED]

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

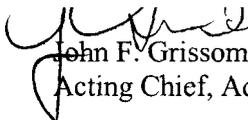
ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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. On appeal, the Administrative Appeals Office (AAO) remanded the matter for further action. The matter is now before the AAO upon certification of the director's subsequent, adverse decision. The decision of the director will be affirmed.

The petitioner seeks immigrant classification 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 a United States citizen.

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).

Section 204(a)(1)(J) of the Act states, in pertinent part:

In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) or clause (ii) or (iii) of subparagraph (B), 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, through prior counsel, submitted the Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant, that is the subject of this certification on August 5, 2003, more than two years subsequent to the petitioner's United States citizen spouse's death on July 8, 2001. In its March 6, 2008 decision on appeal, the AAO concurred with the director's determination that the petitioner had not established a qualifying relationship but remanded the petition for issuance of a Notice of Intent to Deny (NOID) the petition in compliance with the regulation at 8 C.F.R. § 204.2(c)(3)(ii). Upon remand, the director issued a NOID on December 24, 2008, which informed the petitioner that she had failed to establish a qualifying relationship for VAWA purposes because the Form I-360, VAWA petition had been filed more than two years subsequent to her spouse's death and that there is no provision of law that allowed a VAWA petition to be filed beyond this two-year period. The director noted that the petitioner had signed the June 5, 2003 Form I-360, which clearly indicated that the petition was filed as a widow(er) of a U.S. citizen petition.

In response to the NOID, the petitioner noted that the failure to file the VAWA petition within the two-year period was due to her prior counsel's misrepresentation. The petitioner asserted that her prior counsel improperly filed a Form I-360 widow petition on June 5, 2003 when prior counsel should have filed a Form I-360, VAWA petition. The petitioner provided the second page of the agreement she had

signed hiring her prior counsel. The second page does not delineate her purpose for hiring prior counsel. On March 20, 2009, the director determined that the petitioner had not provided evidence that she had filed the Form I-360 VAWA petition within the two-year period after her spouse's death and thus she did not meet the VAWA eligibility requirements. The director determined that the petitioner had not established that she had a qualifying relationship as a spouse of a U.S. citizen and had not established that she is eligible for immigrant classification under section 201(b)(2)(A)(i) of the Act. The director certified the March 20, 2009 decision to the AAO for review.

In the AAO's prior decision of March 6, 2008, incorporated here by reference, we discussed the pertinent facts and relevant evidence submitted, finding that the petitioner had not submitted evidence that established that she had a qualifying relationship with a U.S. citizen and was eligible for immigrant classification. The director properly considered the evidence the petitioner submitted in response to the NOID. Although the petitioner does not present further evidence on certification, the AAO will more thoroughly address the petitioner's claim of ineffective assistance of counsel under the current law. To establish ineffective assistance of counsel *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) 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. In this matter, the petitioner has provided a statement not an affidavit and has not provided a complete copy of the agreement setting out the parameters of her prior counsel's proposed representation. The petitioner has not provided evidence that she has informed prior counsel of her allegations and has not provided evidence that she filed a complaint with the appropriate disciplinary authorities regarding the representation and if she has not filed a complaint, she has not submitted an explanation why she has not filed such a complaint.

The AAO observes that 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, under *Compean* 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.^[1] *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 *Lozada*, as referenced above.

In this matter, the petitioner has not submitted evidence to comply with the requirements of *Lozada* as it pertains to ineffective assistance of counsel. Based on the evidence in the record, she has not established a qualifying relationship with a U.S. citizen, and she has not established eligibility for immigrant classification as set out in section 201(b)(2)(A)(i) of the Act. Upon review, we concur with the director's determination and affirm the director's decision.

The petition will be denied for the reasons stated above, 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 April 4, 2007 decision of the director is affirmed and the petition is denied.

ORDER: The director's March 20, 2009 decision is affirmed. The petition is denied.

^[1] 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.