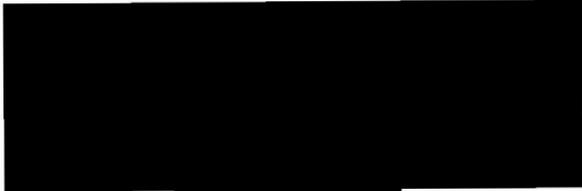


Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



Bq

FILE:



Office: VERMONT SERVICE CENTER

Date:

MAR 05 2009

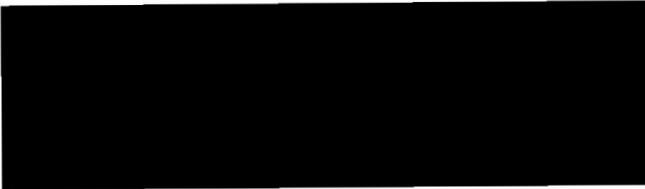
EAC 07 117 50791

IN RE:



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

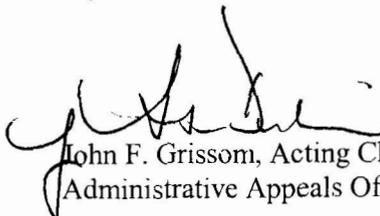
ON BEHALF OF PETITIONER:



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.

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for further action.

The petitioner seeks immigrant classification under section 204(a)(1)(B)(ii) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii), as an alien battered or subjected to extreme cruelty by a lawful permanent resident of the United States.

The director denied the petition on the basis of his determination that because she had been divorced for longer than two years at the time she filed her petition, the petitioner failed to establish that she has a qualifying relationship with a United States lawful permanent resident.

Counsel submitted a timely appeal on October 26, 2007.

Section 204(a)(1)(B)(ii) of the Act provides that an alien who is the spouse of a lawful permanent resident of the United States may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the lawful permanent resident 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 203(a)(2)(A)(i) of the Act, resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(B)(ii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(II).

Section 204(a)(1)(B)(ii)(II)(aa) of the Act states, in pertinent part, that an individual who is no longer married to a lawful permanent resident of the United States is eligible to self-petition under these provisions if he or she is an alien:

- (CC) who was a bona fide spouse of a United States lawful permanent resident within the past 2 years and –
 - (aaa) whose spouse lost status within the past 2 years due to an incident of domestic violence
 - (bbb) whose spouse lost status within the past 2 years related to an incident of domestic violence; or
 - (ccc) who demonstrates a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the lawful permanent resident spouse. . . .

Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J) states, in pertinent part, the following:

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 eligibility requirements are explained further at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part, the following:

- (i) *Basic eligibility requirements.* A spouse may file a self-petition under section 204(a)(1)(B)(ii) . . . of the Act for his or her classification as an immediate relative . . . if he or she:

* * *

- (B) Is eligible for immigrant classification under section 201(a)(2)(A) . . . of the Act based on that relationship [to the lawful permanent resident spouse].

The evidentiary standard and guidelines for a self-petition filed under section 204(a)(1)(B)(ii) of the Act are explained further at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part, the following:

Evidence for a spousal self-petition

- (i) *General.* Self-petitioners are encouraged to submit primary evidence whenever possible. The Service will consider, however, 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 Service.
- (ii) *Relationship.* A self-petition file by a spouse must be accompanied by evidence of . . . the relationship. Primary evidence of a marital relationship is a marriage certificate issued by civil authorities. . . .

The record of proceeding establishes the following pertinent facts and procedural history. The petitioner is a citizen of Mexico who married R-M-¹ a lawful permanent resident, on July 15, 1996. R-M- filed Form I-130, Petition for Alien Relative, on behalf of the petitioner on April 11, 1997. It was approved on September 23, 1997. The record does not indicate that the petitioner filed a Form I-485, Application to Register Permanent Residence or Adjust Status. In response to a December 5, 2003 letter from R-M- notifying U.S. Citizenship and Immigration Services (USCIS) that he and the

¹ Name withheld to protect individual's identity.

petitioner were in the process of divorcing, approval of the Form I-130 was revoked on December 20, 2004.

The divorce between R-M- and the petitioner became final on July 13, 2004. The petitioner filed the instant Form I-360 on March 19, 2007. The director denied the petition on September 27, 2007, on the basis of his determination that, since the petitioner and R-M- had been divorced for longer than two years at the time the petition was filed, the petitioner had failed to establish that she had had a qualifying relationship with a lawful permanent resident within two years of the filing date of the Form I-360. On appeal, counsel submits a brief.

Qualifying Relationship and Eligibility for Classification as an Immediate Relative

Counsel and the petitioner concede that the petitioner and R-M- had been divorced for longer than two years at the time the petition was filed: as noted previously, the divorce became final on July 13, 2004, but the petitioner did not file the Form I-360 until March 19, 2007.

In his October 25, 2007 letter, counsel states that there were extreme and unusual circumstances surrounding the failure to file timely; that during the two-year period following her divorce from R-M-, the petitioner's daughter underwent surgery, and the potential for further surgeries, as well as cancer, is real; that during the two-year period following her divorce from R-M-, the petitioner's infant son died after a series of treatments, surgeries, and hospital stays; that the petitioner's daughter was extremely distraught over the death of her brother, and received counseling; that the petitioner consulted with two separate legal offices after R-M- filed for divorce, but before the divorce was final, and that both offices told her she did not have enough evidence to file a Form I-360; and that, since the intent of the statute was to make relief more readily accessible to victims of abuse, the events that occurred during the two-year period following the divorce should be considered. Accordingly, counsel requests "an exception to the two year rule and a favorable exercise of discretion."

The AAO will first consider counsel's assertions with regard to the two legal offices that the petitioner states she contacted. Counsel is, in essence, making an ineffective assistance of counsel argument. The Attorney General has recently issued a binding precedent superseding *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988): *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.^[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 *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. The record, however, contains none of those items. The record in this particular case does not clearly demonstrate the ineffectiveness of prior counsel, and the petitioner has failed to comply with *Lozada*.

Having considered, and rejected, counsel's assertions with regard to the two legal offices that the petitioner consulted, the AAO turns next to counsel's assertions with regard to the extreme and unusual events which transpired during the two-year period that followed the petitioner's divorce from R-M-. Specifically, counsel notes the petitioner's daughter's medical difficulties, and the death of her son during this period. Although not specifically referenced as such, counsel is in essence asking that the filing deadline be equitably tolled.

^[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.

The doctrine of equitable tolling 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). Statutes 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 a 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.

The AAO is not unsympathetic to the petitioner’s circumstance, and it recognizes the compelling case her situation might present for the discretionary exercise of equitable tolling if that doctrine were in fact available in this case. However, the statutory time limit at issue here is not a statute of limitations subject to equitable tolling. Rather, as discussed above, it is a statute of repose, and thus the doctrine of equitable tolling does not apply. As the doctrine of equitable tolling is not applicable to this case, the AAO is without authority to apply it. There is no relief available for the AAO to grant the petitioner.

Counsel has failed to establish that this section of the Act is a statute of limitations subject to equitable tolling. 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)(B)(ii)(II)(aa)(CC) of the Act. Further, as the petitioner has not demonstrated a qualifying relationship as the spouse of a lawful permanent resident pursuant to section 204(a)(1)(B)(ii) of the Act, she is also not eligible for preference immigrant classification based on such a relationship, as required by section 204(a)(1)(B)(ii) of the Act.

Conclusion

The AAO agrees with the director's determination that because the petitioner had been divorced from R-M- for longer than two years at the time she filed the Form I-360, she has failed to establish that she has a qualifying relationship with a lawful permanent resident. As she has failed to establish the existence of a qualifying relationship with a lawful permanent resident, she has also failed to establish that she is eligible for preference immigrant classification as an immediate relative of a lawful permanent resident. However, the record indicates that the director did not issue a notice of intent to deny the petition (NOID) before he issued his decision. Although the record establishes that the petitioner is ineligible for the benefit sought, the petition must be remanded, solely on procedural grounds, so that the petitioner has the opportunity to respond to a NOID. The petition must be remanded to the director for issuance of a NOID in compliance with the regulation in effect at 8 C.F.R. § 204.2(c)(3)(ii)² on the date this petition was filed, and the director must afford the petitioner the opportunity to submit a response within the 60-day period. On remand, the director need only address the issue before the AAO on appeal; i.e., whether the petitioner has established that she has a qualifying relationship with a lawful permanent resident of the United States.

As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's September 27, 2007 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

² USCIS promulgated a rule on April 17, 2007 related to the issuance of requests for evidence and NOIDs. 72 Fed. Reg. 19100 (Apr. 17, 2007). The rule became effective on June 18, 2007, *after* the filing of this petition.